



Western Australian Industrial Gazette

PUBLISHED BY AUTHORITY

Sub-Part 6

WEDNESDAY 26 JUNE, 2019

Vol. 99—Part 1

THE mode of citation of this volume of the Western Australian Industrial Gazette will be as follows:—

99 W.A.I.G.

CUMULATIVE CONTENTS AND DIGEST APPEAR AT THE END OF THIS PUBLICATION

GENERAL ORDERS—

2019 WAIRC 00290

2019 STATE WAGE ORDER PURSUANT TO SECTION 50A OF THE ACT; APPLICATION FOR THE CREATION OF A PRINCIPLE DEALING WITH CLAIMS FOR EQUAL REMUNERATION FOR MEN AND WOMEN FOR WORK OF EQUAL OR COMPARABLE VALUE

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION : 2019 WAIRC 00290
CORAM : CHIEF COMMISSIONER P E SCOTT
 SENIOR COMMISSIONER S J KENNER
 COMMISSIONER T EMMANUEL
 COMMISSIONER D J MATTHEWS
 COMMISSIONER T B WALKINGTON
HEARD : WEDNESDAY, 22 MAY 2019; TUESDAY, 4 JUNE 2019
DELIVERED : FRIDAY, 14 JUNE 2019
FILE NO. : APPL 1 OF 2019; APPL 34 OF 2018
BETWEEN : ON THE COMMISSION'S OWN MOTION

Catchwords : State Wage order 2019 - Commission's own motion - Minimum wage for employees under *Minimum Conditions of Employment Act 1993* - Award rates of pay - State of and differences between WA and national economies - Signs of economic improvement - Effects on employment - Employer's capacity to pay - References to international research - "Stepping stone effect" of low paid work - Productivity and profitability of various industries - Income inequality - Living standards and measures of relative poverty - Median wage - Living wage - Principle established for equal remuneration for men and women for work of equal or comparable value

Legislation : *Industrial Relations Act 1979* (WA)
Minimum Conditions of Employment Act 1993 (WA)

Result : 2019 State Wage order issued; Principle 8. Claims for equal remuneration for men and women for work of equal or comparable value created

Representation:

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

Mr S Farrell and with him Mr J Walsh on behalf of the Chamber of Commerce and Industry of Western Australia (Inc)

Dr T Dymond on behalf of UnionsWA

Mr C Twomey and later Mr G Hansen on behalf of the Western Australian Council of Social Service Inc

Reasons for Decision

- 1 Each year, before 1 July, the Commission is required to make a general order, the State Wage order (SWO), setting out the State Minimum Wage (SMW) applicable under s 12 of the *Minimum Conditions of Employment Act 1993* (WA) (the MCE Act) to employees 21 years of age and over, and to apprentices. The SWO is also to adjust rates of wages paid under awards and make consequential changes to the awards, pursuant to s 50A of the *Industrial Relations Act 1979* (WA) (the IR Act).
- 2 The SWO also sets out a Statement of Principles to be applied and followed in the Commission's exercise of jurisdiction under the IR Act to set the wages, salaries, allowances and other remuneration of employees, or the prices to be paid in respect of their employment (s 50A(1)(d)).
- 3 The Commission issued this application on its own motion on 2 January 2019 and published notices inviting submissions:
 - (1) on the Commission's website on 12 March 2019;
 - (2) in the *Western Australian Industrial Gazette* on 27 March 2019 (2019) 99 WAIG 251;
 - (3) in *The West Australian* newspaper on 3 April and 13 April 2019; and
 - (4) in *WA Business News* on 1 April 2019.
- 4 Written submissions were received from a range of persons and organisations; from the Hon Minister for Industrial Relations (the Minister), the Chamber of Commerce and Industry of Western Australia (Inc) (CCIWA), UnionsWA, and the Western Australian Council of Social Service Inc (WACOSS).
- 5 Community Legal Centres Association (WA) Inc (CLCA) indicated an intention to appear and make a submission regarding equal remuneration for men and women for work of equal value. However, having had an opportunity to read and consider WACOSS's submission on that issue, CLCA wrote to us advising that it supports that submission. We will deal later with CLCA's comments.
- 6 The Commission convened on Wednesday, 22 May 2019 to hear oral submissions and receive evidence. The Commission reconvened on Tuesday 4 June 2019 after the Fair Work Commission (FWC) issued its Annual Wage Review decision (AWR) [*Annual Wage Review 2018-19* [2019] FWCFB 3501] on Thursday, 30 May 2019, which dealt with the National Minimum Wage (NMW).
- 7 The Commission again had the considerable benefit of evidence from Mr David Christmas, Director of the Economic and Revenue Forecasting Division of the Western Australian Department of Treasury regarding the state of the Western Australian economy. He also dealt with how it compares with the national economy. He did so by reference to a range of indicators including:
 - (a) the global and national economic conditions;
 - (b) the labour market including employment, unemployment and participation;
 - (c) wages including the wage price index;
 - (d) inflation; and
 - (e) risks to the economic outlook.
- 8 We express our appreciation for those submissions and evidence and acknowledge the research and effort taken by those who have made submissions. We have given them detailed consideration.

The proposed increases

- 9 The Minister says that an increase to the SMW and adult award rates of pay of \$19.20 is appropriate. A flat dollar amount is said to ensure that the lowest paid receive the greatest benefit.
- 10 CCIWA submits that the Commission ought to carefully consider the circumstances of the Western Australian economy, in the short to longer term, and adopt a cautious approach to the adjustment to the SMW. CCIWA recommends an increase to the SMW of no more than 1.4%.
- 11 UnionsWA advocates an increase in award wages and statutory minimum wage of \$43.61 per week or 6%, whichever is greater. The full increase should be applied to apprentices and juniors. UnionsWA set out the effect on each award classification level by reference to the *Metal Trades (General) Award* which demonstrates that effect on the C 14 classification, the minimum wage rate, through to the C 5 rate at \$961.20. The effect of 6% increase at the C 5 rate would be \$57.67 with proportionate increases below that level.
- 12 WACOSS submits that an increase to the SMW of 6% or \$43.61 per week is necessary to maintain a fair system of wages and conditions in the current Western Australian context, and that such an increase is very reasonable and takes into account the current economic conditions.

The issues to be considered under the IR Act

- 13 In making a general order setting the SMW and award wages, the Commission is required to take into account a range of matters set out in s 50A(3) of the IR Act. They are:
 - (a) the need to —
 - (i) ensure that Western Australians have a system of fair wages and conditions of employment; and
 - (ii) meet the needs of the low paid; and
 - (iii) provide fair wage standards in the context of living standards generally prevailing in the community; and

- (iv) contribute to improved living standards for employees; and
 - (v) protect employees who may be unable to reach an industrial agreement; and
 - (vi) encourage ongoing skills development; and
 - (vii) provide equal remuneration for men and women for work of equal or comparable value;
- and
- (b) the state of the economy of Western Australia and the likely effect of its decision on that economy and, in particular, on the level of employment, inflation and productivity in Western Australia; and
 - (c) to the extent that it is relevant, the state of the national economy; and
 - (d) to the extent that it is relevant, the capacity of employers as a whole to bear the costs of increased wages, salaries, allowances and other remuneration; and
 - (e) for the purposes of subsection (1)(b) and (c), the need to ensure that the Western Australian award framework represents a system of fair wages and conditions of employment; and
 - (f) relevant decisions of other industrial courts and tribunals; and
 - (g) any other matters the Commission considers relevant.
- 14 In exercising its jurisdiction, the Commission is also required to apply the requirements set out in s 26(1) of the IR Act including that it:
- ...
- (c) shall have regard for the interests of the persons immediately concerned whether directly affected or not and, where appropriate, for the interests of the community as a whole; and
 - (d) shall take into consideration to the extent that it is relevant —
 - (i) the state of the national economy;
 - (ii) the state of the economy of Western Australia;
 - (iii) the capacity of employers as a whole or of an individual employer to pay wages, salaries, allowances or other remuneration and to bear the cost of improved or additional conditions of employment;
 - (iv) the likely effects of its decision on the economies referred to in subparagraphs (i) and (ii) and, in particular, on the level of employment and on inflation;
 - (v) any changes in productivity that have occurred or are likely to occur;
 - (vi) the need to facilitate the efficient organisation and performance of work according to the needs of an industry and enterprises within it, balanced with fairness to the employees in the industry and enterprises;
 - (vii) the need to encourage employers, employees and organisations to reach agreements appropriate to the needs of enterprises and the employees in those enterprises.
- 15 It is clear that a number of the considerations in s 50A(3) of the IR Act overlap with those in s 26(1).
- 16 We also note the objects of the IR Act set out in s 6 and that a number of those objects are particularly relevant to the determinations the Commission is required to make. They include:
- ...
- (ac) to promote equal remuneration for men and women for work of equal value; and
 - (ad) to promote collective bargaining and to establish the primacy of collective agreements over individual agreements; and
- ...
- (af) to facilitate the efficient organisation and performance of work according to the needs of an industry and enterprises within it, balanced with fairness to the employees in the industry and enterprises; and
 - (ag) to encourage employers, employees and organisations to reach agreements appropriate to the needs of enterprises within industry and the employees in those enterprises; and
- ...
- (ca) to provide a system of fair wages and conditions of employment; and
- ...

Impact of the SWO

- 17 The Minister notes that in 2018 approximately 162,000 employees were paid entirely in accordance with State or national awards (ABS (2019), Employee, Earnings and Hours, Australia, May 2018, Data Cube 5 and ABS (2017), Employee Earnings and Hours, Australia, May 2016, Data Cube 5).
- 18 The Minister produced *Table 7: Employment and award reliance by industry, WA and Australia, February 2019* which sets out the proportions of the workforce in Western Australia (WA) and Australia by industry, according to their award reliance:

Industry	WA: Proportion of Workforce	Australia: Proportion of Workforce	Australia: Proportion of employees paid by award
Accommodation and food services	7.0%	7.1%	44.9%
Administrative and support services	3.0%	3.4%	41.3%
Other services	4.5%	4.1%	38.1%
Health care and social assistance	11.8%	13.3%	31.7%
Retail trade	10.2%	10.1%	30.1%
Rental, hiring and real estate services	1.4%	1.6%	29.4%
Arts and recreation services	1.7%	2.0%	22.5%
Manufacturing	6.2%	6.7%	20.8%
Construction	8.9%	9.0%	16.6%
Wholesale trade	3.0%	3.0%	16.1%
Transport, postal and warehousing	5.0%	5.3%	12.7%
Public administration and safety	7.0%	6.7%	10.9%
Education and training	7.2%	7.8%	10.0%
Professional, scientific and technical services	8.1%	8.9%	8.0%
Information, media and telecommunications	1.0%	1.7%	7.1%
Financial and insurance services	2.0%	3.5%	5.2%
Electricity, gas, water and waste services	1.5%	1.2%	4.1%
Mining	7.7%	1.9%	0.9%
Agriculture, forestry and fishing	2.6%	2.7%	N/A *
All industries	100%	100%	22.5%

*N/A: Enterprises primarily engaged in agriculture, forestry and fishing are outside the scope of the ABS *Employee, Earnings and Hours* survey from which this data is drawn

- 19 The Minister also notes that the Department of Mines, Industry Regulation and Safety (DMIRS) has analysed the top five most commonly accessed private sector award summaries on its website between 1 July 2018 and 9 April 2019 and these are: award free employees minimum pay rates and entitlements summary; *Building Trades (Construction) Award 1987*; *Shop and Warehouse (Wholesale and Retail Establishments) State Award 1977*; *Restaurant, Tearoom and Catering Workers' Award, and Hairdressers Award 1989*.
- 20 The top five most commonly discussed awards in calls to Wageline between 1 July 2018 and 9 April 2019 related to: award free employees; *Restaurant, Tearoom and Catering Workers' Award*; *Shop and Warehouse (Wholesale and Retail Establishments) State Award 1977*; *Building Trades (Construction) Award 1987*; and *Metal Trades (General) Award*.
- 21 This suggests that awards in the hospitality, retail, construction, hairdressing, and metal trades sectors are the most commonly utilised within the State's system. However, there are also significant numbers of award free employees.
- 22 CCIWA noted that of the 230,570 actively trading businesses in WA, 97.2% are considered small businesses. 33.4% employ between one and 19 employees and only 2.6% employ between 20 and 199 employees. (ABS Cat. No. 8165.0, Counts of Australian Businesses, including Entries and Exits, June 2014 to June 2018).
- 23 CCIWA also notes the Productivity Commission's Enquiry Report No. 76, *Workplace Relations Framework*, 30 November 2015, where it noted that '[a]s a safety net, awards also increase the wages and conditions for some employees above what they would otherwise be able to negotiate for themselves (328)'. This was evidenced by 'almost one in five employees whose wages and conditions are set at exactly the award rate' and it is said that this is the way that awards 'rectify some of the imbalance of bargaining power that can exist in employee-employee relationships'.
- 24 The Productivity Commission also noted that '[a]ward reliant employees are more likely to work in the accommodation and food services, administrative and support services, retail trade, and other services, and health care and social assistance industries. Award reliant employees are more likely to be female and are younger and less skilled on average than other groups (308)'.
- 25 CCIWA referred to the Australian Government's submission to this year's AWR that around 35% of small business employees are paid award classification wages and that proportion is higher in certain industries.
- 26 The following table sets out percentages of small business employees paid award classification wages and the share of employment of small businesses in each of those industries:

Industry	Percentage of employees at award rate	Small business as a percentage
Accommodation and food services	44.9	45.9
Administrative and support services	41.3	30.0
Other services	38.1	68.2
Health care and social assistance	31.7	30.0
Retail trades	30.1	33.3

- 27 CCIWA notes that together these industries account for 67.5% of all award reliant employees.
- 28 CCIWA says that in the absence of accurate data regarding the actual coverage of the State system, it is reasonable to translate those percentages to the State award reliance considerations where low paid award classifications and industries would be concentrated. Therefore, it says the impact of the SWO will be largely felt by those on the SMW and lower award classifications.
- 29 UnionsWA points out that workers who are likely to be paid the lowest rate which they can lawfully be paid under the State system are more likely to be in precarious employment arrangements and most likely in the service industries such as retail, and accommodation and food services. This area of employment is forecast to be significant for WA's future employment levels.
- 30 UnionsWA addressed who was likely to be impacted by the SWO and refers to the *Interim Report – Ministerial Review of the State Industrial Relations System* (the Interim Report) which set out the proportions and numbers of employees who are covered by the State system, being between 21.7% and 36.2% of the employees in the State. Businesses most likely to be in the State industrial relations system are unincorporated employers.
- 31 UnionsWA notes that the Interim Report also provides a list of award free employees in WA. While some may be employed under modern awards, there is still a significant case that award free workers need a strong SMW outcome if they are employed by an unincorporated employer.
- 32 UnionsWA refers to research carried out for the FWC for the 2018 AWR which identifies the characteristics of minimum wage workers. UnionsWA says that it is likely that these characteristics are shared by WA minimum wage workers. They are:
- more likely to be female (just under 60%);
 - around one quarter are aged 30-49 years;
 - 22.3% aged between 15 and 20 years and not earning junior rates;
 - 17% aged between 15 and 20 years on the NMW;
 - the majority (77.2%) work part-time, compared with all employees (38.9%);
 - primarily engaged on a casual basis (79.6%);
 - nearly half were award reliant, that is, paid at the award rate only, while fewer than one quarter of all employees were award reliant;
 - 98.7% were working in a business in the private sector;
 - three fifths worked for small employers, that is, fewer than 20 employees;
 - the accommodation and food services industry has the highest proportion of NMW earners at 27.9%;
 - a significant proportion, 28.3%, are sales workers and labourers; and
 - most NMW earners were concentrated in the lowest skill levels with 56.7% working in skill level 5.
- 33 The increasing significance of the service economy to employment growth generally means that this is an area justifying a strong SMW increase to ensure these workers obtain decent pay outcomes.
- 34 In 2016, we noted the difficulty in determining with any precision, who is covered by SWO, however, we also noted:
- 144 There are varying views on the basis for calculating the number of employees and employers covered by the State industrial relations system and affected by the State Wage order. In the private sector, they are employees of sole traders, partnerships, some trusts and incorporated businesses which are not trading or financial corporations. In addition, there are State public sector employees.
- 145 We note that the State Wage order deals not merely with the minimum wage for award free employees but also award covered employees and also award rates. It will directly affect some and will have indirect effects on others. It covers the rates for juniors, apprentices and trainees, and sets out the Principles to be applied to a range of types of claims which might come before the Commission, so as to guide the parties in pursuing, and the Commission in deciding, those claims.
- 146 While the State Wage order deals with more than the minimum wage, this is its most direct effect, along with setting the increase for award rates. Therefore, its most direct effect is on award free and award covered employees and their employers. It also provides a floor and, what some have described as, a signalling effect to those not directly covered, for their wage setting. So while the numbers actually covered

or directly affected by the minimum wage is difficult to determine, it is clearly of significance to many employers and employees, either directly or indirectly.

- 147 Those employees dependent on the minimum wage are more likely to be employed in small businesses.
- 148 As UnionsWA submits, it is likely that vulnerable groups of employees are overrepresented within the private sector of the state industrial relations system, partly due to them being employed in small private sector businesses.
- 149 In terms of low income households, UnionsWA refers to the Productivity Commission's report, noting that:
- Employees in the lowest income groups are more likely to be on the minimum wage than those in higher income groups (and by more than a fivefold factor) (figure 4.8). So, while most people in the lowest quintile are not in work (and therefore do not receive any wages), almost half of those who are in work are paid at a minimum rate.

(2016 State Wage Case [2016] WAIRC 00358; (2016) 96 WAIG 636)

- 35 From the submissions and the information provided to us, these conclusions remain relevant in 2019. The number of employers and employees affected by the SWO is significant. As we discuss later, award reliance is high, and enterprise bargaining is limited to a very small area. In those circumstances, the SWO is important to many employers and employees in this State.

The issues to be considered

- 36 We have set out earlier the matters the IR Act requires us to consider. They can be loosely grouped as social and equity considerations and economic and labour market considerations. We note that they are interrelated and interdependent.

A Social and equity issues

- 37 These include a system of fair wages and conditions of employment; the needs of the low paid; living standards and equal remuneration for men and women for work of equal value.
- 38 In respect of the last of these, we will deal later with the aspect of the creation of a principle to explicitly provide for equal remuneration.
- (1) The Minister's submissions
- 39 The Minister notes the essential role of the minimum and award wages framework in protecting the needs of the low paid and ensuring their living standards are maintained and improved in line with those in the broader community. The most recent Australian Bureau of Statistics (ABS) Employee Earnings and Hours, Australia, data (May 2018) indicates that award reliant employees in WA receive substantially lower average hourly rates of pay than those engaged under collective agreements and individual agreements. Many low paid workers are dependent on increases determined in the State Wage Case to meet their everyday living costs.
- 40 Employees who are award free have significantly fewer protections than those who are covered by awards and many award free employees are reliant on minimum rates of pay determined under the MCE Act. Those on the SMW are, according to the Minister, unquestionably low paid.
- (2) CCIWA's submissions
- 41 CCIWA notes that while it is essential to ensure that Western Australians have a system of fair wages and conditions of employment, concepts of fairness should be applied to employees and employers equally.
- 42 CCIWA concentrates its comments around the balancing of improved living standards by an increase in income with the necessity to maintain employment and increase employment opportunities, and the availability of more work, in an economy where there is excess capacity and underemployment. It is desirable to increase overall workplace participation in WA and therefore it says that balance is crucial.
- 43 Further CCIWA notes that low paid jobs play a principal role as an entry point into the workforce, from which people build skills and experience to gain higher paid work in the future. Compared to unemployed people, people in employment have a higher level of wellbeing and lower levels of financial stress (The Productivity Commission's 2015 Inquiry Report, No 76, Workplace Relations Framework, 30 November 2015, p 16).
- 44 In considering the needs of the low paid, CCIWA urges the Commission to take into consideration the need for the low paid to remain in employment, and in circumstances of higher levels of under-employment among the low paid, the need for employees to have access to more hours of work. CCIWA says that if wages are set at a level that is too high there will be consequential reductions in employment opportunities and hours. CCIWA says that '[i]t is through a strong and viable business community that employment opportunities for Western Australians will be generated, creating prosperity for the greater community and improving the living standards for all Western Australians' (CCIWA submissions filed 14 May 2019 [17]).
- (3) UnionsWA's submissions
- 45 As with its submissions made in the years following the State's investment and resources boom, UnionsWA argues that workers in the lower levels of rates of pay did not receive their fair share of WA's previous strong economic growth and are in danger of slipping further behind the State's current economic circumstances. This is said to be demonstrated by measures of inequality such as:
- the gender pay gap;
 - the disparity between the minimum wage and median weekly earnings; and

- household income inequality.

- 46 UnionsWA refers the Commission to an open letter from 124 labour policy experts which calls for proactive measures to help accelerate the rate of wages growth in Australia's economy (The Centre for Future Work's '124 Labour Policy Experts Call for Measures to Promote Stronger Wage Growth' (19 March 2019) https://www.futurework.org.au/wages_open_letter). Amongst other things, this letter says that for the last several years Australian wages have experienced an unprecedented slowdown and that nominal wages have been growing at only about 2% per year since 2015. It said that this has a number of consequences on consumer spending, household indebtedness and financial stress, slower growth in government revenue and widening inequality.
- 47 The ACTU's briefing paper "*Inequality in Australia An economic, Social & Political Disaster*" says that Australia has an 'income recession' as household incomes started falling behind rising living costs from late 2015 onwards. This is said to be as a result of low wages growth.
- 48 UnionsWA also says that living costs outstripped household incomes by 2.9% over the past three years resulting in the biggest fall in living standards for more than 30 years.
- 49 UnionsWA also notes that the Governor of the Reserve Bank of Australia, Dr Philip Lowe, advocates for wage increases of 3.5%.
- 50 Therefore UnionsWA says that decisive action is required to address wage stagnation at the bottom end of wage distribution.
- 51 UnionsWA says that minimum wage decisions in recent years have seen a decline in the minimum wage 'bite' compared to median weekly earnings and notes that a more recent flattening of that decline is more to do with low wage growth generally than wage growth at the bottom.

Living wage

- 52 UnionsWA notes the ACTU's advocacy of a medium term target for the minimum wage of 60% of the median wage for full time employees and that this would deliver a 'living wage' reflective of the [*Ex parte H.V. McKay* (Harvester Case) (1907) 2 CAR 1] (Harvester Decision) in meeting normal needs of the average employee, regarded as a human being living in a civilised community.
- 53 UnionsWA notes that the Organisation for Economic Co-operation and Development (OECD) has defined the level of relative poverty to be 60% of full-time median earnings and the Living Wage policy proposed by unions adopted that benchmark. This has been explicitly adopted in the United Kingdom where the Low Pay Commission recently found that since the minimum wage was introduced in 1999, it had risen faster than average earnings and inflation without damaging jobs.
- 54 UnionsWA notes that the ACTU is arguing for a two stage process over two years to bring the minimum wage back to 60% of median earnings (full-time), otherwise an increase of over 10% (or \$72.80 per week) will be necessary to close that gap.
- 55 The SMW is said to require a larger increase than that amount to reach 60% of WA's full-time median weekly earnings and therefore UnionsWA says that \$43.61 per week or 6%, whichever is greater, is a modest claim that recognises the State's economic circumstances, while keeping the SMW relatively higher than the NMW.
- 56 UnionsWA says that between 2005 and 2018 the SMW fell from 57% to 50.4% of the median wage. It is notable that the Australian comparator is a figure of 57.7% to 54.5%.
- 57 UnionsWA says that minimum wages are substantially lower than what they would be if the minimum wage bite had been held constant, with the result that living standards of minimum wage workers are too low compared to other workers.
- 58 UnionsWA notes that the Gini coefficient for equivalised disposable household income, the gender pay gap and average weekly ordinary time earnings have persistently shown WA as a highly unequal state in terms of the minimum wage bite, relative to Australia as a whole. Recent relative improvement is, unfortunately, in keeping with the post-boom patterns in WA. The rates become more equal in the post-boom period because high income earners do not move to WA and/or move away.
- 59 UnionsWA noted increases in living costs in WA arising from the last WA State Budget. These are said to impact disproportionately on low wage workers and therefore an increase to the minimum wage above CPI inflation is said to be justified. The total increase in tariffs, fees and charges arising from the 2019-20 WA Budget was 2%. Whilst these increases are lower than in previous years, some increases go beyond 2%. For example, UnionsWA has selected certain components of the Consumer Price Index CPI and examined the percentage changes from corresponding quarters in previous years.
- 60 UnionsWA refers to the State Government's Wages Policy of a maximum of \$1,000 per annum increase and says that it appears that the moderate increase in State tariffs, fees and charges is the principal means by which the State Government proposes to relieve low wage growth. However UnionsWA refers to recent research by the Centre for Future Work as demonstrating that changes to taxes and charges are no substitute for regular, ongoing wage increases. Whilst the analysis is from a national level, where taxes are more progressive, the principles are still said to apply.
- 61 UnionsWA says that the needs of the low paid, and particularly the need to improve living standards of the low paid require an increase to the SMW beyond the CPI increase.
- 62 UnionsWA cautions against the claim that the interests of the unemployed and the low paid are best served by them getting a job, any job, regardless of how much they are paid or how they are treated when in employment. It refers to a study by P Butterworth, LS Leach, and others "*The Psychological Quality of Work Determines Whether Employment Has Benefits for Mental Health: Results from a Longitudinal National Household Panel Survey*", Occupational and Environmental Medicine 2011; 68:806-812. This study is said to have found that jobs with poor psycho-social attributes are no better, and may have worse effects on mental health, than unemployment. It found that:

‘(a)n employment continuum which contrasted unemployment with different employment categories including optimal jobs, inadequate jobs, jobs with poor psychosocial conditions (low decision latitude, high job demands, low social support) and jobs with low pay or few benefits. While unemployment and inadequate jobs (salary below the poverty line) were associated with significantly greater levels of depression than optimal jobs, so too were poor quality jobs that combined adverse psychosocial conditions.’

- 63 UnionsWA also refers to Juan Du and J Paul Leigh’s “Effects of Minimum Wages on Absence from Work Due to Illness” (November 13, 2017) (available at SSRN: <https://ssrn.com/abstract=3071132> or <http://dx.doi.org/10.2139/ssrn.3071132>) and other studies that found that raising the minimum wage can have positive effects on the health of low-wage workers and their families. Du and Leigh found that:
- ‘[I]ncreases in real minimum wages resulted in decreases in all absenteeism and in absenteeism due to own illness, and that these health benefits can accrue to low-wage adults, not just teenagers. These effects are likely not due to changes in labor supply or job-related attributes. Instead, we find a possible mechanism: higher minimum wages improve self-reported health for lower educated workers.’ (21).
- 64 UnionsWA also refers to a study dealing with economic policies and their effects on depths of despair and found that a higher minimum wage can significantly reduce non-drug suicides (William H Dow and others, “*Can Economic Policies Reduce Deaths of Despair?*” NBER Working Paper No. 25787 (April 2019) pp.24-25).
- 65 UnionsWA says that these studies make clear that the quality of the job is important for the wellbeing of workers and that job quality is inseparable from having decent pay and conditions that actually improve living standards, not by paying workers just enough to cover immediate living costs.
- 66 UnionsWA notes that the minimum wage is significant in terms of the ‘bite’ compared to median wages for maintaining a fair system of wages and conditions in WA, and in particular, in respect of the gender pay gap.
- 67 UnionsWA says that the increases it advocates will assist in redressing the disparity between the minimum wage and median weekly earnings to provide a fair system of wages and conditions in WA. It says the increase it proposes is needed to help maintain that system.

(4) WACOSS’s Submission

- 68 In its ‘*Cost of Living 2018*’ Report, WACOSS analysed of income and expenditure data provided by financial counselling agencies of 404 households who experienced financial hardship and stress in 2017/18.
- 69 This data is said to provide insight into the spending patterns of those households and the areas of expenditure they are forced to cut back in, contributing to a lower standard of living. In examining low income, wage-only, households in this data set, WACOSS says it reveals that more than half of the average general expenditure of these households is on housing, at 50.2%, equating to \$649.08 per fortnight.
- 70 WACOSS says that there is clear evidence of Western Australians experiencing significant financial hardship and living cost pressures. An increase in the SMW is essential to meet the needs of the low paid and contribute to improved living standards for employees.
- 71 WACOSS says that the CPI is not a cost of living index. It does not take into account the change in the mode of living as well as price changes. It says that while it is a valuable indicator, it is fundamentally a measure of the changes in the prices of a fixed basket of goods and services, rather than changes in the minimum expenditure needed to maintain a certain standard of living. As such it has inherent limitations for the purposes of drawing inferences about the real living cost pressures faced by low income households. For this reason WACOSS focusses on a number of other important data sources.

Household costs and income

- 72 WACOSS’s study is based on various household models which included single parent families, working families, unemployed singles, and other groups. The *Cost of Living 2018* Report found very low income growth across the various model households in 2017/18, with any improvements in their financial positions primarily driven by the continued decline in median rental costs in the Perth metropolitan area. Food expenditure is said to have also declined slightly, while utility costs have seen sizable increases. For those households that owned a car, transport costs have decreased slightly whereas public transport cost has increased. It says that reductions in government supplements such as the Schoolkids Bonus and an increase in tax paid saw little extra income in the single parent’s pocket at the end of the week. There were also reductions in other government payments. WACOSS produced a schedule of weekly income and expenditure of its model households:

Weekly income and expenditure of our model households

	Income	Expenditure	Net Position
Single Parent Family (Parenting Payment Single)	\$983.20	\$876.01	\$107.19
Working Family	\$1,456.62	\$1,227.77	\$228.75
Unemployed Single	\$308.25	\$321.53	-\$13.27
Age Pensioners (Renters)	\$791.40	\$700.35	\$91.05
Age Pensioners (Home Owners)	\$728.56	\$527.76	\$200.81

Source: WACOSS Cost of Living 2018 Report

- 73 WACOSS says that it is important to note that the calculations in its report are focussed on the bare essentials of the basic standard of living and make no allowance for savings, training to improve employment prospects or to respond to unexpected costs or crises. A single parent family does not have any health or home and contents insurance and the model does not provide for spending on items such as birthday presents, school excursions or other so-called non-essential items.

Housing

- 74 Housing cost is the biggest contributor to financial hardship and the biggest risk factor for financial crisis for those on low incomes. Rental affordability has stabilised in Perth in recent years. It still accounts for over 48% of the SMW. Those households in the bottom 40% of Australia's income distribution are considered to be in housing stress when their housing costs exceed 30% of their income and their earnings are in the bottom 40% of equivalised disposable income.
- 75 WACOSS notes that the Department of Communities' *Demand Model* estimates that approximately 61,000 very low, low and moderate income households constitute an unmet social and affordable housing need in WA. The Australian Housing and Urban Research Institute estimates that around 59,000 Western Australians are unable to enter market housing and a further 73,000 require rent assistance.
- 76 WACOSS says that the risk of poverty is more than twice as high for households renting privately than home-owners with or without a mortgage. Poverty is highest amongst public renters, though this is due in part to the fact of eligibility requirements for public housing, that this group has some of the lowest incomes.
- 77 WACOSS notes that the lack of available and affordable housing to rent for various income groups in various regions of the State differs. It notes that the low level of accessible properties available to rent for single minimum wage earners and single parents on the SMW, in particular, strongly indicates the likelihood that many of those households will be living in housing stress or housing that is not appropriate to their circumstances.

Food

- 78 WACOSS refers to research undertaken by Foodbank Australia (Foodbank's Hunger Report 2018), that 49% of people experiencing food insecurity had been unable to buy food due to an unexpected expense or a large bill. Thirty-five per cent experienced food insecurity as a result of having to pay rent or make mortgage repayments. Forty-three per cent were unable to buy food because they were receiving a low income or pension.
- 79 Foodbank's *Rumbling Tummies: Child Hunger in Australia 2018 Report*, found that 32% of parents living in food insecure households with children under the age of 15 are employed full-time with a further 17% employed part-time. Fifty-two per cent of food insecure households with children under the age of 15 faced food insecurity because of an unexpected expense or large bill, with 44% reporting that they could not afford enough food because they simply did not have enough money in the first place.

Utilities and household fees

- 80 WACOSS refers to the 2019/20 State Budget having increased household fees and charges by 2% or \$127.77 for the representative household. It notes that '[w]hile this was the lowest increase in household fees and charges in 13 years, it follows very significant increases in the previous two budgets. In 2017/18, the representative household saw an increase of 7.74% (equating to around \$438.39) and a further 4.8% in the 2018/19 Budget (around \$292.07).' The increase in the cost of energy is said to impact disproportionately on households with the lowest incomes and they have little if any capacity to absorb additional costs.
- 81 WACOSS examined electricity and gas disconnections and instalment plans for residential customers who were having difficulty in paying their energy bills. The numbers on hardship programs or instalment plans had increased each year for the last three years.
- 82 Fees for water, sewerage and drainage had increased by 2% in 2019/20, around \$40.39 for the representative household. In 2018/19, it was 5.5% or \$91.04 and 6% in 2017/18 or \$96.92.
- 83 WACOSS says that limiting cost increases to around the CPI may reduce the rate of increase in financial hardship for those on average incomes but it does little to help those already experiencing hardship whose incomes remain insufficient to match previous price increases.

Digital access

- 84 WACOSS notes that one in four Western Australian households in the lowest income quintile do not have access to internet compared with almost universal access for the highest quintile. With State and federal governments increasingly moving towards transactional services online, and access to other essential community services often requiring online applications, digital access limitation is detrimental and problematic for a number of different groups including, in particular, job seekers. Community resource centres and local public libraries report that they are dedicating increasing amounts of staff and volunteer time to assisting people to access services and entitlements, including Medicare and Centrelink services.

Costs in regions

- 85 WACOSS says the differing cost of living in different regions of WA require consideration. There are significant differences across the regions between the costs for rent, food and beverages, electricity and water.

Financial stress and hardship

- 86 WACOSS refers to research by the FWC in 2019, *Statistical report – Annual Wage Review*, indicating that 27.9% of low paid employee households had financial stress. It examined Western Australian households who are experiencing hardship and stress by reference to the mean of all WA households compared with WA wage-only and low income wage-only households and notes that there are significant pressures being faced by households across WA who are experiencing financial hardship and stress. The mean of all Western Australian households has a deficit of \$141.74 per fortnight; wage-

only households have a deficit of \$130.06 per fortnight and low income wage-only households have a deficit of \$69.87 per fortnight.

- 87 WACOSS notes in particular that the community as a whole bears the cost when households on low incomes or in financial troubles cut back on their access to primary healthcare, the quality of their food and nutrition, and their recreational activities. They lead to higher rates of chronic disease, greater demands on our hospital and tertiary care systems, reduced productivity and life expectancy.

Income inequality

- 88 WACOSS notes that ‘the growth in the gap between SMW rates and median pay levels has contributed to income inequality in WA. As of November 2018, the SMW was only 41.4% of the WA Average Weekly Ordinary Time Earnings (AWOTE). In November 2005, the SMW was 47.6% of the WA AWOTE. In comparison, the NMW was 44.8% of Australia-wide seasonally adjusted average weekly earnings as of November 2018.
- 89 It notes that since 2005, AWOTE has increased in WA by 72.6% while the SMW has increased by 50% over the same period. There was a nearly 10% drop between 2005 and 2013 and the WA SMW’s share of AWOTE has remained relatively stable since then.
- 90 WACOSS says that research undertaken by the FWC found that 44% of minimum wage earners were in the lowest three deciles of household income for households where at least one member was employed.

Gender pay gap

- 91 WACOSS referred to a 2017 research report from the Melbourne Institute of Applied Economic and Social Research by B Broadway, R Wilkins (2017) “Probing the Effects of the Australian System of Minimum Wages on the Gender Wage Gap”, Melbourne Institute Working Paper No. 31/17. This found that female employees are significantly more likely than men to be paid an award wage, at a rate of 18.5% compared with 12.4%.
- 92 WA continues to have the highest gender pay gap in the country at 23.1% compared to 14.1% nationally. It is said by the Workplace Gender Equality Agency and Bankwest Curtin Economics Centre “Gender Equity Insights 2017: Inside Australia’s Gender Pay Gap”, that the gender pay gap can depress economic growth and productivity and it slows the rate of wealth accumulation by women relative to men.

Poverty

- 93 WACOSS refers to the Australian Council of Social Service’s “Poverty in Australia 2018” Report, that around 360,000 or 13.7% of Western Australians live in poverty. This is based on the most common international poverty line of 50% of median incomes. WA’s poverty rate is the highest in the country after South Australia and higher than the poverty rate of 13.2% nationally.
- 94 WACOSS notes that the effects of poverty on health, including psychological health, wellbeing and life prospects of children are well established. Young people who have experienced poverty in the family while growing up have much poorer employment outcomes than those on a greater standard of living. Young people, particularly those with backgrounds of hardship, are much more likely to be seeking and relying upon income from minimum wage positions, often moving in and out of short term and precarious work.
- 95 WACOSS says that the increase to the SMW it proposes would be an important step towards enabling those in low income households to improve their financial resilience, enabling them to respond more effectively to changing employment and financial circumstances.

B Economic and labour market issues

- (1) The Minister’s submissions

- 96 The Minister refers to the 2019 State Wage Case - Economic Outlook document prepared by the Department of Treasury and provided by Mr Christmas as part of his evidence.

The State of the Western Australian Economy

- 97 The Minister notes the current state of the WA economy by reference to major economic indicators. These are:

Table 1: Economic forecasts – major economic aggregates, WA

Indicator	2017-18 Actual	2018-19 Estimated Actual	2019-20 Budget Forecast	2020-21 Forward Estimate	2021-22 Forward Estimate
Gross State Product	1.9%	2.0%	3.5%	3.0%	3.0%
State Final Demand	1.0%	-1.0%	3.0%	3.5%	3.5%
Employment Growth	2.2%	1.0%	1.75%	2.0%	2.0%
Unemployment Rate	6.1%	6.25%	6.0%	5.75%	5.5%
Wage Price Index	1.5%	1.75%	2.25%	2.75%	3.0%
Consumer Price Index	0.9%	1.25%	1.75%	2.25%	2.5%

- 98 A number of key indicators are projected to strengthen across the forward estimates period, in line with a recovery in the State’s domestic economy. They include that Total State Output, measured by Gross State Product (GSP) is expected to increase by 2.0% in 2018-19, up from 1.9% in 2017-18. This is expected to grow further by 3.5% in 2019-20. There has been a lift in job vacancies, new iron ore and lithium projects, and a forecast return to positive business investment growth.

- 99 On the other hand, though, the Minister says growth in retail turnover continues to be subdued, youth unemployment remains elevated and the level of underemployment indicates spare capacity in the labour market. The State continues in its transition from the mining-led investment boom.
- 100 The Minister notes that recent AWOTE data indicates that the gap between male and female earnings in WA increased in the 12 months to November 2018, as male earnings rose at a faster rate than female earnings.
- 101 According to the Minister, it is apparent that some sectors of the Western Australian economy have performed better than others in recent years. The Gross Operating Surplus (GOS) plus Gross Mixed Income (GMI) measure, produced by the ABS, demonstrates that some industries are facing a more challenging trading environment. Across all industries, GOS plus GMI increased by 3.4% in 2017/18, led by the mining industry, which recorded the strongest growth in the second year in a row.

Protecting employees who are unable to bargain

- 102 The Minister says that an analysis of current industrial agreements registered by the Commission that are yet to reach their nominal expiry date reveal that almost all agreements are concentrated in a limited range of sectors. They are the WA public sector; independent schools; community, health and disability support organisations; regional local government authorities; registered political parties; and union/labour organisations. Industries where there is a higher reliance upon awards, particularly accommodation and food services and the retail trade in the smaller, unincorporated businesses in the hospitality and retail sectors are not utilising industrial agreements at present. The Minister says that many of these businesses are likely to be guided by State awards, either directly or indirectly in regard to wage determination for their employees.

Skills development

- 103 The Minister provided data regarding commencements of apprenticeships and traineeships for 2018 and previous years, including information on the proportion of each type of training arrangement undertaken by employees over the age of 21. This data demonstrates that apprenticeship commencements increased from 6,436 in 2017 to 6,834 in 2018. The proportion of apprentices 21 years and over continues to grow and most recently is 38.6%. The Minister notes that apprenticeship commencements in the automotive trades increased by 22.4% in 2018, while they rose by 12.9% in metals, manufacturing and services trades and 5.5% in wholesale, retail and personal services. In contrast, apprenticeship commencements in building and construction trades declined by 10.6% in 2018.
- 104 Traineeships continued to decline in 2018, by 22.6% from 14,692 in 2017 to 11,369. There was a significant decline, of 41.3%, in commencements in the finance, property and business services and 68.2% in process manufacturing. Mining industry commencements continued to rise, by 10.6%.
- 105 The Minister notes that between 2012 and 2018, traineeship commencements in WA have declined by 56.6% in total.
- 106 However, the total number of apprentices in training increased by 0.8% in the 2018 calendar year. This is the first time in six years that total apprenticeship numbers have increased in WA and was driven by the increased automotive trades and the metals, manufacturing and services trades. However, the number of apprentices in building and construction trades declined in 2018, by 12.6%. Trainees in training declined in 2018 from 17,011 to 13,497.
- 107 Across WA, the total number of people in training (apprentices and trainees) fell by 10.6%.

Evidence by Mr Christmas

(i) The State's economy

- 108 The economic outlook information provided by Mr Christmas notes that the Western Australian economy overall is forecast to grow by 2.0% in 2018/19, after growing by 1.9% in 2017/18, and its first contraction on record of 1.8% in 2016/17. The economic conditions have been affected by ongoing tightening of access to credit in response to the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry as well as declining house prices, both nationally and at a State level. These factors are said to have moderated growth in household spending and dwelling investment at a time when business investment continues to decline as construction work on the last remaining LNG project is completed.
- 109 The State's economy, measured by GSP, is expected to increase by 3.5% in 2019/20, underpinned by the first substantial lift in business investment in seven years. This is said to reflect the commencement of work on a number of new resources and infrastructure projects and progress in work on existing projects. GSP growth is forecast at 3.0% per annum in 2020/21 and beyond.
- 110 Household spending is expected to progressively increase over the forecast period due to consolidation in consumer confidence, a lifting population growth and a strengthening in labour market conditions.
- 111 The State's domestic economy, measured by State Final Demand (SFD), is projected to contract by 1.0% in 2018/19, mainly reflecting declines in business and dwelling investment. SFD is forecast at 3.0% per annum in 2019/20 and above in years to come.
- 112 Construction of new and replacement iron ore projects and new lithium projects are expected to contribute to employment growth of 1.75% in 2019/20. Government investment in major road and rail infrastructure projects is said to be supporting improvements in the labour market.

(ii) Global outlook

- 113 Global economic conditions are said to have started to weaken late in 2018, particularly in advanced economies, concentrated in manufacturing, including in Japan and Germany. Commodity prices, however, have remained relatively elevated partly due to the resilient construction activity in China and ongoing demand growth in the populace nations in

south and south east Asia such as India and Vietnam. It is said that the global economy will expand by 3.3% in 2019, down from 3.6% in 2018 with forecasts of improvement to 3.6% by 2020.

- 114 Global commodity markets are significant for WA and the demand for commodities has been stronger than expected over the past year. There have been increases in iron ore, gold, oil, LNG and alumina, partially offset by declines in copper and zinc. The Commodity Price Index has continued to rise but remains well below the extraordinarily high levels during the mining investment boom.
- 115 The collapse of a tailings dam at Vale's Córrego do Feijão mine in Brazil in January 2019 reduced Vale's production and the recent Cyclone Veronica in the Pilbara tightened global supplies of iron ore. The tightness in the iron ore market makes its price more susceptible to short-term supply impacts.
- 116 The global demand for lithium is increasing. WA's lithium production and the movement towards lithium battery growth is contributing to the value of WA's mineral production.
- 117 The oil market is important to WA as it is a major cost input for businesses and a significant source of export income. It is likely to grow in significance for the Western Australian economy as LNG, a cleaner alternative to coal, increases in popularity.
- 118 The Department of Treasury says that despite increases over 2018 and early 2019, prices for WA's key commodities are expected to remain low compared to levels reached during the mining investment boom.

(iii) National economic outlook

- 119 The Department of Treasury notes that the Australian economy, measured by Gross Domestic Product (GDP) is expected to grow by 2.25% in 2018/19, after expanding by 2.8% in 2017/18. Short-term growth is expected to remain below the historical average of 3.0% per annum. Tighter credit conditions and a decline in house prices have affected household consumption and dwelling investment. The forecast for consumption growth has been downgraded since the 2018/19 Mid-Year Economic Fiscal Outlook by 0.25% to 2.25% in 2018/19. Household consumption growth is expected to increase in 2019-20 to 2.75% and in 2020/21 to 3.0%. This is underpinned by expected continued growth in employment and increasing wage growth, and supported by continued low interest rates and personal income tax relief.
- 120 The Department of Treasury provided Table 3 – Major Economic Parameters, Australia showing annual growth as a percentage in a range of economic measures.

Table 3 – Major Economic Parameters, Australia

Annual Growth, %^(a)

	Outcomes		Forecasts		Projections	
	2017-18	2018-19	2019-20	2020-21	2021-22	2022-23
Real GDP	2.8	2.25	2.75	2.75	3.0	3.0
Employment	2.7	2.0	1.75	1.75	1.5	1.5
Unemployment rate	5.4	5.0	5.0	5.0	5.0	5.0
Consumer Price Index	2.1	1.5	2.25	2.5	2.5	2.5
Wage Price Index	2.1	2.5	2.75	3.25	3.5	3.5

(a) Year average growth unless otherwise stated. From 2017-18 to 2020-21, employment and the wage price index are through-the-year growth to the June quarter. The unemployment rate is the rate for the June quarter. The consumer price index is through-the-year growth to the June quarter.

Source: Commonwealth Treasury 2019-20 Budget

- 121 The Minister notes that wages growth in Australia has been more muted than in past cycles in response to improving labour market conditions. The Commonwealth attributes this, at least in part, to lower inflation expectations and spare capacity in the labour market as indicated by broader measures of labour under-utilisation. This in turn is said to reflect, at least in part, that strong employment growth has also drawn people into the labour market who were not previously looking for work. Slower wage growth is also said to reflect adjustments associated with unwinding of the terms of the trade boom in Australia.

(iv) WA's economic outlook

- 122 As noted earlier in 2018/19, the Western Australian economy is forecast to grow by 2.0 per cent, up slightly from 1.9% in 2017/18. In 2019/20, both the domestic economy, particularly business investment and household consumption, as well as net exports, are expected to contribute 3.5% growth to GSP.
- 123 SFD is expected to decline by 1.0% IN 2018/19, reflecting declines in dwelling investment and business investment. These are said to be partially offset by weak growth in household consumption as well as growth in Government consumption and investment. Household spending on housing and consumer goods and services has been affected by the tightening of credit availability through 2018 which has impacted both the State and national economies. Spending has also been impacted by a weaker outlook for wealth as a result of declining house prices. SFD is expected to grow by 3.0% in 2019/20, before stabilising at 3.5% per annum which is slightly below the long run growth rate.
- 124 The Department of Treasury notes that in contrast to the current weakness in Western Australia's domestic economy, domestic demand nationally has increased in recent years (2.9% in 2017 and 3.0% in 2018). Household consumption expenditure in Australia is 2.6% compared with 1.1% in WA; business investment is at 3.9% compared with -6.2% in WA; dwelling investment is 4.4% compared to 4.3%; Government consumption at the national level is 4.8% whereas it is 1.6% in WA. There is a significant difference between Government investment at the national level of 1.1% and -6.5% in WA. SFD is -0.50% compared with Domestic Final Demand at a national level of 3.0%.

- 125 Consumer spending is expected to grow by just 0.75% in 2018/19 after increasing by 1.6% in 2017/18 in WA. Recent improvements in consumer sentiment are said not to have yet translated into higher spending. Households are maintaining high savings rates and continue to restrain spending on non-essential goods. The gradual recovery in household income and wealth, together with a steady increase in population growth are expected to support modest increases in consumption in future years.
- 126 Dwelling investment is expected to decline by 1.75% in 2018/19 and further 2.75% in 2019/20.
- 127 Business investment is expected to decline by 10.0% in 2018/19 due to the completion of construction work on the last major LNG projects. Investment is then expected to increase, growing by 6.0% in 2019/20. The Department of Treasury says that '[t]he lift in investment will be primarily supported by iron ore projects that are intended to replace production at existing mines, and new lithium projects'.
- 128 Business investment for WA will not return to the 2007/08 level until 2022/23, after the peak in 2012/13 and remains subdued.
- 129 Merchandise exports are forecast to grow by 4.0% in 2019/20 as the remaining LNG projects increase shipments and as lithium and gold production increases. Growth was anticipated for 2018/19 of 4.25%.
- 130 Merchandise imports are forecast to decline in 2018-19 as fewer imports of large capital goods are required for the construction of major projects, and consumer goods imports fall in response to weak household spending.
- 131 The conditions in the Western Australian labour market have softened over the past year. Employment grew 2.2% in 2017/18 but is forecast to grow by only 1.0% in 2018/19. This compares with a 28 year average of 2.1%. Full-time hiring has contributed 1.2% to overall growth, offset by a decline of 0.1% in part-time employment. Hiring has been led by the resources sector and related industries. Employment in other industries, including the construction industry, education and training and financial and insurance services has contracted, and to a lesser extent in accommodation and food services, arts and recreation services, and the retail trade.
- 132 The unemployment rate increased to an annual average rate of 6.2% in the year to March 2019 from 5.9% in March 2018. It remains above the national level of 5.2%. WA's unemployment rate has been higher than the national average since April 2016.

(2) CCIWA's submissions

Global issues

- 133 CCIWA notes the dependence of the Western Australian economy on China and its consumers and businesses which contribute around 30% to the Western Australian economy. Forty-nine per cent of WA's exports go to China and 53% of its GSP is made up of exports. The Chinese businesses and other customers contribute to education, tourism, property activity and new projects in WA. The policy response in China to the reduction of tariffs will result in a reduced demand for minerals and resources and could affect projects in WA.

Signs of recovery

- 134 In spite of positive signs of economic recovery that are emerging, Western Australian businesses will continue to face challenging business conditions with compressed margins and cost management pressures. CCIWA says that the recovery needs to be nurtured and guided carefully and not impeded or put at risk.

Labour market

- 135 CCIWA notes the trend unemployment rate for WA at 6.1% is the second highest in the country and is yet to reach the level consistent with full employment, which the Reserve Bank of Australia (RBA) has recently estimated could be as low as 4.5% nationally. Spare capacity in the Western Australian labour market adds to downward pressure on wage increases.
- 136 CCIWA says that continued business investment is crucial to growing employment and the economy as WA continues to recover. Unemployment is expected to decrease with improved business investment. In the longer term, WA's labour market also faces more challenges as technology reshapes work.
- 137 WA also continues to have one of the highest levels of youth unemployment in the country and an unemployment rate for those 15 to 24 years being 13.7% in March 2019 compared to 12.8% nationally. CCIWA says that minimum wage setting is important to actively facilitate and support employment opportunities for young people and those seeking to gain or add skills and qualifications. Minimum wages are said to be an important part of the parameters for doing business and employing in WA, particularly for small businesses. CCIWA supports reasonable and sustainable wage growth through a minimum wage that considers productivity, and therefore business capacity, as a fundamental ingredient for growth and employment in WA.

Small business community

- 138 CCIWA notes that small businesses do not have a high capacity to absorb increases in operating costs or respond to weakening demand, and generally have less capacity to adjust to adverse economic conditions as experienced in WA in recent years.
- 139 CCIWA provided data on small business activities in Australia, noting that of the 2,313,291 actively trading businesses operating at the end of 2017/18, 93% had an annual turnover of less than \$2,000,000. A relatively small proportion, 3.0%, had an annual turnover of \$5,000,000 or more. Nearly a quarter of actively trading businesses had a turnover of less than \$50,000; approximately one-third had turnover of \$50,000 to less than \$200,000, and a further one-third of businesses had an annual turnover of \$200,000 to less than \$2,000,000 (ABS Cat. No. 8165.0 - Counts of Australian Businesses, including Entries and Exits, June 2014 to June 2018.) Thirty-three point four per cent of small businesses employ between one and 19 employees. Only 2.6% employ between 20 and 199 employees.

140 CCIWA notes that labour costs have a direct and immediate bearing on the capacity of small businesses to employ additional employees and provide additional hours of work to existing part-time and casual employees. The competitive environment has been challenging not only due to economic conditions within the State but with competition from interstate and overseas businesses.

Cost of living

141 CCIWA notes that the Perth CPI fell 0.1% over the March 2019 quarter and rose by 1.1% over the year. In annual terms, Perth recorded the second smallest increase in CPI for capital cities around the country in March 2019. CCIWA says that cost of living pressures are much lower in WA than the national average, a position that has existed since June 2015. Nationally, the CPI remained unchanged over the March 2019 quarter and increased by 1.3% over the year. CCIWA expects inflation to lift modestly to 1.8% in 2018/19 and 2.2% in 2019/20, within the RBA’s target range of 2.0 to 3.0%.

Productivity growth

142 CCIWA notes that productivity growth is necessary for wages growth to enable businesses to pay its employees more. If wages artificially increase without a corresponding lift in productivity, businesses are likely to respond with:

- automation;
- reduced profits;
- increased costs passed on to consumers resulting in higher living costs; or
- cost absorption which may result in businesses either lowering their profits or reducing expenditure elsewhere such as capital investment.

143 Business owners may increase their working hours, reduce service levels such as having fewer staff employed at any one time or reduce trading hours.

144 CCIWA undertakes surveys of business and consumer confidence. It says that businesses are investing in a wider range of new mining projects but these will not make up for the major LNG projects that have been or are yet to be completed. Consumers and businesses are more confident about future economic conditions but are worried about their present financial circumstances. Business investment has not experienced the decline CCIWA had forecast for last year due to new investments and project delays but a decline is expected for 2018/19. Business investment is forecast to fall by 15.0% in 2018/19 as the last of the LNG projects are completed. As a result, CCIWA expects the domestic economy to contract this year after 1.1% growth in State Final Demand in 2017/18, returning to a sustained, but subdued, growth trajectory in 2019/20.

Business and consumer confidence and investment

145 CCIWA refers to its WA Super - CCI Business Confidence Survey March Quarter 2019 and notes the different short term and longer term outlooks for business confidence.

Table 4: Business Confidence

Expectation of Economic Conditions	Three-Month Outlook	Twelve-Month Outlook
Weaker	47%	25%
No change	31%	38%
Stronger	22%	36%

Source: CCIWA Business Confidence Survey, March 2019

146 Business expectations for future employment opportunities have declined and three out of four small businesses with one to ten employees expect their workforce to contract or remain unchanged over the next quarter. Almost one in three retailers are expecting to lay off staff in the next three months compared with only 9% who are expecting to hire more staff. One in two businesses reported a decline in profitability over the March quarter, with only 10% stating that their profit margins improved.

147 CCIWA notes that 38% of businesses see weak demand as the largest barrier to growth. Weak demand may be attributed to dampening consumer spending. Mining businesses considered availability of skilled labour as a bigger barrier to growing their businesses suggesting that there may be a growing demand for skilled labour in pockets of the domestic economy.

148 CCIWA’s WA Super – CCI Consumer Confidence Survey, the March Quarter 2019, indicates consumer confidence has decreased by 0.9 index points over the March quarter but remains well above its long term average. The results of this survey indicate that economic recovery in WA is under way and consumers are more confident about the economy compared to this time last year.

149 Costs of living continue to be the biggest dampener on consumer confidence with three out of five consumers considering living costs such as transport, groceries and utilities as having a negative influence on confidence, about the same as the last quarter. Household consumption represented 46% of the economy in the December 2018 quarter. It rose by 1.6% in 2017/18 and 1.0% in 2016/17, but below annual growth of 2.7% over the past 10 years.

150 Consumers have been spending more of their income and remain optimistic about future economic conditions. CCIWA says this implies that consumers will spend more of their income on purchases now, given they think economic conditions will improve in the future, and they will earn a similar income from their job and investment.

151 CCIWA notes that there is a decrease in the savings rate which signals that a future increase in wages growth or employment will not immediately result in an equivalent increase in consumption. This is said to be because a key outcome of a fall in the savings rate is that more people operate closer to their borrowing constraint. This means that: (1) more consumers are experiencing some financial stress; and (2) there is less room for people to increase their spending or make major purchases in the future. Fifty-four per cent of consumers have experienced some financial stress in the last three months and over two thirds believe that it is unlikely that they will be making any major household purchases over the next three months.

152 CCIWA expects that a soft WA property market will continue to affect consumption growth. Since 2013, reductions in property prices in WA have reduced the wealth and borrowing power of property owners.

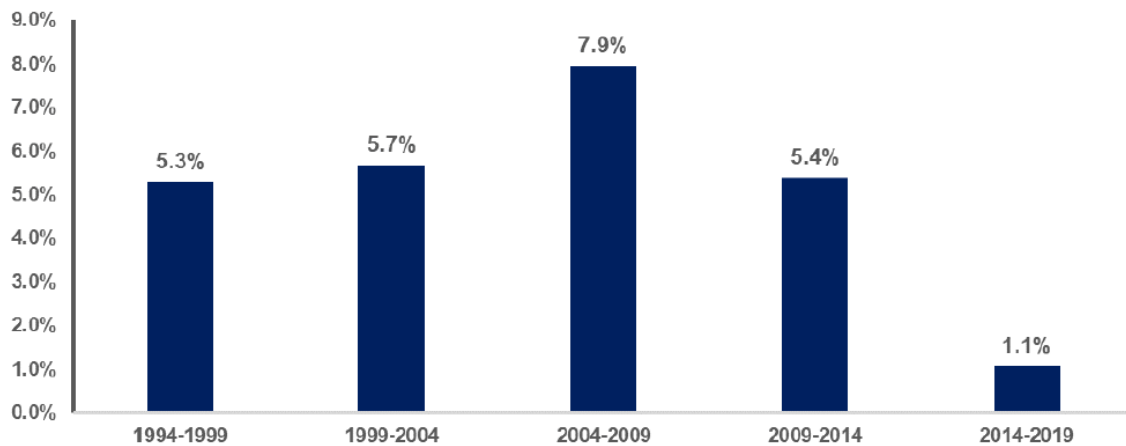
Retail trade

153 Annual growth in retail sales in WA has been less than at the national level due to it coinciding with a decline in the resources construction and investment phase. Growth has been on a downward trajectory since 2015 and through 2017/18 has cycled between positive and negative growth, reflecting continued uncertainty.

154 Retail turnover for WA, seasonally adjusted is reflected in CCIWA's Chart 9:

Chart 9: Average Year-on-Year Growth – Retail Turnover

AVERAGE GROWTH - RETAIL TURNOVER WA, Total Industry, Seasonally Adjusted, Year-on-Year



Source: ABS, Cat No. 8501.0 Retail Trade, March 2019

Dwelling investment

155 Dwelling investment has contracted by 2.8% in 2017/18, following a decline of 24% in 2016/17. Further contraction is forecast in 2018-19 before an expected improvement in 2019/20 and 2020/21. There are some indicators of what CCIWA referred to as 'rebalancing' in the Perth property market, including a reduction in the vacancy rate. It is likely that a weak east coast property market will dampen the recovery of property prices in Perth.

156 Conversely, a decrease in the RBA cash rate in 2019 could put upward pressure on Western Australian property prices. The median house price fell by 0.7% in 2017/18 and is expected to contract for a third consecutive year in 2018/19, down 0.9%.

157 CCIWA examined the CPI in respect of rent and noted that quarterly changes appeared to be improving compared with December 2017 through to June 2018. The rental prices in WA have been contracting for the last two years compared to Australia generally, where prices have increased by less than 0.3% each quarter.

158 New dwelling purchases in WA, as compared to the Australian level, have been significantly lower however they are improving.

Western Australian Labour Market

159 CCIWA noted the population increase of 0.3% over the September quarter of 2018 and that it is expected to remain modest in 2018/19 at 1% before gradually increasing to 1.3% in 2019/20, 1.5% in 2020/21 and 1.6% in 2021/22. The largest contributor to population growth in WA over the last three years has been natural increase. A recovery in interstate migration in line with improvements in the domestic economy is expected to assist population growth by 2021/22. The employment to population ratio of 63.7% was down slightly from 63.8% in February 2019.

160 The labour market is showing signs of improvement with a number of job vacancies increasing by 1%, or 150 advertisements over the year to March 2019. Job vacancies have been trending upwards since a low point of 14,400 job vacancies in May 2015.

161 Thirty per cent of businesses increased their employment levels over the March 2019 quarter while a quarter of businesses employed fewer people. CCIWA expects these conditions to trend downwards over the next quarter, with 29% of businesses expecting to increase their workforce in the next three months, but the majority are anticipating no changes.

- 162 WA's unemployment rate decreased to 6.1% during March 2019 down from 6.2% in February 2019. The trend remains higher than Australia's unemployment rate which was 5% in March 2019. WA had the second highest unemployment rate following Tasmania at 6.5% in trend terms.
- 163 Youth unemployment has steadily increased since January 2015 and was 13.7% in March 2019. The Western Australian youth unemployment rate exceeds the national average and has done since mid-2017.
- 164 CCIWA notes the slight downward trajectory in the underemployment rate in 2018 and early 2019 and says while this is a positive sign that some spare capacity is being taken up in the domestic economy, the degree of spare capacity in the Western Australian labour market remains high, and higher than the Australian rate. WA's in March 2019 was 8.9% whereas Australia's rate was 8.2%. CCIWA says many businesses remain wary about adding to the labour costs in the current economic environment and therefore support a cautious approach to wage adjustment to ensure that this does not result in significant or unexpected labour cost increases that discourage businesses from providing additional jobs and additional hours of work, and from utilising the spare capacity in the labour market.
- 165 This is a measure of spare capacity in the labour market and combines unemployed and underemployed. Australia's underutilisation rate between February 2017 and March 2019, seasonally adjusted, improved by 1.6% points, reaching a high of 14.9% in February 2017 and a low of 13.2% in March 2019. WA's underutilisation rate is currently 13.2% (March 2019), and is 1.5% below the high of 14.7% recorded in November 2017. WA's underutilisation rate remains 2.5% higher than its 10 year average, indicating that relative to previous periods, the underutilisation rate and unemployment rate showed that there is a sizeable number of people in WA who would like to work more hours than is currently being offered in the marketplace. It is conceivable that the existing labour market slack may remain in the short term given that business investment is forecast to improve in 2019/20 and 2020/21. Weak demand is prompting businesses to be cautious about hiring workers, with rising operating costs and strong competition.
- 166 The participation rate measures the share of the working age population either working or looking for work at a point in time. The Western Australian participation rate in March 2019 remained steady at 67.8% in seasonally adjusted terms. This is slightly higher than Australia's participation rate of 65.7% for the same period. WA's participation rate is close to the 2018/19 Western Australian Government Mid-Year Financial Projects Statement Forecast of an annual average participation rate of 68.6% in 2018/19. The female participation rate for WA decreased slightly from 62.8% to 61.9% between March 2018 and March 2019. Similarly, the male participation rate fell from 74.8% to 73.9% over that period.

Apprentices and trainees

- 167 CCIWA notes that apprenticeships and traineeships are essential to developing highly skilled and qualified workers who contribute to the growth and productivity of the domestic economy. They have been strongly supported by businesses across the economy. CCIWA says that adjustments in award wages for apprentices and a government-sponsored incentive affect the relative attractiveness of apprentices to employers and would-be apprentices, with unknown impacts. CCIWA referred to the [Productivity Commission Inquiry Report, Workplace Relations Framework, Overview and Recommendations](#), No. 76, 30 November 2015, page 20, saying that a 'precipitous adjustment to award wages as far as a cascade to apprentices and trainees could have a negative effect on the employment opportunities for apprentices'. Businesses are therefore said to support a cautious approach to wages adjustment to ensure that any movement in wages costs does not exert unsustainable wages pressure that dampens or discourages businesses from continuing to provide employment pathways for apprentices and trainees.

Wages growth

- 168 Private sector wages growth in WA measured in the Wage Price Index (WPI) has decreased over the last three years, reaching its lowest point of 1.0% through the March and June quarters in 2017. It has improved through the December quarter of 2017 (1.5%) finishing in the December quarter of 2018 at 1.7%. Private sector wages growth has been at or below 2% in WA since December 2014. It is expected that wages growth measured by the WPI of 1.75% in 2018/19 will gradually pick up over the remainder of the forward estimates period to 3.25% in 2021/22 as economic activity continues to strengthen and spare capacity in the labour market is absorbed.
- 169 CCIWA forecasts wages growth of 1.8% in 2018/19, increasing to 2.2% in 2019/20 and 2.5% in 2020/21. This is predicated on trends in WA's multi-factor productivity and capital deepening, where businesses invest in machinery and equipment that increases business output and revenue.
- 170 WA's WPI shows that its growth in wages is the lowest of all of the states whereas in 2012 it was the highest.
- 171 WA has the highest AWOTE of the states for November 2018 at \$1,757.10, seasonally adjusted, and exceeded the Australian AWOTE by \$151.60 per week. CCIWA says that this is largely the cumulative result of employment in the resource industries.
- 172 Private sector full-time AWOTE for WA over the 12 months to November 2018 increased by 0.8% while the private sector increase for Australia was 2.2%.
- 173 CCIWA says the Commission should consider the promotion of social inclusion through workplace participation when setting the SMW, award wages and allowances. Access to paid employment opportunities is said to be a critical part of ensuring social inclusion and that any minimum wage fixation framework would not be effective if it did not consider the impact on, and therefore the likely response of, employers to minimum wage outcomes.

Employer's capacity to pay

- 174 CCIWA says that if wages are set at a level that is higher than the productive value of the individual employee, this will result in negative employment impacts. If wage increases cannot be passed on or absorbed, employers will be forced to reduce costs which might ultimately include working hours, rates of pay and employee headcount. The employment costs extend beyond the base award rates of pay to superannuation, payroll tax, leave liabilities, penalty rates and workers

compensation premiums. Excessive increases in wages should not be contemplated and any increases must be sustainable for those required to fund them, such as small and micro-businesses with higher level award reliance.

175 CCIWA notes that excessive wages will create inflationary pressures in the economy. A low inflationary environment, as currently exists in WA, should also direct against a large increase in wages where the revenue of a business will not adjust as readily to fund excessive wage increases through price increases passed on to the consumer. If labour costs increase at a rate faster than inflation, the increased costs will need to be absorbed by the businesses, bringing negative employment effects discussed earlier.

Profitability

176 CCIWA says that populist commentary generalises and discusses all business in the context of large corporations which are said to be unrepresentative of the economy which is comprised of over two million businesses, the smallest co-hort being large business. It says that around three quarters of businesses in WA are unincorporated. Their profit growth adjusted for inflation over the five years to 2018 increased at just 1.2% in real terms per year on average for the same period. This is compared with corporate profit growth which was 4.2% per year on average.

177 Mining accounted for approximately 70% of the increase in corporate profits after a period of unprecedented investment in large capital works. This had a distorting effect on the calculation of profit. CCIWA says that excluding mining, over the five years to 2018, adjusted for inflation, total corporate profit grew by a total of 14.3%, or 2.7% per year on average in real terms. This is compared with 1.2% per year for unincorporated bodies.

WA compared with other jurisdictions

178 Over the last five years:

- construction in WA has contracted by 8.6% per year on average while expanding in New South Wales and Victoria by 4.3% and 5.7% per year on average respectively;
- retail has been flat in WA, growing by 1.1% on average in year-ended terms, while growing by 4.5% and 4.9% in New South Wales and Victoria respectively;
- there is reduced demand for labour in WA compared with other states;
- total construction employment has decreased by 1.6% per year on average in WA while growing 3.3% in New South Wales and 3.5% in Victoria;
- total retail employment has grown at 1.2% in WA while growing 2.5% in New South Wales and 2.8% in Victoria per year on average; and
- total accommodation and food services employment has grown at 4.1% in WA per year compared with 4.6% in New South Wales and, 4.9% in Victoria.

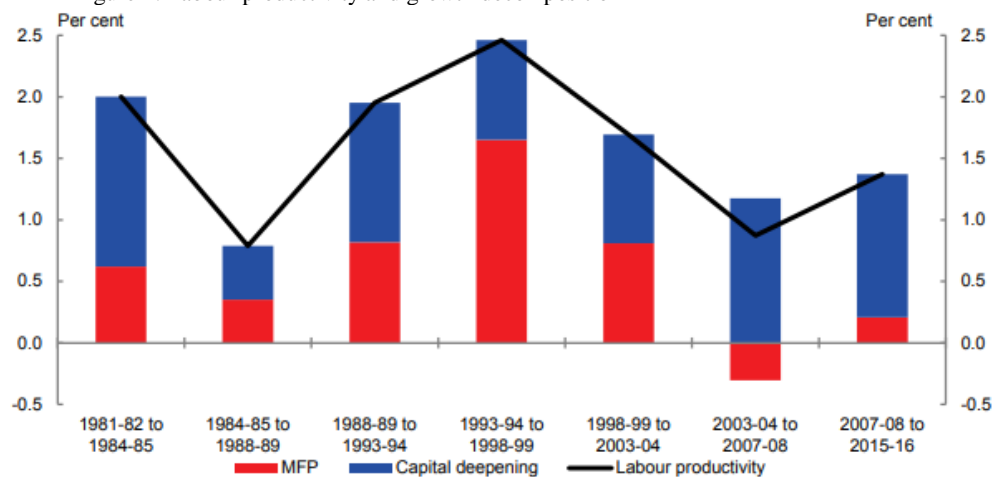
Encouraging employers, employees and unions to reach agreements

179 It is noted by CCIWA that industrial agreements are not a practical or viable option for the small business employers in the State system. CCIWA quotes the Productivity Commission that 'increasing the wages of the low paid through minimum wages and conditions is a better method of income redistribution than the tax transfer system' Productivity Commission Inquiry Report, Workplace Relations Framework, Overview and Recommendations, No. 76, 30 November 2015, page 331). CCIWA notes that it was further stated that no system of re-distribution is perfectly targeted and that many households that receive award wages are not in the lowest-income households.

Productivity

180 CCIWA provided evidence regarding productivity trends. It set out national productivity data from the Commonwealth Treasury, noting that the labour productivity grew by 1.4% per year on average between 2007/8 and 2015/16. It says that '[t]his has led to more output per worker as each worker has more efficient machines, technology and assets to make more goods or services.' The other factor is multifactor productivity (or worker and management efficiency), which is said to have contributed 0.2% to annual growth in labour productivity on average.

Figure 1: Labour productivity and growth decomposition



Source: Commonwealth Treasury, (2017) page 4. ABS cat. no. 5260.0.55.002 and Treasury calculations.

181 CCIWA also notes that the ABS has released ‘experimental data’ on productivity on a State basis. For the last 10 years it showed labour productivity growing at around 3.4% on average. Capital is said to have accounted for 60-80% of that productivity growth around (2.0 - 2.7%) and multifactor productivity between 20 – 40%, (0.7 and 1.4%).

182 CCIWA also notes ABS’s data on the contributions to growth in productivity at a national level in, for example, the retail trade. Between 2009/2010 and 2016/2017, the total output of the retail trade grew by 2.66% per year on average. This is comprised of capital contribution of 0.81%; hours worked of 0.49%, and multifactor productivity of 1.36%. This multifactor productivity is considered to be worker efficiency and contributed most to the growth in the retail output on average on a national level.

(3) UnionsWA submissions

Employees who are unable to reach an industrial agreement

183 UnionsWA contends that ‘it is more probable that a minimum wage increase will act as a spur to bargaining, particularly where employees are considered award free and need a “signal” of what constitutes an acceptable wage [7.13]’.

Encouraging ongoing skills development

184 UnionsWA notes the National Centre for Vocational Education Research (NCVER) 2019, *Apprentices and trainees 2018: September Quarter – Western Australia* Report shows that commencements in apprenticeships and traineeships continue to fall. It contends that this is a consequence of a failure to make undertaking training pay for the trainee. It refers to other reports including the 2011 NCVER research report “*The Impact of Wages And The Likelihood Of Employment On The Probability Of Completing An Apprenticeship Or Traineeship*”. The completion wage premium is said to be a significant factor in apprentices completing their training. Completion rates decrease with increases in the difference between wages in alternative employment and training wages. It is noted by UnionsWA that in the long run, those engaged in training still need to survive in the short term on low wages.

185 UnionsWA also notes that it has previously submitted that the main cost to employers in training apprentices is the cost of supervision rather than wages cost, and that this was supported by the NCVER report “*The Cost of Training Apprentices*”. UnionsWA says that for apprentices, there is an opportunity cost involved in the time spent as an apprentice. Unless regular and generous increases in apprenticeship wages flow on from decisions such as the minimum wage, apprenticeships become increasingly unattractive.

186 UnionsWA notes the recent State Budget included an additional \$182.4 million over the forward estimates to stimulate growth in apprenticeships and traineeships. This is particularly aimed at including small businesses and to enable the government to target assistance to meet the state’s workforce priorities. These incentives should provide additional scope for small businesses to accommodate any increase in apprentice and trainee pay rates, according to UnionsWA.

Providing equal remuneration for men and women for work of equal or comparable value

187 UnionsWA says that an increase in the SMW at or below the CPI inflation rate will make the gender pay gap worse rather than contribute to its improvement. It says that a bold increase in the SMW is needed to address the continuing gender pay gaps in WA and nationally.

The state of the economy of WA and Australia

188 UnionsWA notes the 2018/19 WA State Budget papers noted that the State’s economy, as measured by GSP, is expected to accelerate from 2% in 2018/19 to 3.5% in 2019/20. This reflects an expectation of continuing solid growth in exports, combined with increasing business investment as spending on a new wave of resource sector projects, mostly iron ore and lithium, gathers pace. There is also reference to government investment in major road and METRONET rail infrastructure which are expected to see employment growth of 1.75% in 2019/20 up from an estimated 1% in 2018/19.

189 Household consumption is expected to grow by just 0.75% in 2018/19, after growth of 1.6% in 2017/18. It is said that recent improvements in consumer sentiment have not yet translated into higher spending, as households have maintained a high savings rate and continued to restrain spending on non-essential goods.

190 UnionsWA contends that spending on non-essential goods and services is weak because of low wage growth, and the disparities in wage distribution in WA. It says that the State Wage Case can address consumption growth by increasing award wages. It notes that the Budget Papers refer to increased spending over the forecast period being dependent on progressive increases in income and wealth (proxied by house prices) providing households with confidence to spend. It notes that there is a risk that consumers may further delay spending decisions until wages growth has been sustained and growth in disposable incomes is considered to be permanent (2019-20 WA Budget Papers, Budget Paper No. 3: Economic and Fiscal Outlook, page 17).

191 UnionsWA also notes that the RBA *Statement on Monetary Policy May 2019* says that the outlook for consumption was a key source of uncertainty for the forecasts and that this was important for the outlook for consumption. The RBA noted ‘[s]hould households conclude that low income growth will be more persistent than previously expected, households may adjust their spending by more than currently projected and consumption growth could remain weak for a longer period.’ (RBA *Statement on Monetary Policy May 2019*, p 76).

192 Reference was also made to the National Australia Bank’s *State Economic Overview April 2019* regarding household consumption growth having softened in 2018 and that weak wage growth is a factor. This report also noted that WA has the lowest wage growth of any state or territory.

193 UnionsWA says that a substantial increase to the SMW will assist in the growth of household consumption by increasing aggregate demand. It also notes the RBA’s *Monetary Policy Statement February 2019* which noted that ‘[m]inimum wage

increases could push up aggregate wages growth and increase inflationary pressures, depending on how employment and hours worked are affected.'

- 194 UnionsWA also reports on the United Kingdom Low Pay Commission's report, 20 years of the National Minimum Wage (April 2019), which it refers to as recent which includes the period 2000-2018. It examines the nominal and real growth in minimum wages for OECD countries. UnionsWA says that this shows that while Australia has a reputation for high minimum wages, the last 10 years have not been outstanding in terms of wage growth. It says that the economy needs the accompanying boost to household consumption and expenditure that would result from increased wages growth.

The capacity of employers as a whole to bear costs of increased wages

- 195 UnionsWA says that employers' monopsony position in the labour market has provided them with substantial power to hold labour costs down. It says there is no reason in such an environment for the Commission to restrain the SMW.

- 196 It also refers to the paper by Saul Eslake in *The Wages Crisis in Australia* (by Stuart, Stanford and Hardy (2018) pages 218 to 219), in which he says that the rewards of improvement in productivity have accrued to employers rather than to employees, 'that the divergence between labour productivity growth and the real producer wage reveals that most of the income gains arising from the net improvement in Australia's terms of trade since the early 2000s ... have also accrued, at least in the first instance, to employers (or to governments, in the form of taxes).'

- 197 Mr Eslake also noted that:

Wages paid by small businesses are on average 44% lower than those paid by medium-sized businesses ... and 53% lower than those paid by large businesses. ... That stems partly from the fact that labour productivity (industry value added per employee) is lower, on average, in small businesses than in larger ones. But it also suggests that increasing small businesses' share of total employment – which would appear to be one intention of taxing small business incomes at a lower rate than the income of larger businesses – would do nothing to increase average wages.

...

The decline in the share of national income accruing to labour in Australia and other industrial economies over the past two decades – and the corresponding increase in the share accruing to 'capital' – has not resulted in faster growth in business incomes, or in economic activity more broadly.' (226-227).

- 198 UnionsWA says that an across the board, 'institutional decision', to lift wages is needed because employers and industry generally actively try to constrain wages growth. Increases in minimum wage rates will ensure that firms can compete on factors other than wage costs.

The need to ensure that the Western Australian award framework represents a system of fair wages and conditions of employment

- 199 UnionsWA examined the effect of flat dollar increases in recent State Wage decisions and the slight impact on the compression of relativities. UnionsWA says that relativities have begun to compress again after the 2017 decision where the Commission awarded an increase of 2.3% to C10 and above. It said that an increase of \$43.61 per week or 6%, whichever is greater, best balances the range of factors the Commission must take into account and will assist in giving both substantial increases to the lowest paid but also preserving the existing skill-based relativities for award classifications.

- 200 UnionsWA notes that nationally the WPI rose 0.5% in the March quarter of 2019 and 2.3% through the year. For WA through the year, private sector wages have increased by 1.7% as opposed to 2.3% nationally. UnionsWA also notes that the Centre for Future Work released a briefing paper *The Impact of Minimum Wages on Recent Wage Trends*, which pointed out that:

Because it holds the composition and quality of jobs constant from one period to the next, the WPI does not capture the wage impacts of changes in the composition of jobs over time. In Australia in recent years, employment has become more dependent on part-time work; average hours worked per employee have declined; and other forms of insecure or low paid work have also become more common. These effects are excluded by definition from the WPI, and hence it has overstated the true growth of realised wage income.

(paragraph 2.2 UnionsWA reply)

- 201 UnionsWA also notes that both the Minister and CCIWA refer to household consumption being weak and the concerns that this causes. The GSP growth of 1.9% in 2018/19 has been driven by household consumption (along with business investment and dwelling investment). Household consumption represented 46% of the economy in the December 2018 quarter.

- 202 UnionsWA says that CCIWA then tries to claim that, because the national household savings ratio has fallen, 'a future increase in wages growth or employment will not immediately result in an equivalent increase in consumption' (CCIWA submission [77] and [78]). UnionsWA says that this is a highly debatable claim because the behaviour of lower paid workers is that they are more likely to be earning award and minimum wages and the relationship between income and expenditure means that every extra dollar a low-wage worker earns is more than likely to end up boosting demand for goods and services, with those on the lowest incomes spending a proportionally higher amount of their earnings.

- 203 UnionsWA says that when those on the lowest incomes receive a rise in their wages, they spend it on much needed essential goods and services, typically locally, providing an injection to the economy of their community.

- 204 UnionsWA also notes that CCIWA reports that 38% of respondents to its consumer confidence survey identified weak demand as the largest barrier to growing their business over the coming year. Further, it said that weak consumer spending may have contributed to subdued demand levels and that WA consumers were unlikely to make any major household purchases next quarter. UnionsWA says that the stronger propensity to spend on the part of low wage earners means that a

substantial SMW increase will make the strongest contribution to lifting consumer spending in WA, and consequently, feeding into household consumption.

Fair Work Commission AWR - Decision

205 The FWC issued its AWR 2018/19 Decision on 30 May 2019. The Commission reconvened to hear submissions on the effect of that decision as required by s 50A(3)(f) of the IR Act.

206 We note that the FWC – AWR is set in a different statutory scheme to that applicable under the IR Act. There is overlap between some of the issues to be considered. The AWR decision takes account of the circumstances applying across Australia as a whole, those circumstances including the whole of the national economy, even though there are considerable variations across states and territories according to different circumstances relating to the nature of their industries, workforces, trading arrangements and the like. The State Wage Case decision is to take account of the national economy, however the Commission is able to look more specifically and directly at the circumstances prevailing in WA.

207 The AWR decision also considers social and equity issues including social inclusion through workforce participation, relative living standards and the needs of the low paid and the principle of equal remuneration for work of equal or comparable value.

208 The FWC – AWR 2019 decided to increase the NMW and award rates by 3%, making an increase of \$21.60 to the NMW, taking it to \$740.80 per week.

Conclusions

209 In coming to a determination under the State Wage Case decision, the Commission is required to take an evaluative and balancing approach between competing considerations. Issues of fairness relate to both sides of the employment relationship and must take account of the effect on those who are employed as well as those who seek to be employed or to increase their employment hours.

210 None of the considerations set out in the legislation has priority. All are to be considered and weighed. Depending on all of the circumstances, some carry greater weight than others at particular times.

211 We note and have given careful consideration to the views of those who have made submissions.

212 In respect to ensuring that WA has a system of fair wages and conditions of employment, we note that the system in existence today is the product of decades of legislated attention, negotiations, conciliations and arbitrations. We come to this decision, not with a blank page, but with a system of wages and conditions covering all employees who are currently within the State system. The context of this determination is a review of the existing SMW and award wages, not the creation anew. The limitation on this review is to set a SMW and adjust award rates. The submissions put to us are all aimed at providing a justification for the rate of increase that each espouses. It is against this background that we apply the considerations set out in the IR Act.

213 The IR Act does not impose an obligation to set social, taxation or economic policy. We must take those matters as they exist and apply them to the task of reviewing the SMW and award wages. We are required to balance competing and conflicting views, approaches and interpretations to a wide range of economic and social considerations.

214 We start by dealing with the employment effects of minimum wage increases.

215 Firstly, moderate, regular increases in the minimum wage in the Western Australian context do not have discernible, significant adverse effects on employment. In last year's decision, we reiterated our conclusion reached over a number of years. We said:

158. Overall, based on the materials considered by us in the 2017 State Wage Case; the work undertaken for the Commission by the late Professor David Plowman in 2006, *Report Prepared for the Western Australian Industrial Relations Commission: State Minimum Wage Review, May 2006*; observations of the FWC in its AWRs; and the above research, our opinion remains that moderate, regular increases in the SMW do not lead to negative employment consequences. What is 'moderate' will depend on the circumstances at the time. As we have noted previously, minimum wage increases in the past in this State have exceeded increases in the NMW, in times when the State's economy was very strong and had the capacity to support them. Increases in the SMW over the last five years of between \$13 and \$20 per week can be considered as moderate. The highest such rise was \$29 per week in 2008 during very different economic circumstances. There has been no submission or evidence that any of these increases, in the context of the particular times, have had any adverse employment effects.

[2018] WAIRC 00363

216 We also noted last year:

121. Small businesses reported that their short-term responses to increases in costs would be to implement strategies to manage or reduce their wage bill (69.4 per cent). This included:
- (1) reducing hours of casual staff (71.8 per cent);
 - (2) work more hours themselves (69.3 per cent);
 - (3) reduce the number of employees by attrition (63.1 per cent);
 - (4) reduce the length of shifts (54.3 per cent); and
 - (5) reduce overtime (50.7 per cent).
122. This is consistent with the evidence given to the Commission in 2013 by Professor Rowena Barrett. Other responses related to reducing other business costs.

123. In the cost containment strategies set out above, small business owners may substitute their own labour, reducing staff working hours. This has an impact on the health and wellbeing of those business owners. CCIWA also notes the negative impacts on the physical and mental wellbeing of work-related stress by more than 50 per cent of small business owners.

[2018] WAIRC 00363

217 CCIWA sought to persuade us this, by reference to economic research by:

1. Dr Andrew Leigh in respect of increases to WA's minimum wage (Leigh, A (2003). Employment effects of minimum wages: Evidence from a quasi-experiment, *Australian Economic Review*, 36(4), 361-373 and Leigh A (2004a), *Employment Effects of Minimum Wages: Evidence from a Quasi-Experiment – Erratum*. *Australia Economic Review*, 37(1), (102-110); and
2. David Neumark and William Wascher (Neumark, D., and Wascher, W.L. (2007). Minimum wages and employment. *Foundations and Trends in Microeconomics*, 3(1-2), 1-182),

that there are demonstrable adverse effects to employment by the increases to the minimum wage.

Dr Leigh's Research

218 In an article in the *Australian Financial Review*, of 14 January 2004, Dr Leigh noted that 'setting the federal minimum wage is a balancing act. On the one hand, a higher minimum wage improves the living standards of thousands of working Australians. At the same time, raising the minimum wage may cost jobs'.

219 Dr Leigh compared the circumstances in the United States of America (USA) with Australia and said that '[g]iven that Australian minimum wages are higher (compared with median earnings) than US minimum wages, translating this research into the Australian context is not straightforward.' Dr Leigh reported that within Australia that 'modest increases are not likely to cause significant employment losses'. Dr Leigh was referring to the case by the ACTU in 2004 calling for a 6% increase in the federal minimum wage compared with the federal government's submission of 2-3%. He said:

My findings suggest the ACTU's claim would result in a 0.8 percentage point fall in employment, while the government's would cause a 0.3 percentage point drop.

Only half a percentage point separates the employment effect of the two claims a relatively small amount, given that the employment rate often moves by this amount from one month to the next due to seasonal variation.

The employment costs of raising the minimum wage appear relatively small, while the chance to provide a boost to the incomes of the working poor is real.

Neumark and Wascher's research

220 This research examined over 100 reports about the effects, in particular in the United States of America (USA), of increasing the minimum wage. This paper is not, with respect, particularly helpful in examining what has occurred or is likely to occur in WA. It examined increases in the minimum wage in the USA in the late 1980s and early 1990s. Increases of between 10% and 26% were made after a decade-long freeze in the federal minimum wage. The structural, institutional and economic circumstances in the various states of the USA and the amount of the increases make it very difficult to attach much weight to this research for the purposes of considering the SMW wage and increases to award wages.

221 We also note, as we have previously, the research done in Australia and in particular by Professor Plowman referred to in previous years.

222 Also Dr James Bishop, in "*The Effects of Minimum Wage Increases on Wages, Hours Worked and Job Loss*", Research Discussion Paper (RDP) 2018-06 recorded:

The effect of minimum wages on employment has been widely debated. Despite a vast research effort, economists remain divided on the issue. In Australia, these effects have been particularly difficult to quantify, in part due to Australia's complex system for setting minimum wages. Due to this lack of evidence, policymakers have tended to rely on the evidence for the United States and United Kingdom. However, as the Productivity Commission (2015b, p 190) has argued, we should be cautious in drawing lessons from the US and UK experiences, due to the 'significantly different institutional wage setting arrangements and lower minimum wages' in those countries compared to Australia (1).

223 In his paper, Dr Bishop noted the unique institutional features of wage setting in Australia. He concluded by stating:

I find that small, incremental adjustments to awards are most likely passed on to wages in award-reliant jobs. These adjustments appear to have little adverse effect on hours worked or job loss. These findings are consistent with the international evidence and the FWC's (2017) current assessment of that evidence base. (15).

224 Dr Bishop went on to note some limitations to his conclusions. [F]irstly ... my results are for adult employees only and do not include juniors. Secondly, the results may not necessarily generalise to large, unanticipated changes in award wages'. He went on to say that 'although I find no statistically significant evidence of an effect of award adjustments on job destruction, this does not rule out an adverse effect on employment. For instance, the adverse consequences of higher wage floors may be borne by job seekers, rather than job holders (15-16).'

225 While the research is not unequivocal, there remains no research set in our unique wage setting system, which would lead us to change our view that moderate, regular increases in the minimum and award wages have no significant and discernible negative employment consequences. The issue is what constitutes moderate. Further, the fact of both the NMW and SMW being revised each year is well reported. It is highly unlikely in that context that the level of increases awarded over the years would not be anticipated and factored in to businesses budgeting.

226 In considering what is fair, we need to weigh the interests of those who receive pay rises as a consequence of our decision, those who make those payments, and the community generally, including those looking for work.

Social and equity considerations

227 We note the comments of the FWC – AWR 2019 decision that:

[15] The relative living standards of employees on the NMW and award-reliant employees are affected by the level of wages that they earn, the hours they work, tax-transfer payments and the circumstances of the households in which they live.

...

[17] The assessment of the needs of the low paid requires an examination of the extent to which low-paid workers are able to purchase the essentials for a decent standard of living and to engage in community life, assessed in the context of contemporary norms. The risk of poverty is also relevant in addressing the needs of the low paid. We accept, as we have in previous Review decisions, that if the low paid are forced to live in poverty then their needs are not being met. We also accept that those in full-time employment can reasonably expect a standard of living that exceeds poverty levels.

228 We also note UnionsWA and WACOSS’s submissions regarding the needs of the low paid, and living standards including the case for a rate taking account of the relative poverty benchmark. We note the circumstances of a variety of different households and the effects of low paid work.

229 We have also noted the ‘stepping stone effect’. The FWC - AWR 2019 said at [159] ‘that about half of low paid workers spend less than a year in low paid work before moving to higher-paid work. The remainder either spend more than one year in low paid work, or move from a low paid job into unemployment or leave the labour force’. It then went on to set out the following tables demonstrating this effect:

Table 7.1: Duration in low-paid employment, per cent

Duration	Less than 1 year	1 to 2 years	2 to 5 years	More than 5 years
Proportion	66.2	18.0	13.3	2.5

Source: Department of Jobs and Small Business analysis using the HILDA Survey, release 17 (December 2018), balanced panels waves 1 to 17 with longitudinal weights.

Note: Data is based on flows into low-paid work, not the number of people in low-paid work at a point in time. Numbers are mutually exclusive.

Table 7.2: Destination on leaving low-paid employment, per cent

Duration in low-paid employment	Higher paid work	Left the labour force	Unemployment
Less than 1 year	76.1	16.8	7.1
1 to 2 years	77.3	15.3	7.4
2 to 5 years	81.8	12.2	6.0

Source: Department of Jobs and Small Business analysis using the HILDA Survey, release 17 (December 2018), balanced panels waves 1 to 17 with longitudinal weights.

Note: Those remaining in low pay for 5 years or more are not shown due to a small sample size.

230 As to a living wage, by reference to a relative poverty line, we note that the HILDA analysis defines low paid as less than two-thirds of the median hourly rate, rather than the minimum wage. The median wage at a national level is \$1,066, and two thirds equals \$710.67. In Western Australia, the median wage is \$1,150 and two thirds is \$766.67, which is above the current SMW by nearly \$40.00 per week. The WA median wage is \$56.00 above the national median wage.

231 The FWC - AWR 2019 said of the living wage:

[60] The ACTU contends that we should set the NMW (or C14) rate at a level which lifts a single earner couple without children above the 60 per cent relative poverty line where the non-working partner is not seeking work. Both the ACTU and ACBC submit that the NMW (or C14) rate should be set at a level which lifts single earner couples with 1 or 2 children above the 60 per cent median income poverty line.

...

[62] In addition, low paid employment is often temporary and can act as a ‘stepping stone’ to higher paid work. The C14 (or NMW) rate only features in 45 of the 122 modern awards and in 39 of those awards it is a transitional rate from which employees progress after a period. We also accept that there are instances where low paid employment is not a pathway into higher paid work and as the Panel has observed previously ‘[w]e cannot be indifferent to the standard of living of low-paid workers just because many do not stay in that situation for long periods.

[63] It is important to identify with some precision the number of employees who are sought to be the beneficiaries of a particular policy. If it turns out that the number of employees in the household types below the 60 per cent of median income relative poverty line is very small or that they are transitioning to higher paid jobs then it raises a real question about whether the minimum wage system is the appropriate instrument to address these pockets of disadvantage. As the Panel has observed in the past, ‘increases in minimum wages are a blunt instrument for addressing the needs of the low paid ... [and] the tax-transfer system can provide more targeted assistance to low-income

- households and is a more efficient means of addressing poverty. Of course to the extent that the tax transfer system fails to adequately address the 'needs of the low paid' more may need to be done through the minimum wages system.
- 232 We endorse those comments while noting that a relative poverty line is indeed relative and not absolute. The comparisons between the situation in WA and nationally demonstrates this and raises the question of the usefulness of such a measure for the purpose of setting a minimum wage.
- 233 WA's median is higher than the national median even though the difference has declined since the peak of the mining and resources investment boom. The disparity between the two rates commenced in 2007 and was at its greatest in 2012. It is a volatile measure and has varied each year.
- 234 It also is difficult to properly compare WA's relative poverty level with the national level when there are differing industry structures across the states, territories and regions.
- 235 We also concur with the FWC – AWR 2019 conclusion that the 'increases in minimum wages are a blunt instrument for addressing the needs of the low paid ... [and] the tax-transfer system can provide more targeted assistance to low-income households and is a more efficient means for addressing poverty [63]'.
- 236 We have considered the rate of increases in the SMW and award rates of pay in recent years to determine whether they have kept pace with, or provided an increase above, the cost of living. We note that the CPI is not a perfect measure of increases in the cost of living. However, it provides a stable measure of changes in the prices of a representative and fixed basket of goods and services. This is the best available measure of relative costs changes.
- 237 Each year, the submissions we receive point out the various costs which have risen above the CPI and others which have not. We do not see it as desirable to consider each year the relative impact of components of the CPI unless there are exceptional circumstances. To do so would provide instability and fuel regular arguments about the virtues of and trends in each component. What is helpful is that there is a measure which is known and relatively stable.
- 238 In comparing the Perth CPI with measures of increases in wages, we have chosen to use the WPI. It is less volatile than AWOTE and is recognised each year as being the appropriate measure for this purpose.
- 239 Since 2014-15 until 2017-18, the actual CPI for Perth, seasonally adjusted, has increased by a total of 4.3%. This is compared with the WPI which has increased by 7.0% and the SMW, which has increased by \$61.00 per week, or 8.81%. This demonstrates that even since the decline in the growth of the State economy following the resources and investment boom, the SMW has benefited from significant and real increases. Until the FWC issued the 2019 AWR decision, to apply from 1 July this year, the SMW will be \$7.70 above the NMW, notwithstanding that the State's economic circumstances have been more challenging than at the national level.
- 240 The information provided by WACOSS about the living costs and total income of a number of different model households is helpful in considering the needs of the low paid, living standards generally, and contributions to improved living standards. The SMW and award wages have a role to play in household income, but the decision the Commission must come to is a rate of increase for an individual employees regardless of family or household circumstances. It cannot completely take account of the taxation rates applicable to each of them and the particular benefits they may be entitled to under State and national government programs for families, households and individuals.
- 241 We note that CCIWA has referred in its submissions to enhancing social inclusion. This is not one of the criteria set by the IR Act but arises from the FWC - AWR's criteria. It does, however, have some reflection on issues of fairness and equity.
- 242 The Commission must also take account of the need for wages and employment to be sustainable. Employers must be able to afford to pay the rates without undermining employment, either as a whole job or as increased hours of work.
- 243 Employees are entitled to work in jobs which are likely to enhance their daily lives and not be detrimental to their health. Employees are also entitled to be paid a fair, decent and sustainable wage. As the evidence has shown, a moderate increase in wage rates, in the context of what the economy and the employer can pay, is the key.

The state of the Western Australian economy

- 244 Based on the evidence set out in the documents before us, we note the tentative signs of growth from the lows of recent years.
- 245 GSP growth in 2016/17 was – 2.7%. The estimated actual for 2017/18 was 2.5% but came in at 1.9%, that is a 4.6% improvement but not as good as expected. This compares with the peak in 2011 of nearly 10%.
- 246 SFD in 2016/17 was – 7.2%. The estimated actual last year, for 2017/18, was – 0.25%, however, it was in positive terms of 1.0%, being 1.75% better than expected.
- 247 Employment growth in 2016/2017 was – 0.9%, with an estimated actual for 2017/18 being 2.25%. This was an improvement of 3.95%, and exceeding expectations by 0.05%.
- 248 The unemployment rate was 6.2% in 2016/17. The estimated actual for 2017/18 was 5.75%, and the actual rate for 2017/18 was 6.1%. Therefore, there has been an improvement, but not as great as expected, and modest in the circumstances.
- 249 The WPI grew 1.4% in 2016/17. It was estimated to be 1.5% in 2017/18, and this has eventuated. This brings a 0.1% improvement in the WPI.
- 250 The CPI rose by 0.6% in 2016/17. It was expected to rise to 1.0% in 2017/18, but fell-short at 0.9%.
- 251 Business investment is at its lowest in nearly 15 years. It is expected to increase in 2019/20.

- 252 While employment in WA has grown in the resources and related industries, it has contracted in accommodation and food services, arts and recreation services and the retail trade, construction, education and training, and financial and insurance services.
- 253 Employment growth generally is expected to be 1.75% in 2019/20 compared with the 25 year average of 2.1%. We note the growth in full-time employment is a positive sign, compared with a number of years of part-time growth and full-time decline.
- 254 Consumption is at low levels, albeit that discretionary spending has increased slightly. Dwelling investment is at the lowest level in 20 years.
- 255 These major economic aggregates for WA demonstrate that while there is improvement overall, it is modest.
- 256 Leading indicators such as business and consumer expectations and confidence, housing starts, and investment underscore that, while the economy is not quite 'bumping along the bottom', it is still at a low level compared with the peak only a few short years ago. There are signs of increasing optimism and tentative growth.
- 257 This contrasts strongly with the state of the national economy, which the FWC - AWR 2018/19 decision described this way:
- [6] Despite the recent fall in GDP growth, the Australian economy has performed moderately well and the relevant data are all indicative of a strong labour market. Although business conditions have declined from the high levels recorded in the first half of 2018, they remain consistent with trend growth in the economy and the labour market has performed strongly. As the RBA has recently observed, '[a]lthough GDP growth has moderated, employment has continued to expand by enough to reduce spare capacity in the labour market over the past year'. The Australian Government expects the economy to grow at its potential rate and to support future increases in employment. The proportion of the working-age population that is in employment is at record levels. (Footnotes omitted)
- 258 In comparing the national and state performance, GDP grew by 2.8% compared with GSP of 1.9%. Employment growth nationally was 2.7% compared with 2.2% in WA. The national unemployment rate was 5.4% compared with 6.1% in WA. The WPI nationally grew 2.1% compared with 1.5% in WA. The CPI increase nationally was 2.1% compared with 0.9% for Perth.
- 259 The Commission is required to consider the capacity of employers as a whole to bear the costs of increased wages, salaries, allowances and other remuneration. We note that an increase in the minimum wage and award rates of pay does not end with the weekly or hourly rate. It flows on to superannuation, workers compensation, leave and other costs.
- 260 In looking at the capacity of employers as a whole to bear those cost increases, it is useful to look at a number of measures including profitability and business survival ratios.
- 261 There are no profitability measures which are isolated for WA. However, at a national level GOS and GMI is used as a loose proxy for profitability.
- 262 The Minister's Table 6 sets this out by industry, for the whole of Australia.

Industry	GOS + GMI June 2017 (\$m)	GOS + GMI June 2018 (\$m)	Annual Increase (\$m)	Annual Increase (%)
Mining	56,733	63,258	6,525	11.5
Manufacturing	4,491	4,968	477	10.6
Professional, scientific and technical services	2,658	2,852	194	7.3
Wholesale trade	2,484	2,572	88	3.5
Health care and social assistance	1,594	1,644	50	3.1
Transport, postal and warehousing	5,800	5,974	174	3.0
Retail trade	2,868	2,954	86	3.0
Financial and insurance services	7,642	7,801	159	2.1
Electricity, gas, water and waste services	3,592	3,643	51	1.4
Education and training	830	835	5	0.6
Accommodation and food services	971	946	-25	-2.6
Information media and telecommunications	2,053	1,999	-54	-2.6
Arts and recreation services	558	539	-19	-3.4
Public administration and safety	1,342	1,278	-64	-4.8
Rental, hiring and real estate services	2,678	2,547	-131	-4.9
Administrative and support services	800	758	-42	-5.3
Agriculture, forestry and fishing	5,797	5,405	-392	-6.8
Other services	782	726	-56	-7.2
Construction	8,504	7,291	-1,213	-14.3
Total all industries	129,309	133,714	4,405	3.4

- 263 This demonstrates the average annual increase for the mining industry for 2017/2018 was 11.5% whereas the total for all industries was 3.4%. This is in a context of the Mining industry constituting over 47% of the total GOS and GMI as at June 2018.
- 264 Without the contribution made by the Mining industry, instead of an increase of 3.4%, there was an overall contraction of almost 3%. Interesting, too, is that the Mining industry contributes only 7.7% to WA's workforce (see Minister's Table 7). However, we were informed by Mr Christmas that the industry of Professional, scientific and technical, which constitutes 8.1% of the WA workforce has a significant number of people whose work is associated with the mining industry (ts 16). The Professional, scientific and technical services industry had an annual increase in GOS and GMI of 7.3%. Combined, these two industries experienced an 18.8% increase in GOS and GMI but constitute only 15.8% of the WA workforce. We note that this is not entirely a scientific consideration due to the GOS and GMI figures being national whereas the proportion of the workforce includes explicit WA figures. However, the proportion of the workforce in those two industries nationally is 10.8%. The Mining industry has only 0.9% of employees paid by award, and the Professional, scientific and technical services has 8.0%.
- 265 This is as compared with those industries that constitute a large proportion of those paid by award. The Accommodation and food services industry contributes 7% of the WA workforce and 44.9%, Australia wide, are paid by award. Its GOS and GMI was - 2.6%.
- 266 The Retail trade makes up 10.2% of the WA workforce, 30.1% are paid by award and its GOS and GMI was 3.0%.
- 267 Health care and social assistance industry employees make up 11.8% of the WA workforce, 31.7% are paid by award and its GOS and GMI is 3.1%.
- 268 Administrative and support services make up only 3.0% of the WA workforce, 41.3% are paid by award and its GOS and GMI is - 5.3%.
- 269 Therefore, the industries in WA with the highest proportion of award rate and minimum wage reliance are those where profitability is - 2.6%, 3.1% and 3.0% respectively. This includes the figures for large corporations as well as small businesses in the unincorporated sector.
- 270 There is no data before us about business survival rates to add to this consideration.
- 271 There are some positive signs of recovery in the Western Australian economy, however there is continued weakness over the short to medium term. There is real excess capacity in the labour market. The recovery of the economy from a protracted economic downturn since the decline of business investment following the peak of the resources industry construction boom in 2012 has been slow and is proving more volatile than expected. Declining business investment has been dragging on the economy, due to the end of the high level of LNG investment, and is expected to return to moderate growth in 2019/20.
- 272 Household consumption spending and dwelling investment remain sluggish and recovery in that area is likely to continue to be slow.
- 273 Global and national uncertainty have contributed to declines in business and consumer confidence in the first quarter of 2019, combined with the other economic and household factors. WA is expected to encounter more challenges before the domestic economy returns to sustained growth.
- 274 Last year we concluded that 'the economic circumstances of Western Australia appear to have reached the bottom of the cycle and there are signs of improvement for the future [236].' We have observed continued but not consistent or even moderate improvement.
- 275 We also noted, last year, that the small business sector was 'facing the prospect of improved trading conditions but they have not yet developed [243]'. This remains the case. Consumer confidence and household spending are stubbornly low.
- 276 On Tuesday, 4 June 2019, the Governor of the RBA, Dr Philip Lowe spoke of the RBA's concern, not in preventing inflation, but at addressing 'subdued inflation pressures'. (See Today's Reduction in the Cash Rate", Reserve Bank Board Dinner, Sydney 4 June 2019).
- 277 Dr Philip Lowe noted that the aim of the RBA is to drive employment up by 4% (nationally) and consequently to tighten the labour market to take up the excess capacity. This in turn will fuel price rises and lift subdued inflation back into the 2-3% range.
- 278 These comments were made in a more healthy national economic environment and therefore apply with more resonance in WA. A moderate increase in wages must be the result in this case, to promote employment and absorb the excess capacity. An increase which exceeds what might be moderate may have adverse employment effects.
- 279 We also note that UnionsWA refers to Dr Lowe's evidence to the House of Representatives Standing Committee on Economics in Sydney on 16 February 2018. It says that Dr Lowe advocates for wage increases of 3.5%. What Dr Lowe said was:
- If we're going to deliver average inflation of 2½ per cent we should probably have average wage increases over long periods of time at 3½ per cent, if we can get decent productivity growth. My concern was that we were getting used to - and we didn't like it - wage increases of two to 2½ per cent. I've spoken publicly about the benefits of a pick-up in wage growth, to try to lift wage expectations and to reduce the probability of us getting stuck at this very low equilibrium.
- 280 This advocacy of wage increases of 3.5% referred to by UnionsWA needs to be viewed in the totality of the quote, which contained the caveat 'if we can get decent productivity growth'.
- 281 There is clearly debate about the proper measurement of productivity. However, we note that productivity data from the ABS, including that for WA, demonstrate low levels of growth in recent years, despite higher levels on average in the past ten years.

- 282 The IR Act requires us to take account of the state of the economy of WA and the likely effects of the SWO on the economy and, in particular, on the level of employment, inflation, and productivity in WA (s 50A(3)(b)) and of any changes in productivity that have occurred or are likely to occur (s 26(1)(d)(v)).
- 283 It is clear then, that in weighing the various considerations we are required to have, that productivity growth is not robust, and that it pre-conditions the capacity of the economy to deal with wages growth, albeit that wages growth at the current levels is not desirable for the economy either.
- 284 This applies with the same intensity to rates of pay for apprentices and trainees, in that skills development needs to be enhanced.
- 285 We recognise that a moderate increase to the SMW and award wages will enhance gender equity, given that women make a very significant proportion of those on the lowest pay levels.
- 286 As in the past, an increase above the CPI, when it can be justified without being excessive, will aid in improving living standards.
- 287 Taking into account all of the matters that the IR Act requires us to consider, we have decided that the SMW and award rates of pay will be increased by 2.75%. This will result in the SMW being \$746.90.
- 288 A percentage increase on this occasion will serve a number of purposes. It will assist in addressing the compression of relativities. It will also encourage ongoing skills development. This is because, while those at the lowest levels of pay need a decent increase, there is also a need to maintain the rewards for those who spend their time and efforts in improving their skills, and not to compress the difference in monetary reward from those efforts.
- 289 We also note that women are employed in many occupations which are award reliant. Under those awards, they may not necessarily be the lowest paid, however, a percentage increase may assist with the gender pay gap. This also assists in meeting the requirement for Western Australians to have a system of fair wages and conditions. The increase is, again, higher than the increase in the Perth CPI, and will assist in meeting the needs of the low paid and contribute to improving living standards for employees.
- 290 In the context of the economic environment in WA, and as it compares with the national economic situation, it is a moderate increase. We are of the view that it is within the range of reasonable increases that employers could anticipate and ought not to have any significant adverse employment effects.
- 291 It is lower than the percentage increase granted by the FWC-AWR decision. However, there are two things to note in that regard. Firstly, the SMW commences from a higher base, that is WA's existing SMW is \$726.90 whereas the NMW is \$719.20 and will be \$740.80 from 1 July 2019. Secondly the economic circumstances in WA are not as buoyant as those at the national level. The increase we have decided upon will further reduce the gap between the two rates from \$7.70 to \$6.10.
- 292 We are of the view that the increase we have determined will not adversely affect employers or employment as a whole or the state or national economy. It is not far removed from increases in general measures of productivity and may assist in promoting productivity and wage growth in an environment of low wage growth and low inflation. This in turn may encourage employers, employees and organisations to bargain at an enterprise level, albeit that formal bargaining resulting in registered agreements in the small business sector is not evident in WA. However, employers and employees may informally bargain at that level, to meet the needs of both the employers and employees, but not register their arrangements.
- 293 While we have decided on a percentage increase, the resultant amount aims to meet the needs of the low paid, albeit that they will not, on this occasion, receive as much benefit as those on higher award rates of pay.

The Statement of Principles

- 294 None of those who made submissions suggested that the Principles require any change. As we noted in last year's decision, the Statement of Principles has not been subject to any changes for a number of years. We said at that time that the Commission would bring on an application of its own motion for the purposes of developing a principle dealing with equal remuneration for men and women for work of equal or comparable value.
- 295 APPL 34 of 2018 was created on 28 June 2018 for that purpose. The Commission convened a number of conferences involving the Minister, CCIWA and UnionsWA for the purpose of a principle being developed. The Australian Mines and Metals Association (Incorporated), being an organisation listed, along with the Minister, CCIWA and UnionsWA, as having particular standing under s 50 of the IR Act, expressed its interest in being kept informed, and it was provided with details of progress as it was made.
- 296 We express our thanks to those organisations for the work they have contributed to the development of a proposed Principle, and for their co-operative and helpful approach. A proposed Principle has been agreed by them, and it was the subject of publication along with the notices published regarding the State Wage Case. The original draft was prepared by the Minister. It is based on that developed in Queensland.
- 297 The Proposed Equal Remuneration Principle for inclusion in the Statement of Principles provides:
1. Applications may be made under this Principle to implement equal remuneration for work of equal or comparable value.
 2. The Commission must apply this principle when it:
 - a) hears applications to vary an award in order to implement equal remuneration for work of equal or comparable value;
 - b) arbitrates industrial disputes about equal remuneration; or

- c) values or assesses the work of employees in ‘female dominated’ industries, occupations or callings.
3. In assessing the value of work, the Commission is required to examine the nature of work, skill and responsibility required and the conditions under which work is performed (which has the same meaning as it does for Principle 7 Work Value Changes) as well as other relevant work features.
 4. The assessment is to be transparent, objective, non-discriminatory and free of assumptions based on gender.
 5. The purpose of the assessment is to ascertain the current value of work. Changes in work value do not have to be demonstrated.
 6. Prior work value assessments and/or the prior setting of pay rates for the work cannot be assumed to have been free of assumptions based on gender.
 7. In assessing the value of the work, the Commission is to have regard to the history of the award including whether there have been any assessments of the work in the past and whether remuneration has been affected by the gender of the workers. Relevant matters to consider may include:
 - a) whether there has been some characterisation or labelling of the work as “female”;
 - b) whether there has been some underrating or undervaluation of the skills of female employees;
 - c) whether remuneration in an industry or occupation has been undervalued as a result of occupational segregation or segmentation;
 - d) whether there are features of the industry or occupation that may have influenced the value of the work such as the degree of occupational segregation, the disproportionate representation of women in part time or casual work, low rates of unionisation, limited representation by unions in workplaces covered by formal or informal work agreements, the incidence of consent awards or agreements and other considerations of that type; or
 - e) whether sufficient and adequate weight has been placed on the typical work performed and the skills and responsibilities exercised by women as well as the conditions under which the work is performed and other relevant work features.
 8. Gender discrimination is not required to be shown to establish undervaluation of work, therefore there is no requirement for a male comparator.
 9. Comparisons within and between occupations and industries are not required in order to establish undervaluation of work on a gender basis.
 10. Such comparisons may be used for guidance in ascertaining appropriate remuneration. The proper basis for comparison is not restricted to similar work.
 11. Where the Commission determines that there is not equal remuneration for work of equal or comparable value, the Commission is to make an assessment as to how equal remuneration is to be achieved. Outcomes may include but are not limited to the reclassification of work, the establishment of new career paths, changes to incremental scales, wage increases, the establishment of new allowances and the reassessment of definitions and descriptions of work to properly reflect the value of the work.
 12. There will be no wage leapfrogging as a result of any changes in wage relativities arising from any adjustments under this principle.
 13. The Commission will guard against contrived classifications and over classification of jobs.
 14. The Commission may determine in each case whether any increases in wages will be absorbed into overaward payments.
 15. Equal remuneration will not be achieved by reducing current wage rates or other conditions of employment.
 16. The Commission may decide to phase in any decision arising from this principle. Any affected employer may apply to have any decision phased in. The merit of such application will be determined in the light of the particular circumstances of each case and any material relating thereto will be rigorously tested.
 17. Claims brought under this principle will be considered on a case by case basis.

298 We note the history of the development of equal remuneration principles in Australia. They include:

1. The Pay Equity Inquiry Report by Glynn J of the Industrial Relations Commission of New South Wales in December 1998. In that Report, Glynn J noted:

On the basis of the selected industries and occupations, it would seem that a profile which, prima facie, could indicate the possibility, or even the probability, of an undervaluation of work based on gender, would include the following elements:

- female dominated;

- female characterisation of work;
- often no work value exercise conducted by the Commission;
- inadequate application of equal pay principles;
- weak union;
- few union members;
- consent award/agreements, and
- large component of casual workers;
- lack of, or inadequate recognition of, qualifications (including misalignment of qualifications);
- deprivation of access to training or career paths;
- small workplaces;
- new industry or occupation;
- service industry;
- home based occupations.

Originally in the Inquiry there was perhaps the expectation that merely looking at issues globally, such as qualifications, competencies and the like, would be sufficient to properly address the issues raised by Term 1. However, what the Inquiry has shown is that, in the actual assessment of an industry or occupation, the history of the area and of its award regulation is vital to discovering if inequities are truly suffered by employees, and whether any such inequities, if found to exist, are gender based or otherwise. There may well be a combination of factors acting to create undervaluation, and hence, care needs to be taken to avoid simplistic and single dimension approaches to ascertaining whether any undervaluation exists and what remedies, if any, are required (46-47).

2. The 2001 Queensland Pay Equity Inquiry conducted by Commissioner Glenys Fisher of the Queensland Industrial Relations Commission.
3. The “Pay Equity – The Industrial Relations Act Amendment Bill 2001, (Qld) report published in 2001 by the Queensland Parliamentary Library.
4. “The Equal Remuneration under the Fair Work Act 2009 report” by Dr Robyn Layton, Dr Meg Smith and Professor Andrew Stewart, commissioned by the Fair Work Commission’s Pay Equity Unit, found that the approaches taken in New South Wales and Queensland to whether it was necessary to have a mandatory requirement for male comparators and that such a requirement ‘would be unduly limiting at [6.4], (106). They also noted that in the New South Wales and Queensland proceedings the parties’ evidence was shaped by the terms of the equal remuneration principles in those jurisdictions, and that ‘previous proceedings demonstrated the under-valuation or otherwise of the work central to the application, including linking the undervaluation to gender or a gender associated cause [6.7] (114).’
5. Decisions of the New South Wales and Queensland Industrial Relations Commissions in –

- a) New South Wales

- (i) Librarians

In *Crown Librarians, Library Officers and Archivists Award Proceedings - Applications under the Equal Remuneration Principle* (2002) 111 IR 48, the union and employer parties agreed that the work of Librarians, Library Technicians and Archivists (collectively referred to as ‘Librarians’) had been undervalued, and after examining a range of evidence the Industrial Relations Commission of New South Wales (IRC NSW) concurred. Librarians were found to be engaged in a profession (they exercised skills based on theoretical knowledge, were required to have tertiary qualifications, were eligible for membership of independent professional associations, were subject to standards of competence and were required to follow ethical codes of conduct) yet they received lower pay rates than other professional groups in the New South Wales public service.

The IRC NSW determined appropriate pay rates for Librarians by comparing them with other mostly female-dominated, professional public service groups.

- (ii) Childcare workers

In *Re Miscellaneous Workers' Kindergartens and Child Care Centres (State) Award* (2006) 150 IR 290, the IRC NSW found that childcare workers had been undervalued on a gender basis, but determined that it was not necessary to compare their pay with predominantly male-dominated occupations to set appropriate rates.

The IRC NSW found that teaching, another female-dominated occupation, was an appropriate comparator group, and utilised teachers’ rates of pay when determining appropriate pay scales for childcare workers.

- (b) Queensland

- (i) Dental assistants

In 2003, the Liquor, Hospitality and Miscellaneous Union (LHMU) brought a case on behalf of private sector dental assistants employed under the *State Dental Assistants' (Private Practice) Award (Liquor Hospitality and*

Miscellaneous Union (Queensland Branch) v Australian Dental Association (Qld Branch) (2005) 180 QGIG 187).

In this matter, comparisons were made with male-dominated occupations in assessing gender-based undervaluation. After finding that dental assistants were undervalued on a gender basis, the Queensland Industrial Relations Commission (QIRC) first aligned the work value with the tradesperson rate in the *State Engineering Award*. It then added an Equal Remuneration Component, set at 1.25% of the base rate per annum, in recognition of the fact that most dental assistants were unable to engage in enterprise bargaining. It also made various award amendments, including a revised classification structure to recognise the career path of dental assistants and the role of practice managers.

(ii) Childcare workers

In *Liquor Hospitality and Miscellaneous Union (Queensland Branch) v Queensland Union of Employers* ((2006) 181 QGIG 568) (interim decision) and *Liquor Hospitality and Miscellaneous Union, Queensland Branch, Union of Employees v Children's Services Employers Association* ((2006) 182 QGIG 318) (final decision), the LHMU sought to vary the *Queensland Child Care Industry Award - State 2003*.

The QIRC found the work performed by childcare workers had been historically undervalued based on the gender of those workers. Following on from the Dental Assistants case, it established that a Certificate III gained for a predominantly female occupation had the same value as a Certificate III gained for a predominantly male occupation - attracting payment of the 100% (C 10) in the *State Engineering Award*.

(iii) Social and community services

The Queensland Services Union applied for a new award covering community services and crisis assistance workers in April 2008. *Queensland Services, Industrial Union of Employees v Queensland Chamber of Commerce and Industry Ltd* ((2009) 191 QGIG 19). The first stage of the application resulted in the creation of the *Queensland Community Services and Crisis Assistance Award - State 2008*, by consent.

The second stage saw the QIRC award increased pay rates, to correct historical undervaluation. It also awarded a 1% equal remuneration component in recognition that the relevant employees had experienced a low level of access to the higher wage rates that were available by way of enterprise bargaining.

In considering the rates to be applied in the new award, the QIRC was guided by the rates in industrial instruments in local government and the Queensland Public Service, which also covered a largely female-dominated cohort of workers.

(iv) Disability support workers

In *Australian Workers' Union of Employees, Queensland v Queensland Community Services Employers Association Inc* ((2009) 192 QGIG 46), the Australian Workers' Union sought to increase the rates of pay in the *Disability Support Workers Award - State 2003*. The union and the respondent agreed that employees covered by the award had been historically undervalued for similar reasons to community services workers. The QIRC agreed, and awarded pay increases to employees under the award.

In deciding new pay rates, the QIRC gave consideration to two relevant female-dominated, comparators: the newly created *Queensland Community Services and Crisis Assistance Award - State 2008*, and the State Government Departments Certified Agreement 2006. The pay increase was phased in over five adjustments.

299 It is clear from an examination of the principles developed in New South Wales and Queensland, in particular the latter, that the principle proposed by the parties in this case is an appropriate means of establishing a basis for the Commission's consideration of equal remuneration cases. The principle elements include:

- that it is not to be presumed that rates of remuneration had been properly assessed in female dominated industries in the past;
- that processes such as structure efficiency or minimum rates adjustments had been correctly or fully applied;
- in assessing whether work had been undervalued, comparison work may be useful as a guide, but it was necessary to establish that there was a proper basis for the comparison.

300 Gender neutral assessments were necessary and a number of those assessments which have been undertaken in New South Wales and Queensland have proceeded on the basis of female comparative positions. This has removed some of the impediments that have arisen in the application of the principle in the federal jurisdiction where the requirement for a male comparator has been problematic.

301 In all of the circumstances we are satisfied that the proposed equal remuneration principle developed through the process of consultation and conciliation in the last year is appropriate. Therefore, the Statement of Principles will be amended to include the Principle in the terms proposed.

2019 WAIRC 00296

**2019 STATE WAGE ORDER PURSUANT TO SECTION 50A OF THE ACT;
APPLICATION FOR THE CREATION OF A PRINCIPLE DEALING WITH CLAIMS FOR EQUAL REMUNERATION
FOR MEN AND WOMEN FOR WORK OF EQUAL OR COMPARABLE VALUE**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES ON THE COMMISSION'S OWN MOTION
CORAM CHIEF COMMISSIONER P E SCOTT
 SENIOR COMMISSIONER S J KENNER
 COMMISSIONER T EMMANUEL
 COMMISSIONER D J MATTHEWS
 COMMISSIONER T B WALKINGTON
DATE TUESDAY, 18 JUNE 2019
FILE NO. APPL 1 OF 2019, APPL 34 OF 2018
CITATION NO. 2019 WAIRC 00296

Result 2019 State Wage Order issued; Principle 8. Claims for equal remuneration for men and women for work of equal or comparable value created

Representation

Mr B Entrekin on behalf of the Hon Minister for Industrial Relations
 Mr S Farrell and with him Mr J Walsh on behalf of the Chamber of Commerce and Industry of Western Australia (Inc)
 Dr T Dymond on behalf of UnionsWA
 Mr C Twomey and later Mr G Hansen on behalf of the Western Australian Council of Social Service Inc

General Order

THE COMMISSION IN COURT SESSION in accordance with section 50A(1) of the *Industrial Relations Act 1979* hereby makes the following General Order to be known as the 2019 State Wage order and thereby orders as follows:

1. THAT the 2019 State Wage order takes effect on 1 July 2019.
2. THAT the General Order which issued in matter No. APPL 1 of 2018 ([2018] WAIRC 00368; (2018) 98 WAIG 284) is to be of no force and effect on and from the commencement of the first pay period on or after 1 July 2019.
3. THAT the minimum weekly rate of pay applicable under section 12 of the *Minimum Conditions of Employment Act 1993* to an employee who has reached 21 years of age and who is not an apprentice shall be \$746.90 per week on and from the commencement of the first pay period on or after 1 July 2019.

Apprentices

4. THAT the minimum weekly rate of pay applicable under section 14 of the *Minimum Conditions of Employment Act 1993* to an apprentice whose training contract specifies they are undertaking an apprenticeship ("apprentice") shall be:
 - (a) In relation to that class of apprentice to whom an award or a relevant order applies where an employer-employee agreement is in force, the minimum weekly rate of pay shall be the rate of pay that applies to that class of apprentice under the award where the award applies or the relevant order where an employer-employee agreement is in force.
 - (b) In relation to that class of apprentice to whom an award does not apply and to whom there is no relevant order to apply if an employer-employee agreement is in force or is subsequently entered into, the minimum weekly rate of pay shall be the rate of pay determined by reference to apprentices' rates of pay in the *Metal Trades (General) Award* which operate on and from the commencement of the first pay period on or after 1 July 2019:

	1 July 2019
<i>Four Year Term</i>	
First year	\$357.40
Second year	\$468.00
Third year	\$638.20
Fourth year	\$748.80
<i>Three and a Half Year Term</i>	
First six months	\$357.40
Next year	\$468.00
Next year	\$638.20
Final year	\$748.80
<i>Three Year Term</i>	

First year	\$468.00
Second year	\$638.80
Third year	\$748.80

5. THAT the minimum weekly rate of pay applicable under section 14 of the *Minimum Conditions of Employment Act 1993* to an apprentice who has reached 21 years of age shall be \$638.20 per week on and from the commencement of the first pay period on or after 1 July 2019.

Trainees

6. THAT the minimum weekly rate of pay applicable under section 14 of the *Minimum Conditions of Employment Act 1993* to an apprentice whose training contract specifies they are undertaking a traineeship (“trainee”) shall be:
- (a) In relation to that class of trainee to whom an award applies or a relevant order applies where an employer-employee agreement is in force, the minimum weekly rate of pay shall be the rate of pay that applies to that class of trainee under the award where an award applies or the relevant order where an employer-employee agreement is in force.
- (b) In relation to that class of trainee to whom an award does not apply and to whom there is no relevant order to apply if an employer-employee agreement is in force or is subsequently entered into, the minimum weekly rate of pay at the relevant Industry/Skill level as determined by reference to Attachment A hereunder, shall be the rate of pay based on the *Metal Trades (General) Award* contained in Table 1 as follows:

Table 1

The following rates of pay apply on and from the commencement of the first pay period on or after 1 July 2019:

Industry/Skill Level A			
School Leaver	Year 10	Year 11	Year 12
	\$	\$	\$
	258.00	307.00	378.00
Plus 1 year out of school	307.00	378.00	438.00
Plus 2 years	378.00	438.00	512.00
Plus 3 years	438.00	512.00	585.00
Plus 4 years	512.00	585.00	
Plus 5 years or more	585.00		
Industry/Skill Level B			
School Leaver	Year 10	Year 11	Year 12
	\$	\$	\$
	258.00	307.00	369.00
Plus 1 year out of school	307.00	369.00	422.00
Plus 2 years	369.00	422.00	496.00
Plus 3 years	422.00	496.00	566.00
Plus 4 years	496.00	566.00	
Plus 5 years or more	566.00		
Industry/Skill Level C			
School Leaver	Year 10	Year 11	Year 12
	\$	\$	\$
	258.00	307.00	367.00
Plus 1 year out of school	307.00	367.00	412.00
Plus 2 years	367.00	412.00	462.00
Plus 3 years	412.00	462.00	519.00
Plus 4 years	462.00	519.00	
Plus 5 years or more	519.00		

- (c) For any class of trainees under this subclause undertaking a traineeship that is not provided for in Attachment A, the minimum weekly rate of pay shall be the rate of pay in Industry/Skill Level C.

Australian Qualification Framework (AQF)

- (d) For a trainee in this class undertaking an AQF4 traineeship the minimum weekly rate of pay shall be the weekly wage rate for an AQF3 trainee at Industry/Skill Levels A, B or C as applicable with the addition of 3.8% of that wage rate.

Part-time and School-Based Trainees

- (e) This provision shall apply to trainees who undertake a traineeship on a part-time basis, or as a school-based trainee, by working less than full-time hours and by undertaking the approved training at the same or lesser training time than a full-time trainee.
- (i) School-based trainees will receive the following minimum hourly rates of pay, as for school leavers:

Wage levels	Current year of schooling	
	Year 11	Year 12
A	\$8.08	\$9.95
B	\$8.08	\$9.71
C	\$8.08	\$9.66

- (ii) The minimum hourly rate of pay for part-time trainees shall be calculated by taking the full-time rates expressed in Clause 6(b) Table 1 and dividing that rate by 38 in accordance with section 10 of the *Minimum Conditions of Employment Act 1993*.
- (iii) As per the requirement under 60E(1)(iv) of the *Vocational Education and Training Act 1996* (WA), any time spent by a trainee in performing his or her obligations under the training contract and in being trained and assessed under the contract, whether at the employer's workplace or not, is to be taken for all purposes (including the payment of remuneration) to be time spent working for the employer.
- (f) In relation to that class of trainee to whom an award applies or a relevant order applies where an employer-employee agreement is in force and who has reached 21 years of age, the minimum weekly rate of pay is the rate of pay that applies to that class of trainee determined by reference to the highest weekly wage rate for the skill level relevant to the traineeship under the award or under the relevant order where an employer-employee agreement is in force.
- (g) In relation to that class of trainee to whom an award does not apply and to whom there is no relevant order to apply if an employer-employee agreement is in force or is entered into and who has reached 21 years of age, the minimum weekly rate of pay shall be that determined by reference to the highest weekly wage rate for the skill level relevant to the traineeship set out below:

On and from the commencement of the first pay period on or after 1 July 2019:

Industry/Skill Level A	\$585.00 per week
Industry/Skill Level B	\$566.00 per week
Industry/Skill Level C	\$519.00 per week

7. THAT

- (a) The rates of pay applicable to trainees under the following awards be adjusted in accordance with the formula outlined in sub-clause (b).
- (i) AWU National Training Wage (Agriculture) Award 1994;
 - (ii) Food Industry (Food Manufacturing or Processing) Award;
 - (iii) Furniture Trades Industry Award;
 - (iv) Licensed Establishments (Retail and Wholesale) Award 1979;
 - (v) Metal Trades (General) Award;
 - (vi) Motor Vehicle (Service Station, Sales Establishments, Rust Prevention and Paint Protection) Industry Award No. 29 of 1980;
 - (vii) Printing Award;
 - (viii) Sheet Metal Workers' Award No. 10 of 1973;
 - (ix) The Shop and Warehouse (Wholesale and Retail Establishments) State Award 1977;
 - (x) Soft Furnishings Award; and
 - (xi) Vehicle Builders' Award 1971.
- (b) Trainee rates be adjusted as follows:
- (i) Industry/Skill Level A, B and C top rates are increased by 80% of the arbitrated safety net adjustment. Each result is then rounded to the nearest dollar.
 - (ii) All other Industry/Skill Level A, B and C rates are increased by a percentage of the unrounded result of the first step. Each result is then rounded to the nearest dollar.
 - (iii) However, if an existing rate in Industry/Skill Level B or C is the same as an existing rate in Industry/Skill Level A or B, the former is adjusted in line with the latter rate in order to maintain consistency.

Award Rates of Pay

8. THAT weekly rates of pay for adults in each award of the Commission, other than those set out in Schedule 1, be increased by 2.75% on and from the commencement of the first pay period on or after 1 July 2019 and that this increase shall be subject to absorption in the same terms as previous State Wage orders.
9. THAT where an award rate other than an adult rate is determined by reference to a percentage of the adult rate or some other formula, those award rates shall be varied on the basis of that percentage or formula to take into account the application of this State Wage order increase of 2.75% to the adult award wage on and from the commencement of the first pay period on or after 1 July 2019.
10. THAT increases under previous State Wage Case orders prior to 1 July 2019, except those resulting from enterprise agreements, are not to be used to offset the State Wage order increases herein.
11. THAT on and from 1 July 2019 all awards which contain a Minimum Adult Award Wage Clause or provision be varied by deleting the text of that provision and replacing with the following:

MINIMUM ADULT AWARD WAGE

No employee aged 21 or more shall be paid less than the minimum adult award wage unless otherwise provided by this clause.

The minimum adult award wage for full-time employees aged 21 or more working under an award that provides for a 38 hour week is \$746.90 per week.

The minimum adult award wage for full-time employees aged 21 or more working under awards that provide for other than a 38 hour week is calculated as follows: divide \$746.90 by 38 and multiply by the number of ordinary hours prescribed for a full time employee under the award.

The minimum adult award wage is payable on and from the commencement of the first pay period on or after 1 July 2019.

The minimum adult award wage is deemed to include all State Wage order adjustments from State Wage Case Decisions.

Unless otherwise provided in this clause adults aged 21 or more employed as casuals, part-time employees or piece workers or employees who are remunerated wholly on the basis of payment by result, shall not be paid less than pro rata the minimum adult award wage according to the hours worked.

Employees under the age of 21 shall be paid no less than the wage determined by applying the percentage prescribed in the junior rates provision in this award (if applicable) to the minimum adult award wage, provided that no employee shall be paid less than any applicable minimum rate of pay prescribed by the *Minimum Conditions of Employment Act 1993*.

The minimum adult award wage shall not apply to apprentices, employees engaged on traineeships or government approved work placement programs or employed under the Commonwealth Government Supported Wage System or to other categories of employees who by prescription are paid less than the minimum award rate, provided that no employee shall be paid less than any applicable minimum rate of pay prescribed by the *Minimum Conditions of Employment Act 1993*.

Liberty to apply is reserved in relation to any special category of employees not included here or otherwise in relation to the application of the minimum adult award wage.

Subject to this clause the minimum adult award wage shall –

Apply to all work in ordinary hours.

Apply to the calculation of overtime and all other penalty rates, superannuation, payments during any period of paid leave and for all purposes of this award.

Minimum Adult Award Wage

The rates of pay in this award include the minimum weekly wage for employees aged 21 or more payable under the 2019 State Wage order decision. Any increase arising from the insertion of the minimum wage will be offset against any equivalent amount in rates of pay received by employees whose wages and conditions of employment are regulated by this award which are above the wage rates prescribed in the award. Such above award payments include wages payable pursuant to enterprise agreements, consent awards or award variations to give effect to enterprise agreements and over award arrangements. Absorption which is contrary to the terms of an agreement is not required.

Increases under previous State Wage Case Principles or under the current Statement of Principles, excepting those resulting from enterprise agreements, are not to be used to offset the minimum wage.

Adult Apprentices

Notwithstanding the provisions of this clause, the minimum adult apprentice wage for a full-time apprentice aged 21 years or more working under an award that provides for a 38 hour week is \$638.20 per week.

The minimum adult apprentice wage for a full-time apprentice aged 21 years or more working under an award that provides for other than a 38 hour week is calculated as follows: divide \$638.20 by 38 and multiply by the number of ordinary hours prescribed for a full time apprentice under the award.

The minimum adult apprentice wage is payable on and from the commencement of the first pay period on or after 1 July 2019.

Adult apprentices aged 21 years or more employed on a part-time basis shall not be paid less than pro rata the minimum adult apprentice wage according to the hours worked.

The rates paid in the paragraphs above to an apprentice 21 years of age or more are payable on superannuation and during any period of paid leave prescribed by this award.

Where in this award an additional rate is expressed as a percentage, fraction or multiple of the ordinary rate of pay, it shall be calculated upon the rate prescribed in this award for the actual year of apprenticeship.

Statement of Principles

12. THAT the Statement of Principles – July 2018 under the General Order in matter No. Appl 1 of 2018 be replaced by the Statement of Principles – July 2019 in Schedule 2.

Publication

13. THAT the Registrar publish in the Western Australian Industrial Gazette and on the Commission's website the clauses of the awards varied by Clauses 8 - 10 of this State Wage order incorporating the amendments made.

(Sgd.) P E SCOTT,
Chief Commissioner,
Commission In Court Session.

[L.S.]

ATTACHMENT A

INDUSTRY / SKILL LIST (2019)

SKILL LEVEL A		
CODE*	TRAINING PACKAGE TITLE	AQF CERTIFICATE LEVEL
MEA	Aeroskills	II, Diploma
AVI	Aviation	II, III
BSB	Business Services	II, III, IV, Diploma
PMA	Chemical, Hydrocarbons and Refining	II, III, IV, Diploma
CHC	Community Services	II, III, IV, Diploma
CPC	Construction, Plumbing and Services	II, III, IV, Diploma
CSC	Correctional Services	II, III, IV
UEP	Electricity Supply Industry - Generation Sector	II, III, IV, Diploma
UEE	Electrotechnology	II, III, IV, Diploma, Advanced Diploma
FNS	Financial Services	II, III, IV
SFL	Floristry	III, IV
FBP	Food, Beverage and Pharmaceutical	III, IV
UEG	Gas Industry	III, IV, Diploma, Advanced Diploma
SHB	Hairdressing and Beauty Services	III, IV
ICT	Information and Communications Technology	II, III, IV
MSL	Laboratory Operations	II, III, IV, Diploma, Advanced Diploma
LGA	Local Government (other than Operational Works Certificate II)	II, III, IV
MSA	Manufacturing	II, III, IV, Diploma, Advanced Diploma
MSM	Manufacturing	II, III, IV, Diploma, Advanced Diploma
MAR	Maritime	II, III
MEM	Metal and Engineering (Technical)	II, III, IV, Diploma, Advanced Diploma
NWP	National Water	III, IV
PMB	Plastics, Rubber and Cablemaking	III, IV
PUA	Public Safety	III, Diploma

SKILL LEVEL A		
CODE*	TRAINING PACKAGE TITLE	AQF CERTIFICATE LEVEL
PSP	Public Sector	II, III, IV, Diploma
PPM	Pulp and Paper Manufacturing Industry	III
RII	Resources and Infrastructure Industry	II, III, IV, Diploma, Advanced Diploma
SIR	Retail Services	III, IV
MSS	Sustainability	III, IV, Diploma
MST	Textiles, Clothing and Footwear	III, IV
SIT	Tourism, Travel and Hospitality	II, III, IV, Diploma
UET	Transmission, Distribution and Rail Sector	II, III, IV, Diploma, Advanced Diploma
TLI	Transport and Logistics	III, IV, Diploma
SKILL LEVEL B		
CODE*	TRAINING PACKAGE	AQF CERTIFICATE LEVEL
ACM	Animal Care and Management	II, III, IV
AMP	Australian Meat Processing	II, III, IV, Diploma
AUR	Automotive Retail, Service and Repair	II, III, IV, Diploma
AUM	Automotive Manufacturing	II, III
CUA	Creative Arts and Culture	II, III, IV
SFL	Floristry	II
FBP	Food, Beverage and Pharmaceutical	II
FWP	Forest and Wood Products	II, III, IV, Diploma
MSF	Furnishing	II, III, IV
UEG	Gas Industry	II
SHB	Hairdressing and Beauty Services	II
HLT	Health	II, III, IV, Diploma
LGA	Local Government (Operational Works)	II
MEM	Metal and Engineering (Production)	II, III, IV, Diploma, Advanced Diploma
NWP	National Water	II
PMB	Plastics, Rubber and Cablemaking	II
ICP	Printing and Graphic Arts	II, III
CPP	Property Services	II, III, IV, Diploma
PUA	Public Safety	II
PPM	Pulp and Paper Manufacturing Industry	II
RII	Resources and Infrastructure Industry	I
SIR	Retail Services	II
SIS	Sport, Fitness and Recreation	II, III, IV
MST	Textiles, Clothing and Footwear	II
TLI	Transport and Logistics	II
SKILL LEVEL C		
CODE*	TRAINING PACKAGE	AQF CERTIFICATE LEVEL
AHC	Agriculture, Horticulture and Conservation and Land Management	II, III, IV
SIF	Funeral Services	III, IV
RGR	Racing and Breeding	II, III, IV
SFI	Seafood Industry	II, III, IV

Schedule 1

LIST OF AWARDS NOT SUBJECT TO THIS GENERAL ORDER**Awards that do not contain wages and are therefore excluded:**

Alcoa Long Service Leave Conditions Award, 1980
 Catering Employees' (North West Shelf Project) Long Service Leave Conditions Award 1991
 Catering Workers' (North Rankin A) Long Service Leave Conditions Award No. A 40 of 1987
 The Contract Cleaning (F.M.W.U.) Superannuation Award 1988
 Health Care Industry (Private) Superannuation Award 1987
 Miscellaneous Government Conditions and Allowances Award No A 4 of 1992
 Miscellaneous Workers' (Security Industry) Superannuation Award, 1987
 Ngala Superannuation Award, 1989
 Printing Industry Superannuation Award 1991
 Public Service Allowances (Fisheries and Wildlife Officers) Award 1990
 Supported Employees Industry Award
 The Swan Brewery Company Limited (Superannuation) Award 1987
 West Australian Petroleum Pty Ltd Long Service Leave Conditions Award 1991
 Woodside Offshore Petroleum Pty. Ltd. Long Service Leave Conditions Award, 1984
 Worsley Alumina Pty. Ltd. Long Service Leave Conditions Award, 1984

Awards that have certain parts quarantined:

Clerks (Racing Industry - Betting) Award 1978 – **Schedule C**
 The Iron Ore Production & Processing (Locomotive Drivers) Award 2006 – **Clause 2.1**
 Iron Ore Production & Processing (Locomotive Drivers Rio Tinto Railway) Award 2006 – **Clause 6**
 Shearing Contractors' Award of Western Australia 2003 – **Clause 4.2**

Awards containing transitional provisions to which the General Order does not apply:

Clothing Trades Award 1973 – **Clause 18**
 Department of Communities (CSA Family Resource Workers, Welfare Assistants and Parent Helpers) Award 1990 – **Schedule F**
 Education Department Ministerial Officers Salaries Allowances and Conditions Award 1983 No. 5 of 1983 – **Schedule I**
 Egg Processing Award 1978 – **Appendix 4**
 Electorate Officers Award 1986 – **Schedule G**
 Family Day Care Co-Ordinators' and Assistants' Award, 1985 - **Schedule C**
 Government Officers (Social Trainers) Award 1988 – **Schedule K**
 Government Officers (Insurance Commission of Western Australia) Award, 1987 – **Schedule D**
 Government Officers Salaries, Allowances and Conditions Award 1989 - **Schedule P**
 Juvenile Custodial Officers' Award – **Schedule G**
 Public Service Award 1992 – **Schedule M**

Schedule 2

STATEMENT OF PRINCIPLES – July 2019**1.****Application of the Statement of Principles**

- 1.1 This Statement of Principles is to be applied and followed when the Commission is making or varying an award or making an order in relation to the exercise of the jurisdiction under the Act to set the wages, salaries, allowances or other remuneration of employees or the prices to be paid in respect of their employment.
- 1.2 In these Principles, wages, salaries, allowances or other remuneration of employees or the prices to be paid in respect of employment will be referred to as “wages”.
- 1.3 In making a decision in respect of any application brought under these Principles the primary consideration in all cases will be the merits of the application in accordance with equity, good conscience and the substantial merits of the case pursuant to section 26(1)(a) of the Act.
- 1.4 These Principles do not have application to Enterprise Orders made under section 42I of the Act or to applications made under section 40A of the Act to incorporate industrial agreement provisions into an award by consent.

2. (deleted)
3. **When an Award may be varied or another Award made without the claim being regarded as above or below Minimum Award Conditions**
 - 3.1 In the following circumstances wages in an award, may on application, be varied or another award made without the application being regarded as a claim for wages above or below the minimum award conditions:
 - 3.1.1 To include previous State Wage Case increases in accordance with Principle 4.1.
 - 3.1.2 To adjust wages for total minimum rates pursuant to Principle 4.2.
 - 3.1.3 To incorporate test case standards in accordance with Principle 5.
 - 3.1.4 To adjust allowances and service increments in accordance with Principle 6.
 - 3.1.5 To adjust wages pursuant to work value changes in accordance with Principle 7.
 - 3.1.6 To make or vary an award or to make an order to provide for equal remuneration for men and women for work of equal or comparable value in accordance with Principle 8.
 - 3.1.7 To vary an award to include the minimum wage in accordance with Principle 9.
4. **Previous State Wage Case Increases**
 - 4.1 Wage increases available under previous State Wage Case Decisions such as structural efficiency adjustments, and previous arbitrated safety net adjustments will, on application, still be accessible.
 - 4.2 Minimum rates adjustments may also be progressed under this Principle.
5. **Test Case Standards**
 - 5.1 Test Case Standards in respect of wages established and/or revised by the Commission may be incorporated in an award. Where disagreement exists as to whether a claim involves a test case standard, those asserting that it does, must make an application and justify its referral. The Chief Commissioner will decide whether the claim should be dealt with by a Commission in Court Session.
6. **Adjustment of Allowances and Service Increments**
 - 6.1 Existing allowances which constitute a reimbursement of expenses incurred may be adjusted from time to time where appropriate to reflect the relevant change in the level of such expenses.
 - 6.2 Adjustment of existing allowances which relate to work or conditions which have not changed and of service increments will be determined in each case in accordance with State Wage Case Decisions.
 - 6.3 Allowances which relate to work or conditions which have not changed and service increments may be adjusted as a result of the State Wage order.
 - 6.4 In circumstances where the Commission has determined that it is appropriate to adjust existing allowances relating to work or conditions which have not changed and service increments for a monetary safety net increase, the method of adjustment shall be that such allowances and service increments should be increased by a percentage derived as follows: divide the monetary safety net increase by the rate of pay for the key classification in the relevant award immediately prior to the application of the safety net increase to the award rate and multiply by 100.
 - 6.5 Existing allowances for which an increase is claimed because of changes in the work or conditions will be determined in accordance with the relevant provisions of Principle 7.
 - 6.6 New allowances to compensate for the reimbursement of expenses incurred may be awarded where appropriate having regard to such expenses.
 - 6.7 Where changes in the work have occurred or new work and conditions have arisen, the question of a new allowance, if any, shall be determined in accordance with the relevant Principles of this Statement of Principles. The relevant Principles in this context may be Principle 7 and Principle 11.
 - 6.8 New service increments may only be awarded to compensate for changes in the work and/or conditions and will be determined in accordance with the relevant parts of Principle 7 of this Statement of Principles.
7. **Work Value Changes**
 - 7.1 Applications may be made for a wage increase under this Principle based on changes in work value.
 - 7.2 Changes in work value may arise from changes in the nature of the work, skill and responsibility required or the conditions under which work is performed. Changes in work by themselves may not lead to a change in wage rates. The strict test for an alteration in wage rates is that the change in the nature of the work should constitute such a significant net addition to work requirements as to warrant the creation of a new classification or upgrading to a higher classification.
 - 7.3 In addition to meeting this test a party making a work value application will need to justify any change to wage relativities that might result not only within the relevant internal award classifications structure but also against external classifications to which that structure is related. There must be no likelihood of wage "leapfrogging" arising out of changes in relative position.
 - 7.4 These are the only circumstances in which rates may be altered on the ground of work value and the altered rates may be applied only to employees whose work has changed in accordance with this provision.

- 7.5 In applying the Work Value Changes Principle, the Commission will have regard to the need for any alterations to wage relativities between awards to be based on skill, responsibility and the conditions under which work is performed.
- 7.6 Where new or changed work justifying a higher rate is performed only from time to time by persons covered by a particular classification or where it is performed only by some of the persons covered by the classification, such new or changed work should be compensated by a special allowance which is payable only when the new or changed work is performed by a particular employee and not by increasing the rate for the classification as a whole.
- 7.7 The time from which work value changes in an award should be measured is any date that on the evidence before the Commission is relevant and appropriate in the circumstances.
- 7.8 Care should be exercised to ensure that changes which were or should have been taken into account in any previous work value adjustments or in a structural efficiency exercise are not included in any work evaluation under this provision.
- 7.9 Where the tests specified in 7.2 and 7.3 are met, an assessment will have to be made as to how that alteration should be measured in money terms. Such assessment should normally be based on the previous work and the nature and extent of the change in work.
- 7.10 The expression “the conditions under which the work is performed” relates to the environment in which the work is done.
- 7.11 The Commission should guard against contrived classifications and over-classification of jobs.
- 7.12 Any changes in the nature of the work, skill and responsibility required or the conditions under which the work is performed, taken into account in assessing an increase under any other provision of these Principles, shall not be taken into account in any claim under this provision.

8. Equal Remuneration for Men and Women for Work of Equal or Comparable Value

- 8.1 Applications may be made under this Principle to implement equal remuneration for work of equal or comparable value.
- 8.2 The Commission must apply this principle when it:
- 8.2.1 hears applications to vary an award in order to implement equal remuneration for work of equal or comparable value;
- 8.2.2 arbitrates industrial disputes about equal remuneration; or
- 8.2.3 values or assesses the work of employees in ‘female dominated’ industries, occupations or callings.
- 8.3 In assessing the value of work, the Commission is required to examine the nature of work, skill and responsibility required and the conditions under which work is performed (which has the same meaning as it does for Principle 7 Work Value Changes) as well as other relevant work features.
- 8.4 The assessment is to be transparent, objective, non-discriminatory and free of assumptions based on gender.
- 8.5 The purpose of the assessment is to ascertain the current value of work. Changes in work value do not have to be demonstrated.
- 8.6 Prior work value assessments and/or the prior setting of pay rates for the work cannot be assumed to have been free of assumptions based on gender.
- 8.7 In assessing the value of the work, the Commission is to have regard to the history of the award including whether there have been any assessments of the work in the past and whether remuneration has been affected by the gender of the workers. Relevant matters to consider may include:
- 8.7.1 whether there has been some characterisation or labelling of the work as “female”;
- 8.7.2 whether there has been some underrating or undervaluation of the skills of female employees;
- 8.7.3 whether remuneration in an industry or occupation has been undervalued as a result of occupational segregation or segmentation;
- 8.7.4 whether there are features of the industry or occupation that may have influenced the value of the work such as the degree of occupational segregation, the disproportionate representation of women in part time or casual work, low rates of unionisation, limited representation by unions in workplaces covered by formal or informal work agreements, the incidence of consent awards or agreements and other considerations of that type; or
- 8.7.5 whether sufficient and adequate weight has been placed on the typical work performed and the skills and responsibilities exercised by women as well as the conditions under which the work is performed and other relevant work features.
- 8.8 Gender discrimination is not required to be shown to establish undervaluation of work, therefore there is no requirement for a male comparator.
- 8.9 Comparisons within and between occupations and industries are not required in order to establish undervaluation of work on a gender basis.

- 8.10 Such comparisons may be used for guidance in ascertaining appropriate remuneration. The proper basis for comparison is not restricted to similar work.
- 8.11 Where the Commission determines that there is not equal remuneration for work of equal or comparable value, the Commission is to make an assessment as to how equal remuneration is to be achieved. Outcomes may include but are not limited to the reclassification of work, the establishment of new career paths, changes to incremental scales, wage increases, the establishment of new allowances and the reassessment of definitions and descriptions of work to properly reflect the value of the work.
- 8.12 There will be no wage leapfrogging as a result of any changes in wage relativities arising from any adjustments under this principle.
- 8.13 The Commission will guard against contrived classifications and over classification of jobs.
- 8.14 The Commission may determine in each case whether any increases in wages will be absorbed into overaward payments.
- 8.15 Equal remuneration will not be achieved by reducing current wage rates or other conditions of employment.
- 8.16 The Commission may decide to phase in any decision arising from this principle. Any affected employer may apply to have any decision phased in. The merit of such application will be determined in the light of the particular circumstances of each case and any material relating thereto will be rigorously tested.
- 8.17 Claims brought under this principle will be considered on a case by case basis.

9. Minimum Adult Award Wage

- 9.1 A minimum adult award wage clause will be required to be inserted in all new awards.
- 9.2 The minimum adult award wage clause will be as follows –

MINIMUM ADULT AWARD WAGE

No employee aged 21 or more shall be paid less than the minimum adult award wage unless otherwise provided by this clause.

The minimum adult award wage for full-time employees aged 21 or more working under an award that provides for a 38 hour week is \$746.90 per week.

The minimum adult award wage for full-time employees aged 21 or more working under awards that provide for other than a 38 hour week is calculated as follows: divide \$746.90 by 38 and multiply by the number of ordinary hours prescribed for a full time employee under the award.

The minimum adult award wage is payable on and from the commencement of the first pay period on or after 1 July 2019.

The minimum adult award wage is deemed to include all State Wage order adjustments from State Wage Case Decisions.

Unless otherwise provided in this clause adults aged 21 or more employed as casuals, part-time employees or piece workers or employees who are remunerated wholly on the basis of payment by result, shall not be paid less than pro rata the minimum adult award wage according to the hours worked.

Employees under the age of 21 shall be paid no less than the wage determined by applying the percentage prescribed in the junior rates provision in this award (if applicable) to the minimum adult award wage, provided that no employee shall be paid less than any applicable minimum rate of pay prescribed by the *Minimum Conditions of Employment Act 1993*.

The minimum adult award wage shall not apply to apprentices, employees engaged on traineeships or government approved work placement programs or employed under the Commonwealth Government Supported Wage System or to other categories of employees who by prescription are paid less than the minimum award rate, provided that no employee shall be paid less than any applicable minimum rate of pay prescribed by the *Minimum Conditions of Employment Act 1993*.

Liberty to apply is reserved in relation to any special category of employees not included here or otherwise in relation to the application of the minimum adult award wage.

Subject to this clause the minimum adult award wage shall –

Apply to all work in ordinary hours.

Apply to the calculation of overtime and all other penalty rates, superannuation, payments during any period of paid leave and for all purposes of this award.

Minimum Adult Award Wage

The rates of pay in this award include the minimum weekly wage for employees aged 21 or more payable under the 2019 State Wage order decision. Any increase arising from the insertion of the minimum wage will be offset against any equivalent amount in rates of pay received by employees whose wages and conditions of employment are regulated by this award which are above the wage rates prescribed in the award. Such above award payments include wages payable pursuant to enterprise agreements, consent awards or award variations to give effect to enterprise agreements and over award arrangements. Absorption which is contrary to the terms of an agreement is not required.

Increases under previous State Wage Case Principles or under the current Statement of Principles, excepting those resulting from enterprise agreements, are not to be used to offset the minimum wage.

Adult Apprentices

Notwithstanding the provisions of this clause, the minimum adult apprentice wage for a full-time apprentice aged 21 years or more working under an award that provides for a 38 hour week is \$638.20 per week.

The minimum adult apprentice wage for a full-time apprentice aged 21 years or more working under an award that provides for other than a 38 hour week is calculated as follows: divide \$638.20 by 38 and multiply by the number of ordinary hours prescribed for a full time apprentice under the award.

The minimum adult apprentice wage is payable on and from the commencement of the first pay period on or after 1 July 2019.

Adult apprentices aged 21 years or more employed on a part-time basis shall not be paid less than pro rata the minimum adult apprentice wage according to the hours worked.

The rates paid in the paragraphs above to an apprentice 21 years of age or more are payable on superannuation and during any period of paid leave prescribed by this award.

Where in this award an additional rate is expressed as a percentage, fraction or multiple of the ordinary rate of pay, it shall be calculated upon the rate prescribed in this award for the actual year of apprenticeship.

10. **Making or Varying an Award or issuing an Order which has the effect of varying wages or conditions above or below the award minimum conditions**

- 10.1 An application or reference for a variation in wages which is not made by an applicant under any other Principle and which is a matter or concerns a matter to vary wages above or below the award minimum conditions may be made under this Principle.
- 10.2 Claims may be brought under this Principle irrespective of whether a claim could have been brought under any other Principle.
- 10.3 All claims made under this Principle will be referred to the Chief Commissioner for her to determine whether the matter should be dealt with by a Commission in Court Session or by a single Commissioner.

11. **New Awards (including interim Awards) and Extensions to an Existing Award**

- 11.1 The following shall apply to the making of wages in a new award (including an interim award) and an extension to an existing award:
 - 11.1.1 In the making of wages in an interim award the Commission shall apply the matters set out in section 36A of the Act.
 - 11.1.2 A new award (including an interim award) shall have a clause providing for the minimum award wage [see Principle 9] included in its terms.
 - 11.1.3 In the extension of wages in an existing award to new work or to award-free work the wages applicable to such work shall ensure that any award or order made:
 - (1) meets the need to facilitate the efficient organisation and performance of work according to the needs of an industry and or enterprises within it, balanced with fairness to the employees in the industry or enterprises; and
 - (2) sets fair wages.

12. **Economic Incapacity**

- 12.1 Any respondent or group of respondents to an award may apply to reduce and/or postpone the variation which results in an increase in labour costs under this Statement of Principles on the ground of very serious or extreme economic adversity. The merit of such application shall be determined in the light of the particular circumstances of each case and any material relating thereto shall be rigorously tested. The impact on employment at the enterprise level of the increase in labour costs is a significant factor to be taken into account in assessing the merit of an application. It will then be a matter for the Chief Commissioner to decide whether it should be dealt with by a Commission in Court Session.

13. **Duration**

- 13.1 This Statement of Principles will operate until reviewed under s 50A(1)(d) of the Act.

AWARDS/AGREEMENTS AND ORDERS—Variation of—

2019 WAIRC 00255

PUBLIC TRANSPORT AUTHORITY RAIL CAR DRIVERS (TRANSPERTH TRAIN OPERATIONS) AWARD 2006

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

PUBLIC TRANSPORT AUTHORITY OF WESTERN AUSTRALIA

APPLICANT

-v-

THE AUSTRALIAN RAIL, TRAM AND BUS INDUSTRY UNION OF EMPLOYEES, WEST AUSTRALIAN BRANCH

RESPONDENT**CORAM** COMMISSIONER D J MATTHEWS**DATE** THURSDAY, 30 MAY 2019**FILE NO/S** APPL 8 OF 2019**CITATION NO.** 2019 WAIRC 00255**Result** Award varied**Representation (by correspondence)****Applicant** Ms J Allen-Rana**Respondent** Mr J Dekuyer*Order*

HAVING heard Ms J Allen-Rana on behalf of the applicant and Mr J Dekuyer on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979* hereby orders –

THAT the *Public Transport Authority Rail Car Drivers (Transperth Train Operations) Award 2006* be varied in accordance with the following Schedule and that the variations in the attached Schedule shall have effect from the beginning of the first pay period commencing on or after Tuesday, 4 June 2019.

COMMISSIONER D J MATTHEWS

SCHEDULE

1. **Clause 3.3 – Meal and Rest Breaks: Delete paragraph (b) of subclause 3.3.2 of this clause and insert the following in lieu thereof:**
 - (b) The employer shall provide such employee a meal allowance of \$12.55 to cover the cost associated with the purchase of foods associated with the taking of a second crib.
The above allowance will be adjusted in accordance with the official movements in the Consumer Price Index (CPI) - Food (Perth) as measured for the preceding 12 months at the end of the March quarter by the Australian Bureau of Statistics.
2. **Clause 4.3 – Suburban Electric Railcar Allowance: Delete paragraph (a) of subclause 4.3.1 of this clause and insert the following in lieu thereof:**
 - 4.3.1 (a) An employee qualified in the operation of electric suburban railcars and who, for any shift or part of a shift is rostered to work as driver on the suburban rail system shall, for the whole of that shift, be paid the following allowance in addition to the appropriate rate of pay.

		Rate per week
(1)	First Year	\$41.70
(2)	Thereafter	\$42.00
(3)	Special Case	\$42.70
3. **Clause 5.1 – Shift Work: Delete subclause 5.1.1 of this clause and insert the following in lieu thereof:**
 - 5.1.1 The employer may, if the employer so desires, work any part of its business on shifts in accordance with the following provisions;
 - (a) On an afternoon shift which commences before 1800 hours and the ordinary time of which concludes at or after 1830 hrs, an employee will be paid an allowance of \$2.86 an hour on all time paid at ordinary rate.
 - (b) On a night shift, which commences at or between 1800, and 0359 hours, an employee will be paid an allowance of \$3.32 an hour on all time paid at ordinary rate.

- (c) On an early morning shift, which commences at or, between 0400 and 0530, an employee will be paid an allowance of \$2.86 an hour on all time paid at ordinary rate.
- (d) In addition to the hourly shift work allowance, an employee will be paid an allowance of \$3.32 for any shift where the ordinary time commences or finishes at or between 0101 hours and 0359 hours.
- (e) In calculating the allowance under this clause, broken parts of an hour less than thirty minutes on any shift shall be disregarded and thirty minutes to fifty-nine minutes paid as one hour.
- (f) The above allowances will be adjusted by a percentage derived from the State Wage General Order as amended or superseded, applied to the key classification rate of REA4 of the Railway Employees Award No 18 of 1969, using the procedure stated in ROUNDING OF ALLOWANCES (87 WAIG 1502).

4. Clause 5.2 – Temporary Transfer Allowance: Delete subclause 5.2.1 of this clause and insert the following in lieu thereof:

5.2.1 When an employee in the metropolitan area is required to work at another metropolitan depot other than the depot at which the employee is stationed the following shall apply:

- (a) When the distance the employee is required to travel from the employee's usual place of residence to the depot where the employee is temporarily working is greater than the distance the employee is required to travel from the usual place of residence to the employee's home depot, the employee shall be paid an allowance of \$1.72 per kilometre in both directions for the extra distance the employee is required to travel. Such allowance as specified in this paragraph is in recognition of the cost and time taken for the extra distance to be travelled.

The rates referred to in this subclause shall be adjusted by the Employer from time to time by reference to changes to the median of the Perth metropolitan Tariff 1 weekday pay rates per kilometre charged by all licensed taxis in Perth. The adjustment shall take effect from the date nominated by the employer, which shall be no later than 28 days after being notified in writing by the Union of a change to the median weekly rate.

- (b) When the period of relief is for one week or less the allowance of \$7.65 per shift shall be paid in recognition of the disruption to the employee's normal roster.

The above allowance will be adjusted by a percentage derived from the State Wage General Order as amended or superseded, applied to the key classification rate of REA4 of the Railway Employees Award No 18 of 1969, using the procedure stated in ROUNDING OF ALLOWANCES (87 WAIG 1502).

5. Clause 5.3 – On Call Allowance: Delete subclause 5.3.1 of this clause and insert the following in lieu thereof:

5.3.1 Employees on call outside the ordinary hours of duty will be paid an allowance of \$4.25 per hour for all time on call.

The above allowance will be adjusted by a percentage derived from the State Wage General Order as amended or superseded, applied to the key classification rate of REA4 of the Railway Employees Award No 18 of 1969, using the procedure stated in ROUNDING OF ALLOWANCES (87 WAIG 1502).

2019 WAIRC 00256

PUBLIC TRANSPORT AUTHORITY (TRANSWA) AWARD 2006
WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
PUBLIC TRANSPORT AUTHORITY OF WESTERN AUSTRALIA

PARTIES

APPLICANT

-v-

THE AUSTRALIAN RAIL, TRAM AND BUS INDUSTRY UNION OF EMPLOYEES, WEST AUSTRALIAN BRANCH

RESPONDENT

CORAM COMMISSIONER D J MATTHEWS
DATE THURSDAY, 30 MAY 2019
FILE NO/S APPL 9 OF 2019
CITATION NO. 2019 WAIRC 00256

Result Award varied
Representation (by correspondence)
Applicant Ms J Allen-Rana
Respondent Mr J Dekuyer

Order

HAVING heard Ms J Allen-Rana on behalf of the applicant and Mr J Dekuyer on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979* hereby orders –

THAT the *Public Transport Authority (Transwa) Award 2006* be varied in accordance with the following Schedule and that the variations in the attached Schedule shall have effect from the beginning of the first pay period commencing on or after Tuesday, 4 June 2019.

(Sgd.) D J MATTHEWS,
Commissioner.

[L.S.]

SCHEDULE

1. Clause 5.1 - Shift Work: Delete this clause and insert the following in lieu thereof:

5.1 - SHIFT WORK

- 5.1.1 On an afternoon shift which commences before 1800 hours and the ordinary time of which concludes at or after 1830 hrs, an employee will be paid an allowance of \$2.79 an hour on all time paid at ordinary rate.
- 5.1.2 On a night shift, which commences at or between 1800 and 0359 hours, an employee will be paid an allowance of \$3.21 an hour on all time paid at ordinary rate.
- 5.1.3 On an early morning shift, which commences at or between 0400 and 0530, an employee will be paid an allowance of \$2.79 an hour on all time paid at ordinary rate.
- 5.1.4 In addition to the hourly shift work allowance, an employee will be paid an allowance of \$3.21 for any shift where the ordinary time commences or finishes at or between 0101 hours and 0359 hours.
- 5.1.5 In calculating the allowance under this clause, broken parts of an hour less than thirty minutes on any shift shall be disregarded and thirty minutes to fifty-nine minutes paid as one hour.
- 5.1.6 The above allowances will be adjusted by a percentage derived from the State Wage General Order as amended or superseded, applied to the key classification rate of REA4 of the Railway Employees Award No 18 of 1969, using the procedure stated in ROUNDING OF ALLOWANCES (87 WAIG 1502).

2. Clause 5.2 - Temporary Transfer Allowance: Delete subclause 5.2.1 of this clause and insert the following in lieu thereof:

- 5.2.1 When an employee in the metropolitan area is required to work at another metropolitan depot other than the depot at which the employee is stationed the following shall apply:
- (a) When the distance the employee is required to travel from the employee's usual place of residence to the depot where the employee is temporarily working is greater than the distance the employee is required to travel from his usual place of residence to the employee's home depot, the employee shall be paid an allowance of \$1.72 per kilometre in both directions for the extra distance the employee is required to travel. Such allowance as specified in this paragraph is in recognition of the cost and time taken for the extra distance to be travelled, and in addition:
- (b) When the period of relief is for one week or less the allowance of \$7.65 per shift shall be paid in recognition of the disruption to the employee's normal roster.

3. Clause 5.3 - On Call Allowance: Delete subclause 5.3.1 of this clause and insert the following in lieu thereof:

- 5.3.1 Employees directed by the employer to be on call outside the ordinary hours of duty will be paid an allowance of \$4.62 per hour for all time on call.

That allowance will be adjusted by a percentage derived from the State Wage General Order as amended or superseded, applied to the key classification rate of REA4 of the Railway Employees Award No 18 of 1969, using the procedure stated in ROUNDING OF ALLOWANCES (87 WAIG 1502).

4. Clause 5.5 - Away From Home And Meal Allowances: Delete subclause 5.5.2 of this clause and insert the following in lieu thereof:

- 5.5.2 Railcar Drivers, Coordinator and Road Coach Operators will be paid an allowance to reimburse the costs of meals and incidentals when on roster and required to stay overnight away from home. This allowance will be calculated on the time between booking on and booking off from the home depot at the rate of \$30.50 for each 8 hour period and, where less than 8 hours is worked, at the rate of \$7.55 for each 2 hour period or part thereof worked.

2019 WAIRC 00257

RAILWAY EMPLOYEES' AWARD NO. 18 OF 1969WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
PUBLIC TRANSPORT AUTHORITY OF WESTERN AUSTRALIA

PARTIES

APPLICANT

-v-

THE AUSTRALIAN RAIL, TRAM AND BUS INDUSTRY UNION OF EMPLOYEES, WEST
AUSTRALIAN BRANCH, THE AUTOMOTIVE, FOOD, METALS, ENGINEERING, PRINTING
& KINDRED INDUSTRIES UNION OF WORKERS - WESTERN AUSTRALIAN BRANCH,
ELECTRICAL TRADES UNION OF WA

RESPONDENT

CORAM

COMMISSIONER D J MATTHEWS

DATE

THURSDAY, 30 MAY 2019

FILE NO/S

APPL 10 OF 2019

CITATION NO.

2019 WAIRC 00257

Result	Award varied
Representation (by correspondence)	
Applicant	Ms J Allen-Rana
First Respondent	Mr J Dekuyer
Second Respondent	Mr S McCartney
Third Respondent	Mr A Giddens

Order

HAVING heard Ms J Allen-Rana on behalf of the applicant, Mr J Dekuyer on behalf of the first respondent, Mr S McCartney on behalf of the second respondent and Mr A Giddens on behalf of the third respondent, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979* hereby orders –

THAT the *Railway Employees' Award No. 18 of 1969* be varied in accordance with the following Schedule and that the variations in the attached Schedule shall have effect from the beginning of the first pay period commencing on or after Tuesday, 4 June 2019.

(Sgd.) D J MATTHEWS,
Commissioner.

[L.S.]

SCHEDULE

1. Clause 4.3 – Experience Allowance: Delete this clause and insert the following in lieu thereof:

4.3. - EXPERIENCE ALLOWANCE

Employees classified at levels 4 to 7 inclusive shall be paid the following allowance as part of the ordinary base rate of pay for all purposes:

After 12 months service with the employer - \$ 6.60

After 24 months service with the employer - \$ 13.80

The above allowances will be adjusted by a percentage derived from the State Wage General Order as amended or superseded, applied to the key classification rate of REA4 of the Railway Employees Award No 18 of 1969, using the procedure stated in ROUNDING OF ALLOWANCES (87 WAIG 1502).

2. Clause 4.4 – Tool Allowance: Delete paragraph (a) of subclause 4.4.1 of this clause and insert the following in lieu thereof:

- (a) Where the employer does not provide a tradesperson or an apprentice with the tools ordinarily required by that trades person or apprentice in the performance of work as a tradesperson or as an apprentice the employer shall pay a tool allowance of \$16.80 per week to such tradesperson/apprentice.

The above allowance will be adjusted by a percentage derived from the State Wage General Order as amended or superseded, applied to the key classification rate of REA4 of the Railway Employees Award No 18 of 1969, using the procedure stated in ROUNDING OF ALLOWANCES (87 WAIG 1502).

3. Clause 4.5 – Leading Hands: Delete this clause and insert the following in lieu thereof:

4.5. - LEADING HANDS

Leading Hands shall be paid the following rate per week:

- (a) Class 3
When in charge of not less than three and not more than ten others, paid \$31.20 extra per week
- (b) Class 2
When in charge of more than 10 but fewer than twenty others, paid \$47.00 extra per week
- (c) Class 1
When in charge of more than twenty others, paid \$60.60 extra per week

The above allowances will be adjusted by a percentage derived from the State Wage General Order as amended or superseded, applied to the key classification rate of REA4 of the Railway Employees Award No 18 of 1969, using the procedure stated in ROUNDING OF ALLOWANCES (87 WAIG 1502).

4. Clause 4.6 – Electrical Licence Allowance: Delete this clause and insert the following in lieu thereof:

4.6. - ELECTRICAL LICENCE ALLOWANCE

An electronics tradesperson, an electrical fitter and/or armature winder or an electrical installer who holds and in the course of his or her employment may be required to use a current "A" grade or "B" grade licence issued pursuant to the relevant regulation in force in the 28th day of February, 1978 under the Electricity Act, 1948 shall be paid an allowance of \$22.20 per week.

The above allowance will be adjusted by a percentage derived from the State Wage General Order as amended or superseded, applied to the key classification rate of REA4 of the Railway Employees Award No 18 of 1969, using the procedure stated in ROUNDING OF ALLOWANCES (87 WAIG 1502).

- 5. Clause 5.1 – On Call Allowances: Delete subclause 5.1.2 of this clause and insert the following in lieu thereof:**
- 5.1.2 On Call Allowance
- An employee who is directed by the Head of Branch or other duly authorized officer to be available on call outside the ordinary hours of duty as prescribed in Part 3 of this Award, shall be paid an On Call allowance of \$4.62 per hour.
- The above allowance will be adjusted by a percentage derived from the State Wage General Order as amended or superseded, applied to the key classification rate of REA4 of the Railway Employees Award No 18 of 1969, using the procedure stated in ROUNDING OF ALLOWANCES (87 WAIG 1502).
- 6. Clause 5.3 – Meal Breaks: Delete paragraph (a) of subclause 5.3.1 of this clause and insert the following in lieu thereof:**
- (a) An employee who having responded to a call is unable to return to the employee's home during a recognized meal period for a meal shall be supplied with a meal or be paid a meal allowance of \$10.90 as provided under this Award.
- The above allowance will be adjusted in accordance with the official movements in the Consumer Price Index (CPI) - Food (Perth) as measured for the preceding 12 months at the end of the March quarter by the Australian Bureau of Statistics.
- 7. Clause 5.4 – Away from Home Allowances:**
- A. Delete subclause 5.4.2 of this clause and insert the following in lieu thereof:**
- 5.4.2 Where sub clause 5.4.1. applies, the employee shall be paid an allowance of \$50.30 per day except when the accommodation includes dining facilities and meals, in which case an allowance of \$37.70 per day shall be paid.
- The above allowances will be adjusted by a percentage derived from the State Wage General Order as amended or superseded, applied to the key classification rate of REA4 of the Railway Employees Award No 18 of 1969, using the procedure stated in ROUNDING OF ALLOWANCES (87 WAIG 1502).
- B. Delete subclause 5.4.5 of this clause and insert the following in lieu thereof:**
- 5.4.5 When an employee is required by the employer to attend a training course, seminar or other such meeting which involve an overnight stay away from the employee's home or lodging, the employee, at the discretion of the employer, may be provided with accommodation and meals and if so provided shall be paid an incidental allowance of \$13.25 per day.
- The above allowance will be adjusted by a percentage derived from the State Wage General Order as amended or superseded, applied to the key classification rate of REA4 of the Railway Employees Award No 18 of 1969, using the procedure stated in ROUNDING OF ALLOWANCES (87 WAIG 1502).
- 8. Clause 5.6 – Travelling Time – Traffic: Delete subclause 5.6.3 of this clause and insert the following in lieu thereof:**
- 5.6.3 When the period of relief is for one week or less an allowance of \$7.65 per shift shall be paid in recognition of the disruption to the employee's normal roster. This allowance is in addition to that provided in sub clause 5.6.2.
- The above allowance will be adjusted by a percentage derived from the State Wage General Order as amended or superseded, applied to the key classification rate of REA4 of the Railway Employees Award No 18 of 1969, using the procedure stated in ROUNDING OF ALLOWANCES (87 WAIG 1502).
- 9. Clause 5.7 – Meal Allowance: Delete this clause and insert the following in lieu thereof:**
- 5.7.1 Refreshment Allowance
- An employee employed in the actual running of trains whose shift is extended by more than two hours and the total duration of the shift exceeds ten hours, shall be paid a refreshment allowance of \$5.45 where:
- (a) Notification of the requirement to work an extended shift was not given prior to the finish of the preceding shift; and
- (a) The employee is not entitled to a meal allowance as prescribed elsewhere in this Award.
- The above allowance will be adjusted in accordance with the official movements in the Consumer Price Index (CPI) - Food (Perth) as measured for the preceding 12 months at the end of the March quarter by the Australian Bureau of Statistics.
- 5.7.2 Meal Allowance
- Where an employee is required to work beyond ordinary rostered hours without being notified on the previous day, the employee shall be provided with a meal or be paid \$10.90 in lieu where:
- (a) The employee is in an Other Than Traffic position, and is required to so work for more than 1 hour, or until after 1800 hours; or
- (b) The employee is in a Traffic classification, and the rostered hours of duty have been extended by more than one hour beyond the recognised meal period.
- The above allowance will be adjusted in accordance with the official movements in the Consumer Price Index (CPI) - Food (Perth) as measured for the preceding 12 months at the end of the March quarter by the Australian Bureau of Statistics.
- 9. Clause 5.8 – Shifts and/or Night Work Allowance – (Six – Day Shift Work): Delete subclause 5.8.1 of this clause and insert the following in lieu thereof:**

- 5.8.1 The employer may, if the employer so desires, work any part of the establishment on shift work as part of the 38 ordinary hours per week, Monday to Saturday. The employer shall consult affected employees beforehand, and notify the Union of the intention to introduce shift work. The employer shall post the shift work roster at least 14 days in advance of the start date.
- (a) On an afternoon shift, which commences before 1800 hrs and the ordinary time of which concludes at or after 1830 hours will be paid an allowance of \$2.79 an hour on all time paid at the ordinary rate.
 - (b) On a night shift, which commences at or between 1800 hours and 0359 hours, will be paid an allowance of \$3.21 an hour on all time paid at ordinary rate.
 - (c) On an early morning shift, which commences at or between 0400 hours and 0530 hours, will be paid an allowance of \$2.79 an hour for all time paid at ordinary rate.
 - (d) In addition to the hourly shift work allowance an employee will be paid an allowance of \$3.21 for any shift where the ordinary time commences or finishes at or between 0101 hours and 0359 hours.
 - (e) The provisions of subparagraphs (a) to (d) of this clause will not apply to employee’s continuously on shifts, which start and finish between 1800 and 0600 hours. These employees will be paid night work allowance for ordinary paid time on duty between those hours at the rate of \$3.32 per hour.
 The above allowances will be adjusted by a percentage derived from the State Wage General Order as amended or superseded, applied to the key classification rate of REA4 of the Railway Employees Award No 18 of 1969, using the procedure stated in ROUNDING OF ALLOWANCES (87 WAIG 1502).
 - (f) Provided that shift penalties do not apply to Saturday and Sunday hours, which are paid as follows: ordinary hours on Saturday are paid with a 50% loading in accordance with subclause 3.3.2(c), additional hours on Saturdays are paid at double time in accordance with subclause 3.3.2(b) and all time on Sunday is paid at double time in accordance with subclause 3.3.2(a).

**AWARDS/AGREEMENTS AND ORDERS—Application for variation of—
No variation resulting—**

2019 WAIRC 00244

APPLICATION TO VARY THE IRON ORE PRODUCTION & PROCESSING (LOCOMOTIVE DRIVERS) AWARD 2006 TO ENSURE THAT PAYMENT OF WAGES FOR HOURS IN EXCESS OF 38 PER WEEK COMPLIES WITH STATUTORY MINIMUM REQUIREMENTS

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
COMMISSION'S OWN MOTION

PARTIES

-v-
(NOT APPLICABLE)

APPLICANT

RESPONDENT

CORAM CHIEF COMMISSIONER P E SCOTT
DATE FRIDAY, 24 MAY 2019
FILE NO/S APPL 47 OF 2018
CITATION NO. 2019 WAIRC 00244

Result Order issued

Order

HAVING heard Dr T Dymond on behalf of UnionsWA, Mr K Black and later Mr R Martin on behalf of Chamber of Commerce and Industry WA and Mr B Entrekin on behalf of the Minister for Mines and Petroleum, Energy and Industrial Relations, the Commission has formed the view that the *Iron Ore Production & Processing (Locomotive Drivers) Award 2006* does not require amendment to ensure that the rates of pay do not fall below the State Minimum Wage due to the Award prescribing a 40 hour week. Therefore, The Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979*, and by consent, hereby orders -

THAT the application be and is hereby dismissed.

(Sgd.) P E SCOTT,
Chief Commissioner.

[L.S.]

2019 WAIRC 00243

APPLICATION TO VARY THE IRON ORE PRODUCTION & PROCESSING (LOCOMOTIVE DRIVERS RIO TINTO RAILWAY) AWARD 2006 TO ENSURE THAT PAYMENT OF WAGES FOR HOURS IN EXCESS OF 38 PER WEEK COMPLIES WITH STATUTORY MINIMUM REQUIREMENTS

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

COMMISSION'S OWN MOTION

APPLICANT

-v-

(NOT APPLICABLE)

RESPONDENT

CORAM CHIEF COMMISSIONER P E SCOTT

DATE FRIDAY, 24 MAY 2019

FILE NO/S APPL 44 OF 2018

CITATION NO. 2019 WAIRC 00243

Result Award varied

Order

HAVING heard Dr T Dymond on behalf of UnionsWA, Mr K Black and later Mr R Martin on behalf of Chamber of Commerce and Industry WA and Mr B Entrekin on behalf of the Minister for Mines and Petroleum, Energy and Industrial Relations, the Commission has formed the view that the *Iron Ore Production & Processing (Locomotive Drivers Rio Tinto Railway) Award 2006* does not require amendment to ensure that the rates of pay do not fall below the State Minimum Wage due to the Award prescribing a 40 hour week. Therefore, The Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979*, and by consent, hereby orders -

THAT the application be and is hereby dismissed.

(Sgd.) P E SCOTT,
Chief Commissioner.

[L.S.]

NOTICES—Award/Agreement matters—

2019 WAIRC 00271

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

Application No. AG 11 OF 2019

APPLICATION FOR A NEW AGREEMENT TITLED

“WA HEALTH SYSTEM – UNITED VOICE – ENROLLED NURSES, ASSISTANTS IN NURSING, ABORIGINAL AND ETHNIC HEALTH WORKERS INDUSTRIAL AGREEMENT 2018”

NOTICE is given that an application has been made to the Commission by the *Child And Adolescent Health Service And Others* and *United Voice WA* under the *Industrial Relations Act 1979* for the registration of the above Agreement.

As far as relevant, those parts of the proposed Agreement which relate to area of operation and scope are published hereunder.

4. AREA, INCIDENCE AND PARTIES BOUND

4.1 This Agreement operates throughout the State of Western Australia and is binding on the parties and on Employees to which the Enrolled Nurses and Nursing Assistants (Government) Award applies and to Employees engaged by the Employer to work in any of the classifications listed in Clause 24 – Classification Structure and Wages and who are members of, or eligible to be members of, United Voice WA.

4.2 The Employers party to and bound by this Agreement are:

- (a) The Health Service Providers established pursuant to section 32(1)(b) of the *Health Services Act 2016* (WA) which include:
- (i) Child and Adolescent Health Service;
 - (ii) East Metropolitan Health Service;
 - (iii) Health Support Services;
 - (iv) North Metropolitan Health Service;
 - (v) Quadriplegic Centre;
 - (vi) South Metropolitan Health Service;

(vii) WA Country Health Service; and

(b) Mental Health Commission.

4.3 The union party to and bound by this Agreement is United Voice WA.

4.4 The estimated number of Employees bound by this Agreement at the time of registration is 2,210.

4.5 This Agreement replaces the WA Health System – United Voice – Enrolled Nurses, Assistants in Nursing, Aboriginal and Ethnic Health Workers Industrial Agreement 2016.

A copy of the proposed Agreement may be inspected at my office at 111 St. Georges Terrace, Perth.

(Sgd.) S BASTIAN,
Registrar.

[L.S.]

18 June 2019

UNFAIR DISMISSAL/CONTRACTUAL ENTITLEMENTS—

2019 WAIRC 00262

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	:	2019 WAIRC 00262
CORAM	:	COMMISSIONER T EMMANUEL
HEARD	:	WEDNESDAY, 29 MAY 2019
DELIVERED	:	THURSDAY, 30 MAY 2019
FILE NO.	:	U 146 OF 2018
BETWEEN	:	RICHARD (RICK) ADAM
		Applicant
		AND
		EAST METROPOLITAN HEALTH SERVICE
		Respondent

CatchWords	:	Industrial law – Unfair dismissal – Compromise agreement reached by parties – Maximum compensation already paid to applicant – Reinstatement or re-employment not practicable – Not in the public interest to hear and determine the application
Legislation	:	Section 23A, s 23A(8) and s 27(1)(a) of the <i>Industrial Relations Act 1979</i> (WA)
Result	:	Application dismissed
Representation:		
Applicant	:	In person
Respondent	:	Ms J van den Herik (as agent)

Cases referred to in reasons:

Green v Rozen and others (1955) 2 All ER 797

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

Prudential Assurance Co. Ltd. v McBains Cooper [2000] 1 WLR 2000

Reasons for Decision

- 1 Mr Richard Adam worked as a casual cleaner and occasionally an orderly for East Metropolitan Health Service (EMHS). He was employed from around March 2017 until sometime in 2018. During his employment, Mr Adam was the subject of two disciplinary processes. One of those involved an investigation in 2018.
- 2 Mr Adam says his employment ended on 11 July 2018 when EMHS asked him not to return to work and paid out the remainder of his rostered shifts. EMHS says Mr Adam's employment ended on 20 December 2018, when the disciplinary investigation was completed and EMHS decided not to offer him any further shifts.
- 3 Mr Adam referred this application U 146 of 2018 to the Commission on 24 November 2018, alleging he was unfairly dismissed. At that time, the disciplinary investigation was ongoing.
- 4 Through conciliation the parties reached an agreement to compromise Mr Adam's unfair dismissal application. Their compromise agreement was recorded in a deed of settlement signed by Mr Adam and the Chief Executive of EMHS.
- 5 Mr Adam now asks the Commission to 'null and void the deed of settlement'. He does not want to be reinstated or re-employed. EMHS says Mr Adam's application should be dismissed because the parties reached a compromise agreement and, in any event, there is no order the Commission could make if the matter were heard and determined.

- 6 Because it is not in dispute that the parties reached a compromise agreement and EMHS paid Mr Adam the equivalent of six months' wages, this matter was listed to hear from the parties about whether Mr Adam's unfair dismissal application should be dismissed under s 27(1)(a) of the *Industrial Relations Act 1979* (WA) (**IR Act**).

What must I decide?

- 7 I must decide whether this application should be dismissed under s 27(1)(a) of the IR Act.

Conciliation process

- 8 The Commission convened two conciliation conferences in this application. At the second conference on 10 April 2019, EMHS provided Mr Adam with a deed of settlement containing an agreement to compromise application U 146 of 2018 and resolve all matters between the parties (**Settlement Deed**). Mr Adam signed the Settlement Deed at the conference on 10 April 2019. The Settlement Deed was then executed by the Chief Executive of EMHS and was provided to Mr Adam and the Commission by email on 12 April 2019.
- 9 As part of the compromise agreement, EMHS agreed to provide Mr Adam a settlement sum within 14 days of the execution of the Settlement Deed by the parties.
- 10 On 24 April 2019, being the 14th day after he signed the Settlement Deed, Mr Adam contacted the Commission to inform it that he had not yet received the settlement sum. My Associate immediately contacted EMHS' representative, who informed my Associate that the settlement sum had not yet been paid but would be before the end of that day.
- 11 At 3:57pm on that same day, EMHS provided Mr Adam and the Commission by email with a receipt confirming the settlement sum had been paid to Mr Adam.
- 12 On 8 May 2019, Mr Adam sent two emails to my Associate stating that the Settlement Deed was null and void because the money was not received in his bank account until the 15th day. Mr Adam requested I provide him with a document 'null and voiding the signed deed.'
- 13 My Associate responded to Mr Adam by letter on 9 May 2019, explaining it is not the role of the Commission to provide such documents, and that this matter would be set down for a hearing to determine whether this application should be dismissed under s 27(1)(a) of the IR Act.

Consideration

- 14 Several material facts are not in dispute. First, the parties reached an agreement to compromise Mr Adam's unfair dismissal application at the conciliation conference on 10 April 2019. Second, on 24 April 2019 EMHS paid Mr Adam the settlement sum of \$22,927.00 (net) as set out in the Settlement Deed. I accept that the settlement sum took one day to appear in Mr Adam's bank account.
- 15 An unimpeached compromise agreement represents the end of the dispute or disputes from which it arose: *Prudential Assurance Co. Ltd. v McBains Cooper* [2000] 1 WLR 2000, 2005. In this application, the compromise agreement reached by the parties on 10 April 2019 and recorded in the Settlement Deed has overtaken Mr Adam's unfair dismissal application: *Maurice Bradbury v Jos van Baren, John Denwick, Paul Gangemi and Ivan Hill, Management Agent, Proprietor of Great Western Real Estate* (1995) 75 WAIG 2927 (**Bradbury**); *Green v Rozen and others* (1955) 2 All ER 797. Now before the Commission is the compromise agreement in settlement of Mr Adam's unfair dismissal application, not the unfair dismissal application itself.
- 16 The Full Bench in *Bradbury* stated 'It is certainly not in the public interest, too, that the Commission should have proceeded to hear something which had been settled by agreement, even if, as a matter of law, the Commission could have heard the matter, which it could not have. The Commission did not err in the exercise of its discretion or otherwise.' (2928)
- 17 Given the unimpeached compromise agreement and the payment made by EMHS, I am satisfied that further proceedings are not necessary or desirable in the public interest: s 27(1)(a) of the IR Act.
- 18 But even if I am wrong and the parties have not reached a compromise agreement, I consider it would not be in the public interest to hear Mr Adam's unfair dismissal application.
- 19 Mr Adam is mainly concerned about what he sees as non-compliance with the Settlement Deed. He says EMHS has not complied with the Settlement Deed because:
- a. the settlement sum appeared in his bank account 15 days after Mr Adam signed the Settlement Deed; and
 - b. EMHS sent his final payslip to Armadale Hospital, where it went missing, instead of sending it to his home address.
- 20 Mr Adam seeks an order that the Settlement Deed be declared void and set aside because EMHS has not complied with the Settlement Deed. In the circumstances of this matter, that is not an order the Commission could make under s 23A of the IR Act.
- 21 It is not in dispute, and I find, that EMHS has paid Mr Adam the equivalent of six months' wages. If the matter were heard and Mr Adam were successful at a hearing, this is the maximum amount of compensation the Commission could order under s 23A(8) of the IR Act. Further, I consider that reinstatement or re-employment should not be ordered in this case. I say that for several reasons. First, Mr Adam does not seek reinstatement. EMHS argues that reinstatement is impracticable because the relationship between Mr Adam and EMHS has irrevocably broken down.
- 22 Mr Adam has provided to the Commission many letters and emails to and about EMHS from between 18 July 2018 and 8 May 2019. I find the content and tone of many of those communications to be concerning. His letters and emails can be conservatively characterised as aggressive, abusive and mocking. In many of them, Mr Adam refers to his lack of trust and confidence in EMHS. For example, in a letter sent to EMHS in September 2018, Mr Adam speaks about the need for him to

use a surveillance device in the form of a ‘video recording pen’ when dealing with EMHS management and human resources because he considers them to be untrustworthy. In an email addressed to the Chair of the EMHS Board dated 16 October 2018, Mr Adam writes ‘Seems [the Executive Director] herself has now opted to full inline [sic] with the rest of the corruption... Your management at Armadale Hospital is looking very much like they are all corrupt.’ In an email to the Commission sent in March 2019, Mr Adam refers to expecting a retaliatory response from management and says ‘The [t]oxic working environment is worse now than it ever has been.’ In a letter to my Associate dated 4 January 2019, Mr Adam states ‘I feel that all Management at Armadale Hospital have had a knife in my back since the day I commenced my employment.’ There are also many references to lies, conspiracy and coverups.

- 23 There is an overwhelming lack of trust and confidence in EMHS on Mr Adam’s part. Based on EMHS’ submissions and the statements made by its Chief Executive and Executive Director in letters to Mr Adam, it is clear that EMHS also lacks trust and confidence in Mr Adam. I find that the relationship of trust and confidence between the parties has broken down to such an extent that reinstatement or re-employment of Mr Adam is not reasonably feasible or capable of occurring.
- 24 Given the Commission could not order that Mr Adam be reinstated, re-employed or compensated, it would not be in the public interest to hear application U 146 of 2018 even if the parties had not reached a compromise agreement.
- 25 For these reasons, I will order that application U 146 of 2018 be dismissed.

2019 WAIRC 00260

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

RICHARD (RICK) ADAM

APPLICANT

-v-

EAST METROPOLITAN HEALTH SERVICE

RESPONDENT

CORAM COMMISSIONER T EMMANUEL
DATE THURSDAY, 30 MAY 2019
FILE NO/S U 146 OF 2018
CITATION NO. 2019 WAIRC 00260

Result Application dismissed
Representation
Applicant In person
Respondent Ms J van den Herik (as agent)

Order

HAVING heard from the applicant in person and Ms J van den Herik (as agent) on behalf of the respondent, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), orders –

THAT this application be, and by this order is, dismissed.

(Sgd.) T EMMANUEL,
 Commissioner.

[L.S.]

2019 WAIRC 00240

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION : 2019 WAIRC 00240
CORAM : COMMISSIONER D J MATTHEWS
HEARD : MONDAY, 1 APRIL 2019, WEDNESDAY, 3 APRIL 2019
DELIVERED : THURSDAY, 23 MAY 2019
FILE NO. : U 119 OF 2018
BETWEEN : JESSICA AUFDEMKAMPE
 Applicant
 AND
 THAKKAR FAMILY TRUST
 Respondent

CatchWords	:	Unfair dismissal claim - Applicant given two weeks' notice of dismissal - Respondent dismissed applicant to save money - Found dismissal lawful but not fair in all the circumstances - Applicant not seeking reinstatement - Compensation awarded
Legislation	:	<i>Minimum Conditions of Employment Act 1993</i> sections 40 and section 41
Result	:	Application granted
Representation:		
Counsel:		
Applicant	:	Mr M Harriss (as agent)
Respondent	:	Mr M Thakkar

Reasons for Decision

(Given extemporaneously at the conclusion of proceedings – as edited by Commissioner Matthews)

- 1 The applicant worked at the respondent's Subway franchise store in Aveley as a “sandwich artist”, commencing employment in February 2017. She was good at her job, so good in fact that she entered a Subway competition for “sandwich artistry” and won the West Australian leg of that competition and in fact the Australian leg of the competition qualifying her to compete in the world championships in Washington DC where unfortunately, she told us in evidence, she was unplaced.
- 2 The applicant’s employer, Mr Thakkar, gave evidence that she was a good employee and her performance is in no way in question in these proceedings. Nonetheless, in late August 2018 the applicant was given two weeks' notice by Mr Thakkar that her employment was to end and her employment ended on 9 September 2018.
- 3 The applicant prosecutes a case that she was dismissed by Mr Thakkar because she had disappointed Mr Thakkar in his plans to have her become the supervisor or manager of the store. The applicant says that once she made it clear that that was not a path which she wished to go down that Mr Thakkar decided that there was no future for her in the business at all and took steps to end her employment with the business.
- 4 The case prosecuted was that initially Mr Thakkar gave the applicant a new contract which would have made her a casual employee, allowing Mr Thakkar to reduce her hours, and that when the applicant refused to sign that contract Mr Thakkar simply decided to bring her employment to an end.
- 5 So the applicant prosecutes a case that the real reason why her employment was ended was that she would not agree to take on greater responsibility and, in that event, the respondent sacked her because he could get others to do the job she was willing to do for less money.
- 6 The applicant further prosecutes a case that the process by which the employment was ended did not have regard for certain sections of the *Minimum Conditions of Employment Act 1993*, in particular sections 40 and 41 of the *Minimum Conditions of Employment Act 1993*, which refer to major changes in the operation of a business and the need, where that is to occur, for an employer to bring those to the notice of an employee who is to be affected.
- 7 The respondent's case in turn is quite a simple one and probably does not differ much from that put by the applicant, although it emphasises different aspects.
- 8 Mr Thakkar says that he terminated the applicant to save money. I note that in the notice of termination, which was exhibit 6 in these proceedings, Mr Thakkar wrote to the applicant in these terms and I quote:

However, as per current business requirement, rising employment and food cost and financial affordability, we reviewed our business and staffing structure, your position is no longer needed. This decision is not a reflection on your performance.
- 9 So the letter of termination says that because of rising costs there was a restructure of the business and the position that the applicant held had been abolished or that her position - to use the language of the letter - was no longer needed. That, of course, is what led Mr Harriss on behalf of the applicant into the territory covered by section 40 *Minimum Conditions of Employment Act 1993* which talks about restructuring of the business and so on.
- 10 I do not think this was a genuine redundancy situation. I think what we got to at the hearing, and to his credit Mr Thakkar was quite open about this, was that he let the applicant go so he could maximise profit from the business. He explained that letting the applicant go, with him having more junior people make the sandwiches, and with him providing managerial or supervisory input, saved him about \$500 a week.
- 11 So the two cases are not so different. The applicant says she was sacked so that Mr Thakkar could get others to do her job for less money. Mr Thakkar does not really dispute that.
- 12 Unfortunately, despite repeated questioning from me and the opportunity to do so, the respondent was unable to put the money saved into some sort of context for me. By this I mean he was unable to explain to me exactly what kind of difference \$500 made to him and to the business he operated. I am certainly not able to conclude that it was the difference between being in business and going out of business.
- 13 So I am left with this situation. The respondent runs a small business and is entitled to maximise his profit in that business and may seek to maximise that profit with the reorganisation of staff. He may let staff go to achieve this.

- 14 But we also have the *Industrial Relations Act 1979* in this State which says that, whilst you may establish that you have lawfully dismissed someone, that is not the end of the inquiry for this body. This body must look into whether you have fairly dismissed someone.
 - 15 In all likelihood the dismissal of the applicant was lawful in that she was given two weeks' notice and that is probably all that is required for it to be lawful. But the inquiry for this jurisdiction is a different one. Mr Thakkar had the right to dismiss the applicant but the question is whether he has exercised that right so harshly or oppressively or unfairly against the applicant as to amount to an abuse of that right.
 - 16 I find that he did abuse that right for the following reasons.
 - 17 The applicant had been a good employee for the respondent since he had taken over the business in December 2017.
 - 18 Given that he took over the business in December of 2017, and the applicant had been employed in the business longer than that, throughout the entirety of his ownership of the business, the applicant had been a good employee for him, a good and faithful employee who had brought credit to the business and the respondent by the winning of competitions.
 - 19 I accept what Mr Thakkar says, and I do not think he meant offence by it, that the work involved was not 'rocket science'. But doing it well is to the credit of the applicant and I think it is only proper that this body gives her that credit by finding that she was a very good employee over a long period of time.
 - 20 Mr Thakkar, by August 2018, was entitled, however, to come to a decision that he wanted to let the applicant go because he wanted to maximise profit from the business and because dismissing the applicant may help with this. If the applicant would not move into a supervisory role the respondent was entitled to decide that he would provide the supervision and would find others who could do the applicant's work at a cheaper rate.
 - 21 But the respondent had to handle that change fairly. In my view, he should have sat down with the applicant and said "look, I know I'm only paying you \$21.18 an hour, but I can get the work done for cheaper, and I wish to go down that path, and for that reason I'm going to end your employment." He should have had a discussion with the applicant about how to manage the period of time over which this change might be effected and how there may be a soft landing for the applicant, especially in circumstances where Mr Thakkar knew that she was going to be pursuing work with a bank.
 - 22 So, I am saying and finding, that Mr Thakkar was entitled to make the decision he did and was entitled to take the action that he did, but that he had to do it in a certain way and he had to do it in a way that was a lot fairer than the way in which he pursued it. He couldn't simply give the applicant, at the end of a shift, a letter which, on her evidence, she then read in the car, sacking her. The applicant deserved much better from her employer given her work performance.
 - 23 It may have been a difficult situation for Mr Thakkar. I think sacking someone is an exquisitely difficult situation for a person. It is no fun. But it must be done properly. Mr Thakkar should have sat down with the applicant and explained the situation to her, being that he wished to save some money, and he should have discussed with her how that might be achieved with dignity and fairness for all concerned. Mr Thakkar should not have simply given the applicant a letter giving her two weeks' notice for her to read in the car at the end of a shift.
 - 24 Now, on that basis, that is the way Mr Thakkar handled the applicant, and in all the circumstances, I find the dismissal was an unfair one. It was lawful, but it was still unfair and that is the key question for me.
 - 25 We then turn to what does the applicant get by way of a remedy. She doesn't seek reinstatement. In fact, her life moved on very quickly, and for the better, in that she achieved work with the Commonwealth Bank on 22 October 2018 at a higher rate of pay in what I understand was a permanent, fulltime position in which she works 76 hours per fortnight.
 - 26 That is better work than working as a sandwich artist at Subway, with respect to all concerned. And it is the kind of progression you would expect from someone of the applicant's obvious abilities.
 - 27 And that is relevant to the overall situation and my finding that what Mr Thakkar did was lawful, just badly handled. You do not expect people of the applicant's abilities to go on working at Subway long-term. They work until they are the 21 or 22 years of age that the applicant achieved and then you expect that the owner of Subway might be bringing through younger people at cheaper rates.
 - 28 So, I do not as a concept say that Mr Thakkar did the wrong thing, although I find that he did it in the wrong way. There was a period of six weeks where the applicant was out of work. The question for me is how long would it have taken Mr Thakkar to fairly bring the applicant's employment to an end? I think that if on the date when Mr Thakkar gave the applicant notice he had sat down with her and said, "you know this is what the future looks like as far as I'm concerned. This is what I want to achieve", and if he had given her four weeks work on top of the two weeks he gave her that would have been more than sufficient.
 - 29 So, I'm going to give compensation for four weeks because the respondent has already paid for two weeks of notice. So, four weeks of pay. That is, I am saying that if Mr Thakkar had said on the date that he did, "your employment is going to end in six weeks", rather than two, I would have found that not only was the dismissal lawful, but it was also fair.
 - 30 I am going to say that the applicant was working 34 hours a week on average. Now, I know that she only worked 10 hours in the last week of her employment and 30 hours the week before, but I think over the course of the period of her employment, Mr Thakkar said she worked between 30 and 37 hours. I am picking 34 hours. So, 34 times \$21.18 times four is the amount of compensation that will be ordered, that is an amount of \$2,880.48 which I will round down to \$2,880.
 - 31 The emotional upset of these kinds of things is also compensable in this jurisdiction. I did not hear a great deal from the applicant about the emotional impact it had on her, but I heard enough to award a nominal sum of \$500 for that. So we end up with a figure of \$3,380.
 - 32 So, the order is that the respondent pay the applicant the sum of \$3,380 within 14 days.
-

2019 WAIRC 00242

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES JESSICA AUFDEM KAMPE **APPLICANT**

-v-

THAKKAR FAMILY TRUST **RESPONDENT**

CORAM COMMISSIONER D J MATTHEWS

DATE THURSDAY, 23 MAY 2019

FILE NO/S U 119 OF 2018

CITATION NO. 2019 WAIRC 00242

Result Order made

Representation

Applicant Mr M Harriss (as agent) and with him the applicant in person

Respondent Mr M Thakkar

Order

HAVING HEARD from Mr M Harriss, as agent, for the applicant and with him the applicant in person and Mr M Thakkar for the respondent on Monday, 1 April 2019 and from Mr M Harriss, as agent, for the applicant and Mr M Thakkar for the respondent on Wednesday, 3 April 2019, I, the undersigned, pursuant to the powers conferred under the *Industrial Relations Act 1979* hereby order:

THAT the respondent pay to the applicant the sum of \$3,380.00 within 14 days.

[L.S.]

(Sgd.) D J MATTHEWS,
Commissioner.

2019 WAIRC 00188

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES HAYAT GHANTOUS **APPLICANT**

-v-

HEIDI HERGET **RESPONDENT**

CORAM COMMISSIONER T EMMANUEL

DATE THURSDAY, 11 APRIL 2019

FILE NO/S B 62 OF 2018

CITATION NO. 2019 WAIRC 00188

Result Application dismissed for want of prosecution

Representation

Applicant No appearance

Respondent No appearance

Order

WHEREAS this is an application under s 29(1)(b)(ii) of the *Industrial Relations Act 1979* (WA) that was listed for a show cause hearing on 10 April 2019;

AND WHEREAS at the hearing on 10 April 2019 there was no appearance for or by the applicant and the Commission proceeded in the absence of the applicant;

AND HAVING given reasons for the decision during the hearing on 10 April 2019;

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

THAT this application be, and by this order is, dismissed.

[L.S.]

(Sgd.) T EMMANUEL,
Commissioner.

2014 WAIRC 00240

PARTIES WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
LEIGH MARTIN **APPLICANT**

-v-
MICHAEL MOLONEY
WILDFLOWER ELECTRICAL AND REFRIGERATION SERVICES PTY LTD **RESPONDENT**

CORAM COMMISSIONER S J KENNER
DATE WEDNESDAY, 26 MARCH 2014
FILE NO/S B 189 OF 2013
CITATION NO. 2014 WAIRC 00240

Result Order issued
Representation
Applicant No appearance
Respondent Ms S De Silva of counsel

Order

HAVING heard Ms S De Silva of counsel on behalf of the respondent and there being no appearance by the applicant the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders –

- (1) THAT in relation to the respondent's application to dismiss the applicant's claim due to his failure to appear the applicant file and serve by 2 April 2014 an affidavit explaining his non-appearance at the proceedings listed for hearing on 26 and 27 March 2014. If the applicant fails to comply with this order the application will be dismissed.
- (2) THAT in relation to the respondent's application for costs the respondent file and serve by 2 April 2014 an affidavit as to its costs and expenses incurred in attending the proceedings listed for hearing on 26 and 27 March 2014.
- (3) THAT the parties have liberty to apply on short notice.

(Sgd.) S J KENNER,
Commissioner.

[L.S.]

2014 WAIRC 00363

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION : 2014 WAIRC 00363
CORAM : COMMISSIONER S J KENNER
HEARD : WEDNESDAY, 26 MARCH 2014
DELIVERED : FRIDAY, 2 MAY 2014
FILE NO. : B 189 OF 2013
BETWEEN : LEIGH MARTIN
Applicant
AND
MICHAEL MOLONEY OF WILDFLOWER ELECTRICAL AND REFRIGERATION
SERVICES PTY LTD
Respondent

Catchwords : Industrial law (WA) – Contractual benefits claim – Applicant failed to appear at the hearing – Application that the matter be dismissed – Application for costs and expenses – Principles applied – Exercise of discretion – Equity, good conscience and the substantial merits of the case – Costs and expenses awarded – Orders issued

Legislation : *Industrial Relations Act 1979* (WA) ss 26(1)(a), 27(1)(a), 27(1)(c), 32
Fair Work Act 2009 (Cth)
Industrial Relations Commission Regulations 2005 (WA) regs 24, 26, 37

Result : Orders issued

Representation:
Counsel:
Applicant : No appearance
Respondent : Ms S De Silva
Solicitors:
Respondent : DLA Piper Australia

Case(s) referred to in reasons:

Brailley v Mendex Pty Ltd t/a Mair and Co Maylands (1992) 73 WAIG 26

Hazart Pty Ltd t/a Southern Cross Koala and St Croix Pty Ltd t/a Southern Cross Koala v Mullan (1992) 73 WAIG 51

Reasons for Decision

1 This application for contractual benefits brought by the applicant, Mr Martin, was listed for hearing before the Commission on 26 and 27 March 2014. On the first day listed to hear the matter, Mr Martin failed to appear. As a consequence of Mr Martin's failure to appear, Wildflower Electrical has made two applications. The first application is that the substantive claim be dismissed under s 27(1)(a) of the Act. The second application is for costs and expenses under s 27(1)(c) of the Act, caused by the adjournment. At the hearing on 26 March the Commission made orders for Mr Martin to file and serve an affidavit as to the reason for his failure to appear. Orders were also made requiring Wildflower Electrical to file and serve an affidavit as to costs and expenses incurred in attending the proceedings.

Application to dismiss

- 2 Wildflower Electrical submitted that there was no good reason for Mr Martin's failure to appear. It was submitted that Mr Martin should have been well aware of the dates of the hearing from the notice of hearing sent to both parties. Also, reference was made to a recent s 32 conference where the dates of the hearing were referred to by both parties. Additionally, in the days leading up to the hearing of the matter, email correspondence passed between the parties, regarding it.
- 3 In accordance with the Commission's order, Mr Martin filed an affidavit. In the affidavit Mr Martin apologises "to all concerned" for his failure to appear on the days listed for hearing. Mr Martin referred to being under acute stress at this time, and that he has been receiving medical treatment accordingly. Mr Martin has been on medication for this reason. Additionally, he has been referred to a psychologist. Mr Martin said that the combined effect of his present condition and medication led him to missing the date of the hearing. This is despite Mr Martin saying that he has been working towards the hearing of his claim for some one and a half years.
- 4 Attached to Mr Martin's affidavit is a letter from his treating general practitioner Dr McDonnell dated 26 March 2014. Dr McDonnell said that Mr Martin first attended on him on 15 January 2014 with symptoms of extreme stress and insomnia, as a result of a number of issues. Dr McDonnell saw Mr Martin again on 18 April 2013 and prescribed medication and referred him to a psychologist, as his condition had not improved. It seems the date of "18 April 2013" referred to in Dr McDonnell's letter must be in error, as it predates the attendance by Mr Martin on 15 January 2014. Dr McDonnell referred to the combination of extreme stress and medication, leading to Mr Martin forgetting a number of major events such as a child's recent birthday and him making regular calls to his children, which he has never failed to do in the past year. Dr McDonnell described the failure to attend the hearing as keeping with this same pattern of conduct.
- 5 I should also note that at about 10.45am on the day of the hearing, my Associate made telephone contact with Mr Martin, as to his whereabouts. The file note of the conversation refers to Mr Martin telling my Associate that he thought the matter listed was for a telephone conference instead, and not a hearing. Mr Martin was apparently in Dunsborough, in the Southwest of the State at the time. A file note of a further telephone conversation between my Associate and Mr Martin later on 26 March refers to Mr Martin attending his doctor and being on medication for depression. Additionally, a file note of an earlier telephone conversation between my Associate and Mr Martin on 11 March reveals that Mr Martin was making arrangements to summons witnesses and he was directed to the Commission's website for this purpose.
- 6 Based on the affidavit of Mr Martin, the conversations between my Associate and Mr Martin and in the absence of other compelling reasons raised by Wildflower Electrical, I am not persuaded to dismiss the application under s 27(1)(a) of the Act. Whilst Wildflower Electrical has provided written submissions to the effect that as Mr Martin was an apprentice, he was not, at common law, an employee, that is not of itself, in the absence of submissions from Mr Martin in a hearing of the issues, a basis to support the dismissal of the application.

Application for costs

- 7 Unlike in the federal jurisdiction under the Fair Work Act 2009 (Cth), where there is a greater capacity to award costs, in this jurisdiction, at least presently, the capacity to obtain costs orders is limited. Section 27(1)(c) of the Act provides:

27. Powers of Commission

- (1) Except as otherwise provided in this Act, the Commission may, in relation to any matter before it —

...

- (c) order any party to the matter to pay to any other party such costs and expenses including expenses of witnesses as are specified in the order, but so that no costs shall be allowed for the services of any legal practitioner, or agent;

- 8 The approach of the Commission to the exercise of discretion under s 27(1)(c) of the Act is well settled. The principle being, it is only in special or extreme circumstances that cost orders will be made: *Brailley v Mendex Pty Ltd t/a Mair and Co Maylands* (1992) 73 WAIG 26; *Hazart Pty Ltd t/a Southern Cross Koala and St Croix Pty Ltd t/a Southern Cross Koala v Mullan* (1992) 73 WAIG 51. These cases reflect the general policy of industrial jurisdictions in the past that each party generally bears their own costs and they do not follow the event, as in the civil courts.
- 9 Wildflower Electrical has set out its costs and expenses incurred in attending the proceedings. Mr Moloney, the principal of Wildflower Electrical is presently based in Karratha. He had to fly to Perth and arrange hotel accommodation for 25, 26 and 27 March. Also as a sub-contractor, Wildflower Electrical lost income for both dates of the hearing. The loss of income claimed is \$1,485. The cost of a flight to Perth from Karratha on 25 March and a return flight on 26 March are claimed in the

sum of \$714.63. Accommodation costs for three nights in the sum of \$357 are claimed. The evidence of Mr Moloney was that the hotel would not waive the further two nights booked for 26 and 27 March. Claimed also are taxi and meal expenses in the sum of \$200. The total costs claimed by Wildflower Electrical are in the sum of \$2,756.63.

- 10 In this case, the merits of Mr Martin's claim are yet to be heard. They will be heard on a date to be fixed by the Commission. As a consequence of Mr Martin's failure to appear, Wildflower Electrical has incurred substantial costs in travelling to Perth from the Northwest of the State. Fortunately it seems, Mr Moloney was able to return to Karratha on 26 March and therefore avoided incurring additional costs, by way of further lost income. Whilst Mr Martin has sought to explain his failure to appear on the dates listed for the hearing of the matter, this has imposed a financial penalty on Wildflower Electrical, without any fault on it. Also, given that the dates of hearing were only referred to by the parties a short time prior to the dates listed, in a recent s 32 conference and were the subject of exchanges between the parties, it is all the more perplexing as to Mr Martin's failure to appear, despite the content of the letter from his medical practitioner. There is also some inconsistency between Mr Martin's affidavit and his conversations with my Associate on 26 March.
- 11 Mr Martin was given an opportunity to respond to Wildflower Electrical's application for costs. He initially submitted on 23 April 2014 that he did not believe that Mr Moloney had lost income as Mr Moloney had stated in the past that he was an employee of Rio Tinto, and could have scheduled a break in his roster around the hearing dates. Mr Martin also submitted that Mr Moloney's choice of accommodation was his decision and he could have stayed with a friend. Mr Martin also said that he wanted copies of Mr Moloney's work roster and receipts for expenses. This is so despite the affidavit of Mr Moloney, with its annexures, being sent by email at the email address used by Mr Martin for communication. For the purposes reg 26 of the Industrial Relations Commission Regulations 2005, Mr Martin has not nominated an email address for formal service. Accordingly, it was not appropriate for the solicitors for Wildflower Electrical to serve the affidavit by email. Service should have been effected in accordance with reg 24 of the Regulations, that being by hand or pre-paid post. However from correspondence on the Commission's file it is clear that Mr Martin has received a copy of the affidavit and annexures. In accordance with reg 37, the Commission will waive compliance with reg 24 in this instance.
- 12 Subsequently, on 1 May 2014, Mr Martin, by an email to my Associate, advised that he now considered that Wildflower Electrical should be compensated fully for its costs arising from the adjournment, save for those relating to meals and taxi fares in the sum of \$200. Accordingly, Mr Martin now consents to an order that Wildflower Electrical be awarded costs and expenses in the sum of \$2,556.63.
- 13 Section 27(1)(c) of the Act is to be applied, as in all aspects of the Commission's jurisdiction, consistent with s 26(1)(a) which requires the Commission to discharge its jurisdiction and powers in accordance with equity, good conscience and the substantial merits of the case. In dealing with matters, the Commission is obliged to have regard to the interests of both parties in this matter. This requires the Commission to have regard to interests of not just the employee, but also the employer. In this case, I consider it would, in all of the circumstances, be unjust to not provide compensation to Wildflower Electrical for the substantial costs incurred by it in attending the proceedings. Having to travel to Perth for the dates of the hearing also no doubt caused some disruption to Wildflower Electrical's business. Considering all of the circumstances, and the now consent of Mr Martin, the Commission will order Mr Martin to pay Wildflower Electrical's costs and expenses in the sum of \$2,556.63.

2014 WAIRC 00369

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

LEIGH MARTIN

APPLICANT

-v-

MICHAEL MOLONEY OF WILDFLOWER ELECTRICAL AND REFRIGERATION SERVICES
PTY LTD

RESPONDENT

CORAM

COMMISSIONER S J KENNER

DATE

MONDAY, 5 MAY 2014

FILE NO/S

B 189 OF 2013

CITATION NO.

2014 WAIRC 00369

Result

Orders issued

Representation

Applicant

No appearance

Respondent

Ms S De Silva of counsel

Orders

HAVING heard Ms S De Silva of counsel on behalf of the respondent and there being no appearance by the applicant the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders –

- (1) THAT the respondent's application under s 27(1)(a) of the Act to dismiss the substantive claim be and is hereby dismissed.
- (2) THAT the applicant pay to the respondent costs and expenses in the sum of \$2,556.63 within 21 days of the date of the final order which issues disposing of these proceedings.

[L.S.]

(Sgd.) S J KENNER,
Commissioner.**2014 WAIRC 00600**

PARTIES

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
LEIGH MARTIN
APPLICANT

-v-
MICHAEL MOLONEY
WILDFLOWER ELECTRICAL AND REFRIGERATION SERVICES PTY LTD
RESPONDENT

CORAM COMMISSIONER S J KENNER
DATE WEDNESDAY, 9 JULY 2014
FILE NO/S B 189 OF 2013
CITATION NO. 2014 WAIRC 00600

Result Order issued
Representation
Applicant In person
Respondent Mr B Jackson of counsel

Order

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

- (1) THAT the hearing dates of 24 and 25 July 2014 be and are hereby vacated.
- (2) THAT the matter be listed for hearing for two days on dates to be fixed.
- (3) THAT the witness summonses filed on 12 and 30 June 2014 be and are hereby set aside.

[L.S.]

(Sgd.) S J KENNER,
Commissioner.**2015 WAIRC 00247**

PARTIES

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
LEIGH MARTIN
APPLICANT

-v-
MICHAEL MOLONEY
WILDFLOWER ELECTRICAL AND REFRIGERATION SERVICES PTY LTD
RESPONDENT

CORAM COMMISSIONER S J KENNER
DATE TUESDAY, 24 MARCH 2015
FILE NO/S B 189 OF 2013
CITATION NO. 2015 WAIRC 00247

Result Orders issued
Representation
Applicant In person
Respondent Mr B Jackson of counsel

Orders

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

- (1) THAT the hearing dates of 31 March 2015 and 1 April 2015 be and are hereby vacated.
- (2) THAT the matter be listed for hearing for two days on dates to be fixed.

(Sgd.) S J KENNER,
Commissioner.

[L.S.]

2015 WAIRC 00356

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION LEIGH MARTIN	APPLICANT
	-v-	
	MICHAEL MOLONEY WILDFLOWER ELECTRICAL AND REFRIGERATION SERVICES PTY LTD	RESPONDENT
CORAM	COMMISSIONER S J KENNER	
DATE	WEDNESDAY, 6 MAY 2015	
FILE NO/S	B 189 OF 2013	
CITATION NO.	2015 WAIRC 00356	

Result	Order issued
Representation	
Applicant	In person
Respondent	Mr B Jackson of counsel

Order

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

- (1) THAT the hearing dates of 12 May 2015 and 13 May 2015 be and are hereby vacated.
- (2) THAT the parties shall confer in relation to the categories of documents sought in the applicant's notice of application for discovery filed on 4 May 2015 over the next 7 days.
- (3) In the event that agreement cannot be reached by the parties in relation to the categories of documents referred to in par 2 above:
 - (a) The parties will notify the Commission in writing; and
 - (b) The matter will be listed for directions to deal with those categories that are not agreed.
- (4) THAT the matter be re-listed for hearing for two days on dates to be fixed.
- (5) THAT the parties have liberty to apply.

(Sgd.) S J KENNER,
Commissioner.

[L.S.]

2015 WAIRC 00391

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION LEIGH MARTIN	APPLICANT
	-v-	
	MICHAEL MOLONEY WILDFLOWER ELECTRICAL AND REFRIGERATION SERVICES PTY LTD	RESPONDENT
CORAM	COMMISSIONER S J KENNER	
DATE	THURSDAY, 21 MAY 2015	
FILE NO/S	B 189 OF 2013	
CITATION NO.	2015 WAIRC 00391	

Result Application stayed
Representation
Applicant Mr L Martin
Respondent Mr B Jackson of counsel

Order

WHEREAS a sequestration order was made pursuant to the Bankruptcy Act 1966 (Cth) on 11 May 2015 against the applicant's estate;

AND WHEREAS pursuant to s 60(2) of the Bankruptcy Act 1966 (Cth) proceedings must be stayed, unless and until, the applicant's trustee makes an election, in writing, to either continue or discontinue these proceedings;

NOW THEREFORE the Commission, pursuant to the powers conferred on it under the Industrial Relations Act 1979 hereby orders – THAT subject to a further order of the Commission this application be and is hereby stayed.

[L.S.]

(Sgd.) S J KENNER,
Commissioner.**2019 WAIRC 00026**

PARTIES WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
LEIGH MARTIN **APPLICANT**

-v-
MICHAEL MOLONEY
WILDFLOWER ELECTRICAL AND REFRIGERATION SERVICES PTY LTD **RESPONDENT**

CORAM SENIOR COMMISSIONER S J KENNER
DATE THURSDAY, 31 JANUARY 2019
FILE NO/S B 189 OF 2013
CITATION NO. 2019 WAIRC 00026

Result Direction issued
Representation
Applicant In person
Respondent Mr D Kiel of counsel

Direction

HAVING heard Mr D Kiel of counsel on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 and the Industrial Relations Commission Regulations 2005 hereby directs –

- (1) THAT the Registrar is to issue witness summonses in terms of each of the minutes of proposed summons set out in attachment "A" and attachment "B" of the respondent's Form 1 – Notice of application (general) filed on 16 January 2019 and annexed to this direction.
- (2) THAT the applicant and respondent are granted leave to inspect, and take copies of, any documents produced pursuant to the abovementioned summonses.

[L.S.]

(Sgd.) S J KENNER,
Senior Commissioner.**2019 WAIRC 00232**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION : 2019 WAIRC 00232
CORAM : SENIOR COMMISSIONER S J KENNER
HEARD : THURSDAY, 14 FEBRUARY 2019
DELIVERED : FRIDAY, 10 MAY 2019
FILE NO. : B 189 OF 2013
BETWEEN : LEIGH MARTIN
Applicant
AND
MICHAEL MOLONEY
WILDFLOWER ELECTRICAL AND REFRIGERATION SERVICES PTY LTD
Respondent

Catchwords	:	<i>Industrial Relations Law (WA) - Contractual benefits claim - Claim for underpayment of salary - Whether applicant was an independent contractor or employee - Whether a separate contract of service and training contract existed - Whether an apprentice under the Vocational Education and Training Act 1996 (WA) can be an independent contractor - Whether a collateral contract existed for payment above award rate - Principles applied - Applicant was an employee for work performed under training contract - Separate contract of service did not exist - Agreed rate of pay above award rate formed collateral contract - Applicant's claims do not constitute contractual benefits within Commission's jurisdiction - If separate contract did exist no benefit has been denied - Claim for underpayment of salary refused - Order issued</i>
Legislation	:	<i>Industrial Relations Act 1979 (WA)</i> <i>Bankruptcy Act 1966 (Cth) ss 60(2), 86</i> <i>Vocational Education, Employment and Training Act 1994 (SA)</i> <i>Vocational Education and Training Act 1996 (WA)</i>
Result	:	Application dismissed
Representation:		
Counsel:		
Applicant	:	In person
Respondent	:	Mr D Kiel of counsel
Solicitors:		
Respondent	:	DLA Piper

Case(s) referred to in reasons:

Ahern v AFTPI (1999) 79 WAIG 1867
Automatic Fire Sprinklers v Watson (1946) 72 CLR 435
Coxon v Kat [2009] SASC 28
Csomore v Public Service Board of New South Wales (1987) 10 NSWLR 587
Ford v Lismore City Council (1989) 28 IR 68
Heilbut Symons and Co v Buckleton [1912] AC 30
Hotcopper Australia Ltd v Saab (2001) 81 WAIG 2704
Nokes v Doncaster Amalgamated Collieries Ltd [1940] AC 1014; [1940] 3 All ER 549
Oates v Sanders Executive Pty Ltd t/a L J Hooker Morley (1999) 79 WAIG 1192
Personnel Contracting Pty Ltd t/as Tricord Personnel v The Construction Forestry Mining and Energy Union of Workers (2005) 85 WAIG 5
Philip Digney v The Black Cockatoo Preservation Society of Australia [2014] WAIRC 01285; (2014) 95 WAIG 562
Shepperd v Ryde Corp (1952) 85 CLR 1

Case(s) also cited:

Australian Mutual Provident Society v Chaplin (1978) 18 ALR 385
Balfour v Travelstrength Ltd (1980) 60 WAIG 1015
BGC (Australia) Pty Ltd v Phippard [2002] WASCA 191
Byrne v Australian Airlines Limited (1995) 185 CLR 410
Coventry v Charter Pacific Corporation Limited [2005] HCA 67
Deane v The City Bank of Sydney (1904) 2 CLR 198
Equuscorp Pty Ltd v Glengallan Investments Pty Ltd [2004] HCA 55
Fair Work Ombudsman v D'Adamo Nominees Pty Ltd (No.4) [2015] FCCA 1178
Fergusson v The Salvation Army (Western Australia) Property Trust as the trustee for the Salvation Army (WA) Social Work trading as Salvos Stores [2014] WAIRComm 1042
Gye v McIntyre (1991) 171 CLR 609
Hart v McDonald (1910) 10 CLR 417
Hartwig v Interstate Enterprises Pty Ltd trading as ATS Recruitment Services [2016] WAIRComm 741
Health Services Union of Western Australia (Union of Workers) v Director General of Health in Right of the Minister for Health as the Metropolitan Health Service, the South West Health Board and the WA Country Health Service [2008] WAIRComm 215

HAW Jones Pty Ltd v Neille [1967] WAR 181

Hoffman v TVT Media Pty Ltd (1997) 77 WAIG 2999

Hollis v Vabu (2001) 207 CLR 21

Hospital Products Ltd v United States Surgical Corporation (1984) 156 CLR 41

Hoyt's Pty Ltd v Spencer (1919) 27 CLR 133

James Turner Roofing Pty Ltd v Peters [2003] WASCA 28

Keane v Lomba Pty Ltd [1998] WAIRComm 25

Major v Bretherton (1928) 41 CLR 62

O'Donoghue v Argyle Diamond Mines Pty Ltd [1999] WAIRComm 120

Perth Finishing College Pty Ltd v Watts (1989) 69 WAIG 2307

Re Nguyen (1992) FCR 320

Stein v Blake [1996] AC 243

The Western Australian Builders' Labourers, Painters and Plasterers Union of Workers v R B Exclusive Pools Pty Ltd t/as Florida Exclusive Pools [1996] WAIRComm 231

Thompson v Gregmaun Farms Pty Ltd (2000) 80 WAIG 1733

Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd (2004) 219 CLR 165

Reasons for Decision

Background

- 1 These proceedings have a long history. The applicant filed his notice of application claiming denied contractual benefits under s 29(1)(b)(ii) of the *Industrial Relations Act 1979* (WA) ('IR Act') on 25 November 2013. Following three prior adjournments to allow proceedings in the Federal Circuit Court to run their course, the proceedings before the Commission were stayed by order dated 21 May 2015, on the basis that a sequestration order was made against the applicant under the *Bankruptcy Act 1966* (Cth) on 11 May 2015. In accordance with s 60(2) of that Act proceedings must be stayed, unless and until, the applicant's trustee makes an election, in writing, to either continue or discontinue these proceedings.
- 2 On 9 October 2018 this matter was listed for mention because the applicant informed my Chambers by letter of 30 August 2018, that he had been discharged from his bankruptcy. By letter dated 26 November 2018, a copy of which was provided to my Chambers by the applicant, the Official Trustee, appointed as trustee of the applicant's bankrupt estate, confirmed that any interest in the chose in action pertaining to the proceedings in the Industrial Relations Commission had been assigned to the applicant, and this had completed on 8 November 2018. Accordingly, the applicant advised that he wished to proceed with his application and the matter was listed for a hearing on the merits.
- 3 The applicant was initially engaged by the respondent, an electrical and refrigeration business, on or around April 2011, to carry out refrigeration work as a subcontractor. The applicant had his own business Refrigid Pty Ltd trading as Absolute Climate Control. He was contracting to the respondent for this work. How this arrangement came about is somewhat unclear. The applicant gave evidence that he first contacted the respondent when he responded to an advertisement for the sale of the respondent business. On the other hand, the respondent's position is that the applicant responded to an advertisement for the position of refrigeration mechanic. In any event, the applicant spoke with the respondent and decided to visit the respondent business in Margaret River to, according to the applicant, observe business operations, work with the respondent and consider purchasing the business. The respondent maintained that the applicant came to Margaret River to perform refrigeration work for the respondent in a subcontractor capacity.
- 4 At some point after April 2011, the idea was discussed that the applicant could complete an electrical apprenticeship under the supervision of the respondent, so that the applicant could gain a qualification in electrical work. There was some disagreement as to which party suggested or initiated this arrangement. The applicant gave evidence that the respondent offered the apprenticeship position to make the offer of the sale of the respondent business more attractive. The respondent's position is that the applicant approached the respondent to enquire about commencing an electrical apprenticeship.

The Training Contract

- 5 On 30 June 2011, the applicant and respondent signed a Training Contract under the *Vocational Education and Training Act 1996* (WA) ('VET Act WA') and the applicant commenced an electrical apprenticeship under the supervision of the respondent's Director, Mr Moloney. The contract stated the applicant was employed on a fulltime basis of 38 hours per week. The applicant gave evidence that the parties agreed to a salary of \$1,140.00 per week. He said that despite the apprenticeship, most of his work, approximately 90%, was refrigeration related. The applicant maintained that the respondent gave him an invoice book which he used for work done for the respondent. Tendered as exhibits A2 and R1 were bundles of invoice/statement documents from Absolute Climate Control to the respondent. These covered the period May to December 2011. The documents show that most of the work was for refrigeration services supplied by the applicant.
- 6 Mr Moloney testified that the applicant saw great potential working in business in the Margaret River region. He said the applicant "begged" him to give him an electrical apprenticeship, so he could get the skills in the electrical side of the business. According to Mr Moloney, the applicant would continue working as a contractor and would receive training at the same time. The agreement was the applicant would be paid \$50 per hour for refrigeration work and \$30 per hour for electrical work. This was significantly above the rates prescribed by the Electrical, Electronic and Communications Contracting Award 2010, which applied to the Training Contract and was specified in it. Despite this, Mr Moloney testified that he in fact paid the applicant,

more often than not, the higher rate for all of the work done. Mr Moloney said in his evidence that he paid the applicant for all work that he did for the respondent. Cheque records and bank statements, tendered as exhibits R6 and R7 respectively, were said by the respondent to support this.

- 7 The respondent also submitted that there was a separate collateral agreement to the Training Contract which created the obligation to pay Mr Martin for work he performed. The terms of this separate agreement, according to the respondent, were based on the payments of \$50 per hour for refrigeration work and \$30 per hour for electrical work, that were over the award rate.
- 8 The respondent submitted that it was open to the Commission to make findings that the relationship between the parties was a contracting arrangement. Despite this, the respondent conceded that a Training Contract, by nature, is one that would typically be an employment relationship. The applicant maintained that he was employed by the respondent between 30 June 2011 and 27 April 2012 and that it is contrary to the law to engage an electrical apprentice as a subcontractor.

Cancellation of the Training Contract

- 9 On or around 1 September 2011, the applicant purchased the respondent's refrigeration business name which traded as Margaret River Air Conditioning and Refrigeration. Whilst Mr Moloney said the respondent had an industrial property in Karratha, in the period October 2011 to January 2012, the respondent was still operating in the Margaret River area, mainly doing electrical work. He said that there was no reason the applicant could not have been involved in some of this work.
- 10 The respondent gave evidence that after September 2011, the applicant ceased regularly attending work for the respondent and after 2 December 2011, he did not attend work at all. The respondent says the applicant was experiencing a marital breakdown at that time and the respondent's Director, Mr Moloney, received numerous complaints from regular clients about Mr Martin, who "would go to a job and swear, kick and yell" and act otherwise inappropriately. The respondent said that when the applicant did work, it was as a refrigeration mechanic and he had to advertise for an electrician to cover the work that the applicant was supposed to do for the respondent company in Margaret River. The applicant also failed to attend the SouthWest Institute of Technology Training for required training.
- 11 The applicant gave evidence that after the sale of the business was complete, Mr Moloney would disappear for weeks at a time and in December 2011, Mr Moloney stopped providing work or training under the Training Contract. The applicant said that the work provided to him by the respondent was not sufficient to warrant employing a refrigeration mechanic, and this is why the applicant had to perform this work himself. The applicant said he could not afford to attend TAFE because he was not being provided with work. A bundle of documents tendered as exhibit R3, were tax invoices issued by Absolute Climate Control to various customers over the period September 2011 to December 2011. The applicant contended he had to work on his own behalf over this period because the respondent was not paying him.
- 12 The respondent gave evidence that he postponed cancelling the applicant's apprenticeship to give the applicant a chance to return to work, however eventually decided to make an application to cancel the Training Contract, after which the cancellation date of 27 April 2012 was granted. The applicant gave evidence that he was not opposed to the cancellation, as he was not receiving the requisite supervision and training required to successfully complete his qualification.
- 13 The applicant claims a sum of \$37,058.90 for the denied contractual benefit of underpayment of salary that the applicant says was not paid to him. The applicant says he was paid a total of \$13,706.00 throughout the period of his employment with the respondent.

Relevant legal principles

Denied contractual benefits

- 14 The relevant principles in relation to denied contractual benefits claims are well established. The issue to be determined is whether the applicant had a legal right under his employment contract with the respondent, to receive the claimed underpayment of salary. The applicant must establish that his claim relates to an industrial matter; that the applicant was an employee; that the benefit claimed is one to which the applicant was entitled under his contract of service; the contract is a contract of service; the benefit claimed is not under an award or order; and the benefit claimed has been denied: *Hotcopper Australia Ltd v Saab* (2001) 81 WAIG 2704; *Ahern v AFTPI* (1999) 79 WAIG 1867.

Employee or contractor

- 15 The issue of whether a person is an employee or an independent contractor, involves the consideration of the totality of the relationship between the parties: *Personnel Contracting Pty Ltd t/as Tricord Personnel v The Construction Forestry Mining and Energy Union of Workers* (2005) 85 WAIG 5. In *Philip Digney v The Black Cockatoo Preservation Society of Australia* [2014] WAIRC 01285; (2014) 95 WAIG 562 I set out the relevant principles at par 23, as follows:

23 The relevant principles as to whether a person should, as a matter of fact and law, be regarded as an employee or an independent contractor, have been dealt with by the Industrial Appeal Court. In *Personnel Contracting Pty Ltd t/as Tricord Personnel v The Construction Forestry Mining and Energy Union of Workers* (2004) 85 WAIG 5, Steytler J dealt with this issue at pars 20-28, EM Heenan J at pars 50-52 and Simmonds J dealt with the issue at pars 98-100. In particular, Simmonds J said at pars 95-101 as follows:

95 The common law test for distinguishing a relationship of employer/employee, on the one hand, and principal/independent contractor, on the other, has recently been reviewed in some detail in the judgment of Hasluck J of this Court in *Birighitti* (*supra*), at [57] to [67]. The other members of the Court (Anderson J, who dissented on the jurisdictional issue in the case, and Scott J) did not find it necessary to enter into the question in as much detail because of the case's particular facts.

96 In this case, where it seems to me the matter is rather more evenly balanced than in *Birighitti*, I consider it is necessary to review the matter again, particularly as it was contended in this case that there had been a

shift in the law not entered into in *Birighitti*. I review the matter again without meaning to depart from the view of Hasluck J there in any way, but to emphasise matters of first principle particularly relevant to this case.

97 The most recent High Court authority in point, for the purposes of vicarious liability for the negligence of a bicycle courier, is *Hollis v Vabu Pty Ltd* (*supra*). There was a clear majority on the issue of the application of the test, that of Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ, with McHugh J dissenting, and Callinan J not expressing a concluded view on the matter. As to the test itself, however, I see no clear difference between all of the members of the Court who expressed a concluded view.

98 The test set out in *Vabu* by the majority is expressed in terms of the difference between a person (an employee) whose work serves another, and is done **in that other's business**, on the one hand, and a person whose work is likewise for the benefit of another's business, but is done in the course of the carrying on of a **trade or business of the person doing the work**, on the other. The majority referred (*Vabu*, at 39) for this purpose to *Colonial Mutual Life Assurance Society Ltd v Producers and Citizens Co-operative Assurance Co of Australia Ltd* (1931) 46 CLR 41, at 48, per Dixon J, and to *Marshall v Whittaker's Building Supply Co* (1963) 109 CLR 210, at 217 per Windeyer J, where language of this sort is used. The *Vabu* majority also referred to *Northern Sandblasting Pty Ltd v Harris* (1997) 188 CLR 313, at 366 per McHugh J, where the distinction is expressed in terms of the independent contractor as a person who does the work not as "the representative of the employer".

99 For the application of the test, and particularly for the relevance of the matter of "control" of the work done, the *Vabu* majority refer to the dicta in *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16, at 29 per Mason J. There, his Honour acknowledges the historical significance of the "control test" and the difficulties in using it in the historical ways in modern working conditions, where he says

"The common law has been sufficiently flexible to adapt to changing social conditions by shifting the emphasis in the control test from the actual exercise of control to the right to exercise it, 'so far as there is scope for it', even if it be 'only in incidental or collateral matters': *Zuijs v Wirth Brothers* [(1955) 93 CLR 461, at 571]. Furthermore, control is not now regarded as the only relevant factor. Rather it is the totality of the relationship between the parties which must be considered."

100 What his Honour meant by the reference to the factors, including but not limited to control, subsumed by the "totality of the relationship" is indicated by an earlier passage in his judgment in *Stevens* (*supra*), which is not referred to in *Vabu*, but which is a passage quoted in *Odco* as setting out the law on this point (*supra*) at 754):

"The approach of this court has been to regard it [control] merely as one of a number of indicia which must be considered in the determination of the question: *Queensland Stations Pty Ltd v FCT* (1945) 70 CLR 539 at 552; *Zuijs' case* [*supra*]; *FCT v Barrett* (1973) 129 CLR at 401; 2 ALR 65; *Marshall* [*supra*] at 218. Other relevant factors include, but are not limited to, the mode of remuneration, the provision and maintenance of equipment, the obligation to work, the hours of work and provision for holidays, the deduction of income tax and the delegation of work by the putative employee."

101 As these dicta tend to indicate, the application of the test is a matter of some difficulty, as this case illustrates. I need to consider that question separately.

24 His Honour then went on to apply the test set out in the various decisions of the High Court referred to, and took into account a number of factors including control, the mode of remuneration, the provision and maintenance of equipment, the obligation to work, the hours of work and provision for holidays, the deduction of income tax, the delegation of work, indicia of a separate business, integration in the organisation, and the language of the parties' written contract: see pars 108-150 inclusive.

25 The "multi factor" test referred to and applied by Simmonds J, as set out above, was referred to and applied by the High Court in *Hollis v Vabu Pty Limited* (2001) 207 CLR 21

Contract of service or contract of training?

16 In Western Australia, apprentices can be employees and any rights and duties as between the apprentice and their employer arise in the first instance and are governed by, the applicable training legislation. The relevant legislation applicable to the applicant's contract of training is the VET Act WA. Section 60E is in the following terms:

60E. Training Contracts

(1) A training contract is a contract under which –

(a) a person who is or will be an employer agrees the following –

- (i) that a person who is or will be an employee will be employed while he or she fulfils the requirements of the contract in order to obtain a class A or class B qualification;
- (ii) to train the employee in accordance with the contract;
- (iii) to permit the employee to fulfil his or her obligations under the contract and to be trained and assessed in accordance with the contract;
- (iv) that any time spent by the employee in performing his or her obligations under the contract and is being trained and assessed under the contract, whether at the employer's workplace or not, is to be

taken for all purposes (including the payment of remuneration) to be time spent working for the employer; and

(b) the employee agrees to fulfil his or her obligations under the contract and to be trained and assessed in accordance with the contract.

(2) With the approval of the chief executive, 2 or more employers may enter into a training contract with one apprentice.

(3) A training contract must do the following –

(a) state the class A or B qualification to which the contract relates;

(b) comply with the regulations and with any requirements imposed under the regulations.

(4) Subject to the regulations, a training contract –

(a) may be varied by the parties; and

(b) may be suspended by a party; and

(c) may be assigned by the employer to another person who employs the apprentice.

17 It is well-established that an apprentice/trainee is usually an employee and the fact an apprentice is an employee, does not necessarily mean that a contract of service is in force. As was said by the Full Court of the Supreme Court of South Australia in *Coxon v Kat* [2009] SASC 28 at 305 (Bleby J with Duggan and White JJ agreeing):

305 At common law, there is a distinction between a contract of service and a contract of apprenticeship depending on whether the primary purpose of the contract is the performance of work for the master or the teaching of a trade. [6] A contract is either one or the other. It was never suggested that there could be two contracts in parallel - a contract of employment and a separate contract of apprenticeship. It follows that a contract of apprenticeship could always provide, as a secondary purpose, for the performance of work or service for the employer such that the apprentice was also an employee.

18 It appears that the contract of traineeship is generally the sole contract existing between the apprentice/trainee and their trainer. The contract establishes the relationship of an apprentice as an employee with their employer, who is also the trainer of the apprentice.

19 Contracts of traineeship are regulated by the relevant training legislation and may therefore be exempt from some common law practices where the common law position is clearly overridden. For example, in *Coxon*, it was unanimously held that upon the change of ownership of the business in question, the contract of training that the business entered into with a trainee was not terminated, as would be the effect at common law of a contract of employment (see for example, *Ford v Lismore City Council* (1989) 28 IR 68). The common law position is that a relationship will be governed by either a contract of employment or a contract of traineeship, however it is recognised that a contract of traineeship may and often does have a secondary purpose of providing a service. It is well-established in Western Australia that the common law position has been altered by statute which has provided, for more than a century, that an apprentice is an employee. This is recognised in the definition of “employee” in s 7 of the current IR Act.

20 The approach on the cases, given the regulation of contracts of traineeship by statute, is to consider the operation of the legislation. The terminology used by the legislation is a significant factor in determining whether the contract of traineeship creates a contract of service and an employment relationship. In *Coxon*, the use of terms such as “employer”, “conditions of employment” and “to employ and to teach” in Part 4 of the *Vocational Education, Employment and Training Act 1994* (SA) were considered relevant. This terminology is largely in the same terms in the VET Act WA and is consistent with an apprentice being employed. Furthermore, in s 60E(2) of the VET Act WA, two or more employers may be party to the same Training Contract with a trainee or an apprentice. This concept is plainly at odds with a contract of employment at common law. So too is the ability for a Training Contract to be assigned from one employer to another under s 60E(4)(c). A contract of service is a contract of a personal nature and may not be assigned in this manner, without the express or implied consent of the employee: *Nokes v Doncaster Amalgamated Collieries Ltd* [1940] AC 1014; [1940] 3 All ER 549.

21 The applicant was to complete an electrical qualification, part of which included an apprenticeship with the respondent. As such, the applicant and respondent entered into the Training Contract under the VET Act WA. Prior to this, the applicant may have commenced work with the respondent in an alternative capacity, as a subcontractor or as an employee performing refrigeration work as a mechanic. The circumstances of the present case are unusual in that the apprentice also completed other work for the employer or trainer, outside the scope of the Training Contract, or work of a different kind to that contemplated by the Training Contract. Some work performed by the applicant was not electrical work.

Consideration

22 The difficulty arising in this case is the lack of clarity in relation to the work done by the applicant on his own behalf, through his business Absolute Climate Control, in relation to refrigeration services, and other non-refrigeration work. It was common ground that the applicant was performing refrigeration work for both the respondent and for other customers at some time in the working relationship. In this respect, the applicant used his own business and invoiced for the work performed, including for GST. The respondent also maintained that the applicant was engaged as a contractor in relation to both the electrical and refrigeration work, despite the parties entering into the Training Contract.

23 An issue arising therefore is whether a person who is an independent contractor can also be an apprentice for the purposes of s 60E of the VET Act WA. I do not consider they can be. As I have mentioned above, the independence of an independent contractor/principal relationship is quite at odds with the required training, oversight and supervision inherent in an apprenticeship. The essence of an apprenticeship is a commitment by the employer to train in the relevant field and the corresponding commitment by the apprentice to undertake and successfully complete the training offered. As an apprenticeship

- requires close supervision and, by implication, further training, this is intrinsically at odds with the notion that an independent contractor could be the subject of an apprenticeship contract.
- 24 Furthermore, the terms of the Training Contract (exhibit A1) and the relevant provisions of the VET Act WA, set out above, make it plain that in addition to the training obligations set out in the Training Contract, the relationship between the parties under the Training Contract is one of employer and apprentice. Nowhere in either the Training Contract or the VET Act WA, is it contemplated that the relationship between the parties is or could be, that of principal and independent contractor. Accordingly, to the extent that work was done by the applicant under the terms of the Training Contract, in relation to electrical work, it was governed by the Training Contract, the VET Act WA and the relevant award. The applicant was an employee in relation to this work and not an independent contractor.
- 25 This does not mean however, that the applicant was also employed under a separate common law contract of service, which is an essential ingredient of a contractual benefits claim in this jurisdiction. In my view, the conclusions reached by the Court in *Coxon*, apply with equal force in this jurisdiction. The material terms of the vocational and training legislation under consideration in that case are very similar to the terms of the VET Act WA. It is clear from both the VET Act WA and the terms of the Training Contract itself, that its primary purpose was not the performance of work, but an undertaking to provide and receive training respectively. In such circumstances, as concluded in *Coxon*, a secondary purpose of the Training Contract can be the performance of work, which the applicant clearly did during the period it was in effect.
- 26 Accordingly, whilst I accept that, at least in relation to work performed under the Training Contract the applicant was an “employee” for the purposes of s 7 of the Act, he was not party to a separate contract of service. His claim for wages is not within the Commission’s denied contractual benefits jurisdiction.
- 27 In relation to other work performed by the applicant, this is also a difficult issue to resolve. It is difficult because of the overlap and degree of confusion on the evidence as to the work done by the applicant under the Training Contract as an employee on the one hand, and the work done as a contractor under the auspices of his own business, on the other. It was clear on the evidence that prior to and on the sale of the business to the applicant, the applicant was performing refrigeration contracting work on his own behalf. Exhibit R3 demonstrates that at least over the period September to December 2011, the applicant was performing refrigeration work on behalf of his business for a range of different customers in the Margaret River area. Whilst the applicant maintained that he had to do so because the respondent was not giving him sufficient work, the fact remains that the applicant performed a substantial amount of work as an independent contractor and not as an employee of the respondent, under a common law contract of employment.
- 28 As noted above, the respondent also advanced an alternative argument to the effect that the arrangement between the applicant and the respondent, to pay the applicant the higher hourly rate of \$30 per hour for electrical work, significantly higher than the award rate, constituted a collateral contract. A collateral contract is one where there is a separate representation or promise by one party to the other, to induce the other to enter the main contract: *Shepherd v Ryde Corp* (1952) 85 CLR 1. The respondent submitted that it was open to conclude from the evidence that the applicant would not enter into the Training Contract at the base rate of pay in the award and the offer of the higher rate of \$30 was made. Part of this arrangement was that the applicant would continue to perform refrigeration work via his own company, as required. The applicant would record his hours of work by way of an invoice presented to the respondent and the applicant would be paid at the higher rate for those hours. On this basis, it was submitted by the respondent that the collateral contract had an independent existence and constituted an enforceable contract: *Heilbut Symons and Co v Buckleton* [1912] AC 30. The further argument put in this regard was that for the over award rate of pay agreed to be effective under the Training Contract, there needed to be compliance with reg 46 of the Vocational Education and Training (General) Regulations 2009. This requires a formal variation to the Training Contract. In the absence of this, any purported variation is ineffective.
- 29 The upshot of this according to the respondent, was that any collateral contract to pay the applicant the higher rate of pay cannot constitute a denied contractual benefit. This is because whilst the payment of the hourly rate constitutes a “benefit” for the purposes of s 29(1)(b)(ii) of the IR Act, it is not a benefit “arising under a contract of employment”.
- 30 In my view there is considerable force in this argument. I accept that on the evidence it is open to conclude that the applicant, understandably, would not accept the award rate of pay for the adult apprenticeship, given his skills and experience. I also accept that the higher rate of pay was agreed on the basis it would make the apprenticeship more attractive to the applicant, as an experienced refrigeration tradesperson. As such, this is a further basis to conclude that the arrangement for the higher agreed rate was not a separate contract of employment, but a collateral contract, which stood apart from the Training Contract. It was not a contract of service and as such, cannot form the basis for a contractual benefits claim in this jurisdiction.
- 31 Furthermore, under reg 46(3) of the Regulations, the parties may vary the employment arrangement that governs a training contract under the VET Act WA. However, such a variation must be provided in writing to and receive the written approval of the Chief Executive Officer under reg 46(5) of the Regulations. Any purported variation that does not comply with this requirement is of no effect. The only employment arrangement specified in cl 38 of the Training contract was the federal award that applied. There was no reference to the agreed higher hourly rates of \$30 and \$50 per hour respectively. Thus, even if the terms of the Training Contract could constitute a separate and enforceable contract of service, its terms did not include the rates of pay on which the applicant’s claim was based.
- 32 As to the claims for annual leave and loading, these were award benefits under the relevant award as specified in the Training Contract. In the absence of any separate common law contract aside from the Training Contract, there is no basis for any contention that the terms of the award could be incorporated into the contract and be enforceable in this jurisdiction. The applicant has not established any common law contractual entitlement in this respect. As for the applicant’s superannuation claim, it is settled that statutory entitlements to superannuation are not enforceable as contractual benefits: *Oates v Sanders Executive Pty Ltd t/a L J Hooker Morley* (1999) 79 WAIG 1192. There was no suggestion that the superannuation claim had a basis other than as a statutory entitlement.

- 33 For these reasons I am not satisfied the applicant’s claims constitute contractual benefits amenable to the Commission’s jurisdiction.
- 34 In the alternative, if I am incorrect in this regard, I turn to consider whether, on the evidence, if there was a contract of service between the parties at the material times, any benefit claimed under it has been denied. It is important to clearly re-state in this respect what the agreement was. The Training Contract specified the application of the award at cl 38. However, these proceedings are not in the nature of enforcement of the award. Claims of that kind must be brought elsewhere. As I have already found, the agreement between the parties was for the payment by the respondent to the applicant of \$30 an hour for electrical work and \$50 per hour for refrigeration work. I reject the contention of the applicant that it was agreed that the applicant be paid \$1,140.00 per week for a 38-hour week. This seems to be how the applicant has chosen to describe the arrangement. Whilst reference to this figure was made in a document entitled “Support for Adult Apprentices Claim Form Checklist”, attached to the applicant’s notice of application, it is unclear what this was about. It seems it may have been part of some form of incentive scheme to employers to employ apprentices. However, I am only concerned for present purposes, with the terms of any contract of service and the evidence before me in these proceedings.
- 35 The material tendered in evidence, by way of invoices provided by the respondent and cheque and bank statements of the respondent, lead to the conclusion, as summarised by the respondent in its written submissions, that the applicant was paid for all work that he performed under the Training Contract. This covered the entire period from July 2011 to June 2012. I have no reason on the documentary evidence and the testimony of Mr Moloney, to doubt that the applicant was paid about \$15,200 over this period. I have also found that for the reasons set out above, the applicant’s attendance for work was very irregular after September 2011 and he did not attend TAFE, as required under the Training Contract, at any time. On the evidence, it seems that after early December 2011, the applicant did not attend for work at all.
- 36 The essence of the applicant’s contractual claim was for payment of \$1,140.00 per week for 38 hours of work for the duration of the Training Contract, until its termination on 27 April 2012. This claim could not be made out, even if there was a stand-alone contract of service on the terms alleged by the applicant. This is because the applicant cannot claim for payment of wages or salary in respect of work not performed by him. The essence of a contract of service is the performance of work, in return for which, a wage or salary is paid: *Automatic Fire Sprinklers v Watson* (1946) 72 CLR 435; *Csomore v Public Service Board of New South Wales* (1987) 10 NSWLR 587. It is also the case that the terms of the Training Contract itself, expressly reflected this core principle.
- 37 For these reasons, the applicant cannot demonstrate that he performed the work to be entitled to payment under any contract of service with the respondent, even if one had been in existence over the relevant period. Given this conclusion, it is unnecessary for me to consider the respondent’s alternative argument that if any monies are found to be owed to the applicant, it should be the subject of a set-off under s 86 of the *Bankruptcy Act 1966* (Cth).
- 38 Accordingly, for the foregoing reasons, the application must be dismissed.

2019 WAIRC 00215

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION LEIGH MARTIN	APPLICANT
	-v- MICHAEL MOLONEY WILDFLOWER ELECTRICAL AND REFRIGERATION SERVICES PTY LTD	RESPONDENT
CORAM	SENIOR COMMISSIONER S J KENNER	
DATE	FRIDAY, 10 MAY 2019	
FILE NO/S	B 189 OF 2013	
CITATION NO.	2019 WAIRC 00215	

Result	Order issued
Representation	
Applicant	In person
Respondent	Mr D Kiel of counsel

Order

HAVING heard the applicant in person and Mr D Kiel of counsel on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders –

THAT the application be and is hereby dismissed.

[L.S.]

(Sgd.) S J KENNER,
Senior Commissioner.

2019 WAIRC 00208

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION	
PARTIES	MARISSA OLDS	APPLICANT
	-v-	
	RATTIGAN KEARNEY & BOCHAT	RESPONDENT
CORAM	SENIOR COMMISSIONER S J KENNER	
DATE	WEDNESDAY, 8 MAY 2019	
FILE NO/S	U 28 OF 2019	
CITATION NO.	2019 WAIRC 00208	

Result	Order issued
Representation	
Applicant	No appearance
Respondent	No appearance

Order

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

THAT the application be and is hereby discontinued by leave.

[L.S.]

(Sgd.) S J KENNER,
Senior Commissioner.

2018 WAIRC 00919

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION	
PARTIES	COLIN SHARROCK	APPLICANT
	-v-	
	DOWNER EDI MINING PTY LTD	RESPONDENT
CORAM	SENIOR COMMISSIONER S J KENNER	
DATE	FRIDAY, 21 DECEMBER 2018	
FILE NO/S	B 83 OF 2018	
CITATION NO.	2018 WAIRC 00919	

Result	Order issued
Representation	
Applicant	Mr C Young as agent
Respondent	Mr N Ellery of counsel

Order

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

THAT the application be and is hereby discontinued by leave.

[L.S.]

(Sgd.) S J KENNER,
Senior Commissioner.

2018 WAIRC 00750

PARTIES WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
GAVIN SMITH

APPLICANT

-v-

DOUGLAS JONES FINANCIAL SERVICES

RESPONDENT

CORAM SENIOR COMMISSIONER S J KENNER
DATE FRIDAY, 21 SEPTEMBER 2018
FILE NO/S B 54 OF 2018
CITATION NO. 2018 WAIRC 00750

Result Order issued
Representation
Applicant Mr P Mullally as agent
Respondent Mr L Jones

Order

HAVING heard Mr P Mullally as agent on behalf of the applicant and Mr L Jones on behalf of the respondent the Commission, pursuant to the powers conferred on it by the Industrial Relations Act 1979, hereby orders -

THAT the name of the respondent be amended by the deletion of the name 'Douglas Jones Financial Services' and the insertion in lieu thereof the name 'Silkwood Holdings (WA) Pty Ltd as trustee for the Diablo Discretionary Trust trading as Douglas Jones Financial Services'.

[L.S.]

(Sgd.) S J KENNER,
Senior Commissioner.

2018 WAIRC 00757

PARTIES WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
GAVIN SMITH

APPLICANT

-v-

SILKWOOD HOLDINGS (WA) PTY LTD AS TRUSTEE FOR THE DIABLO DISCRETIONARY TRUST TRADING AS DOUGLAS JONES FINANCIAL SERVICES

RESPONDENT

CORAM SENIOR COMMISSIONER S J KENNER
DATE TUESDAY, 25 SEPTEMBER 2018
FILE NO/S B 54 OF 2018
CITATION NO. 2018 WAIRC 00757

Result Order issued
Representation
Applicant Mr P Mullally as agent
Respondent Mr L Jones

Order

HAVING heard Mr P Mullally as agent on behalf of the applicant and Mr L Jones on behalf of the respondent the Commission, pursuant to the powers conferred on it by the Industrial Relations Act 1979, hereby orders -

THAT the applicant be and is hereby granted leave to amend his application by removing his claims for annual leave, long service leave and superannuation contributions.

[L.S.]

(Sgd.) S J KENNER,
Senior Commissioner.

2019 WAIRC 00041

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION : 2019 WAIRC 00041
CORAM : SENIOR COMMISSIONER S J KENNER
HEARD : THURSDAY, 20 SEPTEMBER 2018, TUESDAY, 13 NOVEMBER 2018
DELIVERED : FRIDAY, 8 FEBRUARY 2019
FILE NO. : B 54 OF 2018
BETWEEN : GAVIN SMITH
 Applicant
 AND
 SILKWOOD HOLDINGS (WA) PTY LTD AS TRUSTEE FOR THE DIABLO
 DISCRETIONARY TRUST TRADING AS DOUGLAS JONES FINANCIAL SERVICES
 Respondent

Catchwords : *Industrial Relations Law (WA) - Contractual benefits claim - Claim for bonus entitlement and furniture allowance - Interpretation of vague and uncertain contractual terms - Variation of contract - Principles applied - Claim for bonus entitlement upheld in part - Claim for furniture allowance refused - Order issued*
Legislation : *Industrial Relations Act 1979 (WA)*
Result : Application upheld in part
Representation:
Counsel:
Applicant : Mr P Mullally as agent
Respondent : Mr L Jones

Case(s) referred to in reasons:*Ahern v AFTPI (1999) 79 WAIG 1867**Black Box Control Pty Ltd v Terravision Pty Ltd [2016] WASCA 219**Brett Arthur King v Griffin Coal Mining Company Pty Ltd [2017] WAIRC 00102; (2017) 97 WAIG 527**G Scammell & Nephew Ltd v Ouston [1941] AC 251**Hotcopper Australia Ltd v Saab (2001) 81 WAIG 2704**Tallerman & Co Pty Ltd v Nathan's Merchandise (Vic) Pty Ltd (1957) 98 CLR 93**Upper Hunter County District Council v Australian Chilling & Freezing Co Ltd (1968) 118 CLR 429***Case(s) also cited:***Associated Newspapers Ltd v Bancks (1951) 83 CLR 322**Astley v Austrust Limited (2000) 197 CLR 1**Australian Woollen Mills Pty Ltd v The Commonwealth (1954) 92 CLR 424**Reasons for Decision***Background**

- 1 The applicant commenced work as an accountant for the respondent, a financial services provider, on 7 February 2008. It was common ground that the applicant did not provide financial planning advice as it was the respondent who was licenced to do this. During the applicant's employment, the respondent made four "offers of employment", each with varied salary packages. Part of the salary package of the latter two employment offers, which are the offers relevant to the applicant's claim, was a bonus entitlement percentage paid monthly for "upfronts". The wording of the entitlement to "upfronts" changed in each employment offer. At some point in 2013, the respondent requested that the applicant vacate the business premises and continue working for the respondent from home. There was some discussion between the parties, both in person and by email, regarding purchasing office furniture for the applicant's home. The applicant began working from home from 1 July 2013 and continued to do so until the final day of his employment on 8 December 2017.
- 2 On 18 December 2017, the applicant sent a letter of demand to the respondent requesting that the respondent pay to the applicant the bonus entitlement of \$4,055.03 by 22 December 2017. This was not paid by the respondent. The applicant brings a claim against the respondent for the denied contractual benefit of bonus entitlements between 3 July 2013 and 12 September 2017 totalling \$4,055.03, and an amount of \$800.00 outstanding from a claimed \$1000.00 entitlement to purchase office furniture, when requested by the respondent to work from home.

- 3 The applicant's original claim was for bonus entitlements, annual leave, long service leave and superannuation contributions. The applicant abandoned his claim for annual leave, long service leave and superannuation contributions. The applicant proceeded with the bonus entitlement aspect of his claim and the claim relating to the office furniture.

Offers of employment

- 4 The applicant tendered unsigned copies of the four "offers of employment" and gave evidence that the respondent had possession of the signed contracts (ts 12-14). Each contract established a "salary package" for a period of six months starting from the commencement date, after which it was stated a further salary package would be negotiated based on performance. The respondent did not dispute that the "offers of employment" were signed and agreed to by the parties.
- 5 The third and fourth offers are those relevant to the period of the applicant's claim for bonus entitlements. The third offer was dated 1 March 2010 and tendered as exhibit A3. The employment offer was for the position of accountant and the salary package read as follows:

Cash Component	\$45 000 (Gross Annual Salary)
Superannuation @ 9%	\$4050
2 Educational Units p.a. up to total value of	\$1500
Bonus Pd Monthly @ 10% of Upfronts up to From all upfronts	\$15000 (Estimated)
Bonus where FUM p/mth > \$500k	\$2500
Bonus where 2 Insurance Policy's written p/mnth (requires successful completion of at least 1 Kaplan course p.a.)	\$2500

Total **\$70 550.00 p/a**

- 6 The fourth offer was dated 20 October 2016 and tendered as exhibit A4. This offer was for the position of office administrator and the salary package read as follows:

Cash Component	\$45 000 (Gross Annual Salary)
Superannuation @ 9.5%	\$4275
**Bonus Pd Monthly @ 20% of insurance upfronts or super entry costs derived from work initiated and placed by you, subject to my review new or existing clients.	
*Optional reimbursement of education fees paid by you to the value of \$2500 per annum	
**Note any successful clawbacks or client revenue adjustments including insurance claim excess payments, or repayment of client revenues received will affect this bonus.	

Total **\$51075.00 p/a**

Change in offer of employment wording

- 7 The respondent put to the applicant in cross-examination that the reason for the change in wording between the 2010 Contract and the 2016 Contract was that the respondent intended to change the basis on which the commissions or bonus entitlements were to be calculated. A flat-rate 10% bonus applied to all "upfronts" in the 2010 Contract. This was increased to 20% in the 2016 Contract, but only for insurance "upfronts" and super entry costs derived from work initiated and placed by the applicant, so the argument went (ts 28). The applicant gave evidence that there was no operative difference between the 2010 and 2016 bonus entitlement as the words "new or existing clients" in the 2016 Contract had the effect of applying the entitlement to all clients, such as in the 2010 Contract. The purpose of the change, according to the applicant, was to make the application of "upfronts" clearer, and not to change which clients it applied to.
- 8 The respondent maintained that the bonus entitlement in the 2016 Contract only covered work brought to the respondent by the applicant or "new business". The applicant agreed that he did not bring or initiate any new business or provide financial advice under his own name, however placed emphasis on the fact that he often met with and maintained communication with clients. The applicant gave evidence that his main duties were to liaise directly with clients for the management of their portfolios, report on the performance of portfolios, and to act as the first point of contact for existing clients and for any new applications for investments, superannuation rollovers or insurance (ts 11-12).
- 9 The respondent maintained that the bonus payments to the applicant were not intended to apply to work done by the applicant in just administering clients' accounts and receiving monies under existing arrangements.

Meaning of "upfronts"

- 10 The applicant submitted, and the respondent agreed, that the bonus percentage amounts for "upfronts" are not in dispute. These amounts are express in the Contracts as 10% in the 2010 Contract, and 20% in the 2016 Contract. The parties did however, somewhat disagree on the meaning of "upfronts" and to what scenarios the bonus entitlement would apply, consequently calculating different bonus entitlement amounts.
- 11 The applicant gave evidence that "upfronts" meant new revenue or new business. The respondent contended that "upfronts" in the financial services industry means a payment by a client at the stage of implementation of advice. This might be for the rollover of a superannuation fund balance or the taking out of a new insurance policy for example. It would not apply in the case of regular and ongoing contributions. The respondent put a scenario to the applicant of a superannuation rollover in the following terms, which the applicant agreed with:

“so if we rolled some super from one fund to another fund and we charged a fee for doing that based on the initial application that the client does, we would prepare a statement of advice for that client, the client would sign it and they would instruct us to perform certain functions in relation to their financial affairs. Part of that process may be changing super funds and we would charge an upfront fee for doing that...so in that example that money that was rolled over from one super fund to another, would that – would you consider that a new business?”.

- 12 This is an issue in the determination of the applicant’s claim. That is, the meaning of the term “upfronts” in the 2010 and 2016 Contracts must be ascertained.

Bonus entitlement amounts

- 13 The applicant relied on a schedule he created during his employment with the respondent when he had access to the respondent’s financial records. The schedule set out the applicant’s account of the bonus entitlements for “upfronts” payable to him under his contract of employment. This schedule was tendered as exhibit A6. The schedule set out the client name, the nature of the transaction, the amount received by the respondent from the licensee and the claimed bonus amount by the applicant. All but a couple of the applicant’s claims were made under the 2010 Contract.
- 14 The respondent relied on a series of reports from the licensee of the respondent, which characterised each client payment made to the respondent into types of transactions, examples being “sales” and “insurance sales”. The licensee reports did not specify which transactions were “upfronts” and this is open to interpretation. On the second day of the hearing, the respondent produced further spreadsheets, including a spreadsheet titled “G Smith Commission Spreadsheet” which was tendered as exhibit R4. The spreadsheet provided the respondent’s reasons for excluding amounts listed on the applicant’s bonus entitlements spreadsheet, which formed part of the applicant’s claim. These reasons included that the amount received was an on-going contribution, a category not covered by the contract of employment or an amount received outside the contract period. This spreadsheet calculated that the respondent owed the applicant \$941.58 in bonus entitlements, after accounting for the deduction of 20% tax and an amount already paid to the applicant. The respondent also submitted that the applicant had failed to account for GST in his claims and had incorrectly calculated the amount of bonus entitlements owing as a percentage of the amount paid by the client before GST was deducted, rather than the amount received by the business.

Furniture claim

- 15 Relevant to the applicant’s claim for the outstanding amount of \$800.00 for furniture, is an email from the respondent to the applicant, dated Saturday 22 June 2013. This email was attached to the applicant’s further and better particulars of claim and read in full as follows:

Gavin

I can confirm for you today the following Gav in writing what we discussed yesterday in articulating that you will not be out of pocket in working from home.

DJ Financial to pay for

- NBN cost of installation (quoted as free)
- Phone connection cost
- Monthly phone & internet cost of \$130 per month that includes 500meg data, unlimited local and mobile phone calls
- Table, Chair, Filing Cabinet to be paid for to the value of \$1000

(the above after use remaining the property of G Smith)

Additionally we can consider the following

- Repackaging of existing wage to include M/V Allowance, Study Lease
- Benefit of reduced travel to the city
- Reduced hours of work to 4:30pm for the same pay
- retention of the 10% upfront bonus

Gavin I also indicated upon a successful financed acquisition that I’m working on, there would be more scope to increase a cash component.

I’d also expect interest rates to reduce to assist you, along with less tax deducted from your wage as a result of the above adjustments to your package.

I will redraft your contract on my return Gav. Please let me know your thoughts Gav.

Kind regards

Lyll Jones – Director

CPA FTIA Registered ASIC and Taxation Agent

Authorised Representative No 312519 of Professional Investment Services Pty Ltd

Licensed Dealer in Securities and Registered Life Broker ABN 11 074 608 558

- 16 The applicant’s evidence was that the respondent varied the employment contract when it requested that the applicant work from home, and the respondent’s email stating “table, chair, filing cabinet to be paid for to the value of \$1000” meant that the applicant was entitled to \$1000.00 irrespective of the total amount spent on furniture. The applicant gave evidence that the respondent purchased a \$200.00 cabinet for the applicant to store files in, which was deducted from the \$1000.00 entitlement in calculating the \$800.00 owing.

- 17 The respondent's position was that the applicant was entitled to be reimbursed for out of pocket expenses incurred by the applicant when purchasing furniture, up to the maximum amount of \$1000.00. The respondent put to the applicant that he had seen the desk and chair that the applicant used to work from home and could not understand how these items would have totalled \$800.00. The applicant's position was that this was irrelevant because the entitlement was for \$1000.00 "to be paid for". The applicant gave evidence that he could not remember how much he spent on furniture other than it was a "reasonable amount" (ts 59). The applicant gave evidence that he likely had the receipts, however did not produce them.

Denied contractual benefits – general principles

- 18 The principles of denied contractual benefits claims are well settled. The issue to be determined is whether the applicant had a legal right under his employment contract with the respondent, to receive the bonus entitlement and an "allowance" for furniture. The applicant must establish that his claim relates to an industrial matter; that the applicant was an employee; that the benefit claimed is one to which the applicant was entitled under his contract of service; the contract is a contract of service; the benefit claimed is not under an award or order; and the benefit claimed has been denied: *Hotcopper Australia Ltd v Saab* (2001) 81 WAIG 2704; *Ahern v AFTPI* (1999) 79 WAIG 1867. The Commission's task in such matters is to discover and enforce the relevant contract of employment.
- 19 The interpretation of a contract is to be approached objectively in accordance with the ordinary and natural meaning of the words used in it, in the view of a reasonable person in the position of the parties. As to the interpretation of contracts generally, in *Brett Arthur King v Griffin Coal Mining Company Pty Ltd* [2017] WAIRC 00102; (2017) 97 WAIG 527 I said as follows at par 11:

Some rules have been developed in the cases as to the approach to adopt in construing the terms of a contract. A recent summary of the relevant principles to be applied was set out by the Court of Appeal (WA) in *Black Box Control Pty Ltd v Terravision Pty Ltd* [2016] WASCA 219. In this case, Newnes and Murphy JJA and Beech J observed at par 42:

Construction of contracts: general principles

- 42 The principles relevant to the proper construction of instruments are well known, and were not in dispute in this case. In summary:
- (1) The process of construction is objective. The meaning of the terms of an instrument is to be determined by what a reasonable person would have understood the terms to mean.⁵⁰
 - (2) The construction of a contract involves determination of the meaning of the words of the contract by reference to its text, context and purpose.⁵¹
 - (3) The commercial purpose or objects sought to be secured by the contract will often be apparent from a consideration of the provisions of the contract read as a whole.⁵² Extrinsic evidence may nevertheless assist in identifying the commercial purpose or objects of the contract where that task is facilitated by an understanding of the genesis of the transaction, its background, the context and the market in which the parties are operating.⁵³
 - (4) Extrinsic evidence may also assist in determining the proper construction where there is a constructional choice, although it is not necessary in this case to determine the question of whether matters external to a contract can be resorted to in order to identify the existence of the constructional choice.⁵⁴
 - (5) If an expression in a contract is unambiguous and susceptible of only one meaning, evidence of surrounding circumstances cannot be adduced to contradict its plain meaning.⁵⁵
 - (6) To the extent that a contract, document or statutory provision is referred to, expressly or impliedly, in an instrument, that contract, document or statutory provision can be considered in construing the instrument, without any need for ambiguity or uncertainty of meaning.⁵⁶
 - (7) There are important limits on the extent to which evidence of surrounding circumstances (when admissible) can influence the proper construction of an instrument. Reliance on surrounding circumstances must be tempered by loyalty to the text of the instrument. Reference to background facts is not a licence to ignore or rewrite the text.⁵⁷ The search is for the meaning of what the parties said in the instrument, not what the parties meant to say.⁵⁸
 - (8) There are also limits on the kind of evidence which is admissible as background to the construction of a contract, and the purposes for which it is admissible. Insofar as such evidence establishes objective background facts known to the parties or the genesis, purpose or objective of the relevant transaction, it is admissible. Insofar as it consists of statements and actions of the parties reflecting their actual intentions and expectations it is inadmissible. Such statements reveal the terms of the contract which the parties intended or hoped to make, and which are superseded by, or merged into, the contract.⁵⁹
 - (9) An instrument should be construed so as to avoid it making commercial nonsense or giving rise to commercial inconvenience.⁶⁰ However, it must be borne in mind that business common sense may be a topic on which minds may differ.⁶¹
 - (10) An instrument should be construed as a whole. A construction that makes the various parts of an instrument harmonious is preferable.⁶² If possible, each part of an instrument should be construed so as to have some operation.⁶³
 - (11) Definitions do not have substantive effect. A definition is not to be construed in isolation from the operative provision(s) in which the defined term is used. Rather, the operative provision is ordinarily to be read by inserting the definition into it.⁶⁴

Variation of contract

- 20 The applicant argued that his contract of employment was varied when he commenced working from home in July 2013. A variation of contract occurs when the original contract remains in force and only some of its terms are varied. This may take the form of a partial discharge of obligations, the addition of new obligations or a combination of discharge and addition (*Tallerman & Co Pty Ltd v Nathan's Merchandise (Vic) Pty Ltd* (1957) 98 CLR 93, Williams J at 127–128). Variation must be the subject of agreement between the parties and does not significantly alter the substance of the agreement or go to the “root of the contract”. A variation of contractual rights and obligations is however a contract and therefore, the variation must meet the requirements of a binding contract, including the presence of consideration.

Vague or uncertain terms

- 21 Uncertain contractual terms should be interpreted broadly and fairly. The term in question should be afforded a reasonable meaning unless it is impossible to do so, and difficulty of interpretation should be distinguished from absence of meaning: *Upper Hunter County District Council v Australian Chilling & Freezing Co Ltd* (1968) 118 CLR 429 at 436 per Barwick CJ. Unless the language of the term is ‘so obscure and so incapable of any definite or precise meaning that the court is unable to attribute to the parties any particular contractual intention’, the contract cannot be held to be void, uncertain or meaningless: *G Scammell & Nephew Ltd v Ouston* [1941] AC 251 at 268.
- 22 Provisions in contracts which are apparently vague or uncertain can be given substance if there is an external standard which will give the content of the agreement a more precise definition (See generally J W Carter *Contract Law in Australia* 6th Ed, LexisNexis p 93).

Consideration

- 23 I apply the above principles to the disposition of this matter.
- 24 In relation to the bonus claim, the first issue to determine is the proper meaning of “upfronts” in the Contracts. The second issue to determine is whether, as contended by the respondent, there was a material change in the 2016 Contract, to the effect that a bonus was only payable if the applicant introduced the new business into the firm, in exchange for a higher rate of commission. The third issue to determine is whether on the facts, having regard to the interpretation of the Contracts, the applicant had a bonus entitlement as he claimed.
- 25 Having regard to the terms of the Contracts viewed in their ordinary and natural sense, the phrase “upfronts” must be given a meaning consistent with the commercial objects and purposes of the transaction. In the context of the industry of financial planning, the term should be understood as an initial or first up payment by a client on the implementation of financial advice as provided by the respondent. This is consistent with the ordinary and natural meaning of the phrase. For example, as contended by the respondent, this could be an initial superannuation rollover payment, based on advice from the respondent. It could also be an upfront payment for entry into an insurance product, again based on the implementation of advice to the client. So construed, regular investment contributions on an ongoing basis, such as regular contributions to a superannuation fund for example, or the receipt of trailing commissions, should not be regarded as “upfront” payments.
- 26 Whilst the applicant seemed to refer to “upfronts” as “new business”, this may or may not be the case. For example, the respondent accepted that there may be the situation where an existing client of the respondent may provide new instructions as to a rollover of a further superannuation amount which, although from an existing client, would be regarded as an “upfront” under the Contracts. In my view this should be regarded as “new business” too. The essential element is that the payments, however described, be accompanied by advice of some form. This is to distinguish such payments from, for example, regular and ongoing contributions to a superannuation fund.
- 27 There was a quite complex body of evidence going to this issue, in the form of reports and schedules referred to above. Some of them have been difficult to navigate. As already noted, one problem is that the documents, in particular those from the licensee, do not, mostly at least, refer to payments made to the respondent as “upfronts”. Thus, a degree of interpretation is required. I have carefully examined the documentary evidence in exhibits R1 and R5 being the licensee documents. I consider them to be the most reliable and independent evidence of the relevant transactions over the relevant time periods of the 2010 Contract and the 2016 Contract.
- 28 In the context of the evidence led in these proceedings, the respondent accepted that the content of the applicant’s claims in exhibit A6 and in the respondent’s derivative document, exhibit R4, which is exhibit A6 with notations by the respondent, relate to transactions described as “new business” by the licensee in its materials. An issue raised by the respondent in its evidence was the contention that many of the applicant’s claims were not covered by the 2010 Contract or the 2016 Contract, because the original advice was provided to the client at an earlier time, in some cases as far back as 2005. Thus, the respondent contended that these transactions fell outside of the scope of the applicant’s contractual entitlement. I am not persuaded to this view.
- 29 The evidence of the applicant was that when compiling his claims, set out in exhibit A6, he confirmed that in each case the relevant transaction was accompanied by advice to the client in relation to that transaction. This was based on the applicant’s notations made at the time and the checking of the respondent’s records. The applicant testified that this is borne out by the fact that several transactions contained in exhibit R5, the licensee document, that were characterised as “new business”, were not accompanied by advice and as such, were not the subject of the applicant’s claims. Furthermore, the applicant’s evidence was that each claim made by him was made in respect of the corresponding contract. I accept the applicant’s evidence on these issues. His evidence was not contradicted by the respondent and I found the applicant’s explanation of his claims and the basis for them to be credible.
- 30 Given the voluminous nature of some of the material, especially the licensee spreadsheets, the applicant tendered as exhibit A10, a composite schedule comparing his claims in exhibit A6 with exhibit R5, the licensee schedule of transactions. The entries in respect of each client refer to “new business”, in the main comprising “Investment Initial Commission”, “Insurance

Initial Commission”, and “Upfront Advice Fees-Product”. I am satisfied that however described, these transaction fall into the category of “upfronts” for the purposes of the 2010 Contract and the 2016 Contract, if accompanied by some form of advice to the client. Accordingly, I find, subject to what follows, that the applicant has established his claim for bonuses.

- 31 As to whether the applicant was entitled to the bonus claim under the 2016 Contract because, as contended by the respondent, he did not bring this to the respondent himself as “new business”, I am not satisfied that the applicant would be disentitled on this basis. In any event, for reasons that follow, it is not necessary for me to finally decide this matter.
- 32 There are two other matters in relation to the bonus claim. The first relates to the respondent’s contention that under the 2010 Contract, the applicant was required to complete a qualification, being one “Kaplan” course per annum. It was common ground that the applicant did not do this. This matter was only raised by the respondent for the first time in his closing submissions and appeared to be somewhat of an afterthought. The terms of the 2010 Contract, set out above, are not clear in respect of this issue. It is not clear whether this stipulation was intended to apply to all the possible bonus payments set out or, whether it was limited to that applying when the applicant wrote two insurance transaction in one month. In any event, the respondent has a more fundamental problem on this issue. It seemed common ground that the applicant stopped receiving his bonuses in 2013. There was no suggestion they were not paid prior to this under the 2010 Contract.
- 33 Thus, to the extent that this course requirement may have been a condition attached to the payment of bonuses by the respondent, the respondent had waived it. There was no suggestion that the respondent ceased paying bonuses for this reason in 2013. On the contrary, the respondent asserted that this occurred because of a need to undertake a “reconciliation” of how the bonuses were calculated, even though this never appeared in any correspondence from the respondent to the applicant at around the time the applicant’s employment was terminated and only seems to have been raised in the context of these proceedings. There was certainly no written evidence the respondent had ever raised the course completion issue with the applicant when responding to the applicant’s letter in 2017. The 2017 letter from the applicant made the claim that he be paid his bonus entitlements. The second matter relates to a “clawback” of a transaction under the 2016 Contract. This was the only substantive transaction claimed by the applicant over this period. The respondent said, and it seemed not to be contested by the applicant, that payments made by this client were reversed and were ultimately not made. This occurred some six months after the termination of the applicant’s employment and was set out in exhibit R11, in the amount of \$3,075. The applicant maintained that as he was entitled to this payment as at the time of the termination of his employment, he should still receive the payment, even though the respondent did not ultimately receive any benefit from the client. I do not consider, as a matter of equity and good conscience, that the applicant should be able to recover this bonus. Under the 2016 Contract it was clear that any “clawbacks” would affect bonus payments. For the applicant to be paid this amount now, considering the evidence, would constitute a windfall in relation to a transaction in respect of which the respondent received no benefit. This would be contrary to the spirit if not the letter of the 2016 Contract. Accordingly, the claimed amount of \$950.29 should be deducted from the applicant’s claim.
- 34 I am also not persuaded that the applicant failed to adjust his claimed amounts in exhibit A10 for GST.
- 35 As for the claim for furniture costs, the applicant’s evidence was he was required to set up an office at home from which the respondent’s business was conducted. To do so, he was required to purchase some office furniture, which he did. The terms of the letter to the applicant from the respondent, set out above, are not entirely clear on this issue. However, I do not consider that the letter conferred a benefit of a cash allowance payable to the applicant, irrespective of the nature of the purchases made by him. The term of the contract does not refer to the payment of an amount of \$1000. It refers to the purchase of furniture. I note also that any furniture purchased was able to be retained by the applicant as his property. In my view, this term was more in the nature of a reimbursable expense. As the applicant has not produced evidence of the purchase of any furniture for a specified value, this claim is refused.

Conclusion

- 36 Accordingly, the Commission will order the respondent to pay to the applicant denied contractual benefits in the sum of \$4,037 gross.

2019 WAIRC 00059

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

GAVIN SMITH

APPLICANT

-v-

SILKWOOD HOLDINGS (WA) PTY LTD AS TRUSTEE FOR THE DIABLO DISCRETIONARY TRUST TRADING AS DOUGLAS JONES FINANCIAL SERVICES

RESPONDENT

CORAM

SENIOR COMMISSIONER S J KENNER

DATE

WEDNESDAY, 13 FEBRUARY 2019

FILE NO/S

B 54 OF 2018

CITATION NO.

2019 WAIRC 00059

Result	Order issued
Representation	
Applicant	Mr P Mullally as agent
Respondent	Mr L Jones

Declaration and Order

HAVING heard Mr P Mullally as agent on behalf of the applicant and Mr L Jones on behalf of the respondent the Commission, pursuant to the powers conferred on it by the Industrial Relations Act 1979, hereby –

- (1) DECLARES that the applicant has been denied contractual benefits by the respondent by way of bonus entitlements.
- (2) ORDERS that the respondent pay to the applicant as denied contractual benefits the sum of \$4,037 gross within 21 days.

[L.S.]

(Sgd.) S J KENNER,
Senior Commissioner.

2019 WAIRC 00269

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	:	2019 WAIRC 00269
CORAM	:	COMMISSIONER T B WALKINGTON
HEARD	:	WEDNESDAY, 29 MAY 2019
DELIVERED	:	FRIDAY, 31 MAY 2019
FILE NO.	:	U 42 OF 2019
BETWEEN	:	AMANDA JOY WALLIS
		Applicant
		AND
		SPRINT EXPRESS (RON'S EXPRESS)
		Respondent

CatchWords	:	Termination of employment - Harsh, oppressive and unfair dismissal - Acceptance of referral out of time - Relevant principles applied - Commission satisfied that discretion should be exercised - Industrial Relations Act 1979 (WA) s 29(1)(b)(i), s 29(2), s 29(3)
Legislation	:	<i>Industrial Relations Act 1979</i> (WA) s 29(2), s 29(3)
Result	:	Application accepted out of time

Case(s) referred to in reasons:

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

Jackamarra v Krakouer (1998) 195 CLR 516

Case(s) also cited:

Brodie-Hanns v MTV Publishing Ltd (1995) 67 IR 298

Reasons for Decision

- 1 The applicant claims that she was harshly, oppressively or unfairly dismissed by the respondent. Her claim was referred to the Western Australian Industrial Relations Commission (**the Commission**) on 14 March 2019. The dismissal is said to have occurred on 31 October 2018. Therefore, the claim was referred to the Commission 106 days outside of the time allowed by s 29(2) of the *Industrial Relations Act 1979* (WA) (**the Act**).
- 2 Given the application was outside of the 28 days limit that is required under s 29(2) of the Act the Commission listed this application to determine whether it ought to accept the application out of time pursuant to s 29(3) of the Act. Section 29(3) of the Act provides for acceptance of claims that are out of time if the Commission considers that would be unfair not to do so.

PRINCIPLES

- 3 In *Malik v Paul Albert Director General, Department of Education of Western Australia* (2004) 84 WAIG 683, 686 [26] Steytler J applies the set of principles enunciated by Marshall J in *Brodie-Hanns v MTV Publishing Ltd* (1995) 67 IR 298 to determine whether the Commission accepts the referral of a claim for unfair dismissal out of time under s 29(3) of the Act. Those principles are:

- 1) Special circumstances are not necessary, but the court must be positively satisfied that the prescribed period should be extended. The prima facie position is that the time limit should be complied with unless there is an acceptable explanation of the delay which makes it equitable to so extend.
 - 2) Action taken by the applicant to contest the termination other than applying under the Act will be relevant. It will show that the decision to terminate is actively contested. It may favour the granting of an extension of time.
 - 3) Prejudice to the respondent including prejudice caused by delay will go against the granting of an extension of time.
 - 4) The mere absence of prejudice to the respondent is an insufficient basis to grant an extension of time.
 - 5) The merits of the substantive application may be taken into account in determining whether to grant an extension of time.
 - 6) Consideration of fairness as between the applicant and other persons in a like position are relevant to the exercise of the Court's discretion [26].
- 4 In deciding whether it would be unfair not to accept the applicant's claim out of time, it is necessary to make some assessment of the merits. It would not be unfair to dismiss a claim that was filed out of time if it could not succeed. At this preliminary stage my assessment of the merits is 'fairly rough and ready': *Jackamarra v Krakouer* (1998) 195 CLR 516 [9] (Brennan CJ & McHugh J).

CONSIDERATION

- 5 Ms Wallis says she was telephoned by Mr De Baugy of Sprint Express, her employer, on 31 October 2018 and advised that she was stood down for three weeks. Ms Wallis was also advised that during this time an investigation, concerning an incident at a client's site, would take place.
- 6 The next day, 1 November 2019, Ms Wallis emailed Sprint Express explaining her perspective on the event that Mr De Baugy had outlined in the telephone call.
- 7 Ms Wallis contacted Sprint Express in November 2019 to request confirmation of her last day of work for loan insurance purposes.
- 8 On 30 January 2019 Ms Wallis emailed Sprint Express seeking information about the investigation and any documentation of the investigation.
- 9 On 30 January 2019 the respondent emailed Ms Wallis a copy of an Employment Separation Certificate in which the 'employment ceased' field contained '31 October 2018'.
- 10 Sometime in February 2019 Ms Wallis lodged a claim for unfair dismissal with the Fair Work Commission (FWC). A few days prior to 14 March 2019 Ms Wallis was telephoned by an officer of the FWC and advised that the FWC did not have jurisdiction to deal with the claim and she ought to lodge a claim with the Commission.

CONCLUSION

- 11 In this matter applying the principles followed in *Malik v Paul Albert Director General, Department of Education of Western Australia* I find that:
- a. Ms Wallis was uncertain as to the status of her employment with Sprint Express for some time and had understood she was stood down for a period while an investigation was undertaken. Once it was clear to Ms Wallis, at the end of January 2019, that the employer had terminated her employment and that this had taken place on 31 October 2019, as stated in the Employment Separation Certificate, Ms Wallis made a claim of unfair dismissal. Unfortunately, Ms Wallis lodged this claim in an incorrect jurisdiction. Once Ms Wallis became aware of this mistake a claim was made to this jurisdiction. I find the explanation provided by Ms Wallis to be reasonable.
 - b. Ms Wallis has taken steps to contest the decision to terminate her employment by firstly seeking information about the investigation and documentation of the investigation from the employer and then by applying to the FWC.
 - c. Mr De Baugy did not identify any concerns that Sprint Express would be prejudiced as a result of the granting of an extension of time.
 - d. A rough and ready assessment of the strength of Ms Wallis's case does not result in a conclusive determination of a finding that her dismissal was unfair. There are conflicting versions of events and at a substantive hearing the respondent may be able to establish that they acted fairly, however, I do not find that Ms Wallis's case has no merit.
- 12 I have taken account of the circumstances of this matter, the test set out in *Malik v Paul Albert Director General, Department of Education of Western Australia* and, in accordance with s 29(3) of the Act, I have decided that it would be unfair to not accept the referral out of time. Accordingly, the application will be accepted out of time. It will now be listed for conciliation.
-

2019 WAIRC 00267

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION AMANDA JOY WALLIS	APPLICANT
	-v- SPRINT EXPRESS (RON'S EXPRESS)	RESPONDENT
CORAM	COMMISSIONER T B WALKINGTON	
DATE	FRIDAY, 31 MAY 2019	
FILE NO/S	U 42 OF 2019	
CITATION NO.	2019 WAIRC 00267	
Result	Order Issued	

Order

The Commission, having heard from the applicant, Ms A Wallis, and having heard from Mr Ivan De Baugy for the respondent, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby orders that the application is accepted out of time.

[L.S.]

(Sgd.) T B WALKINGTON,
Commissioner.**SECTION 29(1)(b)—Notation of—**

	Parties	Number	Commissioner	Result	
	Claire Marie Robertson	MacKillop Family Services Limited	B 50/2019	Commissioner D J Matthews	Discontinued
	Josh Gaul	JD Goad + SM Phillips-Martin	U 21/2019	Commissioner T B Walkington	Discontinued
	Mathew Mark Ponta	Kleenwest Distributors	U 55/2019	Commissioner T B Walkington	Discontinued
	Mikayla McGrory	Callie Fort	U 25/2019	Commissioner D J Matthews	Discontinued
	Peter Wilkinson	Phung & Ai Ngo	U 9/2019	Commissioner D J Matthews	Discontinued

CONFERENCES—Matters arising out of—

2018 WAIRC 00741

**DISPUTE RE ALLEGED ARBITRARY PROPOSED CHANGES
WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION**

CITATION	:	2018 WAIRC 00741
CORAM	:	COMMISSIONER D J MATTHEWS
HEARD	:	WEDNESDAY, 7 FEBRUARY 2018, MONDAY, 27 AUGUST 2018
DELIVERED	:	FRIDAY, 14 SEPTEMBER 2018
FILE NO.	:	C 3 OF 2018
BETWEEN	:	THE AUSTRALIAN RAIL, TRAM AND BUS INDUSTRY UNION OF EMPLOYEES, WEST AUSTRALIAN BRANCH Applicant AND THE PUBLIC TRANSPORT AUTHORITY OF WESTERN AUSTRALIA Respondent

CatchWords	:	Application under section 27 <i>Industrial Relations Act 1979</i> that the Western Australian Industrial Relations Commission not hear and determine matter - Whether alleged alternative dispute resolution processes should be finalised before hearing and determination by the Western Australian Industrial Relations Commission - In all circumstances industrial dispute to be heard and determined by Western Australian Industrial Relations Commission
Legislation	:	<i>Industrial Relations Act 1979</i> <i>Occupational Safety and Health Act 1984</i>
Result	:	Application under section 27 <i>Industrial Relations Act 1979</i> dismissed
Representation:		
Counsel:		
Applicant	:	Mr C Fogliani of counsel
Respondent	:	Mr J Carroll of counsel
Solicitors:		
Applicant	:	Fogliani.Lawyer
Respondent	:	State Solicitor's Office

Case(s) referred to in reasons:

The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch v The Public Transport Authority of Western Australia (2013) 93 WAIG 1804

Reasons for Decision

- 1 The respondent has made an application pursuant to section 27 *Industrial Relations Act 1979* that I refrain from hearing and determining the substantive application insofar as it relates to a matter dealing with occupational safety and health.
- 2 At the heart of the respondent's application is not that I dismiss the substantive application with prejudice to the applicant, but rather that I not hear and determine it until a health and safety committee convened at the workplace, pursuant to the *Occupational Safety and Health Act 1984*, has had an opportunity to consider the matter.
- 3 The respondent relies upon the decision of the Full Bench of the Western Australian Industrial Relations Commission in *The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch v The Public Transport Authority of Western Australia* (2013) 93 WAIG 1804 and, in particular, the reasons of Acting President Smith at [55] of the decision. That appeal concerned a similar matter to that here where the Commissioner at first instance had granted an application under section 27 *Industrial Relations Act 1979* and the union appealed that decision.
- 4 I set out what Acting President Smith said at [55] in full:

"Object 6(ag) elevates this duty to a principal object of the Act. Thus, the power to refrain from dealing with a matter must be read with the requirements of s 48A, s 26(1)(a), s 26(1)(d)(vii) and object 6(ag) of the Act. When these provisions are read together it is apparent that it is contemplated within a scheme of conciliation and arbitration of industrial matters that the parties are to be encouraged to resolve disputes among themselves and in an appropriate case the Commission should refrain from enquiring into or dealing with an industrial matter where processes have been established to deal with the matters in dispute. When those principles are applied to the facts of this matter, it is clear that where processes include dispute resolution processes established under legislation other than the Act, such as the OSH Act, the words that empowered the Commissioner to dismiss or refrain from hearing 'for any other reason' in s 27(1)(a)(iv) are and were wide enough to contemplate the discontinuance of a matter on grounds that those processes could be activated."
- 5 Her Honour's reasons do not go beyond deciding that the Commissioner at first instance had not erred in the exercise of her discretion under section 27 *Industrial Relations Act 1979*. That is not the same thing, as I think the respondent recognises, as deciding that the Commissioner should have decided the matter in the way she did for the reasons she did.
- 6 I note that the respondent does not say that the occupational safety and health matter raised by the substantive application is not an industrial matter.
- 7 I note that the *Industrial Relations Act 1979* encourages parties to resolve disputes about industrial matters among themselves and that arbitration ought only be undertaken if attempts at conciliation have been exhausted.
- 8 I note that the existence of an alternative way of dealing with industrial matters is a relevant consideration under section 27 *Industrial Relations Act 1979* but not a determinative one and that it is where the alternative avenue is consonant with the objects of the *Industrial Relations Act 1979* that it takes on its greatest significance.
- 9 I note the applicant says that "there is no alternate dispute resolution process under the *Occupational Safety and Health Act 1984* whereby the applicant could force resolution of [the issues in dispute]" but that is not expanded upon. I have scanned the provisions of the *Occupational Safety and Health Act 1984* to determine whether its provisions provide a genuine alternative to my substantive jurisdiction to hear and determine this industrial matter and must say I am unconvinced that they do.
- 10 I note that in the matter under consideration in *The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch v The Public Transport Authority of Western Australia* (2013) 93 WAIG 1804, the Western Australian Industrial Relations Commission had given significant assistance over many months to progress attempts at consultation under

the *Occupational Safety and Health Act 1984*. That is, in that matter, the processes under the *Occupational Safety and Health Act 1984* had become the focus of the Western Australian Industrial Relations Commission's involvement.

- 11 This is not the case in this matter. In fact, there is no evidence (or submission) before me of any work having been done on the issue pursuant to the provisions of the *Occupational Safety and Health Act 1984*.
- 12 In this matter the parties are in dispute about an industrial matter and:
- (1) there was a conciliation conference on 7 February 2018;
 - (2) attempts were made by the parties between February 2018 and July 2018 to resolve the dispute;
 - (3) attempts were subsequently made by the parties to agree a memorandum of matters for hearing and determination;
 - (4) a second conference was held on 27 August 2018;
 - (5) the application under section 27 *Industrial Relations Act 1979* has come late in the day; and
 - (6) I am not aware of any process under the *Occupational Safety and Health Act 1984* commencing, let alone progressing, in relation to the matter.
- 13 The parties, in my view, have attempted to conciliate the matter and failed. The most expeditious way to now determine the matter is for me to hear it. I consider that in this case, even if there is an alternative avenue for resolving the dispute, of which I must say I am unconvinced, it is entirely consonant with the objects of the *Industrial Relations Act 1979* that I hear and determine it.
- 14 The application under section 27 *Industrial Relations Act 1979* is dismissed.

2019 WAIRC 00009

DISPUTE RE DISCIPLINARY PROCESS AGAINST UNION MEMBER

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED

APPLICANT

-v-

DIRECTOR GENERAL, DEPARTMENT OF COMMUNITIES SERVICES

RESPONDENT

CORAM

PUBLIC SERVICE ARBITRATOR
COMMISSIONER D J MATTHEWS

DATE

TUESDAY, 15 JANUARY 2019

FILE NO

PSAC 33 OF 2018

CITATION NO.

2019 WAIRC 00009

Result Respondent's name amended

Representation

Applicant Mr J Tebbutt

Respondent Ms J Vincent of counsel

Order

Having heard the parties by correspondence I hereby order, by consent:

THAT the respondent be "Director General, Department of Communities".

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

[L.S.]

CONFERENCES—Notation of—

Parties		Commissioner	Conference Number	Dates	Matter	Result
State School Teachers' Union of W.A. (Incorporated)	Director General, Department of Education	Matthews C	CR 10/2018	04/10/2018 19/11/2018 21/01/2019	Dispute re alleged unfair dismissal of union member	Discontinued

Parties		Commissioner	Conference Number	Dates	Matter	Result
The Department of Fire and Emergency Services	The Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers, Western Australian Branch	Matthews C	C 1/2017	23/01/2017	Dispute re bargaining	Discontinued

PROCEDURAL DIRECTIONS AND ORDERS—

2019 WAIRC 00276

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

NANCY RANDALL

APPLICANT

-v-

BEN TRAGER HOMES PTY LTD

RESPONDENT

CORAM

COMMISSIONER T B WALKINGTON

DATE

WEDNESDAY, 5 JUNE 2019

FILE NO.

B 17 OF 2019

CITATION NO.

2019 WAIRC 00276

Result

Direction Issued

Representation

Applicant

Mr S Mare (of counsel)

Respondent

Mr M Vallence (as agent)

Direction

The Commission, having heard from Mr S Mare on behalf of the applicant and having heard from Mr M Vallence on behalf of the respondent, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby orders:

1. THAT each party shall give informal discovery by serving its list of documents on each other by no later than 12 June 2019.
2. THAT inspection and provision of the documents to each other shall be completed by no later than 19 June 2019.
3. THAT evidence in chief in this matter be adduced by signed witness statements.
4. THAT the applicant file and serve upon the respondent any signed witness statements upon which they intend to rely by no later than 26 June 2019.
5. THAT the respondent file and serve upon the applicant any signed witness statements upon which they intend to rely by no later than 16 July 2019.
6. THAT the parties give notice to one another of witnesses they require to attend at the proceedings for the purposes of cross-examination by no later than 23 July 2019.
7. THAT the applicant and respondent file and serve an outline of submissions and any list of authorities upon which they intend to rely by no later than 26 July 2019.
8. THAT the matter be listed for hearing for 1 day on a date to be determined.
9. THAT the parties have liberty to apply on short notice.

(Sgd.) T B WALKINGTON,
Commissioner.

[L.S.]

2019 WAIRC 00254

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION	
PARTIES	KIERAN KNIGHT	APPLICANT
	-v-	
	FINAL TRIM OPERATORS PTY LTD	RESPONDENT
CORAM	COMMISSIONER T B WALKINGTON	
DATE	WEDNESDAY, 29 MAY 2019	
FILE NO.	B 24 OF 2019	
CITATION NO.	2019 WAIRC 00254	
Result	Direction Issued	
Representation		
Respondent	Ms L Chen (of counsel)	

Direction

The Commission, having heard from the applicant, Mr K Knight, and having heard from Ms L Chen on behalf of the respondent, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby orders:

1. THAT the applicant file and serve further and better particulars of his claim by 6 June 2019.
2. THAT the respondent file and serve a response to the applicant's further and better particulars by 13 June 2019.
3. THAT the applicant file and serve any witness statements and documents upon which he intends to rely and an outline of submissions by 20 June 2019.
4. THAT the respondent file and serve any witness statements and documents upon which it intends to rely and an outline of submissions by 27 June 2019.
5. THAT the witness statements will stand as evidence in chief of those witnesses.
6. THAT the parties have liberty to apply on short notice.

(Sgd.) T B WALKINGTON,
Commissioner.

[L.S.]

2019 WAIRC 00236

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION	
PARTIES	JO ANNE STONES	APPLICANT
	-v-	
	DIRECTOR TROY BARBAGALLO THE HOROLOGIST PTY LTD	RESPONDENT
CORAM	COMMISSIONER T B WALKINGTON	
DATE	THURSDAY, 16 MAY 2019	
FILE NO.	B 139 OF 2018	
CITATION NO.	2019 WAIRC 00236	
Result	Direction Issued	

Direction

WHEREAS on 19 November 2018 the applicant filed a notice of claim of entitlement to a benefit under a contract of employment;
WHEREAS on 7 March 2019 the Commission issued orders for the preparation of hearing of the matter;
WHEREAS on 13 May 2019 the applicant applied to the Commission for an order extending the time for filing of witness statements and outline of submissions to 17 May 2019;

WHEREAS on 14 May 2019 the Commission received the respondent's objections to the extension of time;
AND WHEREAS the Commission has considered the application for an extension of time and the respondent's objections in chambers, the Commission hereby directs:

1. THAT the applicant file and serve on the respondent, witness statements and an outline of submissions by no later than 17 May 2019;
2. THAT the respondent file and serve on the applicant, witness statements and an outline of further submissions in response by no later than 31 May 2019;
4. THAT the hearing listed for 28 May 2019 is vacated;
5. THAT a hearing be scheduled for one day after 10 June 2019; and
6. THAT the parties have liberty to apply on short notice.

(Sgd.) T B WALKINGTON,
Commissioner.

[L.S.]

2019 WAIRC 00239

REVIEW OF IMPROVEMENT NOTICES

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
GEOFFREY RAYMOND MORAN

PARTIES

APPLICANT

-v-

WORKSAFE W.A.

RESPONDENT

CORAM COMMISSIONER T B WALKINGTON
DATE FRIDAY, 17 MAY 2019
FILE NO. OSHT 2 OF 2019
CITATION NO. 2019 WAIRC 00239

Result Direction Issued
Representation
Applicant Ms V Kafentzis of counsel
Respondent Ms T Hollaway of counsel

Direction

HAVING heard from Ms V Kafentzis on behalf of the applicant and having heard from Ms T Hollaway on behalf of the respondent, the Tribunal, pursuant to the powers conferred on it under the *Occupational Safety and Health Act 1984* hereby directs

- (1) THAT any request for production of documents or materials by either party be by letter of request served no later than 24 May 2019.
- (2) THAT each party provide documents or materials requested by the other party by 31 May 2019 or within seven days, whichever is earlier.
- (3) THAT the applicant file and serve upon the respondent amended notices of referral with full particulars of his claims by no later than 7 June 2019.
- (4) THAT the respondent file and serve upon the applicant a notice of answer by no later than 14 June 2019.
- (5) THAT evidence in chief in this matter be adduced by way of signed witness statements which will stand as evidence in chief.
- (6) THAT the applicant file and serve upon the respondent any witness statements upon which he intends to rely by no later than 28 June 2019.
- (7) THAT the respondent file and serve upon the applicant any witness statements upon which it intends to rely by no later than 12 July 2019.
- (8) THAT the applicant file and serve upon the respondent an outline of submissions by no later than 26 July 2019.
- (9) THAT the respondent file and serve upon the applicant an outline of submissions by no later than 9 August 2019.
- (10) THAT the application be listed for hearing for one day on a date to be fixed.
- (11) THAT the parties have liberty to apply on short notice.

(Sgd.) T B WALKINGTON,
Commissioner.

[L.S.]

2019 WAIRC 00258

APPEAL AGAINST THE DECISION TO TERMINATE EMPLOYMENT ON 11 FEBRUARY 2019

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

LYNETTE ANN CALVERT

APPELLANT

-v-

PATHWEST LABORATORY SERVICES WA

RESPONDENT**CORAM**PUBLIC SERVICE APPEAL BOARD
COMMISSIONER T EMMANUEL - CHAIR
MS R SINTON - BOARD MEMBER
MR D HILL - BOARD MEMBER**DATE**

THURSDAY, 30 MAY 2019

FILE NO

PSAB 3 OF 2019

CITATION NO.

2019 WAIRC 00258

Result	Order issued
Representation	
Appellant	In person
Respondent	Mr J Carroll (of counsel)

Order

WHEREAS this is an appeal to the Public Service Appeal Board under the *Industrial Relations Act 1979* (WA);

AND WHEREAS at a directions hearing on 2 April 2019 the parties asked the Public Service Appeal Board to amend the name of the respondent;

AND HAVING heard from the parties, the Public Service Appeal Board considers the name of the respondent should be amended;

NOW THEREFORE the Public Service Appeal Board, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), and by consent, orders –

THAT the name of the respondent be amended to 'PathWest Laboratory Medicine WA'.

(Sgd.) T EMMANUEL,
Commissioner,

[L.S.]

On behalf of the Public Service Appeal Board.

2019 WAIRC 00259

APPEAL AGAINST THE DECISION TO TERMINATE EMPLOYMENT ON 11 FEBRUARY 2019

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

LYNETTE ANN CALVERT

APPELLANT

-v-

PATHWEST LABORATORY MEDICINE WA

RESPONDENT**CORAM**PUBLIC SERVICE APPEAL BOARD
COMMISSIONER T EMMANUEL - CHAIR
MS R SINTON - BOARD MEMBER
MR D HILL - BOARD MEMBER**DATE**

THURSDAY, 30 MAY 2019

FILE NO.

PSAB 3 OF 2019

CITATION NO.

2019 WAIRC 00259

Result	Direction issued
Representation	
Appellant	In person
Respondent	Mr J Carroll (of counsel)

Direction

HAVING heard from the appellant in person and Mr J Carroll (of counsel) on behalf of the respondent, the Public Service Appeal Board, pursuant to the powers conferred under the *Industrial Relations Act 1975* (WA), directs –

1. THAT the parties file a statement of agreed facts and bundle of agreed documents by 20 June 2019.
2. THAT the appellant file outlines of evidence and documents, other than the agreed documents, on which she intends to rely by 11 July 2019.
3. THAT the respondent file outlines of evidence and documents, other than the agreed documents, on which it intends to rely by 1 August 2019.
4. THAT the appellant file outlines of written submissions by 22 August 2019.
5. THAT the respondent file outlines of written submissions by 12 September 2019.
6. THAT discovery be informal.
7. THAT this matter be listed for hearing not less than seven days after 12 September 2019.
8. THAT the parties have liberty to apply.

(Sgd.) T EMMANUEL,
Commissioner,

[L.S.]

On behalf of the Public Service Appeal Board.

2019 WAIRC 00263

APPEAL AGAINST THE DECISION TO TAKE DISCIPLINARY ACTION ON 23 OCTOBER 2018

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
PAULA LOUGHTON-WALSH

PARTIES

APPELLANT

-v-

THE DIRECTOR GENERAL, DEPARTMENT OF JUSTICE

RESPONDENT

CORAM

PUBLIC SERVICE APPEAL BOARD
COMMISSIONER D J MATTHEWS - CHAIRMAN
MR J O'BRIEN - BOARD MEMBER
MS B CONWAY - BOARD MEMBER

DATE

FRIDAY, 31 MAY 2019

FILE NO

PSAB 28 OF 2018

CITATION NO.

2019 WAIRC 00263

Result	Order issued
Representation	
Appellant	Ms D Arntzen (of counsel)
Respondent	Mr J Bennett (of counsel)

Order

HAVING heard from the Ms D Arntzen, of counsel, for the appellant and Mr J Bennett, of counsel, for the respondent on Friday, 31 May 2019:

The Public Service Appeal Board, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby orders that the respondent provide to the appellant the documents listed in Appendix A, annexed to Respondent's Submissions on Discovery filed 15 March 2019 forthwith.

(Sgd.) D J MATTHEWS,
Commissioner,

[L.S.]

On behalf of the Public Service Appeal Board.

INDUSTRIAL AGREEMENTS—Notation of—

Agreement Name/Number	Date of Registration	Parties		Commissioner	Result
Perth Theatre Trust Venues management MEAA Agreement 2019 AG 5/2019	05/17/2019	General Manager, Perth Theatre Trust	Media, Entertainment and Arts Alliance	Commissioner T B Walkington	Agreement registered

PUBLIC SERVICE APPEAL BOARD—

2019 WAIRC 00270

APPEAL AGAINST THE DECISION FOR DISMISSAL ON 1 MARCH 2019

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	:	2019 WAIRC 00270
CORAM	:	PUBLIC SERVICE APPEAL BOARD COMMISSIONER T EMMANUEL - CHAIR MS J LOVE - BOARD MEMBER MR D HILL - BOARD MEMBER
HEARD	:	WEDNESDAY, 29 MAY 2019
DELIVERED	:	FRIDAY, 31 MAY 2019
FILE NO.	:	PSAB 7 OF 2019
BETWEEN	:	MATTHEW WILLIAM JONES Appellant AND CHIEF EXECUTIVE EAST METROPOLITAN HEALTH SERVICE Respondent

CatchWords	:	Industrial law – Public Service Appeal Board – <i>Health Services Act 2016</i> (WA) - Appeal filed out of time – Length of delay short – Delay due to representative error – Appellant has an arguable case - No prejudice to the respondent – Time to file appeal extended
Legislation	:	Section 27(1)(n), s 29(1)(b), s 29(3) of the <i>Industrial Relations Act 1979</i> (WA); reg 107(2) of the <i>Industrial Relations Commission Regulations 2005</i> (WA); s 172 of the <i>Health Services Act 2016</i> (WA)
Result	:	Order issued
Representation:		
Appellant	:	Mr J Nicholas (of counsel)
Respondent	:	Ms M Di Lello (as agent)

Cases referred to in reasons:

Prem Singh Malik v Paul Albert, Director General, Department of Education of Western Australia [2004] WASCA 51; (2004) 84 WAIG 683

Michael Christian Nicholas v Department of Education and Training [2008] WAIRC 01645; (2009) 89 WAIG 817

Jackamarra v Krakouer [1998] HCA 27; (1998) 195 CLR 516

Reasons for Decision

- 1 Mr Jones worked as a security officer for East Metropolitan Health Service (**Health Service**) for around 11 years until he was dismissed for a breach of discipline on 1 March 2019.
- 2 Mr Jones appeals his dismissal. The parties agree that under the *Industrial Relations Act 1979* (WA) (**IR Act**), such appeals must be made within 21 days. Mr Jones' notice of appeal was filed on 29 March 2019. It is seven days late.
- 3 Mr Jones asks the Public Service Appeal Board (**Board**) to extend the time for him to appeal. In summary, he argues:
 - a. the delay is relatively short;
 - b. the delay is due to representative error. Mr Jones sought advice from his lawyer on the day he was notified of the decision to dismiss. His lawyer mistakenly thought Mr Jones could make an unfair dismissal application to the Commission under s 29(1)(b) of the IR Act within 28 days. On 28 March 2019, Mr Jones' lawyer realised that Mr Jones was a government officer and only had 21 days to refer his appeal to the Board under s 172 of the

Health Services Act 2016 (WA) in accordance with reg 107(2) of the *Industrial Relations Commission Regulations 2005* (WA);

- c. Mr Jones has an arguable case; and
- d. any prejudice to the Health Service is minimal.

4 The Health Service says the Board should not extend the time for Mr Jones to appeal. It refers to s 29(3) of the IR Act and the six considerations discussed by the Industrial Appeal Court in *Prem Singh Malik v Paul Albert, Director General, Department of Education of Western Australia* [2004] WASCA 51; (2004) 84 WAIG 683 (*Malik*). In summary, the Health Service argues that:

- a. Mr Jones has not shown it would be unfair for his appeal not to be accepted out of time;
- b. Mr Jones and his lawyer knew by 10 January 2019 that the Health Service proposed to take disciplinary action against Mr Jones by dismissing him;
- c. there is no evidence of Mr Jones taking a vigilant role with his lawyer;
- d. Mr Jones should be bound by the acts of his lawyers. His lawyer’s error is Mr Jones’ error;
- e. that there is a lack of significant prejudice to the Health Service does not mean time should be extended; and
- f. the dismissal was procedurally and substantively fair. In effect, the Health Service stands by its decision to dismiss Mr Jones.

Consideration

5 In the *Malik* decision, the Industrial Appeal Court considered whether the Commission should have granted an extension of time under s 29(3) of the IR Act. This is not an application to the Commission, it is an appeal to the Board. Here, the Board must consider whether under s 27(1)(n) of the IR Act it should extend the time for Mr Jones to appeal to 29 March 2019.

6 The Board must consider the principles set out in *Michael Christian Nicholas v Department of Education and Training* [2008] WAIRC 01645; (2009) 89 WAIG 817 from [10] – [14]. They include the length of the delay, the reason for the delay, whether the appellant has an arguable case and whether there would be any prejudice to the respondent if the appeal is accepted out of time.

7 The length of the delay and the reason for it is not in dispute. The Board considers that the delay is short.

8 Contrary to what appears to be the Health Service’s argument, representative error in the circumstances of this matter does not mean that Mr Jones is bound by the actions of his lawyers such that the Board should find the reason for the delay is inadequate. The different jurisdictions, constituent authorities and standing to bring claims under the legislative regime is complex. Employees are frequently confused about whether they are government officers and whether they have standing to refer an unfair dismissal application to the Commission or an appeal to the Public Service Appeal Board when they have been dismissed. Their representatives are often similarly confused about those issues. Indeed, even the Health Service’s submissions refer to the section of the IR Act and case law that apply to the Commission and unfair dismissal, instead of appeals to the Board. In the circumstances, the Board finds representative error is an adequate reason for the delay.

9 The Health Service does not say that Mr Jones’ case is less than arguable. At this preliminary stage, the Board’s assessment of the merits is ‘fairly rough and ready’: *Jackamarra v Krakouer* [1998] HCA 27; (1998) 195 CLR 516 at [9]. There is no basis for the Board to find Mr Jones’ case could not succeed. The Board finds he has an arguable case.

10 Nothing has been put to the Board to suggest there is any particular prejudice to the respondent if the appeal is accepted out of time, beyond the usual prejudice of having to respond to an appeal at all.

11 For the above reasons, the Board will order that the time to file application PSAB 7 of 2019 be extended to 29 March 2019.

2019 WAIRC 00250

APPEAL AGAINST THE DECISION FOR DISMISSAL ON 1 MARCH 2019

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

MATTHEW WILLIAM JONES

APPELLANT

-v-

CHIEF EXECUTIVE EAST METROPOLITAN HEALTH SERVICE

RESPONDENT

CORAM

PUBLIC SERVICE APPEAL BOARD
COMMISSIONER T EMMANUEL - CHAIR
MS J LOVE - BOARD MEMBER
MR D HILL - BOARD MEMBER

DATE

WEDNESDAY, 29 MAY 2019

FILE NO

PSAB 7 OF 2019

CITATION NO.

2019 WAIRC 00250

Result	Order issued
Representation	
Appellant	Mr J Nicholas (of counsel)
Respondent	Ms M Di Lello (as agent)

Order

HAVING heard from Mr J Nicholas (of counsel) on behalf of the appellant and Ms M Di Lello (as agent) on behalf of the respondent, the Public Service Appeal Board, pursuant to the powers conferred under the *Industrial Relations Act 1975 (WA)*, orders –

THAT the time to file application PSAB 7 of 2019 be extended to 29 March 2019.

[L.S.]

(Sgd.) T EMMANUEL,
Commissioner,
On behalf of the Public Service Appeal Board.

2019 WAIRC 00251

APPEAL AGAINST THE DECISION FOR DISMISSAL ON 1 MARCH 2019

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

MATTHEW WILLIAM JONES

PARTIES**APPELLANT**

-v-

CHIEF EXECUTIVE EAST METROPOLITAN HEALTH SERVICE

RESPONDENT**CORAM**

PUBLIC SERVICE APPEAL BOARD
COMMISSIONER T EMMANUEL - CHAIR
MS J LOVE - BOARD MEMBER
MR D HILL - BOARD MEMBER

DATE

WEDNESDAY, 29 MAY 2019

FILE NO.

PSAB 7 OF 2019

CITATION NO.

2019 WAIRC 00251

Result	Direction issued
Representation	
Appellant	Mr J Nicholas (of counsel)
Respondent	Ms M Di Lello (as agent)

Direction

HAVING heard from Mr J Nicholas (of counsel) on behalf of the appellant and Ms M Di Lello (as agent) on behalf of the respondent, the Public Service Appeal Board, pursuant to the powers conferred under the *Industrial Relations Act 1975 (WA)*, directs –

1. THAT the parties file a statement of agreed facts and bundle of agreed documents by 19 June 2019.
2. THAT the appellant file outlines of evidence and documents, other than the agreed documents, on which he intends to rely by 10 July 2019.
3. THAT the respondent file outlines of evidence and documents, other than the agreed documents, on which it intends to rely by 31 July 2019.
4. THAT the appellant file written submissions by 14 August 2019.
5. THAT the respondent file written submissions by 28 August 2019.
6. THAT discovery be informal.
7. THAT this matter be listed for a three-day hearing not less than seven days after respondent's written submissions are filed.
8. THAT the parties have liberty to apply.

[L.S.]

(Sgd.) T EMMANUEL,
Commissioner,
On behalf of the Public Service Appeal Board.

2019 WAIRC 00110

APPEAL AGAINST THE DECISION TO TAKE DISCIPLINARY ACTION ON 16 APRIL 2018

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION : 2019 WAIRC 00110
CORAM : SENIOR COMMISSIONER S J KENNER
HEARD : THURSDAY, 28 FEBRUARY 2019
DELIVERED : THURSDAY, 28 FEBRUARY 2019
FILE NO. : PSAB 10 OF 2018
BETWEEN : RICHARD TITELIUS
 Appellant
 AND
 DIRECTOR GENERAL OF THE DEPARTMENT OF JUSTICE
 Respondent

Catchwords : *Industrial Relations Law (WA) - Application to set aside summons under s 33(2) of the Industrial Relations Act 1979 - Application considered - Documents sought are records of the court and not the respondent - Relevant procedure is application under s 33(8) of the Magistrates Court Act 2004 - Summons set aside - Order issued*
Legislation : *Industrial Relations Act 1979 (WA) s 33(2)*
 Magistrates Court Act 2004 (WA) s 33, s 38
Result : Order issued
Representation:
Counsel:
Appellant : In person
Respondent : Mr J Carroll of counsel
Solicitors:
Respondent : State Solicitor's Office

Case(s) referred to in reasons:*Lane v Morrison* (2009) 239 CLR 230

Reasons for Decision
Ex Tempore

- 1 Having considered the application to set aside the witness summons which has been made by the respondent we can indicate that we will deal with that matter this afternoon.
- 2 The summons to witness was issued at the request of the appellant on 11 February 2019 directed to Ms Deanne Bishop who we understand is the Regional Manager Fremantle Peel Magistrates Court of Western Australia, Department of Justice. The summons issued to Ms Bishop seeks the production of a court file of the Magistrates Court in the matter as described as follows "Consumer Trading Claim Court File FRE 1388/2016 RMR Diesel Engineering Pty Ltd and Alan Pavlinovich". The summons issued by the appellant is in connection with the present appeal before the Appeal Board listed for hearing on 18 March 2019 by an application filed on 19 February 2019.
- 3 The person summonsed, Ms Deanne Bishop, seeks an order under s 33(2) of the *Industrial Relations Act 1979* for cause to be shown why the summons to her should not be set aside. That application is set out in the grounds of the application, on three bases.
- 4 Firstly, the application contends that the record sought by the summons are records belonging to the Magistrates Court as a court and thus the summons issued to Ms Bishop is ineffective to require her to produce the documents as they are documents which are not in the possession of Ms Bishop but rather the Magistrates Court.
- 5 Secondly, the contention is that the appropriate course for the appellant is an application under s 33 of the *Magistrates Court Act 2004* to seek access to the court file, inspect and take copies of relevant documents, as the case may be.
- 6 Thirdly the contention is put that regardless of these two issues, that in any event, the content of the court file does not contain material relevant to the disposition of the present appeal.
- 7 It is trite to observe that the respondent, the Department of Justice, in these proceedings is not the Magistrates Court of Western Australia. The Magistrates Court of Western Australia is established as a court of record under the *Magistrates Court Act 2004*. By s 8 of that legislation the court is to have as many Registries throughout the State as the responsible Minister by notice to the Chief Magistrate may determine. As a court of record, the proceedings of the court are preserved. Those records are conclusive and the records of a court of record are the court's and are not the respondent's records: *Lane v Morrison* (2009) 239 CLR 230.

- 8 Accordingly, there is a procedure in recognition of what I have just said, set out in the *Magistrates Court Act* in s 33 which was discussed between the parties and the Appeal Board in argument. That procedure enables parties and other persons and persons who may have an interest, to apply to the court to inspect the record; to obtain a copy of a court record; to listen to or to view any other information held by the court in relation to the matter dealt with by the court. We draw attention to s 33(8) for that purpose.
- 9 In the circumstances in which we have outlined them, the documents sought by the appellant, in the opinion of the Appeal Board, cannot be produced by the person summonsed. They must be the subject of an application to the court under s 33(8) of the *Magistrates Court Act 2004*, in accordance with the appropriate rules of court. Therefore, the application under s 33(2) of the Act brought by Ms Bishop is granted and there will be an order setting aside the summons.

2019 WAIRC 00105

APPEAL AGAINST THE DECISION TO TAKE DISCIPLINARY ACTION ON 16 APRIL 2018

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

RICHARD TITELIUS

APPELLANT

-v-

DIRECTOR GENERAL OF THE DEPARTMENT OF JUSTICE

RESPONDENT**CORAM**

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

DATE

FRIDAY, 1 MARCH 2019

FILE NO

PSAB 10 OF 2018

CITATION NO.

2019 WAIRC 00105

Result

Order issued

Representation**Appellant**

In person

Respondent

Mr J Carroll of counsel

Order

HAVING heard Mr R Titelius in person and Mr J Carroll of counsel on behalf of the respondent the Appeal Board, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders –

THAT the summons issued to Ms Deanne Bishop by the appellant dated 14 February 2019 be and is hereby set aside.

(Sgd.) S J KENNER,
 Senior Commissioner,

[L.S.]

On behalf of the Public Service Appeal Board.

2019 WAIRC 00195

APPEAL AGAINST THE DECISION TO TAKE DISCIPLINARY ACTION ON 16 APRIL 2018

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION

: 2019 WAIRC 00195

CORAM

: SENIOR COMMISSIONER S J KENNER, CHAIRMAN
 MS L KENNEWELL, BOARD MEMBER
 MR P WISHART, BOARD MEMBER

HEARD

: MONDAY, 18 MARCH 2019

DELIVERED

: MONDAY, 15 APRIL 2019

FILE NO.

: PSAB 10 OF 2018

BETWEEN

: RICHARD TITELIUS

Appellant

AND

DIRECTOR GENERAL OF THE DEPARTMENT OF JUSTICE

Respondent

Catchwords	:	<i>Industrial Law - Appeal against decision of respondent to take disciplinary action - Whether conduct of appellant constituted breach of discipline - Whether penalty of reprimand and transfer to another position in the respondent was reasonable and proportionate - Whether respondent could rely on past disciplinary matter - Principles applied - Breach of discipline occurred - Reprimand to note appellant was acting with sound intentions - Appeal otherwise dismissed</i>
Legislation	:	<i>Industrial Relations Act 1979 (WA)</i> <i>Public Sector Management Act 1994 (WA) ss 80, 80A, 82A, 80I, 81</i>
Result	:	Order issued
Representation:		
Counsel:		
Appellant	:	In person
Respondent	:	Mr J Carroll of counsel
Solicitors:		
Respondent	:	State Solicitor of Western Australia

Case(s) referred to in reasons:

Blyth v Birmingham Waterworks Co (1856) 11 Ex 781

Harvey v Commissioner for Corrections, Department of Corrective Services [2017] WAIRC 00728; (2017) 97 WAIG 1525
Raxworthy v The Authority for Intellectually Handicapped Persons (1989) 69 WAIG 2266

Titelius v the Public Service Appeal Board (1999) 21 WAR 201

Case(s) also cited:

Anthony David Craig v The State of South Australia (1995) 184 CLR 163

Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1948] 1 KB 223

Briginshaw v Briginshaw (1938) 60 CLR 336

*Reasons for Decision***The appeal and background**

- 1 The appellant is employed by the respondent and at the material times was a Relief Customer Service Officer. The appellant has been employed by the respondent for about 35 years. In June 2017 the appellant was working at the Fremantle Magistrates Court. At the time, he was undertaking training as a Judicial Support Officer (JSO). Following a civil trial, the presiding Magistrate requested the appellant to type up his reserved reasons for decision. In the course of doing so, on 14 June 2017, the appellant made telephone contact with a witness who gave evidence in the trial, to clarify his evidence that he gave in open court. In reliance on information provided to him, the appellant altered and included additional information in the draft reasons for decision prepared by the Magistrate.
- 2 Subsequently, the appellant was subject to disciplinary proceedings under the *Public Sector Management Act 1994*. On 16 April 2018, having found a breach of discipline occurred, the respondent imposed a penalty on the appellant by way of a reprimand and a transfer to another position.
- 3 The appellant now appeals against the disciplinary action and the imposition of the penalty. The appellant contended that the conduct involved did not warrant a finding of a breach of discipline and was the result of an honest and mistaken belief about his course of action. The appellant maintained that he was not negligent in the performance of his duties. The appellant maintained that the appropriate response of the respondent should have been remedial action by way of further training. Additionally, the appellant complained that the respondent's reliance on a previous disciplinary matter in 2016 was inappropriate, as that matter was the subject of mediation before the Commission and a settlement. The appellant seeks an order that the finding of a breach of discipline and the imposition of a penalty be quashed. In the alternative, if the breach of discipline finding is to be sustained, the appellant maintained that improvement action should be imposed instead. The respondent maintained that the conclusion of a breach of discipline was justified on the facts and that the penalty imposed in all of the circumstances, was fair and reasonable.

Approach to the appeal

- 4 In *Harvey v Commissioner for Corrections, Department of Corrective Services* [2017] WAIRC 00728; (2017) 97 WAIG 1525, the Appeal Board affirmed the approach to appeals of the present kind, as set out in *Raxworthy v the Authority for Intellectually Handicapped Persons* (1989) 69 WAIG 2266. That being, as an appeal, the appeal board is given greater scope to substitute its view for that of the employer and the hearing is in the nature of a hearing de novo, based on all the evidence and submissions before the appeal board. It is of course, for the appellant to make out his appeal, and to persuade the appeal board that the decision taken by the respondent should be "adjusted": s 80I(1) PSM Act.

Factual issues

- 5 The parties to the appeal have agreed that the essential facts are not in dispute. The fact of the appellant making contact with a witness who appeared in the civil proceedings, after the conclusion of the trial and the reservation of the Magistrate's decision, was admitted. Also admitted was that the appellant did, in reliance on this information, alter the draft typed reasons of the Magistrate as they were being prepared by the appellant. What is in issue on this appeal, is whether the admitted conduct constituted a breach of discipline in all of the circumstances and if it did, whether the penalty of a reprimand and a transfer to another position, was a reasonable and proportionate response to that conduct.
- 6 In light of those observations, the essential facts are these. They are taken largely from the correspondence to and from the appellant and his union, as set out at annexure A to the respondent's notice of answer, which correspondence was tendered as exhibit R1. The appellant was working as a trainee JSO for a Magistrate at Fremantle Magistrates Court. As noted earlier, at the conclusion of a civil action, the Magistrate reserved his decision in the matter. Subsequently, the Magistrate gave the appellant a written draft of his reasons for decision to be typed. The Magistrate told the appellant to type exactly what he had written however, corrections could be made in relation to any obvious errors of syntax or grammar. As he was typing the Magistrate's reasons, the appellant noticed that reference was made to evidence given by a witness, who was described as the managing director of a business, only described by its business name. The appellant, from his own knowledge, that a person could not be a managing director of a business name but only a corporation, searched for any reference to the relevant corporation on the court file but found none. The appellant then went to discuss the matter with the Magistrate who was not then available in his Chambers. Because of what the appellant described as expectations to complete the task in a timely fashion, he located the phone number to contact the witness on the court file. The appellant telephoned the witness, spoke to him and asked him the name of the company of which he was the managing director. The witness told the appellant the name of the company following which the appellant ended the telephone call. The appellant made a file note of the telephone conversation and put it on the court file. A copy of his file note was exhibit A5.
- 7 Following the telephone call, the appellant altered the Magistrate's draft reasons he was typing by inserting the name of the company as given to him by the witness over the telephone.
- 8 Resulting from these events, by letter of 17 August 2017, the appellant was alleged to have committed two breaches of discipline. The relevant parts of the letter, formal parts omitted, are as follows:

ALLEGED BREACHES OF DISCIPLINE

Pursuant to section 81 (1)(a) of the *Public Sector Management Act 1994* (PSM Act) I inform you that I have become aware that you may have committed breaches of discipline.

It has been alleged that on 14 June 2017 you had undertaken activities that were outside the role and responsibilities of your duties, in relation to a civil matter in the Fremantle Magistrates Court, without instruction or authority to do so.

Allegations

As a result of this conduct, it is alleged that:

1. On 14 June 2017 you contacted a witness to a matter before Magistrate Malley, acting outside of your duties as Relief Customer Service Officer, without authority to do so.

This act is contrary to the principles of conduct prescribed under Paragraph 2 of the Department of the Attorney General's *Code of Conduct (Attachment 1)* and Paragraph 1 of *Commissioner's Instruction No 7- Code of Ethics (Attachment 2)*. It is alleged that your actions further constituted an act of misconduct under section 80(c) of the PSM Act.

2. On or around 14 June 2017 you altered and included additional information in a reserved decision of Magistrate Malley, acting outside of your duties as Relief Customer Service Officer, without authority to do so.

This act is contrary to the principles of conduct prescribed under Paragraph 2 of the Department of the Attorney General's *Code of Conduct* and Paragraph 1 of *Commissioner's Instruction No 7- Code of Ethics*. It is alleged that your actions further constituted an act of misconduct under section 80(c) of the PSM Act.

It is alleged that the above actions constitute a breach of discipline under sections 80(b) and 80(c) of the PSM Act. I have enclosed a copy of these sections of the PSM Act (**Attachment 3**).

Procedural Fairness

I have decided to deal with this as a disciplinary matter under section 81 (1)(a) of the PSM Act. In accordance with the PSM Act and the *Commissioner's Instruction No. 3, Discipline - general (Attachment 4)* you are provided with an opportunity to submit a written response in respect of the above matter.

What you need to do

If you wish to provide me with a written explanation, please do so within 10 working days from receipt of this letter. Your submission is to be marked "PRIVATE AND CONFIDENTIAL" to the attention of Ms. Tracey Bell, Director Human Resources, Department of Justice, PO Box F317, Perth, WA 6841.

If no response is received by the due date I will make a decision on what further action is to be taken on the information I currently have.

I may decide to further investigate the matter. If so you will be informed of this decision and what that investigation will entail. Alternatively, I may decide on the basis of the information I have to hand, that I can make findings on whether or not you have committed the breaches of discipline set out above without further investigation.

Possible action

If I find that you have committed a breach of discipline section 82A(3)(b) of the PSM Act provides that I may take:

- a) disciplinary action; or
- b) both disciplinary action and improvement action; or
- c) improvement action only; or
- d) take no further action.

I enclose a copy of the definition of "disciplinary action" in section 80A of the PSM Act (**Attachment 5**) and a copy of the definition of "improvement action" in section 3 of the PSM Act (**Attachment 6**).

As you will see the actions that may be taken range from counselling to dismissal and combinations of actions may be taken. If I provisionally decide to take any of the actions set out above you will be given an opportunity to comment before I do so.

- 9 In his defence, the appellant maintained that he acted honestly and without any intention to do the wrong thing. Indeed, he said that at the time he was trying to do the right thing by seeking to clarify and correct what he described as a "legal impossibility". As a part of his actions, the appellant referred to the Magistrates Court's Registry Process Area document, which he said provided guidance to him in making contact with the witness to clarify the matter of the company name. As for the alteration of the draft reasons of the Magistrate, the appellant maintained that he was relatively new to the task of preparing reasons for decision but in any event, the Magistrate would always check and approve the decision, prior to it being handed down.
- 10 Subsequently, by letter of 15 December 2017, the respondent made findings of a breach of discipline and informed the appellant that it proposed to take disciplinary action by way of a formal reprimand and transfer to another position within the respondent. In reaching this decision, the respondent noted that the appellant had a previous breach of discipline in May 2016 when it was found that the appellant, on that occasion also, had acted outside of the scope of his position without authority. After hearing further from the appellant's union, by letter of 7 February 2018 the respondent modified its allegations against the appellant, from misconduct under s 80(c) to negligence and carelessness under s 80(d) of the PSM Act. By further letter of 2 March 2018, the appellant was found to have so acted and the penalty as proposed was confirmed.

Consideration

- 11 As mentioned above, the essential facts in this matter are not in dispute. The appellant does not dispute that he did in June 2017, contact a witness who gave evidence in civil proceedings before a Magistrate, after the trial had concluded. It was also not in dispute that as a result, the appellant did alter a draft of a decision he was typing for the Magistrate. The real issue arising on the appeal is how should this conduct be characterised and whether, it could form the basis of a conclusion of a breach of discipline under ss 80(b) and (d) of the PSM Act. Secondly, if the conduct did warrant a breach of discipline finding, whether the disciplinary action imposed under ss 80A and 82A of the PSM Act was warranted. Thirdly, and related to the second point, is whether it was open for the respondent to have regard to the appellant's prior disciplinary history arising from his conduct in May 2016.
- 12 Sections 80(b) and (d) provide as follows:
- 80. Breaches of discipline, defined**
- An employee who —
- ...
- (b) contravenes —
- (i) any provision of this Act applicable to that employee; or
- (ii) any public sector standard or code of ethics;
- or
- ...
- (d) is negligent or careless in the performance of his or her functions; or
- 13 The appellant in his submissions denied that he was negligent or careless in the performance of his duties. He submitted that it had been some years since he had been working in the Court's criminal jurisdiction and he was sent to the Fremantle Court for an eight-week placement to learn the role of a Court Support Officer. The appellant had prior experience as a JSO in the restraining order court. The appellant submitted that prior to going to Fremantle, his manager gave him a copy of the JSO Induction Manual (exhibit A4), which the appellant said did not contain any reference to the procedure for typing up Magistrates' reserved decisions.
- 14 On the day in question, the appellant said that he had been typing the decision for the Magistrate and noticed that the reference to the business of which the witness was the managing director, was described only by its business name. When it became known that the appellant had contacted the witness, the Magistrate, according to the appellant, was upset by his conduct and this led to him being removed from court work and the subsequent commencement of the disciplinary action. A report of the incident is contained in a memorandum to the respondent's Director-General Dr Tomison, dated 26 June 2017. A copy of this memorandum was exhibit A5. To the extent that the report contains reference to matters beyond the admissions made by the appellant in the documents in evidence in these proceedings, I have not had regard to it. The memorandum has annexed to it the file note dated 14 June 2017, placed on the court file by the appellant, which recorded contacting the witness after the conclusion of the trial and prior to the delivery of the Magistrate's decision.
- 15 Whilst the appellant maintained that he acted in good faith and in accordance with the only procedure he then knew may be applicable, that being the Magistrate Court's Registry Process Area Procedure (see attachment 1 to the respondent's notice of answer), this procedure only applies to documents lodged in the Court's Registry. Additionally, the fact that the appellant went to see the Magistrate to clarify what he should do in the situation he found himself in, strongly suggests that this was not

a straightforward situation. Despite not being able to discuss the matter with the Magistrate, and also that the reserved decision in the case was not due to be handed down until 5 July 2017, the appellant went ahead and made contact with the witness and obtained an out of court statement from him. This was a significant error of judgement. It is a foundational principle that a court or tribunal must determine matters based on the evidence and submissions made in open court. The position of a JSO includes the duty of providing support to a Magistrate in and out of court. Self-evidently, contacting a witness who gave evidence in a civil trial after the conclusion of the trial and before a reserved decision is delivered, goes well beyond the scope of a JSO's role.

- 16 The appellant took issue with the respondent's conclusion that his actions had the potential to lead to a negative impact on the respondent. The tenor of the appellant's submissions in this respect, was to the effect that there was no suggestion of any actual damage and therefore, the respondent should not have relied on this ground in coming to its decision. The respondent acknowledged that there was no actual damage in its letter of outcome dated 2 March 2018. However, the potential for a negative impact on the respondent and the Magistrate concerned, is clear. It may have seemed to a reasonable outside observer, being aware of what had occurred, that despite the obligation on a judicial officer to hear and determine a case based on the submissions and evidence put in open court, that the Magistrate had taken into account and relied on information and material informally obtained, outside of the hearing and without the knowledge of all the parties to the proceedings. This clearly had the potential to reflect adversely on the Magistrate concerned, and more broadly, the respondent.
 - 17 As to the question of alterations to the Magistrate's draft reasons, this cannot be divorced from the conduct of contacting the witness. To an extent, they go hand in hand. It was the case that the appellant was instructed to type what the Magistrate had written. Any modifications of substance would be for the Magistrate to make. No such modifications could be properly made without the Magistrate's instructions to do so. In making the change, which the appellant made, he went well beyond the correction of spelling and grammatical errors. It was a change of substance to the Magistrate's reasons, even though they were still in draft form.
 - 18 As part of the appellant's case, it was put, in reliance on *Titelius v the Public Service Appeal Board* (1999) 21 WAR 201, that having regard to the meaning of "negligence" as discussed in that case (per Malcolm CJ at pars 70-71), the appellant's conduct in contacting the witness could not be so characterised. The appellant also contended that "carelessness" for the purposes of s 80(d) of the PSM Act, means that he had to do something wilfully, whilst also being aware that it was done not in accordance with a standard he was trained for.
 - 19 For the purposes of s 80(d), the words "negligent" and "careless" bear their ordinary and natural meaning. In its ordinary meaning "negligent" means "... Inattentive to what ought be done; ... of actions, conduct etc ... displaying negligence or carelessness ..." "careless" is defined to mean "... 3. Not taking due care, negligent, thoughtless, inaccurate": *Shorter Oxford Dictionary*. I do not consider that these ordinary meanings are at odds with the references made in *Titelius*. It certainly comprehends an action or behaviour "which a reasonable man would not do ...": *Blyth v Birmingham Waterworks Co* (1856) 11 Ex 784 cited by Malcolm CJ in *Titelius* above. In the context of the role of a JSO, and given the instructions to the appellant to type only what the Magistrate had written in his draft reasons, I do not think it was reasonable for the appellant to make contact with the witness, obtain an out of court statement from him and to then incorporate the content of the statement into the Magistrate's draft decision.
 - 20 Having regard to the circumstances of this case, I am not able to conclude that the respondent's decision, that the appellant did commit a breach of discipline, was unreasonable or was not reasonably open to it.
 - 21 Moving to the issue of the penalty imposed, a range of options were open to the respondent on a finding of a breach of discipline. Under s 82A(3)(b) of the PSM Act, on a finding of a breach of discipline, an employer may take disciplinary action, improvement action, both actions, or take no further action. In this case, the appellant contended that if the respondent's breach of discipline finding stood, then the appropriate action would be improvement action. This is because the appellant maintained that the matter was one of training.
 - 22 Had this been a one-off incident, there may have been some merit in this contention. However, a previous breach of discipline incident was recorded against the appellant in May 2016, where it was found that the appellant also acted outside of the scope of his authority. Whilst the appellant made submissions about this prior incident, and sought to explain the circumstances of it, this appeal is not for the purposes of re-hearing the circumstances of the earlier matter. Whilst in that matter, the fine originally imposed on the appellant was withdrawn following mediation, the reprimand remained on the appellant's file. It was reasonable for the respondent to have regard to this in its deliberations as to the appropriate penalty in this matter.
 - 23 I note that for the purposes of s 80A of the PSM Act, the penalty of a reprimand is the lowest level of penalty that may be imposed. A transfer to another office, post or position, can be regarded as a "middle order" penalty, short of the more serious penalties of a reduction in remuneration or classification and dismissal, as being the most serious. Having regard to the overall circumstances of the appellant's actions, in conjunction with the prior incident in May 2016, I do not consider that the penalty imposed by the respondent was harsh or excessive, such that the Appeal Board should intervene and adjust it.
 - 24 However, the Appeal Board acknowledges that the appellant's consistent stance throughout the disciplinary process, was that he did not act with any malintent. He considered that at all material times he was doing the right thing. In my view, this is a qualification that should be made to the appellant's reprimand for the purposes of his employment record. In all other respects the appeal must be dismissed.
-

2019 WAIRC 00194

APPEAL AGAINST THE DECISION TO TAKE DISCIPLINARY ACTION ON 16 APRIL 2018

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

RICHARD TITELIUS

APPELLANT

-v-

DIRECTOR GENERAL OF THE DEPARTMENT OF JUSTICE

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

MONDAY, 15 APRIL 2019

FILE NO

PSAB 10 OF 2018

CITATION NO.

2019 WAIRC 00194

Result	Order issued
Representation	
Appellant	In person
Respondent	Mr J Carroll of counsel

Order

HAVING heard the appellant on his own behalf and Mr J Carroll of counsel on behalf of the respondent the Public Service Appeal Board, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders –

- (1) THAT the reprimand issued by the respondent to the appellant constituting a written warning placed on the appellant's personal file arising from the events the subject of the herein appeal, is to note that at all material times the appellant was acting with sound intentions.
- (2) THAT otherwise the appeal be and is hereby dismissed.

(Sgd.) S J KENNER,
Senior Commissioner,

On behalf of the Public Service Appeal Board.

[L.S.]

PUBLIC SECTOR MANAGEMENT ACT 1994—Matters dealt with—

2019 WAIRC 00235

REFERRAL TO COMMISSION UNDER PUBLIC SECTOR MANAGEMENT ACT 1994

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	:	2019 WAIRC 00235
CORAM	:	COMMISSIONER T EMMANUEL
HEARD	:	MONDAY, 6 MAY 2019
DELIVERED	:	WEDNESDAY, 15 MAY 2019
FILE NO.	:	APPL 73 OF 2018
BETWEEN	:	KLAUS AUERT
		Applicant
		AND
		NORTH METROPOLITAN HEALTH SERVICE
		Respondent

CatchWords	:	Industrial law (WA) - Jurisdiction – Applicant is a government officer – Commission cannot hear and determine this application in its general jurisdiction
Legislation	:	Section 172 of the <i>Health Services Act 2016</i> (WA); s 22A, s 23(1), s 80C(1)(b) and s 80E(1) of the <i>Industrial Relations Act 1979</i> (WA); <i>Public Sector Management Act 1994</i> (WA)
Result	:	Application dismissed
Representation:		
Applicant	:	In person
Respondent	:	Ms J Symons (as agent)

Cases referred to in reasons:

Matthew Crowley v Chief Executive Officer, Department of Commerce [2017] WAIRC 00262; (2017) 97 WAIG 454

Reasons for Decision

- 1 Mr Auert is a Poisons Information Specialist at North Metropolitan Health Service (**Health Service**). He has referred his employer's decision to take disciplinary action against him to the Commission under the *Public Sector Management Act 1994* (WA).
- 2 Mr Auert says the Health Service's finding of a breach of discipline and decision to take improvement action on 1 November 2018 were unfair because they came out of an unfair and inconsistently applied performance review process.
- 3 The Health Service objects to the Commission hearing and determining this matter in its general jurisdiction and asks the Commission to dismiss Mr Auert's application. It says that industrial matters relating to Mr Auert come within the exclusive jurisdiction of the Public Service Arbitrator because he is a government officer.
- 4 The parties agree there are no material facts in dispute and the Health Service's application to dismiss Mr Auert's application should be decided on the papers.

What must I decide?

- 5 I must decide whether to dismiss Mr Auert's application because the Commission lacks jurisdiction to deal with it.

Does the Commission have jurisdiction?*The Health Service's submissions*

- 6 The Health Service says Mr Auert is on its salaried staff. The terms and conditions of his employment are regulated by the Hospital Officers Award No. 39 of 1968 and the WA Health System – Health Services Union WA – PACTS – Industrial Agreement 2018. It says the Health Service is a public authority because it is a public corporate body, established under the *Health Services Act 2016* (WA) (**HS Act**).
- 7 The Health Service says Mr Auert is therefore a government officer as defined by s 80C(1)(b) of the *Industrial Relations Act 1979* (WA) (**IR Act**), because he is employed on the salaried staff of a public authority.
- 8 The Health Service says that in accordance with s 80E(1) of the IR Act, an industrial matter relating to a government officer comes within the exclusive jurisdiction of the Public Service Arbitrator. As Mr Auert's application relates to a disciplinary decision or finding, he may only appeal to the Public Service Appeal Board, chaired by a Public Service Arbitrator, under s 172 of the HS Act.
- 9 Therefore, the Health Service says the Commission should dismiss this application because the Commission lacks jurisdiction to hear and determine the matter.

Mr Auert's submissions

- 10 Mr Auert agrees he is a government officer. He does not deal with the question of jurisdiction. Rather, Mr Auert focusses on the assistance he seeks from the Commission to address a range of concerns. They include the outcome of staff surveys, poor recruitment and retention, clinical performance and timesheet anomalies, as well as a lack of annual reports, performance appraisals, hospital orientation for new staff, quality control and peer review, meaningful staff training, publication and research output and regular departmental meetings.

Consideration

- 11 As her Honour Smith AP states in the unanimous decision of the Full Bench *Matthew Crowley v Chief Executive Officer, Department of Commerce* [2017] WAIRC 00262; (2017) 97 WAIG 454:

32. ... The scheme of the provisions of the IR Act are clear. Firstly, where an industrial matter is raised in any application before the Commission which 'relates to a government officer' the general jurisdiction of the Commission under s 23(1) of the IR Act is expressly excluded by s 80E(1) of the IR Act.

...

40. The conferral of exclusive jurisdiction in respect of industrial matters that relate to a 'government officer' is found in the express power in s 80E(1) of the IR Act which provides:

Subject to Division 3 of Part II and subsections (6) and (7), an Arbitrator has exclusive jurisdiction to enquire into and deal with any industrial matter relating to a government officer, a group of government officers or government officers generally.

41. The ousting of the general jurisdiction of the Commission in s 23(1) of the IR Act by s 80E(1) by the exclusive jurisdiction of the constituent authorities, one of which is the Public Service Arbitrator, is put beyond doubt by the expressed intention in the definition of 'industrial matter' in div 2 by operation of s 22A of the IR Act. Section 22A and s 23(1) are both found in div 2 of pt II of the IR Act. Section 22A provides:

In this Division and Divisions 2A to 2G —

Commission means the Commission constituted otherwise than as a constituent authority;

industrial matter does not include a matter in respect of which, subject to Division 3, a constituent authority has exclusive jurisdiction under this Act.

12 The general jurisdiction of the Commission is ousted by the exclusive jurisdiction of the Public Service Arbitrator except in the limited circumstances set out in the IR Act. This matter does not involve those limited circumstances. Therefore as a government officer, Mr Auert comes within the Public Service Arbitrator's exclusive jurisdiction. The Commission cannot deal with Mr Auert's application and I will order that it be dismissed for lack of jurisdiction.

2019 WAIRC 00234

REFERRAL TO COMMISSION UNDER PUBLIC SECTOR MANAGEMENT ACT 1994

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

KLAUS AUERT

APPLICANT

-v-

NORTH METROPOLITAN HEALTH SERVICE

RESPONDENT

CORAM

COMMISSIONER T EMMANUEL

DATE

WEDNESDAY, 15 MAY 2019

FILE NO/S

APPL 73 OF 2018

CITATION NO.

2019 WAIRC 00234

Result	Application dismissed
Representation	
Applicant	In person
Respondent	Ms J Symons (as agent)

Order

HAVING heard from the applicant in person and Ms J Symons (as agent) on behalf of the respondent, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), orders –

THAT this application be, and by this order is, dismissed.

(Sgd.) T EMMANUEL,
Commissioner.

[L.S.]
