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INDUSTRIAL APPEAL COURT—Appeal against decision of Full Bench—

2019 WAIRC 00641

APPEAL AGAINST THE DECISION OF THE FULL BENCH IN FBA 5 OF 2018

WESTERN AUSTRALIAN INDUSTRIAL APPEAL COURT

PARTIES	BROWNE
	APPELLANT
	-v-
	DIRECTOR GENERAL DEPARTMENT OF WATER AND ENVIRONMENTAL REGULATION
	RESPONDENT
CORAM	BUSS J MURPHY J LE MIERE J
DATE	FRIDAY, 16 AUGUST 2019
FILE NO/S	IAC 3 OF 2018
CITATION NO.	2019 WAIRC 00641

Result	Decision reserved
Representation	
Appellant	Mr M A Drake-Brockman
Respondent	Mr R J Andretich (of counsel) State Solicitor's Office

Order

It is ordered:

1. THAT the decision is reserved.

[L.S.]

(Sgd.) S KEMP,
Clerk of Court.

[2019] WASCA 120

JURISDICTION	**:**	WESTERN AUSTRALIAN INDUSTRIAL APPEAL COURT
CITATION	**:**	GOVERNING COUNCIL OF NORTH METROPOLITAN TAFE -v- THE STATE SCHOOL TEACHERS' UNION OF WA (INCORPORATED) [2019] WASCA 120
CORAM	**:**	BUSS J MURPHY J LE MIERE J
HEARD	**:**	13 MARCH 2019
DELIVERED	**:**	16 AUGUST 2019
FILE NO/S	**:**	IAC 2 of 2018
BETWEEN	**:**	GOVERNING COUNCIL OF NORTH METROPOLITAN TAFE Appellant AND THE STATE SCHOOL TEACHERS' UNION OF WA (INCORPORATED) Respondent

ON APPEAL FROM:

Jurisdiction	**:**	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
Coram	**:**	SMITH AP, KENNER SC, MATTHEWS C
Citation	**:**	THE GOVERNING COUNCIL OF NORTH METROPOLITAN TAFE v STATE SCHOOL TEACHERS' UNION OF WA [2018] WAIRC 00746
File Number	**:**	FBA 8 OF 2018

Catchwords:

Industrial law - Appeal against decision of the Full Bench of Western Australian Industrial Relations Commission dismissing appeal from interim order made by the industrial magistrate - Whether majority erred in law in holding that an appeal to the Full Bench does not lie from a decision of an industrial magistrate to order interim relief under s 83(5) and s 83(7) of the *Industrial Relations Act 1979* (WA) - Statutory construction - Whether court should dismiss appeal on ground that it has become moot

Legislation:

Industrial Relations Act 1979 (WA), s 83, s 83(5), s 83(7), s 84, s 84(1), s 84(2)

Labour Relations Reform Act 2002 (WA), s 155(1)

Surveillance Devices Act 1998 (WA), s 5(1)(b), s 9(1)

Result:

Appeal dismissed

Category: B

Representation:

Counsel:

Appellant	:	A J Sefton & J M Carroll
Respondent	:	No appearance

Solicitors:

Appellant	:	State Solicitor for Western Australia
Respondent	:	No appearance

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

Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (2009) 239 CLR 27
Anderson v Pope (1986) 66 WAIG 1563
Bass v Permanent Trustee Co Ltd (1999) 198 CLR 334
Bonan v Hadgkiss (2007) 160 FCR 29
Commissioner of Stamps (South Australia) v Telegraph Investment Co Pty Ltd (1995) 184 CLR 453
Federal Commissioner of Taxation v Consolidated Media Holdings Ltd (2012) 250 CLR 503
Federal Commissioner of Taxation v Industrial Equity Ltd (2000) 98 FCR 573
Hope Downs Management Services Pty Ltd v Hamersley Iron Pty Ltd [1999] FCA 1652
Jardin v Metcash Ltd [2011] NSWCA 409
Long v Minister for Immigration & Multicultural & Indigenous Affairs [2002] FCAFC 438
Minister for Immigration & Multicultural & Indigenous Affairs v Al Masri (2003) 126 FCR 54
Plaintiff S4/2014 v Minister for Immigration (2014) 253 CLR 219
Project Blue Sky Inc v Australian Broadcasting Authority (1998) 194 CLR 355

BUSS J:

1 I agree with Le Miere J.

MURPHY J:

2 I agree with Le Miere J.

LE MIERE J:

Summary

3 The appellant has appealed from the decision of the Full Bench of the Western Australian Industrial Relations Commission which dismissed its appeal from an interim order made by the industrial magistrate pursuant to s 83(5) and s 83(7) of the *Industrial Relations Act 1979* (WA) (the Act) on the ground that the appeal was incompetent. The Full Bench, by majority (Smith AP and Kenner SC), held that the appeal was incompetent because an appeal lies to the Full Bench from a decision of an Industrial Magistrates Court under s 84 of the Act only from a 'decision' of the Industrial Magistrates Court. The interim order made by the industrial magistrate was not considered to be a 'decision' within the meaning of s 84 of the Act.

4 The appellant appeals to this court on the ground that the majority of the Full Bench erred in law in holding that an appeal to the Full Bench does not lie from a decision of an industrial magistrate to order interim relief under s 83(5) and s 83(7) of the Act.

5 For the reasons which follow the appeal should be dismissed on the ground that the appeal is moot in that it asks the court to determine issues which are not live as between the parties because the proceedings have been settled.

Proceedings before the industrial magistrate

6 The interim order made by the industrial magistrate was made in the course of a claim by the respondent union against the appellant employer claiming that the appellant had failed to comply with cl 23.1 of the Western Australian TAFE Lecturers' General Agreement 2014 (the Agreement).

1

7 The appellant had instituted disciplinary proceedings against a member of the respondent union, Mr CS. The respondent alleged that the appellant had regard to an audio recording of a conversation between Mr CS and two other employees of the appellant. Further, that the recording and use of the recording was a contravention of s 5(1)(b) and s 9(1) respectively of the *Surveillance Devices Act 1998* (WA). The use of the recording in the disciplinary process was also claimed to be a breach of cl 23.1 of the Agreement which, amongst other things, provided that no employee shall be subject to penalties unless a fair procedure was applied. The respondent sought an order imposing a penalty on the appellant for its contravention or failure to comply with the Agreement, an order that the appellant pay to the respondent any penalty imposed upon it and orders restraining the appellant from using the recording in the disciplinary process.

8 The respondent applied for an interim order pursuant to s 83(5) and s 83(7) of the Act. The appellant dismissed Mr CS from its employment on the day before the hearing of the respondent's application for an interim order. The industrial magistrate made interim orders (Interim Orders) requiring the appellant to reinstate Mr CS to his employment, restraining the appellant from using the audio recording and some incidental orders.

Appeal to the Full Bench

9 The appellant appealed to the Full Bench from the Interim Orders made by the industrial magistrate on a number of grounds including that the industrial magistrate had no power to make an interim order requiring the appellant to reinstate Mr CS. The Full Bench, by majority, dismissed the appeal on the ground that it was incompetent. The majority found that an appeal to the Full Bench lies from an order or determination of an industrial magistrate which finally determines the application brought to the Industrial Magistrates Court, but not from interim orders which do not finally determine the issue as to whether, if there is found to have been a contravention of the Agreement, final relief of the kind claimed by the respondent could or should be made.

10 After the decision of the Full Bench but before the institution of the appeal to this court, the dispute between the appellant and the respondent giving rise to the proceeding in the Industrial Magistrates Court was settled. The respondent discontinued its claim. The underlying dispute between the parties has been resolved and the Interim Orders have been dissolved. The respondent informed the court that it did not intend to take part in the appeal and filed a notice to that effect.

Is the appeal moot?

11 The first issue is whether the court should dismiss the appeal on the ground that it has become moot because the outcome of the appeal will have no practical consequence for the appellant, the respondent or Mr CS.

12 As a general principle a court should refuse to address an advisory opinion in respect of issues of which there is no longer a controversy between the parties.[1] However the court retains a discretion to continue to hear an appeal in circumstances where the subject matter of the appeal has been rendered moot by reason of a change in circumstances or otherwise.[2]

13 The appellant accepts that the subject matter of the appeal has been rendered moot but submitted that the court should exercise its discretion to hear the appeal for the following reasons. First, the scope of the appeal is narrow. Secondly, there is a public interest in resolving the issue of construction raised by the appeal, which has general application and importance beyond the circumstances of this case.

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[1] ***Bonan v Hadgkiss*** (2007) 160 FCR 29 (***Bonan***) [8]; ***Bass v Permanent Trustee Co Ltd*** (1999) 198 CLR 334 [47].

[2] ***Bonan*** [8]; ***Long v Minister for Immigration & Multicultural & Indigenous Affair***s [2002] FCAFC 438; ***Minister for Immigration & Multicultural & Indigenous Affairs v Al Masri*** (2003) 126 FCR 54 (***Al Masri***); ***Hope Downs Management Services Pty Ltd v Hamersley Iron Pty Ltd*** [1999] FCA 1652.

Appeal should be dismissed

14 Each of the matters raised by the appellant is relevant to the exercise of the court's discretion. As to the scope of the appeal, the amount of judicial resources which would be taken in hearing and determining the appeal is a relevant consideration.[3] I accept that the scope of the appeal is narrow; it is confined to a question of the proper construction of s 84 of the Act. However, the answer to the question of construction raised is not obvious. That is demonstrated by the fact that members of the Full Bench arrived at different decisions. A full consideration of the question raised would require a detailed examination of a number of factors.

15 Whether the decision under appeal has ramifications which extend beyond the facts of the case in question, and whether it is in the public interest that the issue be resolved are also relevant considerations.[4]

16 However, as Campbell J observed in ***Jardin v Metcash Ltd***,[5] even where a case solely raises a question of law, it will only be in rare circumstances that a court will be justified in reaching a decision on a legal question that has no practical consequences for either of the parties.

17 In this case, there is no evidence before this court that there is a pressing need for the court to express its opinion on the question of construction raised by the appeal. The appellant does not submit that whether a party may appeal to the Full Bench from an interim order under s 83(5) and s 83(7) of the Act is an issue in cases pending before the Full Bench or arises with any frequency.

18 Importantly, the appellant asks this court to determine the question of the proper construction of s 83(5), s 83(7) and s 84(1) of the Act contrary to the decision of a majority of the Full Bench in circumstances where there is no contradictor before the court. The construction question raised by the appellant should be determined by the court in a case in which there is a party before the court with a real interest in advancing the construction adopted by the majority of the Full Bench. Courts are more likely to be led into error where there is no contradictor to bring all relevant legal issues before the court.

19 This court has a discretion whether or not to hear the appeal notwithstanding that it is moot. However, the discretion to allow a moot appeal to proceed should be exercised cautiously. I conclude that no sufficient case for the exercise of such a discretion has been made out. I would therefore dismiss the appeal. Nevertheless, the appeal raises a legal issue concerning the jurisdiction of the Full Bench and I think it right to touch on the Full Bench's judgment, although not to embark on the detailed examination which would have been necessary if the issues before the Full Bench were still live.

The construction issue

20 The question of construction raised by the appeal concerns the scope of the right of appeal to the Full Bench from a decision of an industrial magistrate. In particular, whether an appeal lies under s 84(2) of the Act from an interim order of an industrial magistrate pursuant to s 83(5) and s 83(7) of the Act. Before considering the scope of the right of appeal under s 84(2) of the Act, it is necessary to refer to s 83 of the Act which is concerned with the enforcement of awards and other industrial instruments.

21 Section 83 of the Act relevantly provides:

> (1) Subject to this Act, where a person contravenes or fails to comply with a provision of an instrument to which this section applies any of the following may apply in the prescribed manner to an industrial magistrate's court for the enforcement of the provision -
>
> …
>
> (4) On the hearing of an application under subsection (1) the industrial magistrate's court may, by order -
>
> (a) if the contravention or failure to comply is proved -
>
> (i) issue a caution; or
>
> (ii) impose such penalty as the industrial magistrate's court thinks just but not exceeding $2 000 in the case of an employer, organisation or association and $500 in any other case; or
>
> (b) dismiss the application.
>
> (5) If a contravention or failure to comply with a provision of an instrument to which this section applies is proved against a person as mentioned in subsection (4) the industrial magistrate's court may, in addition to imposing a penalty under that subsection, make an order against the person for the purpose of preventing any further contravention or failure to comply with the provision.
>
> …
>
> (7) An interim order may be made under subsection (5) pending final determination of an application under subsection (1).
>
> (8) A person shall comply with an order made against him or her under subsection (5).

22 Section 84 provides for an appeal from the Industrial Magistrates Court to the Full Bench. Section 84 provides:

> (1) In this section ***decision*** includes a penalty, order, order of dismissal, and any other determination of an industrial magistrate's court, but does not include a decision made by such a court in the exercise of the jurisdiction conferred on it by section 96J.

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[3] ***Federal Commissioner of Taxation v Industrial Equity Ltd*** (2000) 98 FCR 573.

[4] ***Al Masri***.

[5] ***Jardin v Metcash Ltd*** [2011] NSWCA 409 [35].

> (2) Subject to this section, an appeal lies to the Full Bench in the manner prescribed from any decision of an industrial magistrate's court.
>
> …

23 The appellant submitted that an 'order' in s 84(1) includes an interim order made under s 83(5) and s 83(7) and is therefore a 'decision' within the definition of 'decision' in s 84(1). If that is correct, then an appeal lies under s 84(2) to the Full Bench from an interim order made by the Industrial Magistrates Court.

Full Bench decision

24 The Full Bench, by majority, found that a 'decision' in s 84(1) of the Act does not include an interim order made under s 83(5) and s 83(7) and therefore an appeal did not lie to the Full Bench from the Interim Orders. The appellant submitted that the majority of the Full Bench reached that decision by applying the decision of the Industrial Appeal Court in ***Anderson***[6] which the majority said is a decision binding upon the Full Bench.

25 The question before the court in ***Anderson*** was whether, under s 84 of the Act, an appeal lay to the Full Bench from a decision of an industrial magistrate that a respondent had a case to answer.[7] The court unanimously held that no appeal lies to the Full Bench in those circumstances.[8]

26 The appellant submitted that ***Anderson*** did not decide that no appeal lies to the Full Bench from a decision of an industrial magistrate to make an interim order under s 83(5) and s 83(7) of the Act. The Act did not confer any power to make interim orders at the time that ***Anderson*** was decided. The appellant submitted that at the time of ***Anderson***, the jurisdiction of the industrial magistrate was essentially the jurisdiction to enforce instruments under s 83 of the Act, whereas, up until 1985, the jurisdiction of industrial magistrates extended to exercising criminal jurisdiction for offences under the Act. At the time that this criminal jurisdiction was removed, the term 'conviction' was removed from the definition of 'decision' within s 84.

Appellant's construction has substance

27 The High Court has emphasised that the rules of statutory construction require primary attention to be directed to the text of the relevant provisions.[9] The court must have regard to the language of the statutory instrument viewed as a whole and considered in its context.[10] The context includes other related statutory provisions, legislative history and the purpose of the statutory provision.

28 The text of s 83 and s 84 of the Act points to a 'decision' including an interim order made under s 83(5) and s 83(7). The definition of 'decision' in s 84 includes 'order'. An 'interim order' is a species of order. Section 83(7) provides that an interim order may be made under s 83(5) which provides, amongst other things, for the industrial magistrate's court to 'make an order … for the purpose of preventing any further contravention or failure to comply with the provision'.

29 In ***Anderson***, the Industrial Appeal Court found that the determining characteristic of a 'decision' within the meaning of s 84 of the Act was a decision which finally determined and disposed of the matter before the court. The relevant statutory provisions have been substantially amended since ***Anderson*** was decided. Importantly, amendments in 2002[11] expanded the enforcement powers of industrial magistrates, including the enactment of the power for an industrial magistrate to grant injunctive relief under s 83(5) and s 83E(2) and a

power to grant such relief on an interim basis under s 83(7) and s 83E(5).

30 The effect of an amending Act may be to alter the meaning which remaining provisions of the amended Act bore before the amendment.[12] Whatever meaning s 84 of the Act may have had before the amendment of s 83, it must now be construed in light of that amendment. The decision of the Industrial Appeal Court in ***Anderson*** was that 'decision' in s 84 of the Act as it then stood did not extend to a finding or ruling given in the course of proceedings which falls short of a final determination of the application. ***Anderson*** is not determinative of whether a 'decision' in s 84(1) after the amendments of 2002 extends to an interim order made under s 83(5) and s 83(7).

31 On the face of it, an interim order made pursuant to s 83(5) and s 83(7) is an 'order' and falls within the definition of 'decision' in s 84(1).

32 However, the majority of the Full Bench considered the enactment of s 83(5) and s 83(7) by the amendments of 2002 and concluded that the amendments did not materially affect the role of the industrial magistrate's court from the role of the industrial magistrate considered in ***Anderson***.[13] This court should not decide the construction question because it has not had the benefit of argument from a party supporting the interpretation adopted by the Full Bench.

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[6] ***Anderson v Pope*** (1986) 66 WAIG 1563 (***Anderson***).

[7] ***Anderson*** (1565) (Olney J).

[8] ***Anderson*** (1565) (Olney J), (1567) (Rowland J) and (1567) (Franklyn J, agreeing with both Olney and Rowland JJ).

[9] ***Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue*** (2009) 239 CLR 27 [47]; ***Federal Commissioner of Taxation v Consolidated Media Holdings Ltd*** (2012) 250 CLR 503 [39].

[10] ***Project Blue Sky Inc v Australian Broadcasting Authority*** (1998) 194 CLR 355 [69]; ***Plaintiff S4/2014 v Minister for Immigration*** (2014) 253 CLR 219 [42].

[11] *Labour Relations Reform Act 2002* (WA) s 155(1).

[12] ***Commissioner of Stamps (South Australia) v Telegraph Investment Co Pty Ltd*** (1995) 184 CLR 453, 463.

[13] Smith AP at [37] - [46]; Kenner SC at [85] - [87].

Conclusion

33 The appeal should be dismissed on the ground that it has become moot.

I certify that the preceding paragraph(s) comprise the reasons for decision of the Western Australian Industrial Appeal Court.

FN

Research Associate to the Honourable Justice Buss

16 AUGUST 2019

2019 WAIRC 00640

APPEAL AGAINST THE DECISION OF THE FULL BENCH IN FBA 8 OF 2018

WESTERN AUSTRALIAN INDUSTRIAL APPEAL COURT

PARTIES	GOVERNING COUNCIL OF NORTH METROPOLITAN TAFE
	APPELLANT
	-v-
	THE STATE SCHOOL TEACHERS' UNION OF WA (INCORPORATED)
	RESPONDENT
CORAM	BUSS J
	MURPHY J
	LE MIERE J
DATE	FRIDAY, 16 AUGUST 2019
FILE NO/S	IAC 2 OF 2018
CITATION NO.	2019 WAIRC 00640

Result	Appeal dismissed
Representation	
Appellant	A J Sefton (of counsel) & J M Carroll (of counsel) State Solicitor for Western Australia
Respondent	No appearance

Order

It is ordered:

1. THAT the appeal be dismissed on the ground that it has become moot.

[L.S.]

(Sgd.) S KEMP,
Clerk of Court.

PRESIDENT—Unions—Matters dealt with under Section 66—

2019 WAIRC 00587

ORDER PURSUANT TO S.66

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2019 WAIRC 00587
CORAM	**:**	CHIEF COMMISSIONER P E SCOTT
HEARD	**:**	WEDNESDAY, 27 MARCH 2019, TUESDAY, 21 MAY 2019, FRIDAY, 5 JULY 2019
DELIVERED	**:**	THURSDAY, 25 JULY 2019
FILE NO.	**:**	PRES 3 OF 2019
BETWEEN	**:**	SANWELL PTY LTD Applicant AND MASTER PLUMBERS AND GASFITTERS ASSOCIATION OF WESTERN AUSTRALIA (UNION OF EMPLOYERS) Respondent

CatchWords	:	Industrial Law (WA) - Application pursuant to s 66 of the *Industrial Relations Act 1979* (WA) for orders to inspect books pursuant to association rules – books not defined in the rules of the association –whether privileged or confidential commercial documents are books – order made
Legislation	:	*Industrial Relations Act 1979* (WA) s 26(1)(a); *Industrial Relations Commission Regulations 2005* (WA); *Associations Incorporation Act 2015* (WA) s 3, s 62; *Associations Incorporation Regulations 2016* (WA)
Result	:	Order issued
Representation:		
Applicant	:	Mr B Holt (as agent)
Respondent	:	Ms R Cutler (as agent) and Ms K Jones (as agent)

Case(s) referred to in reasons:

MA Drake v LB Carter [1992] 72 WAIG 706

Extempore Reasons for Decision (Revised from the Transcript)

1 The applicant in this matter is Sanwell Pty Ltd (Sanwell). The parties agree that the applicant is a member of the respondent. The respondent is an organisation of employers registered under the *Industrial Relations Act 1979* (IR Act). The respondent's Rules provide at 8.15(c) that:

> Any member and person who has an interest in the funds may inspect the books and register of members at any reasonable time.

2 The applicant has applied for an order to permit it to inspect the respondent's books pursuant to that Rule.

3 The applicant, through its Chief Financial Officer, Mr Bradley Holt, had previously made a request to inspect the books. In a letter dated 5 February 2019 it sought inspection within 10 business days of:

(1) Management accounts including but not limited to the Profit and Loss statements and Balance Sheet at 31 December 2018;

(2) All Debtor invoices and Creditor invoices for the period 1 January 2018 to 31 December 2018;

(3) Copies of Agreements with Suppliers and Contractors; and

(4) All Debtor invoices and Creditor invoices for the period 1 January 2017 to 31 December 2017.

4 The respondent responded by letter dated 11 February 2019 inviting Mr Holt and the applicant's General Manager to attend the Executive Committee meeting on Wednesday, 20 February 2019 at 3:00 pm. It noted that the content of the applicant's letter of 5 February 2019 had been placed on the agenda and would be discussed at that time. By letter dated 12 February 2019 the applicant declined the invitation to attend the Executive Committee meeting and reiterated its request.

5 There was further correspondence between the parties. By letter dated 19 February 2019 Mr Murray Thomas of the respondent advised that the 2018 financial records were then in the process of being audited and at that stage there were no audited financial reports to provide to the applicant as the auditors had yet to complete their findings. Mr Thomas's letter went on to invite the applicant to contact him directly.

6 I note that this morning I have been informed that the audit is almost complete, and that part of the delay was caused by the change in the accounting method and a change in the accountants. There have been other communications between the parties, but none has resulted in the respondent acceding to the applicant's request.

7 It is clear by the documents filed that the applicant and the respondent are in dispute about a number of issues. However, this application is limited to the applicant's request to view the respondent's records. It has become very clear throughout the process to date, including at the directions hearings and in the documents, is that the respondent is resisting the application by reference to:

(1) The applicant having failed initially to comply with the *Industrial Relations Commission Regulations 2005* in terms of the form of application; and

(2) The applicant's failure to comply with my directions to file, amongst other things, a list of books or documents or types of documents and the time period covered by those documents that it seeks to inspect. The applicant notified the Commission and the respondent of those documents that it seeks to inspect by email separate from its submission filed earlier. It did so only yesterday.

8 At my direction, my Associate contacted the respondent to ascertain if it had sufficient time to prepare to respond to that list or would it be seeking an adjournment. The respondent replied that it could respond today by verbal submissions. The issue that caused me to inquire was whether the respondent would be prejudiced by the lateness of the information. Cleary the respondent does not suggest any prejudice. However, I note that the only difference in the list of documents provided yesterday, compared with that contained in the originating application, is that the time periods have been specified for copies of agreements with suppliers and contractors - one for each of the calendar years, 2017 and 2018.

9 Both this objection by the respondent and its objection raised initially about non compliance with the Regulations are without substance. The first issue is a matter of form over substance. The correspondence attached to the application form clearly identified all of the information required by the Regulations.

10 As I noted earlier, the respondent has also objected on the basis of the failure to comply with the direction. Section 26(1)(a) of the IR Act says that:

> (1) In the exercise of its jurisdiction under this Act, the Commission –
>
> (a) shall act according to equity, good conscience and the substantial merits of the case without regard to technicalities or legal forms.

11 In this case I respectfully repeat the comments of Sharkey P in *MA Drake v LB Carter* [1992] 72 WAIG 706 as being relevant to this matter. He said:

> It is, I think, fair to say that the submission put to me on behalf of the respondents constituted an invitation to me to have little regard to section 26(1)(a) of the Act and to concern myself with technicalities and legal forms which do not, in my view, exist in any event under the Act or Regulations.

12 I now turn to the substance of the matter. The applicant has a right under Rule 8(15)(c) of the respondent's Rules to inspect the books and register of members at any reasonable time. The Rules contain no definition of the word "books". In its written submissions, the respondent says that the IR Act defines books to include profit and loss statements, income statements and other generally accepted accounting records.

13 In fact, the IR Act contains no definition of "books". It does, however, set out at section 63, the records an organisation is required to keep. They are:

> (a) A register of its members showing the name and residential address of each member and details of the financial status of each member in respect of his membership.
>
> (b) A list of the names, residential addresses and occupations of the persons holding offices in the organisation.
>
> (c) Accounting records that are, in accordance with generally accepted accounting principles and truly record and explain the financial transactions and financial positions of the organisation.
>
> (d) Such other records as are prescribed.

14 In respect of (d), the Rules of the respondent do not prescribe any particular records. Therefore, the IR Act does not expressly include or exclude the documents that the applicant seeks, in particular invoices or contracts.

15 The question, in respect of (c), is whether the documents that the applicant wishes to inspect are accounting records that are in accordance with generally accepted accounting principles and truly record and explain the financial transactions and financial position of the organisation. In the absence of a definition of "the books" in the IR Act or the respondent's Rules, I note that a member is entitled to inspect the books and register of members. The Macquarie Online Dictionary defines "the books" as "A record of commercial transactions."

16 Taking account of the lack of statutory definition in the IR Act or in the respondent's Rules, I take some guidance from a number of definitions including that I have just referred to. They include definitions contained within the *Associations Incorporation Act 2015 (WA)* (AI Act). Under section 3, "Terms Used", it defines "books" as including:

> (a) a register;
>
> (b) financial records, financial statements or financial reports, as each of those terms is defined in section 62, however compiled, recorded or stored;
>
> (c) a document;
>
> (d) any other record of information.

17 Part 5 – Financial records, reporting and accountability, contains section 62 - Terms used, which defines financial records as including:

> (a) invoices, receipts, orders for the payment of money, bills of exchange, cheques, promissory notes and vouchers; and
>
> (b) documents of prime entry; and
>
> (c) working papers and other documents needed to explain –
>
> (i) the methods by which financial statements are prepared; and
>
> (ii) adjustments to be made in preparing financial statements;

18 Schedule 2 of the *Associations Incorporation Regulations 2016* provides model rules for incorporated associations. These Regulations provide a definition that includes a document and any other record of information. It defines "books" in almost identical terms to the definition in the AI Act.

19 So, while an organisation registered under the IR Act is not required to be an incorporated association and strictly speaking the AI Act and the model rules do not apply, they provide some guidance as to what might be meant by "the books". I take account of the lack of statutory definition in the IR Act and Regulations or in the Rules of the respondent, but find that there is no doubt that the management accounts, including but not limited to, the profit and loss statement and balance sheet, are part of the books, as are invoices for both debtors and creditors.

20 That leaves the issue of copies of agreements with suppliers and contractors. In the context of the definitions that I have referred to, copies of agreements with suppliers and contractors would be encompassed in the reference to a document or any other record of information. Therefore, all of the documents the applicant seeks are part of the books of the respondent, unless there is a good reason the applicant is entitled by the Rules to inspect them.

21 The question then arises, is there any good reason? In its written submissions, the respondent suggests that the agreements with suppliers and contractors are privileged documents. However, at the hearing, it said that there were issues of privacy and commercial confidentiality. The respondent also raised concerns about the applicant having access to invoices from its legal advisors. This is on the basis that those invoices are said to contain information identifying legal advice and matters of privilege.

22 At the hearing, Mr Holt, on behalf of the applicant, indicated that the purpose of having access to the respondent's books is to examine them with a view to identifying why there has been, what the applicant describes as, a significant turnaround in the respondent's finances. He said that he could assist and add value to the respondent in examining the books. He says that he is prepared to give an undertaking that, in inspecting the records of the Association, he and Sanwell will ensure privacy and confidentiality of the books and will ensure that their use and the information gained is not for any commercial purpose not associated with ensuring the interest of the respondent.

23 As to the invoices from legal advisors, the respondent says that any information which might identify legal advice can be redacted. The applicant says that this is acceptable.

24 I note that both parties are expected to act in good faith. In all of the circumstances, I conclude that an order ought to be made in the terms sought by the applicant in the email yesterday, subject to it being clearly understood that the inspection of documents is for the purposes of the applicant's role as a member of the respondent and not for any other purpose.

25 Therefore, I intend to issue an order that the respondent is to inform the applicant of when the documents are to be returned from the auditors, and to do that no later than two business days after they have been received. That upon two business days' notice thereafter, the respondent is to provide the applicant with an opportunity to inspect the following:

(1) All debtor invoices and creditor invoices for the period 1 January 2017 to 31 December 2017, and from 1 January 2018 to 31 December 2018 subject to those invoices which may identify matters of legal professional privilege being redacted;

(2) Copies of agreements with suppliers and contractors for the period 1 January 2017 to 31 December 2017, and 1 January 2018 to 31 December 2018; and

(3) The management financial reports being profit and loss statement and balance sheet for 1 January 2018 to 31 December 2018.

2019 WAIRC 00352

ORDER PURSUANT TO S.66

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	SANWELL PTY LTD
	APPLICANT
	-v-
	MASTER PLUMBERS AND GASFITTERS ASSOCIATION OF WESTERN AUSTRALIA (UNION OF EMPLOYERS)
	RESPONDENT
CORAM	CHIEF COMMISSIONER P E SCOTT
DATE	FRIDAY, 5 JULY 2019
FILE NO/S	PRES 3 OF 2019
CITATION NO.	2019 WAIRC 00352

Result	Order made
Representation	
Applicant	Mr B Holt as agent
Respondent	Mr M Thomas as agent, Ms R Cutler as agent and Ms K Jones as agent

Order

This is an application for an order requiring the respondent to comply with rule 8.15 of its Rules.

Having heard from Mr B Holt for the applicant and Mr M Thomas, Ms R Cutler, and later Ms K Jones for the respondent, and noting that the applicant has given an undertaking to use its access to the books under rule 8.15 of the respondent's rules for the

purposes of its relationship with the respondent as a member of the respondent and not for any commercial purpose and will maintain the confidentiality of these books in that context.

THEREFORE, having considered the matter and pursuant to the powers conferred under the *Industrial Relations Act 1979*, I hereby order that –

1. Within two business days of the respondent's books being returned to it from its auditors, the respondent shall inform the applicant that the books are available for inspection.

2. Upon the applicant giving two business days' notice thereafter, the respondent shall provide an opportunity for the applicant to inspect the following books:

   (a) All Debtor invoices and Creditor invoices for the period 1 January 2017 to 31 December 2017 and the period 1 January 2018 to 31 December 2018, subject to those invoices which may identify matters of legal professional privilege being redacted; and

   (b) Copies of Agreements with Suppliers and Contractors for the period 1 January 2017 to 31 December 2017 and the period 1 January 2018 to 31 December 2018; and

   (c) Management Financial Reports being Profit & Loss Statement and Balance Sheet from 1 January 2018 to 31 December 2018.

(Sgd.) P E SCOTT,
[L.S.] Chief Commissioner.

INDUSTRIAL MAGISTRATE—Claims before—

2019 WAIRC 00594

WESTERN AUSTRALIAN INDUSTRIAL MAGISTRATES COURT

CITATION	**:**	2019 WAIRC 00594
CORAM	**:**	INDUSTRIAL MAGISTRATE D. SCADDAN
HEARD	**:**	THURSDAY, 4 JULY 2019
DELIVERED	**:**	THURSDAY, 1 AUGUST 2019
FILE NO.	**:**	M 180 OF 2018
BETWEEN	**:**	RAUL ADUCAL
		CLAIMANT
		AND
		BUILDERS STEEL WA PTY LTD
		RESPONDENT

CatchWords	**:**	INDUSTRIAL LAW – Alleged failure to pay redundancy pay – s 119 *Fair Work Act 2009* (Cth) – Reason for termination of employment – Whether employer a 'small business employer' - Turns on own facts
Legislation	**:**	*Fair Work Act 2009* (Cth)
		Industrial Relations Act 1979 (WA)
		Magistrates Court (Civil Proceedings) Act 2004 (WA)
		Fair Work Regulations 2009 (Cth)
Case(s) referred to		
in reasons	**:**	***R v Industrial Commission of South Australia; ex parte Adelaide Milk Cooperative (No 2)*** [1977] 46 SAIR 1202
		Hodgson v Amcor Ltd; Amcor Ltd v Barnes [2012] VSC 94
		Mildren and Anor v Gabbusch [2014] SAIRC 15
		Miller v Minister of Pensions [1947] 2 All ER 372
		Briginshaw v Briginshaw [1938] HCA 34; (1938) 60 CLR 336
		McShane v Image Bollards Pty Ltd [2011] FMCA 215
		Sammut v AVM Holdings Pty Ltd [No2] [2012] WASC 27
Result	**:**	Claim dismissed
Representation:		
Claimant	**:**	In person
Respondent	**:**	Mr Ron Martinovich (director)

REASONS FOR DECISION

1 Builders Steel WA Pty Ltd (the Company) employed Raul Aducal (Mr Aducal) as an estimator from 15 April 2015 to 7 August 2018 when his employment was terminated by the Company.

2 Mr Aducal originally claimed the Company failed to comply with the *Fair Work Act 2009* (Cth) (FWA) when it failed to pay him three weeks payment in lieu of notice of termination (having only paid him one week) and failed to pay him a redundancy entitlement of seven weeks.

3 At the hearing Mr Aducal confirmed that the claim was limited to the Company's failure to pay him redundancy entitlements pursuant to s 119 of the FWA.

4 Mr Aducal predicates the entitlement to redundancy on a conversation with Kim Spirkoski (Mr K Spirkoski), a director of the Company and Mr Aducal's manager, on 7 August 2018 when he was informed that his employment was terminated due to a shortage of work, loss of clients and low volume.

5 The Company disputes the claim and says that Mr Aducal was terminated due to poor work performance and not because of redundancy or a reduction in staff numbers.

6 Schedule I of this decision sets out the law relevant to the jurisdiction, practice and procedure of this court in determining this case. Relevant to matters identified under the heading, 'Jurisdiction' in Schedule I of this decision, I am satisfied: the Company is a corporation to which paragraph 51(xx) of the Constitution applies and it is a 'national system employer'; Mr Aducal was an individual who was employed by the Company and is a 'national system employee'.

7 Accordingly, the National Employment Standards (NES) set out in Part 2-2 of the FWA apply to Mr Aducal and, if his claim is successful, s 119 of the FWA may entitle him to a redundancy payment.

8 A failure to pay redundancy pay is a contravention of the NES pursuant to s 44 of the FWA, which is also a civil remedy provision under s 539(1) of the FWA.

Section 119 of the FWA

9 An employee is entitled to redundancy pay if the employee's employment is terminated at the employer's initiative because the employer no longer requires the job done by the employee to be done by anyone: FW Act, s 119(1)(a). The entitlement is subject to exceptions, exclusions, and provisions concerning variation of the entitlement and transfer of employment situations (discussed below).

10 The basis for the entitlement – because the employer no longer required the job to be done by anyone - draws upon a concept 'redundancy' formulated by Bray C J in ***R v Industrial Commission of South Australia; ex parte Adelaide Milk Cooperative (No 2)*** [1977] 46 SAIR 1202, 1205: '*a job becomes redundant when the employer no longer desires to have it performed by anyone*'. In ***Hodgson v Amcor Ltd; Amcor Ltd v Barnes*** [2012] VSC 94 [371], Vicory J identifies frequently encountered circumstances when a job may cease, including reorganisation (resulting in a job no longer being performed at all or being redistributed among other employees), mechanisation, change in demand or other reason, or the employer no longer desires to have it performed by anyone.

11 The quantum (amount) of redundancy pay is worked out using a table set out at s 119(2) of the FW Act. The effect is that for continuous service of at least:

- One year but less than two years, four weeks' pay;
- Two to three years, six weeks' pay;
- Three to four years, seven weeks' pay;
- Four to five years, eight weeks' pay;
- Five to six years, 10 weeks' pay;
- Six to seven years, 11 weeks' pay;
- Seven to eight years, 13 weeks' pay;
- Eight to nine years, 14 weeks' pay;
- Nine to 10 years, 16 weeks' pay;
- At least 10 years, 12 weeks' pay.

12 The entitlement to redundancy pay does not arise where the termination is:

- 'Due to the ordinary and customary turnover of labour': FW Act, s 119(1)(a).
- Of an employee who was employed 'for a specified period of time, for a specified task, or for the duration of a specified season' (discussed below): FW Act, s 123(1)(a).
- 'Because of serious misconduct' of the employee: FW Act, s 123(1)(b).
- Of an employee who is a 'casual employee': FW Act, s 123(1)(c).
- Of an employee who is an apprentice or to whom an industry-specific redundancy scheme applies: FW Act, s 123(4).
- Of an employee whose period of continuous service is less than 12 months: FW Act, s 121(1)(a).
- By an employer who is a small business employer: FW Act, s 121(1). A 'small business employer' is an employer who employs fewer than 15 employees: FW Act, s 23(1).

Evidence

13 For the most part the witnesses' evidence was uncontroversial, save for the content of a conversation between Mr Aducal and Mr K Spirkoski on 7 August 2018.

14 Mr Aducal's evidence is that during this conversation he was told by Mr K Spirkoski that his employment was terminated because of low volume, a shortage of work and loss of clients.[1] He denied that he was told that the Company was dissatisfied with his work performance and attitude and coming to work late. He also denied that he was told in the weeks leading up to the termination of his employment that the Company was concerned about his work performance.

15 Mr Aducal said that he was aware the Company employed someone after his employment was terminated but he said this person was a 'detailer' which is not the same role as an 'estimator'.

16 Mr Aducal admitted that he was not aware of any in-house changes and he was not aware if someone already employed by the Company had taken over his role and he had no knowledge if someone else was doing the role he previously occupied.

17 Mr Aducal referred to 17 people employed by the Company, but he admitted that he did not know the status of their employment.[2] He accepted that some were casual employees and he admitted that people come and go from employment at the Company.

18 Mr K Spirkoski's evidence is that the Company had issues with Mr Aducal's work predominantly in the period leading up to the termination of Mr Aducal's employment. He said he had numerous conversations with Mr Aducal about mistakes in his work. He accepted that he never issued a written warning to Mr Aducal and he never told him he would be terminated prior to terminating his employment.

19 Mr K Spirkoski agreed that he also made mistakes from time to time, but he said the Company's issues with Mr Aducal's work performance went beyond merely making mistakes. He said Mr Aducal's poor attitude and poor timekeeping also resulted in his employment being terminated.

20 Mr K Spirkoski denied the termination of Mr Aducal's employment was because of the loss of work or clients and said that within days of Mr Aducal's termination the Company had employed another person. Mr K Spirkoski admitted this person was a 'detailer' to do draft work and he said that he (Mr K Spirkoski) assumed the role of 'estimator' previously undertaken by Mr Aducal. That is, Mr K Spirkoski said his role was previously to draft, but the Company employed another person to do the drafting work and he assumed the 'estimator' role along with Nelson Tiu (Mr Tiu).

21 Mr K Spirkoski said that there remained two estimators employed by the Company, he and Mr Tiu.

22 Mr Tiu works as an estimator for the Company. His evidence was directed to the work he undertakes as an estimator given to him by Cristian Spirkoski (Mr C Spirkoski), purchase manager for the Company.

23 Mr C Spirkoski's evidence was consistent with Mr K Spirkoski's evidence that the Company had issues with Mr Aducal's work performance and he says he spoke to Mr Aducal on several occasions about mistakes in his work.[3]

24 Mr Aducal also referred to a letter from the Company dated 23 August 2018[4] which provides the reason for his termination, namely:

> *Due to low volumes of work, we could not continue with the errors being made by you in preparing quotes. Too many items and some quite costly were being missed and we were bound to supply at no cost to the customer. This was bought to your attention on several occasions.*

25 In this letter signed by Ron Martinovich (Mr Martinovich), it also states the Company is exempt from redundancy due to the amount of full time employees on the books.

Small business employer exemption

26 One aspect of the Company's denial of the requirement to pay redundancy pay is that it is a small business employer. In my view, where the Company alleges an exclusion from an obligation to pay redundancy pay the Company bears the onus to prove the basis for the exclusion.

27 Beyond Mr Aducal admitting that he did not know the employment status of the people he recounted in paragraph 8 of exhibit 1, there is no evidence before the court as to the actual number of employees employed by the Company or their employment status, whether it be full time or casual (and if a casual employee whether the employee is employed on a regular and systemic basis).

28 It was open to the Company to adduce such evidence, given that it must be within the Company's records howsoever kept. It elected not to do so. Accordingly, I am unable to find to the requisite standard the number of employees employed by the Company at the time of the termination of Mr Aducal's employment and, therefore, I am not satisfied the Company is a small business employer for the purposes of s 121(1)(b) of the FWA.

The reason for Mr Aducal's termination of employment

29 I am satisfied that Mr Aducal's employment was terminated on the Company's initiative. This was not in dispute.

30 I am unable to fully reconcile the difference in the content of the conversation between Mr Aducal and Mr K Spirkoski on 7 August 2018. To some extent, other evidence is more consistent with Mr K Spirkoski's evidence, particularly the letter dated 23 August 2018 and Mr C Spirkoski's evidence.

31 While the letter dated 23 August 2018 refers to '*low volumes of work*', it also refers to issues with Mr Aducal's work performance. In the context of Mr K Spirkoski's evidence that the errors and mistakes in the '*low volume priced market*' were causing problems for the Company,[5] the content of the letter is consistent with the reasons given by the Company and Mr K Spirkoski for the termination of Mr Aducal's employment.

32 Further, and notwithstanding Mr K Spirkoski evidence that '[w]*e reorganised our workload and employed another person into that department within that week*'[6] might suggest restructuring to reduce the number of estimators, when cross examined Mr K Spirkoski clarified that the person was employed as a drafter and he (Mr K Spirkoski) assumed the estimator's role (from previously being a drafter).

33 Where Mr Aducal has no knowledge of the roles within the Company after his termination and in the absence of any other evidence, I cannot discount Mr K Spirkoski's evidence that he assumed the job done by Mr Aducal and carries out this job with Mr Tiu. It is apparent that Mr K Spirkoski was significantly involved in checking the estimators' quotes in any event.

34 Further, having regard to all of the evidence, I cannot discount the Company's evidence that Mr Aducal's employment was terminated due to poor work performance.

35 Therefore, I am not satisfied to the requisite standard that the termination of Mr Aducal's employment was because the Company no longer required his job to be done by anyone where Mr K Spirkoski is one of two people doing an estimator's job similar to when Mr Aducal was employed by the Company.

36 I find on the balance of probabilities that the Company terminated Mr Aducal's employment because of concerns with his work performance.

Determination

37 Where I am not satisfied that Mr Aducal has proven to the requisite standard that his employment was terminated because the Company no longer required his job to be done by anyone, the Company is not liable to pay any entitlement under s 119(1) of the FWA.

38 Therefore, the claimant's claim is dismissed.

INDUSTRIAL MAGISTRATE

D. SCADDAN

[1] Exhibit 1 at [6].

[2] Exhibit 1 at [8].

[3] Exhibit 3.

[4] Exhibit 1 at 'RA006'.

[5] Exhibit 2 at [14].

[6] Exhibit 2 at [15].

Schedule I: Jurisdiction, Practice and Procedure of the Industrial Magistrates Court (WA) under the *Fair Work Act 2009* (Cth): Small Claim Alleging Contravention of the FWA

Jurisdiction

[1] An employee, an employee organization or an inspector may apply to an eligible state or territory court for orders regarding a contravention of the civil penalty provisions identified in s 539(2) of the FWA.

[2] The Industrial Magistrates Court (WA) (IMC), being a court constituted by an industrial magistrate, is 'an eligible State or Territory court': FWA, s 12 (see definitions of 'eligible State or Territory court' and 'Magistrates Court'); *Industrial Relations Act 1979* (WA), s 81, s 81B.

[3] The application to the IMC must be made within six years after the day on which the contravention of the civil penalty provision occurred: FWA, s 544.

[4] The civil penalty provisions identified in s 539 of the FWA include the provisions of the National Employment Standards (NES): FWA, s 44.

[5] An obligation upon an 'employer' with respect to the NES is an obligation upon a 'national system employer' and that term, relevantly, is defined to include 'a corporation to which paragraph 51(xx) of the Constitution applies': FWA, s 60, s 42, s 14, s 12. An entitlement of an employee is an entitlement of an 'employee' who is a 'national system employee' and that term, relevantly, is defined to include 'an individual so far as he or she is employed by a national system employer': FWA, s 60, s 42, s 13.

[6] Where the claimant elects to use the small claims procedure as provided for in s 548 of the FWA, the IMC may not award more than $20,000 and may not make order for any pecuniary penalty: FWA, s 548(1)(a), s 548(2)(a).

Contravention

[7] Where the IMC is satisfied that there has been a contravention of a civil penalty provision, the court may make orders for an *employer* to pay to an employee an amount that the employer was required to pay under the FWA: FWA, s 545(3)(a).

[8] The civil penalty provisions identified in s 539 of the FWA include:

- The NES set out in Part 2-2 of the FWA: FWA, s 539; s 44(1). Those standards include obligations of employers to employees with respect to redundancy pay as set out sections 119 to 123 of the FWA.
- A modern award set out in Part 2-3 of the FWA: FWA, s 539; s45. Those standards include obligations of employers to employees with respect to rates of pay, ordinary hours of work, superannuation.
- Other terms and conditions of employment as set out in Part 3-6 of the FWA: FWA, s 539; s 535. Those terms and conditions include obligations of employers to employees with respect prescribed records under the *Fair Work Regulations 2009* (Cth).

- An 'employer' has the statutory obligations noted above if the employer is a 'national system employer' and that term, relevantly, is defined to include 'a corporation to which paragraph 51(xx) of the Constitution applies': FWA, s 14, s 12. The obligation is to an 'employee' who is a 'national system employee' and that term, relevantly, is defined to include 'an individual so far as he or she is employed by a national system employer': FWA, s 13.

[9] Where the IMC is satisfied that there has been a contravention of a civil penalty provision, the court may make orders for:

- An *employer* to pay to an employee an amount that the employer was required to pay under the FWA: FWA, s 545(3).

In contrast to the powers of the Federal Court and the Federal Circuit Court, an eligible state or territory court has no power to order payment by an entity other than the employer of amounts that the employer was required to pay under the FWA. For example, the IMC has no power to order that the director of an employer company make payments of amounts payable under the FWA: ***Mildren and Anor v Gabbusch*** [2014] SAIRC 15.

Burden and standard of proof

[10] In an application under the FWA, the party making an allegation to enforce a legal right or to relieve the party of a legal obligation carries the burden of proving the allegation. The standard of proof required to discharge the burden is proof 'on the balance of probabilities'. In ***Miller v Minister of Pensions*** [1947] 2 All ER 372, 374, Lord Denning explained the standard in the following terms:

> *It must carry a reasonable degree of probability but not so high as is required in a criminal case. If the evidence is such that the tribunal can say 'we think it more probable than not' the burden is discharged, but if the probabilities are equal it is not.*

[11] In the context of an allegation of the breach of a civil penalty provision of the FWA it is also relevant to recall the observation of Dixon J said in ***Briginshaw v Briginshaw*** [1938] HCA 34; (1938) 60 CLR 336:

> *The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal. In such matters 'reasonable satisfaction' should not be produced by inexact proofs, indefinite testimony, or indirect inferences [362].*

[12] Where in this decision I state that 'I am satisfied' of a fact or matter I am saying that 'I am satisfied on the balance of probabilities' of that fact or matter. Where I state that 'I am not satisfied' of a fact or matter I am saying that 'I am not satisfied on the balance of probabilities' of that fact or matter.

Practice and procedure of the Industrial Magistrates Court: small claim

[13] The FWA provides that 'in small claims proceedings, the court is not bound by any rules of evidence and procedure and may act in an informal manner and without regard to legal forms and technicalities: FWA, s 548(3). The significance of this provision was explained by Judge Lucev in ***McShane v Image Bollards Pty Ltd*** [2011] FMCA 215 [7] in the following terms:

> *Although the Court is not bound by the rules of evidence, and may act informally, and without regard to legal forms and technicalities in small claim proceedings in the Fair Work Division, this does not relive an applicant from the necessity to prove their claim. The Court can only act on evidence having a rational probative force.*

[14] The IMC has experience of similar provisions. The *Industrial Relations Act 1979* (WA) (IRA) provides that, except as prescribed by or under the Act, the powers, practice and procedure of the IMC is to be the same as if the proceedings were a case under the *Magistrates Court (Civil Proceedings) Act 2004* (WA): IRA, s 81CA Relevantly, regulations prescribed under the IRA provide for an exception: a court hearing a trial is not bound by the rules of evidence and may inform itself on any matter and in any manner as it thinks fit: Regulation 35(4). In ***Sammut v AVM Holdings Pty Ltd [No2]*** [2012] WASC 27, Commissioner Sleight examined a similarly worded provision regulating the conduct of proceedings in the State Administrative Tribunal and made the following observations (omitting citations):

> *40* … *The tribunal is not bound by the rules of evidence and may inform itself in such a manner as it thinks appropriate. This does not mean that the rules of evidence are to be ignored. The more flexible procedure provided for does not justify decisions made without a basis in evidence having probative force. The drawing of an inference without evidence is an error of law. Similarly, such error is shown when the tribunal bases its conclusion on its own view of a matter which requires evidence.*
>
> *42* … *After all, they represent the attempt made, through many generations, to evolve a method of enquiry best calculated to prevent error and elicit truth. No tribunal can, without grave danger of injustice, set them on one side and resort to methods of enquiry which necessarily advantage one party and necessarily disadvantage the opposing party. In other words, although rules of evidence, as such, do not bind, every attempt must be made to administer 'substantial justice'.*
>
> 43 … *The tribunal can obtain information in any way it thinks best, always giving a fair opportunity to any party interested to meet that information; it is not obliged to obtain such independent opinion, for instance, upon oath, and whether the cross-examination shall take place upon that opinion is entirely a question for the discretion of the Tribunal; it is not bound by any rules of evidence and is authorised to act according to substantial justice and the merits of the case.*
>
> *44* … *An essential ingredient of procedural fairness is the opportunity of presenting one's case.*
>
> *45* … *the right to cross-examination is viewed as an important feature of procedural fairness.*

47 … Procedural fairness requires fairness in the particular circumstances of the case. While a right to cross-examination is not necessarily to be recognised in every case as an incident of the obligation to accord procedural fairness, the right to challenge by cross-examination a deponent whose evidence is adverse, in important respects, to the case a party wishes to present, is.

2019 WAIRC 00592

WESTERN AUSTRALIAN INDUSTRIAL MAGISTRATES COURT

CITATION	**:**	2019 WAIRC 00592
CORAM	**:**	INDUSTRIAL MAGISTRATE D. SCADDAN
HEARD	**:**	THURSDAY, 13 JUNE 2019
DELIVERED	**:**	THURSDAY, 1 AUGUST 2019
FILE NO.	**:**	M 206 OF 2018
BETWEEN	**:**	THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INC.
		CLAIMANT
		AND
		DIRECTOR GENERAL, DEPARTMENT PRIMARY INDUSTRIES AND REGIONAL DEVELOPMENT
		RESPONDENT

CatchWords	**:**	INDUSTRIAL LAW (WA) – Application to strike out pleadings – Jurisdiction of industrial magistrate to hear claim – Enforcement of alleged failure to pay correct rate of pay for an incentive payment and long service leave – Voluntary severance under Targeted Voluntary Separation Scheme
Legislation	**:**	*Industrial Relations Act 1979* (WA) *Public Sector Management Act 1994* (WA) *Public Sector Management (Redeployment and Redundancy) Regulations 2014* (WA) *Long Service Leave Act 1958* (WA) *Minimum Conditions of Employment Act 1993* (WA) *Industrial Magistrates Courts (General Jurisdiction) Regulations 2005* (WA) *Magistrates Court (Civil Proceedings) Act 2004* (WA)
Instruments	**:**	*Public Sector and Government Officers CSA General Agreement 2017* *Public Service Award 1992*
Case(s) referred to in reasons	**:**	***Crowley v Chief Executive Officer, Department of Commerce*** 2017 WAIRC 00262 ***Kershaw v Sunvalley Australia Pty Ltd*** [2007] WASCA 278 ***Garbett v Midland Brick Company Pty Ltd*** [2003] WASCA 36 ***General Steel Industries Inc v Commissioner of Railways*** [1964] HCA 69 ***Fedec v The Minister for Corrective Services*** [2017] WAIRC 00828 ***Sammut v AVM Holdings Pty Ltd [No2]*** [2012] WASC 27 ***City of Wanneroo v Australian Municipal, Administrative, Clerical And Services Union*** [2006] FCA 813 ***Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Excelior Pty Ltd*** [2013] FCA 638
Result	**:**	Application granted
Representation:		
Claimant	**:**	Ms D. Larson (industrial officer)
Respondent	**:**	Mr R. Andretich (of counsel) from the State Solicitor's Office

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REASONS FOR DECISION

1 Susan Smailes (Ms Smailes) accepted a voluntary severance in March 2018 while employed as a financial analyst for the Department of Primary Industries and Regional Development (the Department). At the time she had been acting in a level 4 position for 10 years and was in receipt of a higher duties allowance (HDA), but her substantive position was classed as a level 2.

2 The voluntary severance was in response to an offer under a Targeted Voluntary Separation Scheme (the Scheme) made pursuant to reg 16 of the *Public Sector Management (Redeployment and Redundancy) Regulations 2014* (WA) (the Redundancy Regulations).

3 Regulations 13, 14 and 15 of the Redundancy Regulations provide the severance entitlements that may be paid to an employee and includes a severance payment, payment of cash in lieu of all accrued long service leave and an incentive payment.

4 The Civil Service Association of Western Australia Inc. (the claimant) disputes the amount paid to Ms Smailes for the payment of cash in lieu of all accrued long service leave, the incentive payment and annual leave.

5 Ms Smailes says she was paid a severance payment upon redundancy at the level 4 rate and her annual leave, long service leave and incentive payment was paid at the level 2 rate.

6 The claimant seeks the payment of $8,414.98 to Ms Smailes being the difference between the amount paid to her and the amount she was entitled to had she been paid at the level 4 rate for annual leave, long service leave and incentive payment.

7 In making the claim to the Industrial Magistrates Court (IMC), the claimant says the Department failed to comply with:

- clause 40 of the *Public Sector and Government Officers CSA General Agreement 2017* (the Agreement) in failing to pay the HDA;
- section 18 of the *Minimum Conditions of Employment Act 1993* (WA) (MCE Act); and
- regulation 13 of the Redundancy Regulations.

8 On 31 May 2019, the Department lodged an application to dismiss the claimant's claim as it relates to the payment for long service leave and the incentive payment at the level 4 rate on the basis that the IMC has no jurisdiction to deal with this aspect of the claim under s 83 of the *Industrial Relations Act 1979* (WA) (the IR Act) or otherwise (the Application).

9 While not expressed in the Application, I infer the Application is made pursuant to reg 7(1)(h) of the *Industrial Magistrates Courts (General Jurisdiction) Regulations 2005* (WA) (the IMC Regulations).

10 The claimant opposes the Application.

11 Schedule I to this decision outlines the jurisdiction of the IMC.

12 Schedule II to this decision outlines principles applicable to construction of an industrial agreement and statutes.

13 Schedule III to this decision contains relevant extracts of the Agreement and *Public Service Award 1992* (the Award).

Issues for Determination

14 The following issues require determination:

- The IMC's jurisdiction under s 83 of the IR Act.
- What provisions of what instrument and what orders are sought to be enforced by the claimant having regard to the claimant's claim?
- The interaction between provisions of the MCE Act, the Agreement and the Award.
- The nature of the entitlements paid under the Redundancy Regulations.

The Department's Contentions

15 The Department contends that:

- the IMC has jurisdiction conferred by s 83(1) of the IR Act to enforce '*a provision of an instrument*' specified in s 83(2) which includes: (a) an award; (b) an industrial agreement; (c) an employer-employee agreement; and (d) an order made by the Western Australian Industrial Relations Commission (the Commission);
- Ms Smailes' employment was governed by the Award and the Agreement, neither of which provides for the payment of the value of untaken accrued long service leave on cessation of employment;
- further, an entitlement to an incentive payment only arises upon the early acceptance of an offer of voluntary severance made under the Redundancy Regulations and not any award or agreement applicable to Ms Smailes; and
- any dispute regarding the amount paid arising from a voluntary severance under the Redundancy Regulations is confined to a referral made pursuant to s 95 or s 96A of the *Public Sector Management Act 1994* (WA) (the PSM Act) (see ***Crowley v Chief Executive Officer, Department of Commerce*** 2017 WAIRC 00262).

Claimant's Contentions

16 The claimant contends that the:

- claim concerns the rate of pay paid to Ms Smailes under the Scheme (which the Department says is a departure from the original claim);
- incentive payment forming part of the redundancy payments is an implied term of Ms Smailes' contract of employment by virtue of the requirement to pay entitlements in full under s 17C(1) of the MCE Act and the Agreement where the incentive payment is a wage entitlement;
- Redundancy Regulations do not provide a rate of pay for long service leave which is contained in the Award and the Agreement where Ms Smailes is entitled to full pay implied pursuant to s 7 of the MCE Act;

- entitlements owed to Ms Smailes is not a decision within the definition of s 94 of the PSM Act where the decision was to offer voluntary severance to Ms Smailes, therefore, s 95 of the PSM Act has no application in Ms Smailes case; and
- amount owed for long service leave under the Award and Agreement is an entitlement enforceable under s 83 of the IR Act and the incentive payment was not paid in full and is enforceable under s 83 of the IR Act due to the operation of s 17C of the MCE Act.

Jurisdiction of the IMC

17 The IMC jurisdiction under s 83 of the IR Act is uncontroversial. That is, an application to the IMC for enforcement can only be made in respect of an instrument to which subsection (1) applies. These instruments are detailed in subsection (2) and include an award, an industrial agreement, an employer-employee agreement or an order made by the Commission.

18 To invoke the IMC's enforcement jurisdiction, the claimant must first identify which instrument it says it is seeking to enforce. In Ms Smailes' case the claimant can only rely upon the Award and/or the Agreement there being no employer-employee agreement and no order made by the Commission.

19 Thereafter, once the instrument is identified, consistent with the words in subsection (1), the claimant must then also identify the provision it says has been contravened or not complied with by the Department.

20 The claimant's claim refers to a failure to comply with cl 40 of the Agreement, which is not challenged in the Application, a failure to comply with s 18 of the MCE Act and a failure to comply with reg 13 of the Redundancy Regulations.

21 The order sought by the claimant is the payment of an amount of money it says is the difference between the amount Ms Smailes was paid and the amount it says she was entitled to be paid under the Scheme. Any such order can only be made by the IMC under s 83A(1) of the IR Act in proceedings under s 83 where the employee has not been paid an amount to which they are entitled under the relevant instrument.

The Claimant's Claim

22 The claimant's claim is predicated on it being the correct interpretation of the Redundancy Regulations where it says Ms Smailes ought to have been paid at the level 4 rate of pay when she was paid out annual leave, long service leave and the incentive payment.

23 The claimant's claim acknowledges the incentive payment arises because of the Redundancy Regulations, but the claimant now seeks to import into an employment instrument a term of its payment otherwise than by reason of the Redundancy Regulations.

24 The claimant's claim also acknowledges the Award does not specify arrangements for paying out any accruals on termination of employment, including long service leave, but says s 18 of the MCE Act applies to the applicable rate of leave that ought to have been paid. However, the claimant now also seeks to rely upon payments of long service leave contained in the Award and the Agreement to be paid in full in compliance with s 17C of the MCE Act.

25 On 18 April 2019, the claimant lodged further and better particulars of its claim. Relevant to the Application are part 3 – long service leave and part 4 – incentive payment. In part 3, the claimant says Ms Smailes is entitled to long service leave at 'full pay' under cl 25 of the Award meaning that she is entitled to an amount of long service leave paid at the higher rate. In part 4, the claimant similarly says Ms Smailes is entitled to an incentive payment at the higher rate but relies on the definition of 'pay' in reg 13 of the Redundancy Regulations.

The Award

26 Clause 25 of the Award provides for long service leave. Broadly speaking it refers to when the entitlement to long service leave commences and how it is calculated, when it may be taken, and the terms upon which it may be taken. Clause 25 is silent on what occurs to long service leave entitlements upon the cessation of employment and the rate at which long service leave is paid, save that under cl 25(1) an officer is entitled to 13 weeks of long service leave on full pay.

27 The Award does not contain a provision relating to redundancy, severance payments, or incentive payments.

The Agreement

28 Clause 30 of the Agreement provides for early access to pro-rata long service leave. Similar to clause 25 of the Award it is silent on what occurs to long service leave entitlements upon the cessation of employment and the rate of pay for long service leave.

29 Clause 45 of the Agreement provides for redeployment and redundancy where the parties to the Agreement (including the claimant) acknowledge the PSM Act and the Redundancy Regulations provide the legislative framework for redeployment and redundancy for all employees covered by the Agreement (including Ms Smailes). Further, if the provisions of the Agreement and the Redundancy Regulations are inconsistent, the provision of the Redundancy Regulations prevail.

30 Thereafter, cl 45 of the Agreement provides for how surplus employees are to be managed and is silent on severance payments, rates of pay or types of payments to be made.

31 The Agreement does not otherwise contain a provision relating to severance payments or incentive payments.

The MCE Act

32 Section 5(1) of the MCE Act provides that the minimum conditions of employment extends to and binds all employees and employers and are taken to be implied, relevantly, in any award (s 5(1)(aa) and s 5(1)(c) of the MCE Act do not apply in Ms Smailes case).[1]

33 *Award* is defined to mean an award made under the IR Act and includes any industrial agreement or order of the Commissioner under that Act.[2]

34 *Minimum condition of employment* means: (a) the requirement as to the maximum hours of work; or (b) a rate of pay prescribed by the MCE Act; or (c) a requirement as to pay, other than a rate of pay, prescribed by the MCE Act; (d) a condition for leave prescribed by the MCE Act; or (e) the use, in manner prescribed by the MCE Act, of a condition for leave prescribed by the MCE Act; or (f) a condition prescribed by Part 5.[3]

35 The enforcement of a minimum condition of employment where the condition is implied in an award may occur under Part III of the IR Act, which includes s 83.[4]

36 Section 17C(1) of the MCE Act provides that where an employee receives their pay in money they are entitled to be paid in full and the payment is to be made by one of four ways provided for in s 17C(1)(a) to (d).

37 Section 18(1) of the MCE Act provides that where leave is paid leave, payment is to be made at the rate the employee would have received as his or her payment at the time the leave is taken under, relevantly, the award. Subsection (3) provides that the payment for overtime, penalty rates or any kind of allowance is not required to be considered in determining any rate of payment for this section.

38 The Industrial Appeal Court in ***Kershaw v Sunvalley Australia Pty Ltd*** [2007] WASCA 278 [22] - [24], explained the interaction of sections 5 and 7 of the MCE Act and sections 83 and 83A of the IR Act, albeit as it related to minimum conditions of employment implied into a contract of employment rather than an award or agreement.

39 The effect of s 5 of the MCE Act is that the minimum conditions of employment, including s 17C and s 18, is implied in an award or agreement. The effect of s 7 of the MCE Act is that the minimum condition may be enforced under s 83 of the IR Act as if it were a provision of an award or agreement.[5]

40 However, notably in ***Kershaw***, Le Miere J (with whom Wheeler and Pullin JJ agreed) stated:

> *The obligation of the respondent to pay to the appellant annual leave entitlements owing at 30 June 2003 arises, if at all, from the provisions of the deed. The deed is not an instrument to which s 83(1) applies and the provisions of the deed are not provisions of an instrument to which s 83(1) of the IR Act applies or which are deemed by s 7 of the MCE Act to be provisions to which s 83(1) of the IR Act applies[28].*

The *Public Sector Management Act 1994* (WA)

41 Part 6 of the PSM Act contains provisions relating to redundancy and redeployment in the Public Sector. Section 94 of the PSM Act details the regulation-making power relating to the redundancy and redeployment of registrable employees, who are defined in s 94(1A).

42 Section 95 of the PSM Act invests the Commission with certain powers to review a decision made or purported to be made under regulations referred to in s 94. Two things arise: (1) the Commission does not have jurisdiction in respect of a referred decision from s 94 if the employment of the employee concerned is terminated;[6] and (2) the Commission must confine its determination to whether the regulations in s 94 have been fairly and properly applied in relation to the employee.[7]

43 In respect of (1), pursuant to s 95(6) of the PSM Act, the Commission does not have jurisdiction in respect of a purported referral of a s 94 decision in circumstances where the employment of the employee concerned has already come to an end at the time of the referral.[8]

44 Section 96A of the PSM Act invests the Commission with certain powers to review a decision made under regulations referred to in s 95A. Section 95A of the PSM Act concerns the termination of employment of a registered employee (as that term is defined). Ms Smailes was not a registered employee for the purposes of Part 6 of the PSM Act or the Redundancy Regulations.

45 According to the Full Bench of the Commission in ***Crowley***:

> *…there is only one power conferred to hear and determine a claim by a government officer, including a former government officer, that he or she has not been paid a severance payment in accordance with the requirements of the Redeployment and Redundancy Regulations. The sole power of the Commission to hear and determine such a claim and the power of a government officer to refer such a claim is confined to a referral made pursuant to s 95 or s 96A of the PSM Act [69].*

46 The Full Bench referred to policy reasons for concluding that the specific power conferred on the Commission to review a s 94 decision or a s 95A decision was limited to a referral under s 95 or s 96A of the PSM Act rather than by way of a referral pursuant to s 23(1) invoking the Commission's general power of review.

47 Ms Smailes no longer has a right of review to the Commission under s 95(6) of the PSM Act.

48 The claimant effectively seeks to circumvent the effect of the decision in ***Crowley*** by applying for the enforcement of an award or agreement term under s 83 of the IR Act, rather than by the Commission's review powers under s 95 or s 96A of the PSM Act, and implying into the Award and/or the Agreement certain MCE Act conditions it says are applicable to the payments made to Ms Smailes.

49 Neither of these issues appear to have been argued before the Full Bench in ***Crowley*** (because it was not the case run by Mr Crowley), and the question is whether the conclusion on jurisdiction in ***Crowley*** applies in Ms Smailes case as it relates to the jurisdiction of the IMC to review payments made to Ms Smailes under the umbrella of the IMC's enforcement jurisdiction in s 83 of the IR Act.

The Redundancy Regulations

50 There is no dispute the Scheme was made pursuant to the Redundancy Regulations and Ms Smailes was offered voluntary severance under the Scheme which she accepted.

51 Regulation 16 of the Redundancy Regulations provides for the approval of a scheme under which employees are invited to apply to be offered voluntary severance, which in Ms Smailes case, included the Scheme.

52 The Scheme was published in the Government Gazette, WA on 15 September 2017 which contained the following relevant terms:

- regulations 3, 13, 14 and 17 shall apply to all offers of voluntary severance made under this scheme; and
- an employee who accepts a voluntary severance shall be paid an incentive payment consistent with regulation 15.

53 Regulation 13 provides the calculation to be applied in determining the amount of severance pay made where 'pay' is defined in reg 3(1) of the Redundancy Regulations but also includes the allowances referred to in reg 13(1)(a) to (c).

54 Regulation 14 requires the employing authority to pay, in addition to any amount payable under any relevant employment instrument, cash in lieu of all accrued long serve leave to the extent, if any, not provided for by that instrument.

55 *Employment instrument* means a contract of employment or an award.[9] Relevantly, *award* means an award, industrial agreement or order under the IR Act.[10]

56 Regulation 15 refers to an incentive payment, which is a payment made when an employee accepts an offer of voluntary severance but resigns earlier than four weeks after the day on which the offer is accepted. The calculation depends on the timing of the resignation.

57 Regulation 17 refers to restriction of employment in the public sector after the payment of a severance payment and is not relevant to the Application.

58 Section 95B of the PSM Act deals with inconsistencies between Part 6 of the PSM Act, any regulations made under s 94 or s 95A of the PSM Act and any award or agreement.

59 Section 95B(2) of the PSM Act provides that '*the provisions of this Part and regulations referred to in sections 94 and 95A prevail, to the extent of any inconsistency, over any industrial agreement*'. Clause 45 of the Agreement contains a similar term.

60 In Ms Smailes' case the industrial agreement is the Award and/or the Agreement.

What is the incentive payment?

61 The incentive payment referred to in reg 15 of the Redundancy Regulations arises solely because of accepting an early voluntary severance. The Award and/or the Agreement contains no reference to the payment of an incentive payment.

62 The claimant's claim as it relates to the payment of the incentive payment is that Ms Smailes ought to have been paid in accordance with the definition of 'pay' in reg 3(1) of the Redundancy Regulations (which arguably includes an allowance in reg 3(2)). However, at the hearing of the Application the claimant increased the scope of its claim to include the reference to a term being implied into the Award or Agreement that the incentive payment ought to have been 'paid in full' pursuant to s 17C of the MCE Act.

63 There does not appear to be any inconsistency between the actual payment of an incentive payment under the Redundancy Regulations and the Award and/or Agreement. To the extent that there may be an inconsistency, it relates to the amount of the incentive payment to be paid.

64 Leaving aside the claimant's ability to alter its claim as it sought to do, is there any merit in the claimant's contention as it relates to the meaning of 'paid in full'?

Operation of section 17C of the MCE Act

65 Section 17C of the MCE Act is within Part 3A of the MCE Act entitled 'Other requirements as to pay'. Section 3 of the MCE Act defines 'minimum condition of employment', which relevant to s 17C, includes at (b) a requirement as to pay, *other than a rate of pay*, prescribed by this Act (my emphasis).

66 The claimant argues that the requirement to 'paid in full' referred to in s 17C of the MCE Act means the employee is entitled to be paid all his or her entitlements at the rate of pay applicable to the employee.

67 There are three reasons why I do not accept the claimant's construction of 'paid in full' in s 17C MCE Act.

68 First, the definition of 'minimum condition of employment' applicable to s 17C expressly excludes rates of pay, which is contained in Part 3 of the MCE Act. Thus, s 17C of the MCE Act must be referrable to something other than how much money is paid or is entitled to be paid or the rate of pay.

69 Secondly, a review of the whole of Part 3A demonstrates that this part is directed to ensuring the employer, unless authorised by the employee, pays the whole of the employee's pay in money to the employee and does not withhold monies or compel the employee to accept some other form of remuneration in lieu of money.[11]

70 Thirdly, the claimant's suggested interpretation of 'paid in full' in s 17C does not provide a harmonious construction of s 17B, s 17C and s 17D of the MCE Act where the sections are intended to be read together.

71 That is, s 17D(1) starts with '[d]*espite section 17C, an employer may deduct from an employee's pay*…'. On the claimant's contention, the opening words to s 17D(1) would have no meaning because s 17C on the claimant's construction requires an employee to be paid all their entitlements at an applicable rate rather than being paid the whole of their entitlements.

72 Therefore, while I accept that s 17C of the MCE Act is deemed to apply to the Award and/or Agreement, in my view, it does not operate in the manner suggested by the claimant but requires the whole of an employee's pay (howsoever comprised) to be paid in money by the employer to the employee, unless otherwise authorised by the employee.

73 However, if I am wrong about that, where the Redundancy Regulations apply to the extent of any inconsistency with the Award and/or Agreement, issues relating to the rate of pay to be applied to an incentive payment are outlined in reg 3 and reg 14 of the Redundancy Regulations and not by reference to s 17C of the MCE Act, implied or otherwise.

Determination on incentive payment

74 Having regard to the application of s 17C of the MCE Act and the genesis of an incentive payment, the requirement to pay an incentive payment arises from the acceptance of a voluntary severance under the Redundancy Regulations and not from any provision, implied or otherwise, of the Award or the Agreement.

75 Further, the claimant's claim as it relates to the payment of the incentive payment is predicated on Ms Smailes being paid at an incorrect rate of pay and rather than she was not paid the whole of any payment. The claimant is seeking a review of the rate of pay paid as an incentive payment.

76 Accordingly, the IMC does not have jurisdiction to consider the rate of pay of the payment of the incentive payment because no provision of the Award or Agreement, implied or otherwise, has been contravened applicable to the payment of the incentive payment, which is capable of being enforced under s 83 of the IR Act.

77 Further, where the claimant is seeking a review of the rate of pay paid for an incentive payment, if ***Crowley*** applies to an incentive payment in the same way that it applies to a severance payment, the appropriate review is under s 95 of the PSM Act as a payment not made in accordance with the requirements of the Redundancy Regulations.

78 The claimant contends that unless the ground on which the strike out of a part of a case is 'clearly demonstrated' and 'apparent at a glance' the claimant ought not to be denied access to court.[12]

79 However, similarly, argument '*perhaps even of an extensive kind, may be necessary to demonstrate that the case of the plaintiff is so clearly untenable that it cannot possibly succeed*'.[13]

80 In Ms Smailes' case, it is clear, albeit via legal argument, that there is no provision of an award or agreement capable of being enforced applicable to the payment of an incentive payment paid under reg 15 of the Redundancy Regulations.

81 Therefore, s 83 of the IR Act has no application and any alleged underpayment cannot be ordered pursuant to s 83A(1) of the IR Act.

Long service leave

82 As part of the offer and acceptance of a voluntary severance, regulation 14 of the Redundancy Regulations provides for the payment of *all accrued* long service leave of the employee (calculated for each completed year of service) to the extent, if any, not provided for by the Award or Agreement (my emphasis).

83 *Accrued long service leave* is defined in the reg 3(1) of the Redundancy Regulations.

84 The only provisions relevant and provided by the Award or the Agreement is the amount of long service leave an employee is eligible for once they have completed the requisite years of service or where they are eligible for early access to pro rata long service leave (to be taken as leave and not cash in lieu). However, in neither case does the Award or Agreement refer to the cashing out of long service leave upon cessation of employment, specifically upon the acceptance of voluntary severance.

85 I note the *Long Service Leave Act 1958* (WA) provides for the payment of accumulated long service leave upon termination of employment but on different conditions.

86 Therefore, much like an incentive payment, the payment of all accrued long service leave (as defined) is a creature of the Redundancy Regulations, which arises only upon acceptance of voluntary severance.

87 The claimant contends that pursuant to s 18(1) of the MCE Act, implied into the Award or Agreement, Ms Smailes is entitled to be paid at the rate she would have received at the time the leave is taken under the Award.

88 Three issues arise with the claimant's contention.

89 Firstly, s 18(1) of the MCE Act is predicated on the leave being taken rather than cashed out. That is, when regard is had to the words '*payment at the time the leave is taken*' and leave being *paid leave*, it is apparent that what is intended by s 18(1) is that when an employee takes paid leave, they get paid at the rate of pay they would have received had they been at work.

90 Section 18(3) of the MCE Act supports this interpretation where other payment types are not required to be taken into account in determining the rate of pay in s 18 of the MCE Act.

91 Second, s 18 of the MCE Act is within Part 4, which contains the types of leave for which paid leave and unpaid leave is available. That is, and by way of example, Part 4, Division 2 contains s 19(1) of the MCE Act, which entitles an employee to a yearly amount of paid leave as sick leave, carer's leave or family leave. The entitlements accrue pro-rata on a weekly basis and are cumulative, but the employee is not entitled to take paid carer's leave more than they are otherwise entitled to. Section 20B of the MCE Act entitles an employee to unpaid carer's leave. There is no provision to cash out this type of paid leave.

92 Similarly, Part 4, Division 3 contains s 23 of the MCE Act, which entitles an employee to be paid annual leave of four weeks in a year up to 152 hours. Notably, s 24(1) of the MCE Act enables the employee to elect to be paid prior to the commencement of annual leave for the period of annual leave taken.

93 Part 4 further contains entitlements to paid bereavement leave, paid parental leave and so on.

94 Thus, when the sections are read together, Part 4 entitles an employee to, as a minimum, a certain amount and type of paid and unpaid leave during their employment. It says nothing about the cashing out of any type of leave and makes no reference to long service leave.

95 Thirdly, the cashing out of leave relevant to the Award and the Agreement is contained within cl 36 of the Agreement relating to annual leave and cl 25 of the Award relating to long service leave. The cashing out of long service leave says nothing about the rate of pay to be paid when it is cashed out. Further, early access to long service leave is referred to in cl 30 of the Agreement and can only be taken as paid leave and not cash in lieu. Meaning that in certain circumstances an employee can elect to take paid long service leave and have the time off work while employed but they cannot otherwise cash out their entitlement to pro rata long service leave.

96 Therefore, s 18 of the MCE Act is directed towards the payment of paid leave while the employee is employed and, in fact, taking paid or unpaid leave.

97 Section 18 of the MCE Act does not determine the rate of pay of entitlements to be paid upon the cessation of employment, including voluntary severance under the Redundancy Regulations.

98 Regulation 14 of the Redundancy Regulations refers to 'pay' in terms of the payment of cash in lieu of all accrued long service leave. 'Pay' is defined in reg 3(1) of the Redundancy Regulations and includes the sum of, relevantly, at (a) *the award rate of pay, excluding allowances, applicable to the substantive classification of the recipient of the pay or, if the recipient does not have a substantive classification, the rate of pay, excluding allowances, under his or her contract of employment*; and (b) *an allowance listed in subregulation (2).*

99 Regulation 3(2) of the Redundancy Regulations contains the applicable allowances for the purposes of the definition of 'pay' in subregulation (1).

100 As previously stated, the Award and the Agreement make no reference to the rate of pay of long service leave either at the time that it is taken, or when it is cashed out during employment, or upon the cessation of employment for the purposes of cashing out accrued long service leave.

101 The combined effect of regulations 3 and 14 of the Redundancy Regulations provides the mechanism within which all accrued long service leave is paid upon acceptance of voluntary severance, which would not otherwise be available to the employee (noting the definition of accrued long service leave includes long service leave that is accruing).

Determination on long service leave

102 Therefore, as with the incentive payment, having regard to the application of s 18 of the MCE Act and the genesis of the payment of cash in lieu for all accrued long service leave, the requirement to pay cash in lieu of all accrued long service leave arises from the acceptance of a voluntary severance under the Redundancy Regulations and not from any provision, implied or otherwise, of the Award or the Agreement.

103 Further, similar to the payment of the incentive payment, the claimant's claim as it relates to the payment of the accrued long service leave is predicated on Ms Smailes being paid at an incorrect rate of pay. The claimant is seeking a review of the rate of pay paid for cash in lieu of all accrued long service leave.

104 Accordingly, the IMC does not have jurisdiction to consider the payment of the cash in lieu of all accrued long service leave because no provision of the Award or Agreement, implied or otherwise, has been contravened applicable to the payment of the cash in lieu of all accrued long service leave, which is capable of being enforced under s 83 of the IR Act.

105 Further, where the claimant is seeking a review of the rate of pay paid for the cash in lieu of all accrued long service leave, if ***Crowley*** applies to the cash in lieu of all accrued long service leave in the same way that it applies to a severance payment, the appropriate review is under s 95 of the PSM Act as a payment not made in accordance with the requirements of the Redundancy Regulations.

106 In Ms Smailes' case, it is clear, albeit via legal argument, that there is no provision of an award or agreement capable of being enforced applicable to the payment of the cash in lieu of all accrued long service leave paid under reg 14 of the Redundancy Regulations.

107 Therefore, s 83 of the IR Act has no application and any alleged underpayment cannot be ordered pursuant to s 83A(1) of the IR Act.

Outcome

108 The Application is and be granted as follows:

a. Pursuant to reg 7(1)(h) of the of the IMC Regulations, paragraphs 26 to 27 of the claimant's claim and order sought in respect to the payment of cash in lieu of all accrued long service leave and paragraphs 3.1 to 3.10 of the claimant's further and better particulars with consequential calculations are struck out where the IMC has no jurisdiction to determine this aspect of the claim.

b. Pursuant to reg 7(1)(h) of the of the IMC Regulations, paragraphs 32 to 37 of the claimant's claim and order sought in respect of the payment of incentive payment and paragraphs 4.1 to 4.8 of the claimant's further and better particulars with consequential calculations are struck out where the IMC has no jurisdiction to determine this aspect of the claim.

109 I will now hear from the parties in respect of orders to be made.

D SCADDAN

INDUSTRIAL MAGISTRATE

[1] ***Garbett v Midland Brick Company Pty Ltd*** [2003] WASCA 36 [81].

[2] Section 3(1) of the MCE Act.

[3] Section 3(1) of the MCE Act.

[4] Section 7 of the MCE Act.

[5] ***Kershaw*** [22] and ***Garbett*** [83].

[6] Section 95(6) of the PSM Act.

[7] Section 95(5) of the PSM Act.

[8] ***Crowley*** [67(a)].

[9] Regulation 3 of the Redundancy Regulations.

[10] Regulation 3 of the Redundancy Regulations.

[11] Commonly referred to as 'Truck Act' provisions.

[12] ***General Steel Industries Inc v Commissioner of Railways*** [1964] HCA 69.

[13] ***General Steel Industries***.

Schedule I – Jurisdiction of the IMC

1. The IMC has the jurisdiction conferred by the *Industrial Relations Act 1979* (WA) (IR Act) and other legislation. Sections 83 and 83A of the IR Act confer jurisdiction on the court to make orders for the enforcement of a provision of an industrial agreement where a person has contravened or failed to comply with the agreement. If the contravention or failure to comply is proved, the IMC may issue a caution or impose a penalty and make any other order, including an interim order, necessary for the purpose of preventing any further contravention. The IMC must order the payment of any unpaid entitlements due under an industrial agreement.
2. The powers, practice and procedure of the IMC are the same as a case under the *Magistrates Court (Civil Proceedings) Act 2004* (WA). The onus of proving a claim is on the claimant and the standard of proof required to discharge this onus is proof 'on the balance of probabilities'. The IMC is not bound by the rules of evidence and may inform itself on any matter and in any manner as it thinks fit. In ***Sammut v AVM Holdings Pty Ltd [No2]*** [2012] WASC 27 [40] - [47], Commissioner Sleight examined a similarly worded provision regulating cases in the State Administrative Tribunal of Western Australia, noting:

> *[T]he rules of evidence are [not] to be ignored…. After all, they represent the attempt made, through many generations, to evolve a method of enquiry best calculated to prevent error and elicit truth. …*
>
> *The more flexible procedure provided for does not justify decisions made without a basis in evidence having probative force.*

Schedule II – Relevant Principles of Construction

1. This case involves construing industrial agreements and statutes. Similar principles apply to both. The relevant principles to be applied when interpreting an industrial instrument are set out by the Full Bench of the Western Australian Industrial Relations Commission in ***Fedec -v- The Minister for Corrective Services*** [2017] WAIRC 00828 [21] - [23]. In summary (omitting citations), the Full Bench stated:
    a. 'The general principles that apply to the construction of contracts and other instruments also apply to the construction of an industrial agreement.'
    b. 'The primary duty of the court in construing an instrument is to endeavour to discover the intention of the parties as embodied in the words they have used in the instrument. It is the objectively ascertained intention of the parties, as it is expressed in the instrument, that matters; not the parties' subjective intentions. The meaning of the terms of an instrument is to be determined by what a reasonable person would have understood the terms to mean;'
    c. 'The objectively ascertained purpose and objective of the transaction that is the subject of a commercial instrument may be taken into account in construing that instrument. This may invite attention to the genesis of the transaction, its background and context. The apparent purpose or object of the relevant transaction can be inferred from the express and implied terms of the instrument, and from any admissible evidence of surrounding circumstances';
    d. 'An instrument should be construed so as to avoid it making commercial nonsense or giving rise to commercial inconvenience. However, it must be borne in mind that business common sense may be a topic on which minds may differ';
    e. 'An instrument should be construed as a whole. A construction that makes the various parts of an instrument harmonious is preferable. If possible, each part of an instrument should be construed so as to have some operation'; and
    f. 'Industrial agreements are usually not drafted with careful attention to form by persons who are experienced in drafting documents that have legal effect.'

    To the above list I would add:
    g. Ascertaining the intention of the parties begins with a consideration of the ordinary meaning of the words of the instrument. Ascertaining the ordinary meaning of the words requires attention to the context and purpose of the clause being construed. ***City of Wanneroo v Australian Municipal, Administrative, Clerical And Services Union*** [2006] FCA 813 [53] - [57] (French J).
    h. Context may appear from the text of the instrument taken as a whole, its arrangement and the place of the provision under construction. The context includes the history of the instrument and the legal background against which the instrument was made and in which it was to operate. ***City of Wanneroo v Australian Municipal, Administrative, Clerical And Services Union*** [supra] at [53] - [57] (French J); ***Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Excelior Pty Ltd*** [2013] FCA 638 [28] - [30] (Katzmann J).

Schedule III – Relevant Clauses

Public Service Award 1992

4. - SCOPE

This Award shall apply to all public service officers, other than those listed in (a), (b) and (c) of this clause, appointed under *Part 3 or Part 8 Section 100, of the Public Sector Management Act 1994* or continuing as such by virtue of *clause 4(c) of Schedule 5* of that Act, who are members of or eligible to be members of the Civil Service Association of Western Australia (Inc).

(a) A public service officer whose remuneration payable is determined or recommended pursuant to the *Salaries and Allowances Act 1975*.

(b) A public service officer whose remuneration is determined by an Act to be at a fixed rate, or is determined or to be determined by the Governor pursuant to the provisions of any Act.

(c) A chief executive officer as defined in *section 3(1)* of the *Public Sector Management Act 1994*.

…

6. - DEFINITIONS

In this Award, the following expressions shall have the following meaning:-

"Administrative Instruction" means administrative instruction as defined by *Schedule 5* of the *Public Sector Management Act 1994.*

"Casual Officer" means an officer engaged by the hour for a period not exceeding one calendar month in any period of engagement, as determined by the employer.

"Chief Executive Officer" in relation to any officer employed in a Department, means the person immediately responsible for the general management of the Department to the Minister of the Crown for the time being administering the Department.

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

“Employees” means public service officers and executive officers employed in the Public Service under Part 3 and Part 8 of the Public Sector Management Act 1994.”

"Employer" and "Employing Authority" means employing authorities as defined by section 5 of the Public *Sector Management Act 1994.*

"Headquarters" means the place in which the principal work of an officer is carried out, as defined by the employer.

"Metropolitan Area" means that area within a radius of fifty (50) kilometres from the Perth City Railway Station.

"Officers" means public service officers and executive officers employed in the Public Service under *Part 3 and Part 8 of the Public Sector Management Act 1994.*

"Partner" means either spouse or defacto partner.

"Spouse" means a person who is lawfully married to that person.

“Union” means the Civil Service Association of Western Australia Incorporated (the Association).

…

25. - LONG SERVICE LEAVE

(1) Each officer who has completed:

(a) A period of 7 years of continuous service in a permanent and/or fixed term contract capacity; or

(b) 10 years of continuous service in a temporary capacity;

shall be entitled to 13 weeks of long service leave on full pay.

Employees may by agreement with their employer, clear any accrued entitlement to long service leave in minimum periods of one (1) day.

(2) Where an officer has continuous service in both a temporary and permanent capacity the date on which the officer shall become entitled to long service leave shall be determined by taking into account on a proportional basis the periods of temporary and permanent service.

The category of temporary officer ceased on 1 October 1994 with the repeal of the *Public Service Act 1978.*

(3) Each officer is entitled to an additional 13 weeks of long service leave on full pay for each subsequent period of 7 years of continuous service.

(4) A part-time officer shall have the same entitlement to long service leave, as full time officers however payment made during such periods of long service leave shall be adjusted according to the hours worked by the officer during that accrual period.

(5) For the purpose of determining an officer's long service leave entitlement, the expression "continuous service" includes any period during which the officer is absent on full pay or part pay from duties in the Public Service, but does not include:

(a) any period exceeding two weeks during which the officer is absent on leave without pay or unpaid parental leave, except where leave without pay is approved for the purpose of fulfilling an obligation by the Government of Western Australia to provide staff for a particular assignment external to the Public Sector of Western Australia;

(b) any period during which an officer is taking long service leave entitlement or any portion thereof except in the case of subclause (10) when the period excised will equate to a full entitlement of 13 weeks;

(c) any service by an officer who resigns, is dismissed or whose services are otherwise terminated other than service prior to such resignation, dismissal or termination when that prior service has actually entitled the officer to the long service leave under this clause;

(d) any period of service that was taken into account in ascertaining the amount of a lump sum payment in lieu of long service leave;

(e) any service of a Cadet whilst undertaking full time studies.

(6) A long service leave entitlement, which fell due prior to March 16, 1988, amounted to three (3) months. A long service leave entitlement, which falls due on or after that date, shall amount to thirteen (13) weeks.

(7) Any Public Holiday or days in lieu of the repealed public service holidays occurring during an officers absence on long service leave shall be deemed to be a portion of the long service leave and extra days in lieu thereof shall not be granted.

(8) The employer may direct an officer to take accrued long service leave and may determine the date on which such leave shall commence. Should the officer not comply with the direction, disciplinary action may be taken against the officer.

(9) An officer who has elected to retire at or over the age of 55 years and who will complete not less than 12 months continuous service before the date of retirement may make application to the employer to take pro rata long service leave before the date of retirement, based on continuous service of a lesser period than that prescribed by this clause for a long service entitlement.

(10) Compaction of leave

(a) An officer who, during an accrual period was subject to variations in ordinary working hours or whose ordinary working hours during the accrual period are less than the officer's ordinary working hours at the time of commencement of long service leave, may elect to take a lesser period of long service leave calculated by converting the average ordinary working hours during the accrual period to the equivalent ordinary hours at the time of commencement of long service leave.

(b) Notwithstanding subclause (6) of this clause, an officer who has elected to compact an accrued entitlement to long service leave in accordance with paragraph (10)(a) of this clause, shall only take such leave in any period on full pay, and the period excised as "continuous service" shall be 13 weeks.

(11) Portability

(a) Where an officer was, immediately prior to being employed in the Public Service, employed in the service of:

The Commonwealth of Australia, or

Any other State Government of Australia, or

Any Western Australian State body or statutory authority prescribed in Administrative Instruction 611

and the period between the date when the officer ceased previous employment and the date of commencing employment in the Public Service does not exceed one week, that officer shall be entitled to long service leave determined in the following manner:

(i) the pro rata portion of long service leave to which the officer would have been entitled up to the date of appointment under the *Public Sector Management Act 1994*, shall be calculated in accordance with the provisions that applied to the previous employment referred to, but in calculating that period of pro rata long service leave, any long service leave taken or any benefit granted in lieu of any such long service leave during that employment shall be deducted from any long service leave to which the officer may become entitled under this clause; and

(ii) the balance of the long service leave entitlement of the officer shall be calculated upon appointment to the Public Service in accordance with the provisions of this clause.

(b) Nothing in this clause confers or shall be deemed to confer on any officer previously employed by the Commonwealth or by any other State of Australia any entitlement to a complete period of long service leave that accrued in the officer's favour prior to the date on which the officer commenced employment in the Public Service.

(12) Half Pay

Subject to the employer's convenience, an employer may approve an officer's application to take long service leave on full pay or half pay. In the case of long service leave which falls due on or after March 16, 1988 portions in excess of four weeks shall be in multiples of one week's entitlement.

(13) Long Service Leave on Double Pay

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

(b) Where employees proceed on long service leave on double pay in accordance with this subclause, the entitlement accessed is excised for the purpose of continuous service in accordance with subclause (5) of this clause.

(14) Cash Out of Accrued Long Service Leave Entitlement

(a) Employees may by agreement with their employer, cash out any portion of an accrued entitlement to long service leave, provided the employee proceeds on a minimum of ten (10) days annual leave in that calendar year.

(b) Where employees cash out any portion of an accrued entitlement to long service leave in accordance with this subclause, the entitlement accessed is excised for the purpose of continuous service in accordance with subclause (5) of this clause.

Public Sector and Government Officers CSA General Agreement 2017

30. EARLY ACCESS TO PRO RATA LONG SERVICE LEAVE

30.1 This clause is to be read in conjunction with clause 25 – Long Service Leave of the Applicable Award.

30.2 For the purpose of this clause, "Employee" includes full time, part time, permanent and fixed term contract Employees.

30.3 Subject to clause 30.5, Employees within seven years of their preservation age under Western Australian Government superannuation arrangements may, by agreement with their Employer, choose early access of their long service leave at the rate of 9.28 days per completed twelve month period of continuous service for full time Employees.

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

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

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

30.7 Employees may, by agreement with their Employer, clear long service leave in minimum periods of one day.

30.8 Where Employees access pro rata long service leave early, any period of leave taken will be excised for the purpose of continuous service in accordance with the following clauses of the Applicable Award:

(a) clause 25 (5) of the *Public Service Award 1992*; or

(b) clause 25 (4) of the *Government Officers Salaries, Allowances and Conditions Award 1989*.

…

40. HIGHER DUTIES ALLOWANCE

Higher Duties Allowance and Leave

40.1 This clause replaces clauses 19 (6), (7) and (8) – Higher Duties Allowance of the Applicable Award.

40.2 Where an Employee who is in receipt of an allowance granted under clause 19 – Higher Duties Allowance of the Applicable Award and has been doing so for a continuous period of twelve months or more, proceeds on any period of paid leave and:

(a) resumes in the office immediately on return from leave, the Employee shall continue to receive the allowance for the period of leave; or

(b) does not resume in the office immediately on return from leave, the Employee shall continue to receive the allowance for the period of leave accrued during the period of higher duties.

40.3 Where an Employee who is in receipt of an allowance granted under clause 19 – Higher Duties Allowance of the Applicable Award for less than twelve months proceeds on a period of paid leave, whether in excess of the normal entitlement or not, the Employee shall continue to receive the allowance for the period of normal leave provided that:

(a) during the Employee's absence, no other Employee acts in the office in which the Employee was acting immediately prior to proceeding on leave; and

(b) the Employee resumes in the office immediately on return from leave.

40.4 For the purpose of clause 40.3, "normal leave" means the period of paid leave an Employee would accrue in twelve months. It shall also include any public holidays and leave in lieu accrued during the preceding twelve months taken in conjunction with such paid leave.

Part Time Higher Duties Allowance Arrangements

40.5 This clause shall be read in conjunction with clause 19 – Higher Duties Allowance of the Applicable Award.

40.6 Where a part time Employee acts in a higher office, the allowance shall be payable after the completion of 37.5 hours service in that position. The 37.5 hours service in the higher position must be worked consecutively according to the normal working hours of the part time position for which the allowance is being paid.

…

45. REDEPLOYMENT AND REDUNDANCY

45.1 The parties acknowledge that the *Public Sector Management Act 1994* (**PSMA**) and the *Public Sector Management (Redeployment and Redundancy) Regulations 2014* (**Regulations**) provide the legislative framework for redeployment and redundancy for all Employees covered by this General Agreement. If the provisions of this General Agreement and the Regulations are inconsistent, the provision of the Regulations shall prevail.

45.2 The Employer and prospective Employer will assess the Suitability of a Surplus employee broadly which includes, but is not limited to:

(a) acknowledging that the Employee's classification level illustrates core competencies for that classification level;

(b) providing sufficient weight to the Employee's knowledge, skills and experience; and

(c) recognising the transferability of skills to roles where a direct fit may not exist.

45.3 The Employer and prospective Employer will seek to place Surplus employees in suitable positions in accordance with clause 45.2.

45.4 The Employer will provide Surplus employees with direct access to priority vacancies through the online Recruitment Advertising Management System.

45.5 The Employer will provide Surplus employees with case management in line with the Public Sector Commission's Redeployment and Redundancy Guidelines and the Public Sector Commission's Redeployment and Redundancy Guidelines Appendix A – Case Management or any revised arrangement subsequent to the review of the redeployment and redundancy provisions. The Employer will ensure that Surplus employees are provided with an appropriately skilled case manager/s, a skills audit and continual support to find Suitable employment.

45.6 Upon notification of registration, the Employer shall provide an Employee who is notified of the Employer's intention to register them under regulation 18 of the Regulations with the written reason/s for the intended registration and the possible employment, placement and training options available to them.

45.7 Where the Employer is able to do so consistent with Commissioner's Instruction No. 12 – Redeployment and Redundancy, the Employer may Suspend the Redeployment period of a Registered employee for the duration that the Employee is participating in retraining, a secondment or other employment placement arrangement. Where suspension of the total duration would exceed the allowable duration under Commissioner's Instruction No. 12 – Redeployment and Redundancy, the Employer may Suspend the Redeployment period for the portion allowable.

45.8 When a Registered employee enters the last three months of their Redeployment period, the Employer will notify the Union as soon as possible.

UNFAIR DISMISSAL/CONTRACTUAL ENTITLEMENTS—

2019 WAIRC 00595

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2019 WAIRC 00595
CORAM	**:**	COMMISSIONER T B WALKINGTON
HEARD	**:**	ON THE PAPERS
DELIVERED	**:**	THURSDAY, 1 AUGUST 2019
FILE NO.	**:**	U 57 OF 2019
BETWEEN	**:**	JUSTINE AMANDA BUDD Applicant AND ABORIGINAL COMMUNITY HOUSING LIMITED Respondent

CatchWords	**:**	Industrial Law (WA) - Termination of employment - Whether the Commission has jurisdiction - Whether respondent is a trading corporation - Principles applied - Jurisdiction not found
Legislation	**:**	*Industrial Relations Act 1979*
Result	**:**	Application Dismissed
Representation:		
Counsel:		
Applicant	**:**	In person
Respondent	**:**	Mr J Duffy (of counsel)
Solicitors:		
Applicant	**:**	Not applicable
Respondent	**:**	Gilchrist Connell

Case(s) referred to in reasons:

Aboriginal Legal Service of Western Australia (Inc) v Lawrence [No 2] [2008] WASCA 254

Bankstown Handicapped Children's Centre Association Inc and Another v Hillman and Others [2010] FCAFC 11; (2010) 182 FCR 483

Kelly v Great Southern Employment Development Service Committee Incorporated [2017] WAIRC 00968; (2017) 98 WAIG 57

R v Trade Practices Tribunal; Ex parte St George County Council (1974) 130 CLR 533

Case(s) also cited:

United Firefighters' Union of Australia v Country Fire Authority [2015] FCAFC 1; (2015) 228 FCR 497

Reasons for Decision

Background

1 Ms Justine Amanda Budd worked for the Aboriginal Community Housing Limited **(ACHL)** from 10 September 2018 as a Housing and Property Service Officer. On 20 March 2019 Ms Budd's employment ceased and on 9 April 2019 Ms Budd applied to the WA Industrial Relations Commission pursuant to s 29 of the *Industrial Relations Act 1979* **(IR Act)** alleging her dismissal was unfair.

2 The ACHL objected to the Commission considering this matter on the basis that it is a national system employer.

3 The parties agreed that the preliminary matter of whether the respondent is a trading corporation and a national system employer be determined in chambers on the papers.

4 The ACHL submitted comprehensive submissions including a witness statement of the Company Secretary attaching former and current constitutions, annual reports for year ending 30 June 2018, various documents which contained its arrangements and agreements with the Department of Housing (**DOH**) and a contract with Paupiyala Tjarutja Aboriginal Corporation. Ms Budd did not provide any submissions.

Question to be decided

5 The question to be decided is whether ACHL is a trading corporation and a national system employer.

Principles

6 Section 14(1)(a) of the *Fair Work Act 2009* **(FW Act)** defines a national system employer as a constitutional corporation so far as it employs or usually employs an individual and s 13 of the FW Act defines a national system employee as an individual employed by a national system employer. Section 12 of the FW Act defines constitutional corporations as corporations which are trading, or financial corporations formed within the limits of the Commonwealth. Section 26 of the FW Act states that it applies to the exclusion of all state or territory industrial laws that would otherwise apply to a national system employee or employer including the Act. If the respondent is a trading corporation the jurisdiction of the Commission to deal with the applicant's claim is therefore excluded.

7 The issues to be determined in this matter when deciding whether the respondent is a trading corporation is whether it is incorporated, the character of the activities carried on by it at the relevant time and whether or not it was engaged in significant and substantial trading activities of a commercial nature such that it can be described as a trading corporation.

8 ***Aboriginal Legal Service of Western Australia (Inc) v Lawrence*** [No 2] [2008] WASCA 254 **(*ALS*)**, sets out the principles to be applied when considering whether an entity is a trading corporation at [68]

(1) A corporation may be a trading corporation even though trading is not its predominant activity: ***Adamson*** (239); ***State Superannuation Board*** (303 – 304); ***Tasmanian Dam case*** (156, 240, 293); ***Quickenden*** [49] - [51], [101]; ***Hardeman*** [18].

(2) However, trading must be a substantial and not merely a peripheral activity: ***Adamson*** (208, 234, 239); ***State Superannuation Board*** (303 - 304); ***Hughes v Western Australian Cricket Association Inc*** (1986) 19 FCR 10, 20; ***Fencott*** (622); ***Tasmanian Dam case*** (156, 240, 293); ***Mid Density*** (584); ***Hardeman*** [22].

(3) In this context, "trading" is not given a narrow construction. It extends beyond buying and selling to business activities carried on with a view to earning revenue and includes trade in services: ***Ku-ring-gai*** (139, 159 - 60); ***Adamson*** (235); ***Actors and Announcers Equity Association of Australia v Fontana Films Pty Ltd*** (1982) 150 CLR 169, 184 - 185, 203; ***Bevanere Pty Ltd v Lubidineuse*** (1985) 7 FCR 325, 330; ***Quickenden*** [101].

(4) The making of a profit is not an essential prerequisite to trade, but it is a usual concomitant: ***St George County Council*** (539, 563, 569); ***Ku-ring-gai*** (140, 167); ***Adamson*** (219); ***E*** (343, 345); ***Pellow*** [28].

(5) The ends which a corporation seeks to serve by trading are irrelevant to its description: ***St George County Council*** (543, 569); ***Ku-ring-gai*** (160); ***State Superannuation Board*** (304 – 306); ***E*** (343). Consequently, the fact that the trading activities are conducted is the public interest or for a public purpose will not necessarily exclude the categorisation of those activities as "trade": ***St George County Council*** (543) (Barwick CJ); ***Tasmanian Dam case*** (156) (Mason J).

(6) Whether the trading activities of an incorporated body are sufficient to justify its categorisations as a 'trading corporation' is a question of fact and degree: ***Adamson*** (234) (Mason J); ***State Superannuation Board*** (304); ***Fencott (***589); ***Quickenden*** [52], [l01]; ***Mid Density*** (584).

(7) The current activities of the corporation, while an important criterion for determining its characterisation, are not the only criterion. Regard must also be had to the intended purpose of the corporation, although a corporation that carries on trading activities can be found to be a trading corporation even if it was not originally established to trade: ***State Superannuation Board*** (294 - 295, 304 - 305); ***Fencott*** (588 - 589, 602, 611, 622 - 624); ***Hughes*** (20); ***Quickenden*** [101]; ***E*** (344); ***Hardeman*** [18].

(8) The commercial nature of an activity is an element in deciding whether the activity is in trade or trading: ***Adamson*** (209, 211); ***Ku-ring-gai*** (139, 142, 160, 167); ***Bevanere*** (330); ***Hughes*** (19 - 20); ***E*** (343); ***Fowler***; ***Hardeman*** [26].

9 The decision of the Court in ***ALS*** has been cited with approval in superior appellate court decisions ***United Firefighters' Union of Australia v Country Fire Authority*** [2015] FCAFC 1; (2015) 228 FCR 497; ***Bankstown Handicapped Children's Centre Association Inc and Another v Hillman and Others*** [2010] FCAFC 11; (2010) 182 FCR 483 **(*Bankstown*)**.

10 In ***Bankstown*** the Full Court of the Federal Court held that the *Bankstown Handicapped Children's Centre Association* (**Association**) was a trading corporation on an assessment of the activities of the Association which involved the provision of services to the state and remuneration for doing so. The surrounding circumstances and the nature of the agreement between the association and the New South Wales state government department concluding it was a commercial one involving trade in services [54] - [55].

11 In ***Kelly v Great Southern Employment Development Service Committee Incorporated*** [2017] WAIRC 00968; (2017) 98 WAIG 57 (***GSEDSC***), Kenner SC distinguished ***Bankstown*** from the matter before him on the basis that unlike the GSEDSC the Association offered its services to the state government at prices determined by the Association and the state government was free to accept or reject the price for services offered. Kenner SC considered two other activities of GSEDSC as important differences between the two matters: in ***Bankstown*** the Association provided quotes for the provision of some services for which invoices were sent (***Bankstown*** [41] - [43]) and the language used in the header agreement between the parties was of selling its services and of the state purchasing these services. Furthermore, unlike the GSEDSC which received no other income, the Association in ***Bankstown*** received a substantial amount in fees directly from users of some of its services, such as day care and community services [35].

12 In ***Bankstown*** the state department assessed the prices charged by other organisations offering similar services in the marketplace [33] - [37].

Consideration

13 The respondent was incorporated in Victoria on 1 August 2013 as the Community Housing (Capital) Ltd with Community Housing Limited as its sole member, and the relevant constitution at the time of Ms Budd's termination states that it is a public benevolent institution providing charitable housing to address financial disadvantage, and physical, social or psychological needs (cl 3(ii)). Activities permitted in pursuit of these purposes include acquiring or managing land and buildings to provide shelter to persons in crisis and/or who have inadequate access to safe and secure housing (cl 3(a)(i)); housing to low income persons including young people, people with disabilities, people who are aged, childless couples, single parent families and/or other households in need (cl 3(a)(ii)). The intended purpose of the organisation is primarily a benevolent one of providing charitable housing and the activities undertaken to do this may include those that involve trading such as acquiring or managing land.

14 The most significant source of income for ACHL is payment for the provision of housing management services to nominated Aboriginal communities under an arrangement with the Department of Housing (**DOH**). Similar to ***R v Trade Practices Tribunal; Ex parte St George County Council*** (1974) 130 CLR 533, the fact that these activities are conducted for a public purpose does not exclude them as being "trade".

15 The arrangements with the DOH commenced in 2012 through a Service Agreement and most recently secured through a tender process conducted in 2014 and 2015. This arrangement yielded about 98% of ACHL's income for the year ending 30 June 2018.

16 Similar to the circumstances in ***Bankstown*** the tender process involved ACHL submitting a competitive bid nominating a price for services to be provided by it.

17 In March 2015, DOH accepted an offer for the Request HOU0503214 For Housing Management Services to Remote Aboriginal Communities from ACHL and the written advice of acceptance constitutes an agreement between the two. The Request for Tender (**RFT**) completed by ACHL included prices proposed by ACML for the provision of services in for two regional areas. Similar to NSW state government in ***Bankstown*** the DOH was free to accept or reject the prices proposed by ACHL.

18 The RFT states that the Customer, DOH, "is seeking to engage Contractors under new contractual arrangements from 1 July 2015". Section 2 of the RFT sets out the Selection process including the "Value for Money" criteria which includes several considerations. One of the criteria is an assessment of the "Offered Prices and Pricing Requirements in Schedule 3". The tenderer is required to complete the worksheet "Schedule 3 – Pricing" with their price data for "price (by Zone)", "Volume Discount" and "Transition In (by Zone)". Further, Schedule 3 of the Request HOU0503214 states that "The Customer, DOH reserves the right to reject any Offer that does not properly address and satisfy any of the Offered Price and Pricing Requirements" and sets out the conditions of the price offered by the tender respondent.

19 The weighting given by DOH to the criteria of the "Offered Price" against the other selection criteria, such as quality of service, is not known however it is evident that price was an important consideration and one that DOH specifically reserved the right to reject the proposal.

20 Unlike in ***Bankstown*** there is no provision in the RFT for additional payments to ACHL for services on an as required basis and revenue other than that from the DOH and National Rental Affordability Scheme is negligible.

Conclusion

21 In my assessment of the activities of the ACHL, I conclude that the organisation is a trading corporation and therefore, the Commission does not have jurisdiction to hear and determine Ms Budd's application. The application is dismissed.

2019 WAIRC 00596

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	JUSTINE AMANDA BUDD
	APPLICANT
	-v-
	ABORIGINAL COMMUNITY HOUSING LIMITED
	RESPONDENT
CORAM	COMMISSIONER T B WALKINGTON
DATE	THURSDAY, 1 AUGUST 2019
FILE NO/S	U 57 OF 2019
CITATION NO.	2019 WAIRC 00596

Result	Application dismissed
Representation	
Applicant	Ms J Budd
Respondent	Mr J Duffy (of counsel)

Order

HAVING HEARD Ms J Budd on her own behalf and Mr J Duffy (of counsel) on behalf of the respondent, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby orders:

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

(Sgd.) T B WALKINGTON,
[L.S.] Commissioner.

2019 WAIRC 00196

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	NAN JAYA GALAW
	APPLICANT
	-v-
	BILL POPOSKI ASSISTANT MANAGER, PATIENT SUPPORT SERVICE ROYAL PERTH BENTLEY GROUP
	RESPONDENT
CORAM	SENIOR COMMISSIONER S J KENNER
DATE	TUESDAY, 16 APRIL 2019
FILE NO/S	U 82 OF 2018
CITATION NO.	2019 WAIRC 00196

Result	Order issued
Representation	
Applicant	Ms N Galaw
Respondent	Mr P Heslewood

Order

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

THAT the name of the respondent be amended by the deletion of the name 'Bill Poposki Assistant Manager, Patient Support Service Royal Perth Bentley Group' and the insertion in lieu thereof the name 'Chief Executive Officer, East Metropolitan Health Service'.

(Sgd.) S J KENNER,
[L.S.] Senior Commissioner.

2019 WAIRC 00365

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2019 WAIRC 00365
CORAM	**:**	SENIOR COMMISSIONER S J KENNER
HEARD	**:**	TUESDAY, 19 FEBRUARY 2019, FRIDAY, 5 APRIL 2019
DELIVERED	**:**	MONDAY, 22 JULY 2019
FILE NO.	**:**	U 82 OF 2018
BETWEEN	**:**	NAN JAYA GALAW
		Applicant
		AND
		CHIEF EXECUTIVE OFFICER, EAST METROPOLITAN HEALTH SERVICE
		Respondent

Catchwords	**:**	*Industrial law (WA) - Termination of employment - Harsh, oppressive or unfair dismissal - Whether the applicant was dismissed from casual employment - Whether the Commission has jurisdiction - Whether the dismissal was unfair - Applicant was dismissed - Commission has jurisdiction to hear applicant's claim - Clear history of performance and conduct issues - Dismissal not unfair - Application dismissed.*
Legislation	**:**	*Industrial Relations Act 1979* (WA)
Result	**:**	Application dismissed
Representation:		
Counsel:		
Applicant	**:**	In person
Respondent	**:**	Mr P Heslewood and with him Ms M Di Lello

Case(s) referred to in reasons:

Australasian Meat Industry Employees' Union v Sunland Enterprises Pty Ltd (1988) 24 IR 467

Doyle v Sydney Steel Co Ltd (1936) 56 CLR 545

Melrose Farm Pty Ltd t/as Milesaway Tours v Milward (2008) 88 WAIG 1751

Reed v Blueline Cruises Ltd (1996) 73 IR 420

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

Swan Yacht Club (Inc) v Bramwell (1997) 78 WAIG 579

Reasons for Decision

1 The applicant was employed as a casual Patient Care Assistant by the respondent at Royal Perth Hospital. She commenced her employment in March 2014 and ceased working for the respondent in June 2018. The circumstances of that cessation of employment are controversial. The applicant complains that she was dismissed and her dismissal was unfair. She further complains that she was bullied and victimised in the workplace. The respondent maintains that the applicant was employed on an "as required" basis as a casual employee and there was no dismissal. If there was a dismissal, in the alternative, the respondent says that it was not unfair. As the applicant now resides in Melbourne, she does not seek reinstatement or re-employment but rather compensation for loss.

2 As a matter of jurisdiction arises in this proceeding, I must be satisfied that the applicant was dismissed as a matter of fact and law. I will consider this issue first.

Jurisdiction – was the applicant dismissed?

3 The applicant's employment as a PCA was covered by the WA Health System – United Voice WA – Hospital Support Workers Industrial Agreement 2017. Clause 11.5 – Casual Employment of the agreement provides:

> 11.5 Casual Employment
>
> (a) A casual employee will be paid a 20% casual loading on the ordinary rate of pay.
>
> (b) For the purposes of calculating the correct payment, hours worked on any day stand alone.
>
> (c) (i) The Employer will not re-engage a casual employee unless at least 10 hours has elapsed between the end of one period of engagement and the commencement of a following period of engagement.
>
> (ii) The Employer will not engage a casual employee to work more than 12 hours on any day.
>
> (d) Any shift, weekend and/or Public Holiday penalty rate will be calculated on the ordinary rate of pay. Penalty rates will be paid in addition to the loading provided by subclause 11.5(a) and the ordinary rate of pay specified in this Agreement.

(e) A casual contract of employment is terminable by the giving of 1 hour's notice by either party to the other or by the payment or forfeiture as the case may be of 1 hour's wage.

(f) The minimum period of employment of a casual employee will be 3 hours on each engagement.

(g) A period of casual employment will stand alone and will not accrue towards entitlements under this Agreement.

4 A standard form letter of offer of casual employment was provided to the applicant by the respondent and was dated 21 March 2014. Although the copy tendered in evidence by the applicant was not signed by her, there was no dispute that the parties entered into the arrangement. Formal parts omitted, the letter, which was exhibit A1, provided as follows:

> Dear Nan,
>
> This letter is to confirm that from time to time you may be offered casual hours by Metropolitan Health Service. This offer provides for you to be employed as a casual on a needs basis.
>
> **1. POSITION**
>
> In the period of this casual work you will be appointed as Patient Care Assistant
>
> During any period of casual work you will be classified as Level 3/4 increment 1
>
> The duties of the position are outlined in your Job Description Form (JDF). You may during the course of this contract be required to comply with any reasonable request to transfer to another location based on operational requirements within the Metropolitan Health Service.
>
> You will initially be placed within the casual pool at Royal Perth Hospital
>
> Your location is Perth
>
> 2. **TERM OF EMPLOYMENT**
>
> Your term of employment will commence on the 10-Mar-2014
>
> Your hourly rate will be $23.23 with a loading rate of 20%
>
> In signing this agreement you acknowledge that you have been offered an opportunity to work on a casual basis from time to time only, and that upon expiration of this casual offer there is no obligation on either party to enter into any further employment arrangement.
>
> This offer applies to your potential employment at Royal Perth Hospital in the State of Western Australia (the Hospital/Health Service).
>
> 3. **TERMS AND CONDITIONS OF EMPLOYMENT**
>
> The terms and conditions of your employment are governed by, but not limited to:
>
> HGA – Health and Disability Services Support Workers Award
>
> This contact is subject to a satisfactory criminal record screening and pre employment screening.
>
> This employment contract is subject to the Working With Children (Criminal Record Checking) Act 2004. Your continued employment is subject to you applying for an Assessment Notice and maintaining an Assessment Notice. General information about the Working With Children Check is enclosed. Please note this is an incomplete statement and should you require further information see the Working With Children Check website at www.checkwwc.wa.gov.au or seek independent legal advice.
>
> 4. **SIGNATURES**
>
> **Janelle Zandvliet** 21/03/2014
>
> **Manager Employment Services** Date
>
> **Workforce Services Directorate**
>
> on behalf of the Employer

5 It is notable that the letter refers to the fact that the applicant may be offered work on a "needs basis". The manner of the engagement of the applicant as a casual or PCA was outlined in the evidence of Mr Poposki, the respondent's Assistant Manager, Patient Support Services. It seemed common ground that there are two types of casual engagement. The first is where casuals are engaged to cover a known future and planned absence and the second, where casual employees are engaged to provide cover for unplanned absences that may arise from day to day. It appeared to not be in dispute that the applicant was engaged predominantly on the second type of casual employment arrangement. Mr Poposki testified that the usual procedure is that set out in exhibits R2 and R3. Exhibit R2 is a memorandum from the respondent's management setting out the process for registering the shift availability.

6 Casual employees complete a "Shift Availability Form". This document, examples of which were tendered as exhibit R3, requires casual employees to nominate which days of the week they are available to work, and whether this is in the morning, the afternoon or both. Once the information is entered into the respondent's computer system, the supervisor will then assess what the upcoming shift coverage needs are. Based on the "Shift Availability Form", contact is then made with the person as to whether they are able to accept an offer of a shift(s). The applicant confirmed in her evidence that this is what happened in her case. She testified that she would generally receive a telephone call on a Wednesday for shifts for the upcoming weekend, and a telephone call on a Saturday for shifts for the upcoming Monday to Friday. She would either accept the offer or not. The applicant testified that she mostly accepted offers of shifts, but sometimes she was not available because of other commitments.

7 The process of "Roster Deficit Allocation" was also explained by Mr Poposki in his evidence. This was set out in a flow-chart tendered as exhibit R5. This process draws a distinction between the need to cover shifts where prior notice is given and where no notice is given. Preference is given to coverage of gaps in the roster by casual employees, for shifts where no notice is given. In the case of casual PCAs, they are essentially engaged on an ad-hoc basis to fill gaps in the roster by reason of unplanned absences. The evidence showed that they do not have regular or consistent work locations but may be located in a range of designated work areas or locations, in accordance with the needs arising on the roster. This contrasts with employees who are not casually employed and who work in accordance with the Agreement in regular locations for set lengths of time.

8 Whether a casual employee can be dismissed unfairly and reinstated or compensated, is ultimately a question of fact. There is no fixed meaning of "casual employee": *Melrose Farm Pty Ltd t/as Milesaway Tours v Milward* (2008) 88 WAIG 1751 per Le Miere J at par 103 (citing *Doyle v Sydney Steel Co Ltd* (1936) 56 CLR 545; *Australasian Meat Industry Employees Union v Sunland Enterprises Pty Ltd* (1988) 24 IR 467; *Ryde-Eastwood Leagues Club Ltd v Taylor* (1994) 56 IR 385; *Reed v Blueline Cruises Ltd* (1996) 73 IR 420). Casual employment may be characterised by a series of separate and distinct contracts of employment in respect of each engagement. Alternatively, there may be an ongoing contract, a term of which is that the employer may offer work from time to time on particular days and the employee may accept the offers and work on those days accordingly.

9 The proper characterisation of a "casual" employee's employment can be problematic. In this case, it involves consideration of the letter of offer and the relevant provisions of the Agreement, both set out above, in the context of the facts of the case.

10 It is first necessary to consider the terms of the letter set out above. In the first paragraph the last sentence refers to the applicant being "employed as a casual on a needs basis". Under the heading "**1. Position**" is reference in the third paragraph to "during the course of this contract" the applicant is to comply with various requests as to work locations. The second main heading refers to the applicant's "**Term of Employment**" with a start date of 10 March 2014. Under the third heading which refers to "**Terms and Conditions of Employment**" there is reference to the need for a criminal screening check and that the applicant's "continued employment" is subject to applying for and maintaining an "Assessment Notice" under the working with children legislation. These latter requirements in particular, are of an ongoing nature and are quite inconsistent with there being no ongoing contract of employment.

11 The third paragraph under the second heading of the letter states "upon expiration of this casual offer there is no obligation on either party to enter into any further employment relationship". This is somewhat at odds with other parts of the letter, however I tend to the view that taken as a whole, the letter of offer represents an offer of an ongoing contract, a term of which, as was established on the evidence, was that the respondent would offer to the applicant days of work in accordance with the periods over which the applicant indicated she was available to perform it. The evidence was that the respondent, in accordance with this arrangement, did offer the applicant casual work engagements on an ongoing basis over several years. As I have noted above, more often than not it seems, the applicant accepted such engagements and worked as a PCA in the location to which she was directed as and when the occasions for work arose.

12 There is nothing in the Agreement which is inconsistent with the letter of appointment in my view. Clause 11.5 set out above, prescribes the rates of pay for casual employees, in terms of appropriate penalty rates to apply. It also deals with minimum notice and periods of engagements. The reference to periods of casual employment "standing alone" are not inconsistent with an ongoing contract of employment and refer to entitlements accruing under the Agreement and not the nature of the contract between the parties.

13 It is clear that for the purposes of the Commission's unfair dismissal jurisdiction, a "dismissal" can be constituted by the "dispensing with of ones' services" or the "sending away" of a person from their employment: *Ryde-Eastwood Leagues Club* at 392-393; *Swan Yacht Club (Inc) v Bramwell* (1997) 78 WAIG 579 per Sharkey P at 583. Simply because a person is not performing services at the time of any purported dismissal, does not mean that there may not be a termination of employment: *Ryde-Eastwood Leagues Club* at 392. Having regard to the foregoing, in this case, I consider the respondent's letter of 18 June 2018 to the applicant, informing her that the respondent would not offer the applicant any more casual engagements, was a "dismissal" for the purposes of the Act. The Commission has jurisdiction to hear and determine the applicant's claim.

Was the dismissal unfair?

14 It is fair to say that as to the respondent's many complaints concerning the applicant's performance, conduct and attitude in the workplace, they were in the main, met with denials by the applicant. The applicant also maintained that others were to blame for the respondent's concerns and that many of the meetings and various conversations, where the respondent's supervisors or manager raised matters with the applicant, either did not happen or were just made up. For the following reasons, I do not consider that the applicant's position in relation to these issues was credible. There was a lengthy history of complaints as to the applicant's attitude and performance in the workplace. I will deal with those matters now.

15 Mr Poposki wrote to the applicant on 18 June 2018 and informed her that as a result of ongoing problems with the applicant in the workplace, that no further shifts would be offered to her. The letter, formal parts omitted, was in the following terms:

> I write in reference to the ongoing issues arising around your behaviours and interactions with others in the workplace.
>
> Despite repeated counselling and advice having been provided to you regarding appropriate behaviour at work on the following dates 25th October 2015, 23rd April 2016, 26th April 2016, 5th September 2016, 26th October 2016, 10th January 2017, 9th April 2017, 26th April 2017, 30th May 2017, 12th July 2017, 7th September 2017, 9th November 2017, 9th February 2018, 19th April 2018; together with the incident reported to me on 30th May 2018, as well as training and development on 21st August 2016 (valid for 2 years}, there has been no improvement in your behaviour and interaction with others.

> Consequently, we are unable to offer you any further opportunities as a casual employee in the role of Patient Care Assistant due to your demonstrated inability to fulfil the inherent requirements of the role.
>
> You are required to return your identification badge and uniforms as soon as practicable to the PSS Supervisor's Office, as these items remain the property of. Royal Perth Hospital.
>
> Furthermore, if you feel you would benefit from counselling and support I encourage you to access the confidential service offered by the Employee Assistance Program. To access these services contact either Converge International on 1300 687 327 or Optum on 1300 361 008.

16 In summary, the evidence of the respondent was to the effect that the applicant regularly absented herself from her duties on the wards and was not cooperative with nursing and other staff. It was common ground on the evidence that under the JDF for a PCA (exhibit R1) PCAs were responsible for providing customer service to assist patients and to provide support to doctors, nurses and other staff. A team approach is required. Given the nature of the work of a PCA, they are required to be under the direction of nursing staff when working on the hospital wards. Supervisors of PCAs, such as Mr Marriott, who gave evidence in these proceedings, do not work on the wards.

17 The respondent referred to a considerable number of incidents and reports from nursing and other staff, where the applicant's performance and conduct problems were first reported. These commenced as early as late 2015 and continued through 2016 and 2017. The reports of conduct and poor attitude comprised in the main, complaints from nurses made to Mr Marriott and other supervisors. Other complaints in relation to the applicant being missing from her ward and nurses not being able to locate her to assign work, were also made. Some of these complaints were also in the form of "Employee/Employer Feedback" forms, completed by a supervisor and recording an interview between the supervisor and the applicant. On 26 October 2016, reference was made on such a feedback form, to the applicant going missing on her ward and refusing to go to the pharmacy to collect medication. Also raised was the applicant's constant questioning of nursing staff directions. The applicant refused to accept the counselling and did not sign the document.

18 In early January 2017, there were further complaints from nursing staff in relation to the applicant's absences on the ward and the relevant nursing supervisor making the comment that she did not want the applicant to be allocated back on to her ward in the future. In March 2017 there were further complaints from nursing staff that again, the applicant went missing on the ward and was argumentative and difficult to work with. As with the previous incident, the applicant was not wanted back on that ward. These matters were reported to Mr Poposki and the Manager of Patient Support Services, Mr Jarvis. There were also problems with the applicant reported in January 2017, where she continued to park in an unauthorised parking location at the hospital, which caused disruption to the hospital operations.

19 In March 2017 an incident occurred between the applicant and another staff member where both engaged in inappropriate behaviour and conduct and were counselled as to the respondent's workplace code of conduct. There was a further report in July 2017 from a nursing coordinator as to the applicant's behaviour and attitude in the workplace. A little later in August 2017, nursing staff complained that the applicant was not placing her name on a whiteboard that was supposed to be used by PCAs so that nurses knew of their whereabouts on the ward. Further issues raised also included the applicant's constant questioning of directions from nursing staff and procedures on the wards. In January 2018 there were further complaints in relation to the applicant being non-cooperative and arguing with nurses.

20 On 13 February 2018 a meeting took place between Mr Poposki, Mr Marriott and the applicant. Discussion took place in relation to an incident which occurred on 9 February 2018 on a ward where the applicant was alleged to have displayed inappropriate behaviour to the nursing staff. The importance of good working relationships was emphasised by the management and the need for a commitment to the respondent's Code of Conduct. The meeting note records that the applicant complained of being "ganged up on" by nurses. However the applicant committed to complying with Mr Poposki's request to be cooperative in her dealings with other staff members.

21 Not long after however, in May 2018, a further complaint was made from the Assistant Nursing Manager that the applicant had confronted her and chastised her for raising performance issues in the past about the applicant, that the applicant had invaded the nursing manager's "personal space" and displayed aggressive and inappropriate behaviour in the workplace. This led to a meeting between the applicant and Mr Poposki on 30 May 2018. Mr Poposki again explained standards of behaviour required in the workplace and the failure of the applicant to follow directions from nursing staff. In the course of the meeting, Mr Poposki said that the applicant questioned the respondent's Code of Conduct. This required Mr Poposki to tell the applicant that he was formally directing her as to the standards of conduct and behaviour expected in the respondent's workplaces. I should also note that in relation to this incident, the applicant had lodged a formal complaint about the Nursing Manager concerned. This was investigated by the respondent and was found to have no substance, as recorded by a letter to the applicant dated 22 August 2018, after her employment had ceased.

22 As I have already mentioned, the applicant in her evidence generally denied the various incidents complained of as outlined by the respondent. She sought to deflect blame onto other nursing staff and suggested that she had been discriminated against and victimised. Despite the documentary evidence of meetings held with her to discuss the various conduct and performance issues over a lengthy period of time, the applicant suggested that some of these meetings just did not occur. No evidence was led by the applicant to contradict or otherwise challenge the history of incidents I have just outlined. The onus is on the applicant to establish that her dismissal was unfair.

23 There was clearly a history of performance and conduct issues with the applicant in the workplace. This simply cannot be glossed over. An important part of the PCA position as reflected in the JDF is team work and taking directions from nursing staff on the wards. I am well satisfied that over a considerable period of time, performance and conduct issues were raised with the applicant by the respondent. These were raised both formally and informally. These matters in particular related to difficulties with the applicant in taking directions from nurses and resistance to them. The respondent was entitled to raise these issues and despite a commitment to Mr Poposki to comply with his directions and the respondent's Code of Conduct,

difficulties with the applicant's approach in the workplace continued. I do not consider that in all of the circumstances the respondent's decision to cease offering the applicant further shifts was unfair. The application is dismissed.

2019 WAIRC 00366

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	NAN JAYA GALAW
	APPLICANT
	-v-
	CHIEF EXECUTIVE OFFICER, EAST METROPOLITAN HEALTH SERVICE
	RESPONDENT
CORAM	SENIOR COMMISSIONER S J KENNER
DATE	MONDAY, 22 JULY 2019
FILE NO/S	U 82 OF 2018
CITATION NO.	2019 WAIRC 00366

Result	Dismissed
Representation	
Applicant	In person
Respondent	Mr P Heslewood and with him Ms M Di Lello

Order

HAVING heard the applicant on her own behalf and Mr P Heslewood and with him Ms M Di Lello 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.

(Sgd.) S J KENNER,
[L.S.] Senior Commissioner.

2019 WAIRC 00619

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2019 WAIRC 00619
CORAM	**:**	COMMISSIONER T B WALKINGTON
HEARD	**:**	WEDNESDAY, 3 JULY 2019
DELIVERED	**:**	WEDNESDAY, 14 AUGUST 2019
FILE NO.	**:**	U 72 OF 2019
BETWEEN	**:**	JAYCINTA SMITH
		Applicant
		AND
		CHISHAM AVENUE GUARDIAN PHARMACY
		Respondent

CatchWords	**:**	Industrial law - Termination of employment - Harsh, oppressive and unfair dismissal and denied contractual benefits - Whether constructive dismissal or resignation - No dismissal at the initiative of the employer - Commission lacks jurisdiction - *Industrial Relations Act 1979* (WA) s 29(1)(b)(i), s 29(1)(b)(ii)
Legislation	**:**	*Industrial Relations Act 1979*
Result	**:**	Application dismissed
Representation:		
Applicant	**:**	In person
Respondent	**:**	Ms K Post (as agent)

Case(s) referred to in reasons:

ABB Engineering Construction Pty Limited v Doumit, Print N6999 [1996] (AIRCFB 9 December 1996)

JL v Haydar Family Restaurants t/a McDonalds [2003] WAIRC 09489; (2003) 83 WAIG 3303

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

Mohazab v Dick Smith Electronics Pty Ltd (No. 2) (1995) IRCA 625; (1995) 62 IR 200

Robert Gallotti v Argyle Diamonds Pty Ltd [2003] 83 WAIRC 07928; (2003) 83 WAIG 919

Robert John Gallotti v Argyle Diamond Mines Pty Ltd [2003] WASCA 166; (2003) 83 WAIG 3053

The Attorney General v Western Australian Prison Officers' Union of Workers (1995) 75 WAIG 3166

Reasons for Decision

Background

1 Ms Jaycinta Smith was employed by Chisham Avenue Guardian Pharmacy from 11 September 2011 until 16 May 2019.

2 Chisham Avenue Guardian Pharmacy has been co-owned by Mr Matthew Sims and Mr David Henrisson since July 2003. The Pharmacy business is separated into two operations: The Pharmacy and the Aged Care area and each area has its own access. Mr Sims works primarily in the Aged Care area five days a week and Mr Henrisson works primarily in the Pharmacy on Monday, Tuesday, Thursday and Friday. Ms Smith worked primarily in the Pharmacy area with Mr Henrisson.

3 Some eighteen months before Ms Smith's employment ended, Mr Henrisson developed concerns about Ms Smith's inappropriate behaviour and conduct which he believed had escalated over time. Mr Henrisson's concerns included an offensive and racist text Ms Smith sent to him on 18 July 2018. Other concerns included absences and the tone and manner Ms Smith adopted when Mr Henrisson sought to counsel her. In December 2018, Ms Smith was issued with a letter setting out the concerns including a notification that continued inappropriate and poor behaviour may result in a review of Ms Smith's employment and a review may result in further disciplinary action including termination. Ms Smith did not refute that these events had occurred.

4 Subsequently the relationship between Ms Smith and Mr Henrisson deteriorated. On 4 or 5 March 2019, Ms Smith and Mr Henrisson had an exchange about claims that Ms Smith had discussed aspects of Mr Henrisson's personal life with colleagues. Later that day Ms Smith approached Mr Henrisson and made an offensive remark.

5 On 5 April 2019, Mr Henrisson counselled another employee about a matter that Ms Smith had understood she had responsibility to deal with. Ms Smith disagreed with the approach of Mr Henrisson and following an exchange between them, left the workplace advising Mr Sims that she "didn't want to work with Mr Henrisson, whilst he was in the mood that day." Ms Smith left the workplace to seek medical attention as she felt stressed and emotional (ts 5).

6 Later that day Ms Smith emailed Mr Sims, Mr Henrisson and "Chisham Avenue Guardian Pharmacy" with a number of concerns including the intervention by Mr Henrisson with another member of staff earlier that day and claims that Mr Henrisson's conduct toward Ms Smith and a couple of other staff was bullying. The subsequent email exchange between Ms Smith and Mr Henrisson does not reflect well upon either person.

7 Ms Smith was absent from the workplace until her return on 9 April 2019 when she worked in the Aged Care area. Ms Smith provided a medical certificate for the period of her absence.

8 On 11 April 2019 Mr Sims met with Ms Smith to discuss her claims concerning Mr Henrisson's conduct toward her. Mr Sims requested Ms Smith provide more information about the examples of the behaviour Ms Smith alleges was bullying of her by Mr Henrisson. Ms Smith provided a two-page handwritten statement on the same day.

9 Following this meeting Ms Smith was not required to attend at the workplace without loss of pay and entitlements.

10 Mr Sims' evidence is that he investigated the claims made by Ms Smith and concluded that they lacked details such as dates and times and this did not enable an investigation of some of the claims, and for the most part the examples lacked substance. Mr Sims says he formed the view that the working relationship between Ms Smith and Mr Henrisson had deteriorated and Ms Smith was not being bullied.

11 On 17 April 2019 a meeting was held between Ms Smith, Mr Sims, Mrs Sims (who worked in the business) and another staff member who Ms Smith claimed was the subject of bullying by Mr Henrisson. Mr Sims' evidence is that he advised Ms Smith that he had observed the relationship between Mr Henrisson and Ms Smith had progressively deteriorated and it would continue to be uncomfortable for her unless the issues between them were resolved. Mr Sims also informed Ms Smith that Mr Henrisson had significant concerns regarding her behaviour, and these would likely be addressed in the future. Mr Sims states that he discussed options including continuing to work with Mr Henrisson, attempting to resolve their issues and resignation with a reference. Mr Sims states that he advised Ms Smith not to decide immediately and at the conclusion of the meeting said to Ms Smith "have a think about it and let me know what you're at" (ts 20).

12 Ms Smith's evidence of the statements made at the meeting differed from that of Mr Sims in two respects:

a. Ms Smith says Mr Sims advised her that Mr Henrisson would make her life a living hell if she did not resign. Mr Henrisson's evidence is that he did not state that he would make Ms Smith's "life a living hell" or any statement to that effect, to Mr Sims or anyone else. Mr Sims also says he did not make such a statement.

b. Ms Smith says Mr Sims said that it was in her best interests to resign as there was no other way to resolve anything as Mr Henrisson had no interest in resolving anything and so that he [Mr Sims] could give Ms Smith an accredited reference (ts 6). In his evidence Mr Sims says that one of the options he canvassed was resignation, on the basis that "it looks better when you go for another job to have actually resigned rather than it to be forcibly sacked or whatever" (ts 20).

13 Mr Sims' evidence is that that Ms Smith approached him later that afternoon and stated that she wished to resign, and he requested that she provide this in writing. When Ms Smith informed Mr Sims that she wished to resign, Mr Sims made arrangements with Ms Smith that she work only one day per week, on Wednesday's when Mr Henrisson was not at the workplace, during her notice period without loss of salary and entitlements.

14 Ms Smith submitted a letter the following day, 18 April 2019, notifying of her resignation with four weeks' notice being effective on 16 May 2019. In this letter Ms Smith states:

> …
>
> I would like to advise the reason for me resigning is, Because I've been bullied in to it by business owner David Lawrence Henrisson. And told that if do not resign he will make my life a living hell. This has been an ongoing matter for the past two years and despite I have tried to resolve this matter with David in a professional way he still persists in bullying me out of my job.
>
> …

15 Mr Sims provided Ms Smith with a reference on or around 22 April 2019 and Ms Smith's last day at the workplace was 15 May 2019.

16 Ms Smith applied to the Commission alleging unfair dismissal on 9 May 2019.

17 The respondent contends that the applicant resigned and was not dismissed from her employment.

Question to be determined

18 A threshold issue arises as to whether Ms Smith resigned from her employment or was dismissed in order to attract the jurisdiction of the Commission under s 29(1)(b)(i) of *the Industrial Relations Act 1979* **(IR Act)**. This is a jurisdictional fact necessary to be found in order for the Commission to further consider whether any such dismissal is harsh, oppressive or unfair: ***Robert Gallotti v Argyle Diamonds Pty Ltd*** [2003] WAIRC 07928; (2003) 83 WAIG 919, ***Robert John Gallotti v Argyle Diamond Mines Pty Ltd*** [2003] WASCA 166; (2003) 83 WAIG 3053, ***JL v Haydar Family Restaurants t/a McDonalds*** [2003] WAIRC 09489; (2003) 83 WAIG 3303.

19 The question I must decide is whether Ms Smith's employment was terminated as a result of a voluntary resignation by her or at the initiative of the employer.

Principles

20 Fundamental to the Commission's jurisdiction in matters of this kind is for the applicant to be dismissed as a matter of fact and law. That is a matter of jurisdictional fact as set out in the decision of the Industrial Appeal Court in ***Metropolitan (Perth) Passenger Transport Trust v Erhard Gersdorf*** (1981) 61 WAIG 611.

21 The Industrial Appeal Court in ***The Attorney General v Western Australian Prison Officers' Union of Workers*** (1995) 75 WAIG 3166 ***(Attorney General),*** held that the resignation of the employee was in fact a dismissal by the employer. The employee was told that the allegations of the employer, which the employer's agents supported with statements they knew to be false, would be made public unless the employee resigned. The employer's agents stated that they had been directed to obtain the employee's resignation and the letter of resignation was dictated to the employee by the employer's agent. Furthermore, the employee's request for an opportunity to obtain legal advice was denied. The Court found that the employer's conduct had left the employee with the impression that the options were to resign or be dismissed in circumstances of duress or procedural unfairness and held that Western Australian Industrial Commission had jurisdiction to determine the matter.

22 In ***Mohazab v Dick Smith Electronics Pty Ltd (No. 2)*** (1995) IRCA 625; (1995) 62 IR 200 ***(Mohazab)***, the Full Bench of the Industrial Appeal Court held that for a resignation to be considered, termination of employment at the initiative of the employer, it is necessary that the conduct of the employer results directly or consequentially in the termination of the employment, and that the employee does not voluntarily leave the employment relationship. In this matter that employer suspected an employee had acted dishonestly and during an interview the employee was told to resign, or the police would be called in. The employee agreed to resign and was escorted out of the premises and left standing in the car park until the respondent prepared a letter of resignation and brought it to him to sign.

23 The Full Bench of the Australian Industrial Relations Commission, in ***ABB Engineering Construction Pty Limited v Doumit,*** Print N6999 [1996] (AIRCFB 9 December 1996) ***(ABB Engineering)***, held that an employer's conduct and decisions concerning the workplace which the employee found difficult, including behaviours toward the employee by one of the supervisors, the Full Bench described as offensive and abusive, did not constitute conduct that left an employee with no choice but to resign.

Consideration

24 Ms Smith's evidence is that she felt pressured to resign. Ms Smith alleges that the only option she had was to resign as her employer had threatened to "make her life a living hell". There is conflicting evidence as to whether the threat or statement to that effect had been made. This claim is central to Ms Smith's contention that she was dismissed at the initiative of her employer whom she says had told her the situation in the workplace would become untenable should she continue to work there. Although Ms Smith seeks to rely on this matter to demonstrate she was given no option but to resign Ms Smith did not test the evidence of Mr Sims nor Mr Henrisson during cross examination. Given the omission of any cross examination and having had the opportunity to hear from the three witnesses including Ms Smith, I prefer the evidence of Mr Sims and Mr Henrisson and therefore I find that the statement was not made.

25 Ms Smith had time to reflect and consider her options, she had an opportunity to consider her circumstances and obtain advice from others including her union, an employment/community law centre or a lawyer if she wished. As it was, it was later in the day of the meeting on 17 April 2019, Ms Smith advised Mr Sims that she wished to resign. The following day she submitted her resignation in writing. There is no evidence that the timing of these events was anything other than that set by Ms Smith. Unlike in ***Attorney General*** and ***Mohazab***, Ms Smith's employer did not require a decision, threatening an adverse action should the employee not comply with the employers' request to resign, there and then.

26 In her resignation letter Ms Smith states, she has been bullied into resigning and claims the bullying had been ongoing for two years. Ms Smith first raised her concerns that she had been bullied by Mr Henrisson in an email on 5 April 2019 which contains a complaint about Mr Henrisson's intervention in a matter Ms Smith understood she was to deal with. Mr Sims acted within an appropriate time frame to investigate further. This matter appears to have been subsequently incorporated into the complaints set out by Ms Smith on 11 April 2019. Mr Sims made arrangements so that Ms Smith would not be required to work nor communicate with Mr Henrisson whilst he investigated the complaints. It is evident that the working relationship between Ms Smith and Mr Henrisson had deteriorated and would need effort to repair. The evidence before this Commission indicates that the difficulties in the workplace were not the result of the behaviour and conduct of only one person, and Ms Smith's behaviour contributed to the situation. The outcome of Mr Sims' consideration of Ms Smith's complaints may not have been the outcome Ms Smith was looking for. The option to continue working with the prospects of addressing the conflict with Mr Henrisson in the knowledge that Mr Henrisson held concerns about Ms Smith's conduct and behaviour would not have been a comfortable one. The resolution of the difficulties would have required changes in behaviours by both Ms Smith and Mr Henrisson. The success of any attempts to resolve the situation cannot be known, however, similar to ***ABB Engineering***, the employers conduct had not left Ms Smith with no effective or real choice.

27 Furthermore, unlike in ***Mohazab***, Ms Smith's employer did not treat Ms Smith's resignation as being of immediate effect. Ms Smith worked out her notice under terms agreed with her employer to minimise further conflict at the workplace. During that period Ms Smith did not advise her employer that she had changed her mind or make any request that her employer agree to her resignation being revoked.

Name of Respondent

28 The applicant's claim erroneously named the respondent as "Chisham Ave Gaurdian Pharmacy". The correct spelling of the respondent's name is "Chisham Avenue Guardian Pharmacy". The Commission notified the parties of the spelling error and proposal, in accordance with s 27(1)(l) or (m) to amend the name of the respondent. Both parties confirmed the correct spelling. I will make and order that the name "Chisham Ave Gaurdian Pharmacy be deleted and that there be substituted therefor the name "Chisham Avenue Guardian Pharamcy".

Conclusion

29 I find that Ms Smith resigned from her employer and therefore I dismiss the application.

2019 WAIRC 00620

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	JAYCINTA SMITH
	APPLICANT
	-v-
	CHISHAM AVENUE GUARDIAN PHARMACY
	RESPONDENT
CORAM	COMMISSIONER T B WALKINGTON
DATE	WEDNESDAY, 14 AUGUST 2019
FILE NO/S	U 72 OF 2019
CITATION NO.	2019 WAIRC 00620

Result	Application dismissed
Representation	
Applicant	In person
Respondent	Ms K Post (as agent)

Order

HAVING HEARD Ms J Smith on her own behalf and Ms K Post (as agent) on behalf of the respondent, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby orders:

1. THAT the name of the respondent be amended to Chisham Avenue Guardian Pharmacy; and
2. THAT this application be, and by this order is, dismissed.

(Sgd.) T B WALKINGTON,
Commissioner.

[L.S.]

2019 WAIRC 00590

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MACIEJ SPRUTTA
	APPLICANT
	-v-
	THE TRUSTEE FOR THE LUO FAMILY TRUST
	RESPONDENT
CORAM	COMMISSIONER D J MATTHEWS
DATE	TUESDAY, 30 JULY 2019
FILE NO.	B 60 OF 2019
CITATION NO.	2019 WAIRC 00590

Result	Directions issued
Representation	
Applicant	In person
Respondent	Mr D Howlett (of counsel)

Direction

HAVING heard from the applicant in person and Mr D Howlett, of counsel, for the respondent on Monday, 29 July 2019 I, the undersigned, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby direct that:

1. The applicant provide to the respondent any documents upon which he intends to rely at the hearing by close of business Thursday, 1 August 2019;
2. The respondent provide to the applicant any documents upon which he intends to rely at the hearing by close of business Friday, 2 August 2019; and
3. There be liberty to apply.

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

2019 WAIRC 00607

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2019 WAIRC 00607
CORAM	**:**	COMMISSIONER D J MATTHEWS
HEARD	**:**	WEDNESDAY, 7 AUGUST 2019
DELIVERED	**:**	WEDNESDAY, 7 AUGUST 2019
FILE NO.	**:**	B 60 OF 2019
BETWEEN	**:**	MACIEJ SPRUTTA
		Applicant
		AND
		THE TRUSTEE FOR THE LUO FAMILY TRUST
		Respondent

CatchWords	**:**	Denied contractual benefits claim - Contract of employment was a sham contract - Application dismissed
Legislation	**:**	*Industrial Relations Act 1979 s26*
Result	**:**	Application Dismissed
Representation:		
Counsel:		
Applicant	**:**	In person
Respondent	**:**	Mr D Howlett (of counsel)
Solicitors:		
Respondent	**:**	Westmont Legal

Reasons for Decision

1 The claimant was employed under a contract of employment with the respondent under which he was employed full time and was to receive $61,000 per annum or, expressed differently, $1,173.08 per week.

2 The claimant received, during the period to which the claim relates, the sum of $1,173.08 by direct deposit into his bank account.

3 However, by a side agreement, the true circumstances of the claimant's employment was that he was a casual employee who worked for $25 per hour. Where, in any given period, the 'true' pay to which he was entitled was less than the weekly amount of $1,173.08, he 'refunded' the difference to his employer.

4 The contract of employment and the side agreement were directed toward fooling the Commonwealth Department of Immigration.

5 The contract of employment the claimant seeks to enforce is plainly a sham contract and I will not be enforcing any part of it. It would be entirely inconsistent with section 26(1)(a) *Industrial Relations Act 1979* to do so.

6 The claim is dismissed.

7 The respondent was, it emerged at the hearing, preparing to run a defence that the claimant had, in fact, been paid $1,173.08 per week and that, accordingly, the contract was complied with. The argument continued that if the claimant wished to pay the respondent a sum of money out of his wages to further a conspiracy to fool the Department of Immigration that was a matter for him.

8 In the end I have decided that there is nothing to enforce because the purported contract was no more than a sham.

9 I note, however, that to assert that a contract is complied with because money is paid in full with one hand, even though a portion of it is immediately retaken by another hand, is utterly and totally ridiculous.

2019 WAIRC 00608

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MACIEJ SPRUTTA
	APPLICANT
	-v-
	THE TRUSTEE FOR THE LUO FAMILY TRUST
	RESPONDENT
CORAM	COMMISSIONER D J MATTHEWS
DATE	WEDNESDAY, 7 AUGUST 2019
FILE NO/S	B 60 OF 2019
CITATION NO.	2019 WAIRC 00608

Result	Application dismissed
Representation	
Applicant	In person
Respondent	Mr D Howlett (of counsel)

Order

HAVING heard from the applicant in person and Mr D Howlett, of counsel, for the respondent on Wednesday, 7 August 2019;

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

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

SECTION 29(1)(b)—Notation of—

Parties		Number	Commissioner	Result
Amanda Joy Wallis	Sprint Express (Ron's Express)	U 42/2019	Commissioner T B Walkington	Discontinued
Bernard Evans	Public Trustee WA	U 41/2019	Commissioner T Emmanuel	Discontinued
Deborah Devitt	Mawarnkarra Health Service	U 27/2019	Commissioner T Emmanuel	Discontinued
Hyun (Kai) Kim	Kogas Prelude Pty Ltd	B 32/2019	Commissioner T B Walkington	Discontinued

Parties		Number	Commissioner	Result
Jeremy Nicholas Blank	North Metropolitan TAFE	U 83/2019	Commissioner D J Matthews	Discontinued
Kayla Gott	The Trustee for Lidcorp Trust	U 75/2019	Senior Commissioner S J Kenner	Withdrawn
Natasha Bayliss	The Baker Family Trust	U 47/2019	Commissioner T Emmanuel	Discontinued
Peter Wharram	Managing Director, North Metropolitan TAFE	U 4/2019	Commissioner D J Matthews	Discontinued
Shaeley Kirley	The Trustee for Jandalah Family Trust	U 77/2019	Commissioner T Emmanuel	Discontinued
Shaun Malone	Shire of Trayning	B 94/2019	Commissioner D J Matthews	Discontinued
Simon Glossop	The National Party of Australia (WA) Incorporated	U 82/2019	Commissioner T Emmanuel	Discontinued

CONFERENCES—Matters referred—

2019 WAIRC 00591

DISPUTE RE ALLEGED UNFAIR TERMINATION OF EMPLOYMENT

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2019 WAIRC 00591
CORAM	**:**	COMMISSIONER D J MATTHEWS
HEARD	**:**	MONDAY, 22 OCTOBER 2018, FRIDAY, 16 NOVEMBER 2018, TUESDAY, 4 JUNE 2019, WEDNESDAY, 5 JUNE 2019
DELIVERED	**:**	WEDNESDAY, 31 JULY 2019
FILE NO.	**:**	CR 27 OF 2018
BETWEEN	**:**	THE STATE SCHOOL TEACHERS' UNION OF W.A. (INCORPORATED) Applicant AND DIRECTOR GENERAL, DEPARTMENT OF EDUCATION Respondent

CatchWords	**:**	Unfair dismissal application - Applicant's member terminated after Teacher Registration Board registration lapsed - No repudiation of contract as employer alleged - Termination unfair in all the circumstances - Applicant's member to be reinstated - No order for remuneration
Legislation	**:**	*Teacher Registration Act 2012* ss 6 and 7 *Industrial Relations Act 1979* s 23A
Result	**:**	Applicant's member reinstated
Representation:		
Counsel:		
Applicant	**:**	Ms P Giles (of counsel) and with her Mr C Fordham (of counsel)
Respondent	**:**	Ms J Vincent (of counsel) and with her Ms J Whittle
Solicitors:		
Applicant	**:**	State Solicitor’s Office
Respondent	**:**	Slater and Gordon

Reasons for Decision

1 By letter dated 21 May 2018 the respondent wrote to the applicant’s member informing her that, because she had failed to maintain her registration with the Teacher Registration Board of Western Australia, she had repudiated her contract of employment and “as a result your contract of employment with the Department has ceased and you will be paid any entitlements effective 3 May 2018.”

2 A “repudiation” of a contract of employment occurs, and may be accepted with legal effect, where a party to the contract either:

(1) engages in conduct amounting to a breach of the contract which evinces an intention on the part of that party not to be bound by the contract or to fulfil it only in a manner substantially inconsistent with the defaulting party's contractual obligations; or

(2) breaches an essential term, or an important term in such a serious way that it gives rise to a right to terminate.

3 No argument was actually made in this matter, so far as I can tell, that maintaining registration with the Teacher Registration Board of Western Australia was a term of the contract of employment between the applicant's member and the respondent. That is, no written contract of employment was referred to which contained such an express term and no argument was made that there was a basis for its implication as a term of the contract of employment.

4 Section 6 of the *Teacher Registration Act 2012* provides that a person must not teach in an educational venue unless a person is a registered teacher and section 7(1) of that Act provides that "a person must not appoint, employ, engage or give permission to another person to teach in an educational venue unless the other person is a registered teacher." However, these statutory provisions do not as a matter of course, or as a matter of law, mean anything in particular for the terms of the contract of employment between a person and their employer.

5 I do not consider it to be correct to say, as a matter of law, that it is a term of a contract of employment between the applicant's member and the respondent that the applicant's member maintain her registration with the Teacher Registration Board of Western Australia. No argument to this effect was made before me.

6 Accordingly, I do not consider that the reason given in the letter to the applicant's member was a good reason for her termination.

7 That, of course, does not mean that the termination was unfair.

8 What makes the termination unfair in this case is that the respondent represented in her letter, and acted, as if the applicant's member had repudiated her contract, in one or both of the above ways, when she clearly had not.

9 It was within the respondent's knowledge as at 21 May 2018, through her servants and agents, that the applicant's member, despite her registration status, wished to remain employed by her.

10 For instance, after learning that she was to be terminated, at a meeting on 8 May 2018, the applicant's member asked, later that day, for help in becoming re-registered.

11 Also, the respondent was aware, through communications with the applicant before the letter of termination was sent, that the applicant, on its member's behalf, was taking an interest in the matter with the intention of trying to preserve her employment.

12 As at 21 May 2018 it was inappropriate, on the evidence, for the respondent to proceed as though the applicant's member had, by her actions, indicated that she no longer wished to be employed by her as a teacher or had so seriously breached her contract of employment that her employment could be legally, or fairly, brought to an end.

13 The opposite was true. The applicant's member was indicating she wished to remain employed by the respondent.

14 It is highly relevant, in my view, that the applicant's member had been employed by the respondent for over 15 years prior to her termination and was teaching in one of her schools at the time she was dismissed.

15 There was evidence that, along with the applicant's member, people who had lived overseas for many years and who had no recent, let alone current, contact with the respondent were dismissed on the same basis as the applicant's member. Their circumstances could hardly be more different to those of the applicant's member.

16 It was also unfair that the applicant's member was not given a warning that if she did not take certain action her employment would be terminated.

17 It was also unfair that the applicant's member was not given a clear opportunity to explain herself to the decision-maker before her employment was terminated.

18 It was also unfair that some people in the period 2016 to 2018 who had not paid their registration fees on time were "saved" by their Principals making an application for limited registration. This device could have been used to "save" the applicant's member but was not. No credible explanation was given for why others were "saved" and the applicant's member was not, beyond the personal preference of Principals. That is not a good reason for different approaches. It is unfair.

19 That is not to say, of course, that the respondent has to give permission "to an unregistered teacher to teach in" one of her schools or to find alternative duties for an unregistered teacher. It is, of course, possible, indeed probable, that a person who becomes unregistered and does not become registered will lose their employment for that reason. But if it is to be a fair dismissal it will be as a result of a different process than that evidenced in this case.

20 No good reason was put up as to why the applicant's member should not be reinstated to her former employment. I specifically reject the argument that I may reasonably rely on the opinion of the general practitioner in his letter dated 29 May 2018 that the applicant's member "suffers from type 2 diabetes, high BP, high lipids, depression, coeliac disease and hypothyroidism, she is on medication" and that "all these chronic illnesses can sometimes cause forgetfulness and she most likely gets that sometimes" to find that the applicant's member is not well enough to be reinstated. The evidence is not sufficiently probative to rely upon it for such a drastic conclusion.

21 The matter of the applicant's member's fitness for duty is something that will have to be investigated, if the respondent chooses, following the usual processes, upon the applicant's member's return to her position at South Thornlie Primary School.

22 I will make an order providing that the applicant's member's employment be considered to be unbroken by the period she was not employed by the respondent.

23 Pursuant to section 23A(5) *Industrial Relations Act 1979* I have a discretion whether or not to make an order that the respondent pay the applicant's member remuneration lost, or likely to have been lost, by her because of the dismissal. I have chosen not to exercise that discretion.

24 The applicant's member only had to pay a modest registration fee to avoid this whole mess. Even if changes in address or other issues meant she did not receive reminders, they were only reminders. The primary duty to be registered remained upon her at all times.

25 Even after she was actually and certainly made aware she was unregistered, and told of the possible, indeed likely, implications of this on 8 May 2018, the applicant's member did not act expeditiously to rectify the situation.

26 The evidence establishes that the respondent devoted significant resources to matters that would not even arise if people such as the applicant's member discharged the simple responsibility upon them of remaining registered. I consider that the applicant's member wasted a great deal of public money by her actions and omissions and I make no award of money to her.

27 I have found on balance that the decision to dismiss the applicant's member was unfair because it proceeded on the basis, which was incorrect, that the applicant's member did not wish to remain in employment with the respondent or did not wish to fulfil her contract of employment. I have also found there were materially unfair aspects to the process that led to the applicant's members dismissal. However, the applicant's member clearly played a role in the respondent bringing her employment to an end and that role is, in my view, significant enough for me to decline to exercise my discretion under section 23A(5) *Industrial Relations Act 1979*.

28 Before I leave this matter, I note that it may be argued that I am obliged to make an order under section 23A(5) *Industrial Relations Act 1979* where I find a dismissal to have been unfair and where loss is demonstrated. That is, it may be argued that the correct interpretation of the *Industrial Relations Act 1979* is that the "may" in section 23A(5) *Industrial Relations Act 1979* does not import a discretion.

29 I reject such an argument. The *Industrial Relations Act 1979* requires that, as far as possible, fairness be done as between parties and, of course, section 26(1)(a) *Industrial Relations Act 1979* must be complied with. Against this background the argument that a word such as "may" appearing in section 23A(5) *Industrial Relations Act 1979* should not be interpreted as giving a discretion to the Western Australian Industrial Relations Commission seems to me to be unsustainable. A myriad of circumstances may arise in an unfair dismissal case and it is important that the Western Australian Industrial Relations Commission be able to respond to those circumstances to achieve fairness between parties. This invites a construction of the *Industrial Relations Act 1979* which gives maximum flexibility.

30 Finally, the applicant's case, at least in prospect, involved criticism of the Principal of South Thornlie Primary School, Ms Megan Barnett. Counsel for the applicant admitted in closing that such criticism was wide of the mark. I place on the record that Ms Barnett's conduct in this matter was impeccable. She acted at all times with care and diligence and in a real attempt to do the right thing.

2019 WAIRC 00597

DISPUTE RE ALLEGED UNFAIR TERMINATION OF EMPLOYMENT

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE STATE SCHOOL TEACHERS' UNION OF W.A. (INCORPORATED)
	APPLICANT
	-v-
	DIRECTOR GENERAL, DEPARTMENT OF EDUCATION
	RESPONDENT
CORAM	COMMISSIONER D J MATTHEWS
DATE	FRIDAY, 2 AUGUST 2019
FILE NO/S	CR 27 OF 2018
CITATION NO.	2019 WAIRC 00597

Result	Applicant's member reinstated
Representation	
Applicant	Ms P Giles (of counsel) and with her Mr C Fordham (of counsel)
Respondent	Ms J Vincent (of counsel) and with her Ms J Whittle

Order

HAVING heard Ms Giles, of counsel, and with her Mr C Fordham, of counsel, for the applicant and Ms J Vincent, of counsel, and with her Ms J Whittle for the respondent on Monday, 22 October 2018, Friday, 16 November 2018, Tuesday, 4 June 2019 and Wednesday, 5 June 2019; and

HAVING given Reasons for Decision in which I determined to uphold the application and reinstate the applicant's member to her former position with the respondent;

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

1. THAT the respondent reinstate the applicant's member to her former position; and
2. THAT the applicant's member's service with the respondent be considered unbroken.

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

2018 WAIRC 00878

DISPUTE RE ALLEGED UNFAIR DISMISSAL OF UNION MEMBER

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	WESTERN AUSTRALIAN PRISON OFFICERS' UNION OF WORKERS
	APPLICANT
	-v-
	THE DEPARTMENT OF CORRECTIVE SERVICES
	RESPONDENT
CORAM	SENIOR COMMISSIONER S J KENNER
DATE	FRIDAY, 30 NOVEMBER 2018
FILE NO.	CR 32 OF 2018
CITATION NO.	2018 WAIRC 00878

Result	Directions issued
Representation	
Applicant	Mr D Stojanoski of counsel
Respondent	Mr J Carroll of counsel

Direction

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

(1) THAT the schedule to the notice of application stand as the applicant's statement of claim.

(2) THAT the respondent file and serve a notice of answer by 20 December 2018.

(3) THAT the parties have liberty to apply on short notice.

(Sgd.) S J KENNER,
[L.S.] Senior Commissioner.

2018 WAIRC 00918

DISPUTE RE ALLEGED UNFAIR DISMISSAL OF UNION MEMBER

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	WESTERN AUSTRALIAN PRISON OFFICERS' UNION OF WORKERS
	APPLICANT
	-v-
	THE DEPARTMENT OF CORRECTIVE SERVICES
	RESPONDENT
CORAM	SENIOR COMMISSIONER S J KENNER
DATE	FRIDAY, 21 DECEMBER 2018
FILE NO.	CR 32 OF 2018
CITATION NO.	2018 WAIRC 00918

Result	Order issued
Representation	
Applicant	Mr D Stojanoski of counsel
Respondent	Mr J Carroll of counsel

Order

HAVING heard Mr D Stojanoski of counsel on behalf of the applicant and Mr J Carroll 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 name of the respondent be amended by deleting the name "The Department of Corrective Services" and inserting in lieu thereof the name "Minister for Corrective Services".

(2) THAT the parties file and serve their respective outlines of submissions by 7 May 2019.

(3) THAT discovery be informal.

(4) THAT the parties have liberty to apply on short notice.

(Sgd.) S J KENNER,
[L.S.] Senior Commissioner.

2019 WAIRC 00261

DISPUTE RE ALLEGED UNFAIR DISMISSAL OF UNION MEMBER

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	WESTERN AUSTRALIAN PRISON OFFICERS' UNION OF WORKERS
	APPLICANT
	-v-
	MINISTER FOR CORRECTIVE SERVICES
	RESPONDENT
CORAM	SENIOR COMMISSIONER S J KENNER
DATE	THURSDAY, 30 MAY 2019
FILE NO/S	CR 32 OF 2018
CITATION NO.	2019 WAIRC 00261

Result	Order issued
Representation	
Applicant	Mr D Stojanoski of counsel
Respondent	Mr J Carroll of counsel

Order

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

THAT the application be and is hereby discontinued by leave.

(Sgd.) S J KENNER,
[L.S.] Senior Commissioner.

CONFERENCES—Notation of—

Parties		Commissioner	Conference Number	Dates	Matter	Result
Australian Nursing Federation, Industrial Union of Workers	North Metropolitan Health Service	Matthews C	C 34/2017	25/01/2018	Dispute re disciplinary action of union member	Discontinued

Parties		Commissioner	Conference Number	Dates	Matter	Result
Health Services Union of Western Australia (Union of Workers)	PathWest	Emmanuel C	PSAC 7/2019	08/05/2019	Dispute re union member's employment	Discontinued
Health Services Union of Western Australia (Union of Workers)	The Chief Executive PathWest Laboratory Medicine WA	Emmanuel C	PSAC 1/2019	08/02/2019	Dispute re alleged unfair treatment of union member	Withdrawn
The United Firefighters Union of Australia West Australia Branch	The Department of Fire and Emergency Services	Kenner SC	C 38/2018	04/12/2018	Dispute re alleged unfair changes to union member's roster	Discontinued

PROCEDURAL DIRECTIONS AND ORDERS—

2019 WAIRC 00212

APPEAL AGAINST A DECISION OF THE COMMISSIONER OF POLICE TO TAKE REMOVAL ACTION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES ADIB ABDENNABI

APPLICANT

-v-

THE COMMISSIONER OF POLICE

WA POLICE

RESPONDENT

CORAM CHIEF COMMISSIONER P E SCOTT

SENIOR COMMISSIONER S J KENNER

COMMISSIONER D J MATTHEWS

DATE FRIDAY, 10 MAY 2019

FILE NO/S APPL 42 OF 2016

CITATION NO. 2019 WAIRC 00212

Result Order issued

Representation **(by correspondence)**

Applicant Mr R Yates (of Counsel)

Respondent Ms C Chapman (of Counsel)

Order

This is an appeal filed on 13 July 2016 pursuant to s 33P of the *Police Act 1892* against a decision of the Commissioner of Police to take removal action. The parties have informed the Commission

that they have conferred and seek Orders in the terms set out below.

The Commission has considered the circumstances of the matter, including the agreement of the parties to the proposed Orders and is of the view that the following Orders, as sought and varied by the Commission, ought to be made -

1. The Orders issued on Friday, 29 June 2018 in this appeal ([2018] WAIRC 00393) cease to have effect on and from the date of this Order.
2. The hearing listed for 10 May 2019 be vacated.
3. By 24 May 2019, the respondent is to file and serve a list of all documents, as defined in regulation 20(1) of the *Industrial Relations Commission Regulations 2005*, which the respondent considered before making the decision.
4. By 7 June 2019, the appellant may, with the written consent of the respondent, tender new evidence.
5. By 5 July 2019, the respondent is to file and serve the documents in accordance with regulation 91 of the *Industrial Relations Commission Regulations 2005*, save for the list referred to in regulation 91(1)(b).

6. The response by the respondent, filed in accordance with Order 5, may include reformulated reasons and new evidence.
7. The operation of regulation 92 of the *Industrial Relations Commission Regulations 2005* is suspended until further Order is made by the Commission.
8. The matter is adjourned to a Directions Hearing during the month of July 2019, on a date to be determined by the Commission.

(Sgd.) P E SCOTT,
Chief Commissioner,
[L.S.] For and On behalf of the Western Australian Industrial Relations Commission.

2019 WAIRC 00343

APPEAL AGAINST A DECISION OF THE COMMISSIONER OF POLICE TO TAKE REMOVAL ACTION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ADIB ABDENNABI
	APPLICANT
	-v-
	THE COMMISSIONER OF POLICE
	WA POLICE
	RESPONDENT
CORAM	CHIEF COMMISSIONER P E SCOTT
	SENIOR COMMISSIONER S J KENNER
	COMMISSIONER D J MATTHEWS
DATE	THURSDAY, 4 JULY 2019
FILE NO/S	APPL 42 OF 2016
CITATION NO.	2019 WAIRC 00343

Result	Order issued
Representation	**(by correspondence)**
Applicant	Mr R Yates (of counsel)
Respondent	Ms C Chapman (of counsel)

Order

This is an appeal filed on 13 July 2016 pursuant to s 33P of the *Police Act 1892* against a decision of the Commissioner of Police to take removal action. The parties have informed the Commission that they have conferred and seek Orders in the terms set out below.

The Commission has considered the circumstances of the matter, including the agreement of the parties to the proposed Orders and is of the view that the following Orders, as sought and varied by the Commission, ought to be made –

1. The Orders issued on Friday, 10 May 2019 in this appeal ([2019] WAIRC 00212) cease to have effect on and from the date of this Order.
2. The directions hearing listed for 1 August 2019 be vacated.
3. By 16 August 2019, the respondent is to file and serve the documents as set out in 'Response by the Commissioner of Police' regulation 91 of the *Industrial Relations Commission Regulations 2005*, save for the list referred to in regulation 91(1)(b).
4. The Response by the Commissioner of Police, filed in accordance with Order 3, may include reformulated reasons and new evidence.
5. The operation of regulation 92 of the *Industrial Relations Commission Regulations 2005* is suspended until further order is made by the Commission.
6. The matter is adjourned to a directions hearing on a date to be determined by the Commission.

(Sgd.) P E SCOTT,
Chief Commissioner,
[L.S.] For and On behalf of the Western Australian Industrial Relations Commission.

2019 WAIRC 00642

APPEAL AGAINST A DECISION OF THE COMMISSIONER OF POLICE TO TAKE REMOVAL ACTION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ADIB ABDENNABI
	APPLICANT
	-v-
	THE COMMISSIONER OF POLICE, WA POLICE
	RESPONDENT
CORAM	CHIEF COMMISSIONER P E SCOTT
	SENIOR COMMISSIONER S J KENNER
	COMMISSIONER D J MATTHEWS
DATE	MONDAY, 19 AUGUST 2019
FILE NO/S	APPL 42 OF 2016
CITATION NO.	2019 WAIRC 00642

Result	Order issued
Representation	**(by correspondence)**
Applicant	Mr R Yates of counsel
Respondent	Ms C Chapman of counsel

Order

This is an appeal filed on 13 July 2016 pursuant to s 33P of the *Police Act 1892* against a decision of the Commissioner of Police to take removal action. The parties have informed the Commission that they have conferred and seek Orders in the terms set out below.

The Commission has considered the circumstances of the matter, including the agreement of the parties to the proposed Orders and is of the view that the following Orders, as sought and varied by the Commission, ought to be made –

1. The Orders issued on Thursday, 4 July 2019 in this appeal ([2019] WAIRC 00343) cease to have effect on and from the date of this Order.
2. The operation of regulation 92 of the *Industrial Relations Commission Regulations 2005* is suspended until further order is made by the Commission.
3. By 30 August 2019, the appellant is to file and serve submissions in support of the appellant's application filed on 13 August 2019, to tender a statement of Mr Adib Abdennabi as new evidence, pursuant to s 33R of the *Police Act 1892* (WA).
4. By 13 September 2019, the respondent is to file and serve submissions in response to the appellant's application filed on 13 August 2019.
5. The matter is adjourned to a hearing in relation to the appellant's application on a date to be determined by the Commission.

(Sgd.) P E SCOTT,
Chief Commissioner,

[L.S.] For and On behalf of the Western Australian Industrial Relations Commission.

2018 WAIRC 00819

REFERRAL OF DISPUTE

THE OCCUPATIONAL SAFETY AND HEALTH TRIBUNAL

PARTIES	GERRY HANSSEN, HANSSEN PTY LTD DIRECTOR
	APPLICANT
	-v-
	LEX MCCULLOCH, WORKSAFE WESTERN AUSTRALIA COMMISSIONER
	RESPONDENT
CORAM	SENIOR COMMISSIONER S J KENNER
DATE	THURSDAY, 1 NOVEMBER 2018
FILE NO/S	OSHT 2, 3 & 4 OF 2018
CITATION NO.	2018 WAIRC 00819

Result	Order issued
Representation	
Applicant	Mr M Hemery of counsel
Respondent	Mr D McDonnell of counsel

Order

HAVING heard Mr M Hemery of counsel on behalf of the applicant and Mr D McDonnell of counsel on behalf of the respondent the Tribunal, pursuant to the powers conferred on it under the Occupational Safety and Health Act, 1984, hereby orders, by consent –

(1) THAT the notices of referral in the herein matters filed on 16 August 2018 and 5 October 2018 be joined and heard and determined together.

(2) THAT the applicant be granted leave, pursuant to reg 17(1) of the Industrial Relations Commission Regulations 2005 (WA) to amend the notices of referral to the Tribunal:

(a) by deleting the name of the applicant "Gerry Hanssen, Hanssen Pty Ltd Director" and inserting in lieu thereof the name "Hanssen Pty Ltd";

(b) by deleting the name of the respondent "Lex McCulloch, Worksafe Western Australia Commissioner" and inserting in lieu thereof the name "Worksafe Western Australia Commissioner"; and

(c) in the terms of the applicant's application for leave to amend dated 29 October 2018.

(3) THAT on or before 2 November 2018 the applicant file and serve notices of referral amended in accordance with par 2(c) of this order ("amended notices of referral").

(4) THAT the hearing of the respondent's application to dismiss the notices of referral dated 11 September 2018 be adjourned to the final hearing of this proceeding, if not withdrawn before ("first application to dismiss").

(5) THAT on or before 16 November 2018 the respondent make any application to dismiss the amended notices of referral ("second application to dismiss").

(6) THAT the second application to dismiss (if any) be listed for hearing at the final hearing of this proceeding.

(7) THAT the proceedings be listed for hearing for two days on the earliest available dates after 19 April 2019.

(8) THAT evidence in chief at the hearing shall be by way of affidavit, except with the leave of the Tribunal.

(9) THAT on or before 21 December 2018 the applicant shall file and serve upon the respondent any affidavits on which the applicant intends to rely.

(10) THAT on or before 1 March 2019 the respondent shall file and serve upon the applicant any affidavits on which the respondent intends to rely.

(11) THAT on or before 15 March 2019 the applicant shall file and serve upon the respondent any affidavits in reply on which the applicant intends to rely.

(12) THAT by no later than 14 days prior to the hearing the applicant shall file and serve on the respondent an outline of submissions.

(13) THAT by no later than seven days prior to the hearing the respondent shall file and serve on the applicant an outline of submissions.

(14) THAT by no later than seven days prior to the hearing the parties shall give notice to each other of:

(a) any objections to evidence; and

(b) any witnesses required to attend the hearing for cross-examination.

(15) THAT by no later than three days prior to the hearing the parties shall confer for the purposes of resolving any outstanding objections to evidence.

(16) THAT the parties have liberty to apply on short notice.

(Sgd.) S J KENNER,
[L.S.] Senior Commissioner.

2019 WAIRC 00360

REFERRAL OF DISPUTE

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	HANSSEN PTY LTD
	APPLICANT
	-v-
	WORKSAFE WESTERN AUSTRALIA COMMISSIONER
	RESPONDENT
CORAM	COMMISSIONER T B WALKINGTON
DATE	TUESDAY, 16 JULY 2019
FILE NO.	OSHT 2 OF 2018, OSHT 3 OF 2018, OSHT 4 OF 2018, OSHT 3 OF 2019
CITATION NO.	2019 WAIRC 00360

Result	Direction issued
Representation	
Applicant	Mr J Raftos (of counsel) and with him Mr L Swanson (of counsel)
Respondent	Mr D McDonnell (of counsel)

Direction

The Commission, having heard from Mr J Raftos (of counsel) and with him Mr L Swanson (of counsel) on behalf of the applicant and Mr D McDonnell (of counsel) 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 closing submissions no later than two weeks after receipt of the transcript of the hearing held on Tuesday, 16 July 2019; and
2. THAT the respondent file and serve closing submissions no later than three weeks after receipt of the transcript of the hearing held on Tuesday, 16 July 2019.

(Sgd.) T B WALKINGTON,
[L.S.] Commissioner.

2019 WAIRC 00615

REVIEW OF IMPROVEMENT NOTICES 49301162 AND 49301163

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	GEOFFREY RAYMOND MORAN
	APPLICANT
	-v-
	WORKSAFE W.A.
	RESPONDENT
CORAM	COMMISSIONER T B WALKINGTON
DATE	FRIDAY, 9 AUGUST 2019
FILE NO.	OSHT 2 OF 2019
CITATION NO.	2019 WAIRC 00615

Result	Direction and Order issued
Representation	
Applicant	Ms V Kafentzis (of counsel)
Respondent	Ms T Holloway (of counsel)

Direction and Order

WHEREAS on 8 March 2019 the applicant referred, pursuant to s 51A of the *Occupational Safety and Health Act 1984*, a review of two improvement notices issued in late December 2018 to the Occupational Health and Safety Tribunal;

AND WHEREAS on 18 March 2019, 22 March 2019, 29 March 2019 and 1 May 2019 the Tribunal requested the applicant provide the Tribunal the written notice of the decision of the Worksafe Commissioner in order that s 51A(2) of the *Occupational Safety and Health Act 1984*, be satisfied;

AND WHEREAS on 3 May 2019, the Tribunal issued a notice of hearing for 16 May 2019, concerning the applicant's compliance with s 51A(2);

AND WHEREAS on 9 May 2019 the applicant submitted the written notice of decision of the Worksafe Commissioner in compliance with s 51A(2);

AND WHEREAS on 17 May 2019 the Tribunal issued Directions for the management of the case;

AND WHEREAS the applicant failed to comply with Directions to file and serve amended notices of referral;

AND WHEREAS on 20 June 2019 the Tribunal issued amended directions;

AND WHEREAS the applicant failed to comply with the Directions to produce documents and file and serve witness statements;

NOW THEREFORE, having heard from Ms V Kafentzis (of counsel) of behalf of the applicant and Ms T Hollaway (of counsel) on behalf of the respondent, the Tribunal, pursuant to the powers conferred on it under the *Occupational Safety and Health Act 1984*, hereby directs and orders –

1. THAT the applicant file and serve upon the respondent production of documents by no later than 23 August 2019;
2. THAT evidence in chief in this matter be adduced by way of signed witness statements;
3. THAT the applicant file and serve upon the respondent any witness statements upon which he intends to rely by no later than 23 August 2019;
4. THAT if the applicant has not complied with Direction (1) and Direction (3) by no later than 23 August 2019, the matter will be dismissed;
5. THAT the respondent file and serve upon the applicant any witness statements upon which it intends to rely by no later than 30 August 2019;
6. THAT the applicant file and serve upon the respondent an outline of submissions by no later than 5 September 2019;
7. THAT the respondent file and serve upon the applicant an outline of submissions by no later than 10 September 2019;
8. THAT the application will remain listed for hearing on Thursday, 12 September 2019;
9. THAT the respondent is granted leave to produce any further evidence in response to the applicant's witness statements and the applicant's outline of submissions;
10. THAT the parties give notice to one another of the witnesses they require to attend at the proceedings for the purposes of cross-examination by 10 September 2019.
11. THAT the parties have liberty to apply on short notice.

(Sgd.) T B WALKINGTON,
[L.S.] Commissioner.

2019 WAIRC 00586

APPEAL AGAINST THE DECISION TO TERMINATE EMPLOYMENT ON 30 APRIL 2019

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	RACHEL CATHERINE TOWNES-VIGH
	APPELLANT
	-v-
	NORTH METRO HEALTH SERVICES
	RESPONDENT
CORAM	PUBLIC SERVICE APPEAL BOARD
	COMMISSIONER T EMMANUEL - CHAIR
	MS L BRICK - BOARD MEMBER
	MR D HILL - BOARD MEMBER
DATE	WEDNESDAY, 24 JULY 2019
FILE NO	PSAB 10 OF 2019
CITATION NO.	2019 WAIRC 00586

Result	Order issued
Representation	
Appellant	Mr K Trainer (as agent)
Respondent	Ms G Rosendorff (as agent)

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 24 July 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 'North Metropolitan Health Service'.

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

2019 WAIRC 00588

APPEAL AGAINST THE DECISION TO TERMINATE EMPLOYMENT ON 30 APRIL 2019

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	RACHEL CATHERINE TOWNES-VIGH
	APPELLANT
	-v-
	NORTH METROPOLITAN HEALTH SERVICE
	RESPONDENT
CORAM	PUBLIC SERVICE APPEAL BOARD COMMISSIONER T EMMANUEL - CHAIR MS L BRICK - BOARD MEMBER MR D HILL - BOARD MEMBER
DATE	FRIDAY, 26 JULY 2019
FILE NO.	PSAB 10 OF 2019
CITATION NO.	2019 WAIRC 00588

Result	Order issued
Representation	
Applicant	Mr K Trainer (as agent)
Respondent	Ms G Rosendorff (as agent)

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 24 July 2019 the appellant's representative gave an undertaking he would file an application for mediation in the Registry by close of business, Friday 26 July 2019;

NOW THEREFORE the Public Service Appeal Board, pursuant to the powers conferred under the *Industrial Relations Act 1975* (WA), orders –

1. THAT the parties file a statement of agreed facts and bundle of agreed documents by no later than two weeks after the date on which the mediation is held;
2. THAT the appellant file outlines of evidence and documents, other than the agreed documents, on which she intends to rely by no later than two weeks after the statement of agreed facts and bundle of agreed documents are due; and
3. THAT the respondent file outlines of evidence and documents, other than the agreed documents, on which it intends to rely by no later than two weeks after the appellant's outlines of evidence and documents are due.

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

INDUSTRIAL AGREEMENTS—Notation of—

Agreement Name/Number	Date of Registration	Parties		Commissioner	Result
WA Health System - United Voice - Enrolled Nurses, Assistants in Nursing, Aboriginal and Ethnic Health Workers Industrial Agreement 2018 AG 11/2019	07/19/2019	Child and Adolescent Health Service, East Metropolitan Health Service, Health Support Services	United Voice WA	Commissioner T Emmanuel	Agreement registered

PUBLIC SERVICE APPEAL BOARD—

2019 WAIRC 00361

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
MR D HILL - BOARD MEMBER
MS R SINTON - BOARD MEMBER

DATE WEDNESDAY, 17 JULY 2019

FILE NO PSAB 3 OF 2019

CITATION NO. 2019 WAIRC 00361

Result Application dismissed

Representation

Appellant In person

Respondent Mr J Carroll (of counsel)

Order

WHEREAS this is an appeal to the Public Service Appeal Board (**Board**) pursuant to s 80I of the *Industrial Relations Act 1979* (WA); and

WHEREAS on 16 July 2019 the appellant submitted an application for discovery to the Registry online; and

WHEREAS on 17 July 2019 a directions hearing was held in PSAB 3 of 2019 and the Board heard from the parties about the application for discovery submitted by the appellant;

NOW THEREFORE the Board, for the reasons given at the directions hearing on 17 July 2019 and pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), hereby orders:

THAT the application for discovery submitted by the appellant on 16 July 2019 be, and by this order is, dismissed.

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

ROAD FREIGHT TRANSPORT INDUSTRY TRIBUNAL—Matters Dealt With—

2018 WAIRC 00673

DISPUTE RE OUTSTANDING PAYMENTS

IN THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

SITTING AS

THE ROAD FREIGHT TRANSPORT INDUSTRY TRIBUNAL

PARTIES	CHARLES SPARSHATT-POTTER
	APPLICANT
	-v-
	BLACK HAMMER GROUP PTY LTD ACN 619676470
	RESPONDENT
CORAM	SENIOR COMMISSIONER S J KENNER
DATE	FRIDAY, 27 JULY 2018
FILE NO/S	RFT 1 OF 2018
CITATION NO.	2018 WAIRC 00673

Result	Order issued
Representation	
Applicant	Mr C Sparshatt-Potter
Respondent	Mr M McGregor

Order

HAVING heard Mr C Sparshatt-Potter on behalf of the applicant and Mr M McGregor on behalf of the respondent the Tribunal, pursuant to the powers conferred on it by the Owner-Drivers (Contracts and Disputes) Act 2007, hereby orders-

THAT the name of the applicant be amended by the deletion of the name 'Charles Sparshatt-Potter' and the insertion in lieu thereof the name 'Henri Keys Logistics Pty Ltd'.

(Sgd.) S J KENNER,
[L.S.] Senior Commissioner.

2018 WAIRC 00771

DISPUTE RE OUTSTANDING PAYMENTS

IN THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

SITTING AS

THE ROAD FREIGHT TRANSPORT INDUSTRY TRIBUNAL

PARTIES	HENRI KEYS LOGISTICS PTY LTD
	APPLICANT
	-v-
	BLACK HAMMER GROUP PTY LTD ACN 619676470
	RESPONDENT
CORAM	SENIOR COMMISSIONER S J KENNER
DATE	THURSDAY, 27 SEPTEMBER 2018
FILE NO/S	RFT 1 OF 2018
CITATION NO.	2018 WAIRC 00771

Result	Order issued
Representation	
Applicant	Mr C Sparshatt-Potter
Respondent	Mr M McGregor

Order

WHEREAS on 15 June 2018 the applicant filed a notice of referral to the Road Freight Transport Industry Tribunal under the Owner-Drivers (Contracts and Disputes) Act 2007 (WA) seeking recovery from the respondent of the sum of $43,037.50 for worked performed in accordance with owner-driver contracts between the applicant and the respondent;

AND WHEREAS a conference before the Tribunal under s 44 of the Act was listed, and proceeded on 27 July 2018;

AND WHEREAS the hearing of the substantive matter was listed, and proceeded on 27 September 2018;

AND WHEREAS at the hearing the respondent acknowledged and did not dispute that the work claimed was performed by the applicant under owner-driver contracts between it and the applicant and that the respondent was indebted to the applicant in the sum claimed;

NOW THEREFORE having heard Mr C Sparshatt-Potter on behalf of the applicant and Mr M McGregor on behalf of the respondent, the Tribunal, pursuant to the powers conferred on it under the Owner-Drivers (Contracts and Disputes) Act 2007 (WA) hereby orders –

THAT the respondent pay to the applicant the sum of $43,037.50 within 21 days of the date of this order.

(Sgd.) S J KENNER,
[L.S.] Senior Commissioner.

ROAD FREIGHT TRANSPORT INDUSTRY TRIBUNAL—Notation of—

The following were matters before the Commission sitting as the Road Freight Transport Industry Tribunal pursuant to s 38 of the *Owner-Drivers (Contracts and Disputes) Act 2007* that settled prior to an order issuing.

Parties		Commissioner	Application Number	Dates	Matter	Result
Dougal McWhannell	Airstep Australia Ltd	Kenner SC	RFT 3/2019	16/07/2019	Dispute re alleged breach of contract	Discontinued