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CUMULATIVE CONTENTS AND DIGEST APPEAR AT THE END OF THIS PUBLICATION

FULL BENCH—Appeals against decision of Commission—

2019 WAIRC 00606

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION	APPELLANT
	MR LESLIE MAGYAR	
	-and-	
	DEPARTMENT OF EDUCATION	RESPONDENT
CORAM	FULL BENCH SENIOR COMMISSIONER S J KENNER COMMISSIONER T EMMANUEL COMMISSIONER T B WALKINGTON	
DATE	TUESDAY, 6 AUGUST 2019	
FILE NO/S	FBA 8 OF 2019	
CITATION NO.	2019 WAIRC 00606	
Result	Order issued	

Order

WHEREAS on 16 July 2019 the appellant filed the herein appeal under s 49 of the *Industrial Relations Act 1979*;

AND WHEREAS the appeal is in common terms with appeals filed by the appellant in matters FBA 9 and FBA 10 of 2019;

AND WHEREAS it is in the interests of the efficient use of time and resources of the Commission and the parties that the appeals be consolidated and heard and determined together;

NOW THEREFORE the Full Bench, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders —

THAT the appeals in FBA 8 of 2019, FBA 9 of 2019 and FBA 10 of 2019 be and are hereby consolidated and will be heard and determined together.

By the Full Bench

(Sgd.) S J KENNER,
Senior Commissioner.

[L.S.]

2019 WAIRC 00605

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION	
	MR LESLIE MAGYAR	APPELLANT
	-and-	
	DEPARTMENT OF EDUCATION	RESPONDENT
CORAM	FULL BENCH	
	SENIOR COMMISSIONER S J KENNER	
	COMMISSIONER T EMMANUEL	
	COMMISSIONER T B WALKINGTON	
DATE	TUESDAY, 6 AUGUST 2019	
FILE NO/S	FBA 9 OF 2019	
CITATION NO.	2019 WAIRC 00605	
Result	Order issued	

Order

WHEREAS on 16 July 2019 the appellant filed the herein appeal under s 49 of the *Industrial Relations Act 1979*;
AND WHEREAS the appeal is in common terms with appeals filed by the appellant in matters FBA 8 and FBA 10 of 2019;
AND WHEREAS it is in the interests of the efficient use of time and resources of the Commission and the parties that the appeals be consolidated and heard and determined together;
NOW THEREFORE the Full Bench, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders —
 THAT the appeals in FBA 8 of 2019, FBA 9 of 2019 and FBA 10 of 2019 be and are hereby consolidated and will be heard and determined together.

By the Full Bench

(Sgd.) S J KENNER,
Senior Commissioner.

[L.S.]

2019 WAIRC 00604

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION	
	MR LESLIE MAGYAR	APPELLANT
	-and-	
	DEPARTMENT OF EDUCATION	RESPONDENT
CORAM	FULL BENCH	
	SENIOR COMMISSIONER S J KENNER	
	COMMISSIONER T EMMANUEL	
	COMMISSIONER T B WALKINGTON	
DATE	TUESDAY, 6 AUGUST 2019	
FILE NO/S	FBA 10 OF 2019	
CITATION NO.	2019 WAIRC 00604	
Result	Order issued	

Order

WHEREAS on 16 July 2019 the appellant filed the herein appeal under s 49 of the *Industrial Relations Act 1979*;
 AND WHEREAS the appeal is in common terms with appeals filed by the appellant in matters FBA 8 and FBA 9 of 2019;
 AND WHEREAS it is in the interests of the efficient use of time and resources of the Commission and the parties that the appeals be consolidated and heard and determined together;

NOW THEREFORE the Full Bench, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders —

THAT the appeals in FBA 8 of 2019, FBA 9 of 2019 and FBA 10 of 2019 be and are hereby consolidated and will be heard and determined together.

By the Full Bench

(Sgd.) S J KENNER,
 Senior Commissioner.

[L.S.]

2019 WAIRC 00781

APPEAL AGAINST A DECISION OF THE COMMISSION IN MATTER NUMBER APPL 11/2019 GIVEN ON 27 JUNE 2019
WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

FULL BENCH

CITATION : 2019 WAIRC 00781
CORAM : SENIOR COMMISSIONER S J KENNER
 COMMISSIONER T EMMANUEL
 COMMISSIONER T B WALKINGTON
HEARD : THURSDAY, 26 SEPTEMBER 2019
DELIVERED : FRIDAY, 1 NOVEMBER 2019
FILE NO. : FBA 8 OF 2019, FBA 9 OF 2019, FBA 10 OF 2019
BETWEEN : MR LESLIE MAGYAR
 Appellant
 AND
 DEPARTMENT OF EDUCATION
 Respondent

ON APPEAL FROM:

Jurisdiction : Western Australian Industrial Relations Commission
Coram : Commissioner D J Matthews
Citation : 2019 WAIRC 00321
File No : APPL 11 of 2019, APPL 13 of 2019 and APPL 14 of 2019

Catchwords : *Industrial Law (WA) - Appeal against decision of the Commission to dismiss three applications - s 27(1)(a) of the Act - Whether the Commissioner erred in law or fact in dismissing the applications without properly regarding hardship to the applicant, the public interest and the interests of employees generally - Whether the Commissioner erred in law or fact by not sufficiently regarding the lack of prejudice to the respondent - Whether the Commissioner erred in law or fact in dismissing the applications because he prejudged the appellant as conceding wrongdoing, was influenced by prejudicial material or was biased towards the appellant - No appealable error established - appeals dismissed*

Legislation : *Industrial Relations Act 1979 (WA) ss 6(c), 26(1)(a), 27(1)(a), 29(1)(b)(i)*
Public Sector Management Act 1994 (WA) ss 78(2)(b), 82A(3)(b)

Result : Appeals dismissed

Representation:**Counsel:**

Applicant : In person
Respondent : Ms R Hartley of counsel

Solicitors:

Respondent : State Solicitor's Office

Case(s) referred to in reasons:

The Australian Workers Union, West Australian Branch, Industrial Union of Workers v Barmenco Pty Ltd – Plutonic Project [2000] WAIRC 13162; (2000) 80 WAIG 3162

The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch v Public Transport Authority of Western Australia [2014] WAIRC 00451; (2014) 94 WAIG 787

The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch v Public Transport Authority of Western Australia [2017] WAIRC 00830; (2017) 97 WAIG 1689

Birkett v James [1978] AC 297

Coal and Allied Operations Pty Ltd v Australian Industrial Relations Commission (2003) 203 CLR 194

Holsworthy Urban District Council v Holsworthy Rural Council [1907] 2 Ch 62

House v The King [1936] HCA 40; (1936) 55 CLR 499

Howley v Principal Healthcare Finance Pty Ltd [2014] NSWCA 447

Johnston v Mr Ron Mance, Acting Director-General Department of Education [2002] WAIRC 06155; (2002) 83 WAIG 1553

Johnston v Wesfarmers Ltd [1990] WAIRC 12434; (1990) 70 WAIG 2434

Muto v Faul [1980] VR 26

Nathan Maher v Director General of Health [2012] WAIRC 00134; (2012) 92 WAIG 386

Palermo v Rosenthal [2011] WAIRC 00069; (2011) 91 WAIG 129

Ulowski v Miller [1968] SASR 277

White v Northern Territory of Australia (No. 519 of 1981 dated 13 June 1989)

Case(s) also cited:

Alfresco Concepts Pty Ltd v Franse [2015] WAIRC 00244; (2015) 95 WAIG 437

Barry Landwher v Department of Education [2017] WAIRC 00866; (2017) 97 WAIG 1671

Browne v Dunn [1893] 6 R. 67, H.L

Deborah Harvey v Commissioner for Corrections [2017] WAIRC 00728

The Minister for Health v Drake-Brockman [2012] WAIRC 00150; (2012) 92 WAIG 203

*Reasons for Decision***KENNER SC:****The appeals and brief background**

- 1 The Full Bench has three appeals before it. The three appeals relate to the dismissal of applications 11, 13 and 14 of 2019 brought by the appellant against the respondent, arising out of disciplinary proceedings. Two of the applications, which are relevant to FBA 8 and FBA 10 of 2019, were dismissed by the Commission under s 27(1)(a) of the *Industrial Relations Act 1979* (WA) by reason of excessive delay in bringing the proceedings. The dismissal of the application arising on FBA 9 of 2019, again under s 27(1)(a) of the Act, was on the ground that the appellant had signed a deed of settlement and release which included a bar to future proceedings being brought by the appellant against the respondent.
- 2 The appellant was employed as a teacher at Kent Street Senior High School from February 2001 until September 2018. In application 11 of 2019, the appellant sought to challenge a finding of a breach of discipline and the imposition of a disciplinary penalty by the respondent on 18 August 2017. The relevant breach of discipline related to the appellant, in May 2016, knowingly enrolling a student at the school in a Certificate III in Information, Digital Media and Technology. This was at a time when such enrolment was in breach of a memorandum of understanding between the School and the Registered Training Organisation responsible for the delivery of the training.
- 3 In relation to application 13 of 2019, this proceeding was commenced in February 2019 and related to a breach of discipline imposed on the appellant by the respondent in August 2015, arising from conduct in February 2015. The appellant impermissibly provided a computer access code to a student when the student was knowingly under a temporary suspension of his internet access. In those proceedings, in which the appellant was represented by a legal practitioner, the proceedings were settled, and a deed of settlement and release was signed in January 2016. As a result, the Commission made an order in February 2016 dismissing the application.
- 4 Finally, application 14 of 2019 related to a breach of discipline incident which occurred in October 2016, involving unnecessary contact by the appellant with a student, leading to a disciplinary penalty being imposed in August 2017.
- 5 In each case, the penalty was a reprimand and a fine.
- 6 The appellant now appeals against the dismissal of the applications under s 27(1)(a) of the Act on various grounds, which are set out below.
- 7 Some considerable time after the disciplinary proceedings, the appellant was dismissed by the respondent, which is the subject of separate proceedings before the Commission. The three disciplinary penalties imposed, the subject of these appeals, were not the only basis for the ultimate termination of the appellant's employment by the respondent. However, as will be explained further below, it was made clear by the respondent at the time of the imposition of the disciplinary penalties, that these matters could be later relied on in any further disciplinary action commenced by the respondent against the appellant.

Decision at first instance

- 8 In its decision on the applications brought by the respondent for the dismissal of the proceedings, in relation to application 13 of 2019, in which the appellant signed the Deed, the Commission concluded that the application should be dismissed by reason of the appellant entering into the Deed and it was not established there was any duress or other vitiating factor.
- 9 In relation to applications 11 and 14 of 2019, the Commission concluded that the delay in bringing the claims, that being one year and five months and one year and eight months respectively after the imposition of the disciplinary penalties by the respondent, was excessive and no adequate explanation had been offered by the appellant for the delay. Furthermore, the learned Commissioner was of the view that given the lengthy period of time from the occurrence of the relevant incidents, the imposition of the relevant disciplinary penalties, and the commencement by the appellant of his applications to belatedly challenge them, the employer was entitled to conclude that the employee had accepted the outcome and that state of affairs governed their employment relationship from that point onwards.
- 10 The learned Commissioner did not accept the appellant's explanation for the delay, that being that he could not afford legal representation at the time to mount a challenge, as in and of itself, a satisfactory explanation. He considered the appellant had made at the time, a tactical and personal choice not to challenge the disciplinary penalties, which he could not now resile from. Furthermore, whilst the learned Commissioner concluded that the respondent did not point to any actual or presumptive prejudice because of the delay, she was entitled to assume that the findings and conclusions, and the imposition of the disciplinary penalties, were not going to be disturbed.

Grounds of appeal

- 11 The three appeals have common grounds, except for an additional ground of appeal in relation to FBA 9 of 2019, relating to the Deed. The grounds of appeal are summarised in the first paragraph of each ground and are as follows:

Ground 1 - Hardship to the employee if application dismissed

The Commissioner erred in law and or fact in summarily dismissing this application because he did not have regard or insufficient regard to the hardship to the employee if the appeal is dismissed and the cause of action left statute barred. The reasons for the decision are silent on the matter of hardship to the employee.

Ground 2 - Public Interest

The Commissioner erred in law and or fact in summarily dismissing this application because he did not have regard or insufficient regard to the principles of the "public interest".

Ground 2A - Interests of Employees Not Sufficiently Considered

The Commissioner erred in law and or fact in summarily dismissing this application because paragraph 13 of the decision indicates that the Commissioner primarily focused on the interests of the employer. The principles of the "public interest" require that consideration must be given to all the parties, that is, employees and employers.

Ground 2B - Decision Gives Employers an Unfair Advantage - violates the "fair go all round" principle.

The Commissioner erred in law and or fact in summarily dismissing this application because he did not have regard or insufficient regard to the principles of the "fair go all round" philosophy of the Australian industrial relations model used throughout Australia.

Ground 3 - No Prejudice to the Employer

The Commissioner erred in law and or fact in summarily dismissing this application because he did not have regard or insufficient regard to the lack of prejudice to the employer.

Ground 4 – Prejudicial Conduct Of The Employer

Ground 4.1 – Act of Omission – The Deed of Settlement and Release

The Commissioner erred in law and or fact in summarily dismissing this application because he prejudged the employee as having admitted wrongdoing in relation to the IP Address misconduct finding.

Ground 4.2 - Act of Commission - The Brendan C Allegation

The Commissioner erred in law and or fact in summarily dismissing this application because he was influenced by prejudicial material placed before him by the employer.

Ground 4.3 - Act of Commission - Prejudicial Investigation Reports

The Commissioner erred in law and or fact in summarily dismissing this application because he was influenced by prejudicial material (two investigation reports) placed before him by the employer at an inappropriate time.

Ground 5 - Favoured Treatment of Employer

Ground 5.1 Conduct Contrary to Objective 6c - Maximum of expedition

The Commissioner erred in law and or fact in summarily dismissing this application because he acted in a biased manner that was contrary to object 6c of the Act and in doing so the Commissioner demonstrated biased conduct that favoured the employer.

Ground 5.2 - Preferential Treatment of Employer - Employee Exhibits Refused

The Commissioner erred in law and or fact in summarily dismissing this application because he demonstrated bias against the employee in refusing to accept employee exhibits, yet inappropriately called for employer submission even though employer's counsel did not request to adjourn the hearing in order to prepare additional submissions and evidence.

Ground 5.3 - Preferential Treatment of Employer - Easy Treatment of Employer's Position

The Commissioner erred in law and or fact in summarily dismissing the application because he demonstrated bias in favour of the employer as demonstrated by the soft interactions between the Commissioner and the employer's counsel during the hearing.

Approach to the appeal

- 12 Given that the three appeals before the Full Bench arise from a discretionary decision of the Commission at first instance, the well-known principles set out in *House v The King* [1936] HCA 40; (1936) 55 CLR 499 apply. That is, it is not sufficient for an appellant to persuade the Full Bench that it should reach a different decision to that of the learned Commissioner. It is necessary that the appellant establish an error in the exercise of the Commission's discretion, such as the learned Commissioner acting upon a wrong principle; making a material mistake in relation to the facts; failing to take into account relevant considerations or taking into account irrelevant considerations; or allowing extraneous or irrelevant matters to affect his decision making: *Coal and Allied Operations Pty Ltd v Australian Industrial Relations Commission* (2003) 203 CLR 194. Kirby J in *Coal and Allied* at par 72, emphasised that an appeal court, considering an appeal from a discretionary decision, should proceed with appropriate caution and restraint.
- 13 The Commission has available to it a broad power under s 27(1)(a) of the Act, to dismiss or refrain from further hearing a matter if at any stage of the proceedings, it is satisfied as to certain things. Section 27(1)(a) provides as follows:

27. Powers of Commission

- (1) Except as otherwise provided in this Act, the Commission may, in relation to any matter before it —
- (a) at any stage of the proceedings dismiss the matter or any part thereof or refrain from further hearing or determining the matter or part if it is satisfied —
- (i) that the matter or part thereof is trivial; or
 - (ii) that further proceedings are not necessary or desirable in the public interest; or
 - (iii) that the person who referred the matter to the Commission does not have a sufficient interest in the matter; or
 - (iv) that for any other reason the matter or part should be dismissed or the hearing thereof discontinued, as the case may be;

- 14 In a decision of the Full Bench in *The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch v Public Transport Authority of Western Australia* [2017] WAIRC 00830; (2017) 97 WAIG 1689, in relation to an appeal from a decision of the Commission dismissing at first instance proceedings under s 27(1)(a) of the Act, in relation to this power, and in particular s 27(1)(a)(ii), at pars 137 to 139 I said as follows:

137 Section 27(1)(a) is a power to dismiss an application or refrain from further hearing an application. This power is broad in scope and should be exercised with caution. It is in the following terms:

27. Powers of Commission

- (1) Except as otherwise provided in this Act, the Commission may, in relation to any matter before it—
- (a) at any stage of the proceedings dismiss the matter or any part thereof or refrain from further hearing or determining the matter or part if it is satisfied—
- (i) that the matter or part thereof is trivial; or
 - (ii) that further proceedings are not necessary or desirable in the public interest; or
 - (iii) that the person who referred the matter to the Commission does not have a sufficient interest in the matter; or
 - (iv) that for any other reason the matter or part should be dismissed or the hearing thereof discontinued, as the case may be;

And

...

- 138 In *The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch v Public Transport Authority of Western Australia* [2013] WAIRC 00754; (2013) 93 WAIG 1431, in considering an application under s 27(1)(a)(ii) to dismiss a matter before the Commission in the public interest, I said at pars 22 and 23:

22 In another context, in *The Construction, Forestry, Mining and Energy Union of Workers v Skilled Rail Services Pty Ltd* (2006) 86 WAIG 1268, I considered the meaning of the "public interest" for the purposes of s 36A(1) of the Act. In referring to s 27(1)(a)(ii) of the Act, empowering the Commission to dismiss or refrain from further hearing a matter, I referred to *QEC* and at par 35 I observed as follows:

- 35 Given the construction I have placed on s 36A(1) of the Act, it is for the PTA to demonstrate that it would not be in the public interest for the Proposed Award to be made. The notion of the "public interest" is somewhat amorphous. Consideration of this issue is similar to the terms of s 27(1)(a)(ii) of the Act empowering the Commission to dismiss or refrain from further hearing a matter on the basis that further proceedings are not necessary or desirable in the public interest. Similar provisions exist in other industrial jurisdictions. In *Re Queensland Electricity Commission and Ors; Ex-parte Electrical Trade's Union of Australia* (1987) 21 IR 151 the High Court in proceedings for prerogative writs against a Full

Bench of the then Australian Conciliation and Arbitration Commission, held that for the purposes of the then s 41(1)(d)(iii) of the Conciliation and Arbitration Act 1904 (Cth) that "Ascertainment in any particular case of where the public interest lies will often depend on a balancing of interests, including competing public interests, and be very much a question of fact and degree" (per Mason CJ and Wilson and Dawson JJ). In the same case, Deane J in dealing with the refrain from hearing power in the public interest observed at 162:

"The right to invoke the jurisdiction of the courts and other public tribunals of the land carries with it a prima facie right to insist upon the exercise of the jurisdiction invoked. That prima facie right to insist upon the exercise or jurisdiction is a concomitant of a basic element of the rule of law, namely, that every person and organisation, regardless of rank, condition or official standing, is "amenable to the jurisdiction" of the courts and other public tribunals (cf Dicey, An Introduction to the Study of the Law of the Constitution, 10th ed (1959), p 193). In the rare instances where a particular court of tribunal is given a broad discretionary power to refuse to exercise its jurisdiction on public interest grounds, the necessary starting point of a consideration whether such a refusal would be warranted in the circumstances of a particular case in which its jurisdiction has been duly invoked by a party must ordinarily be the prima facie right of the party who has invoked the jurisdiction to insist upon its exercise (cf per Higgins J, Merchant Service Guild of Australasia v Commonwealth Steamship Owners' Association [No 1] (1920) 28 CLR 278 at 281). That position is a fortiori in a case where no other court or tribunal, Commonwealth or State, possesses jurisdiction fully to deal with the particular dispute. Were it otherwise, effective access to the courts and other public tribunals would be not a right which could be denied in an exceptional case on the grounds of extraordinary consideration of public policy but an uncertain privilege which could be withheld at any time on unconfined and largely unexaminable discretionary grounds (see, generally, Friedman, "Access to Justice: Social and Historical Context: in Cappelletti and Weisner (eds) Access to Justice, vol II, book 1 (1978) pp 5ff; Raz, The Authority of Law, (1979), at p 217)."

- 23 I adopt what I said in *Skilled Rail Services* for present purposes. The discretion open to the Commission to be exercised under s 27(1)(a) is a broad one. A gloss should not be put on the words of the section to import any particular level of satisfaction to be achieved by the Commission for the exercise of the power. However, given that a party is entitled to invoke the Commission's jurisdiction, and prima facie expect it to be exercised there is an onus on the Authority in this case, to persuade the Commission, that in the circumstances, that prima facie right should be overridden: *QEC* per Deane J at 163. Further, in the exercise of the discretion, the Commission is required, as in all matters before it, to have regard to its statutory obligations under s 26(1) of the Act: *Robe River Iron Associates v Amalgamated Metal Workers and Shipwrights Union of Western Australia* (1987) 68 WAIG 4.

139 This approach to s 27(1)(a) of the Act was affirmed on appeal to the Full Bench (*The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch v Public Transport Authority of Western Australia* [2014] WAIRC 00451; (2014) 94 WAIG 787) and on further appeal to the Industrial Appeal Court (*The Public Transport Authority of Western Australia v The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch* [2015] WASCA 150; (2015) 95 WAIG 1593).

- 15 In an earlier decision of the Full Bench in *The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch v Public Transport Authority of Western Australia* [2014] WAIRC 00451; (2014) 94 WAIG 787, Smith AP, when also considering the operation of s 27(1)(a) of the Act, came to similar conclusions at pars 49 to 58 of her reasons for decision. Accordingly, I adopt and apply the above approach to the exercise of the s 27(1)(a) discretionary power for the purposes of determining the present appeals.

Consideration of the appeal grounds

Ground 1

- 16 By this ground of appeal the appellant submitted that the learned Commissioner did not properly consider or consider at all whether the appellant would suffer hardship if the applications were dismissed. In this respect the appellant referred to a decision of the Commission in *Nathan Maher v Director General of Health* [2012] WAIRC 00134; (2012) 92 WAIG 386, a decision of the Public Service Appeal Board in relation to an application by the respondent in that matter to have the proceedings dismissed for want of prosecution. In that case, the Appeal Board, at par 12, referred to and relied on the decision of the Full Bench in *The Australian Workers Union, West Australian Branch, Industrial Union of Workers and Barmingo Pty Ltd – Plutonic Project* [2000] WAIRC 13162; (2000) 80 WAIG 3162, where, in reliance on *Ulofski v Miller* [1968] SASR 277 at 280; *Birkett v James* [1978] AC 297 and *Muto v Faul* [1980] VR 26, principles for the dismissal for want of prosecution were considered.
- 17 In *Barmingo*, Sharkey P referred to "five paramount matters" to be taken into account in the exercise of the discretion to dismiss a matter for want of prosecution. Those considerations being the length of the delay; the explanation for the delay; the hardship to the plaintiff if the application is dismissed and the cause of action left statute barred; the prejudice to the defendant if the action is allowed to proceed notwithstanding the delay, and the conduct of the defendant in the litigation. In a similar vein, the appellant also referred to a decision of the Supreme Court of the Northern Territory in *White v Northern Territory of Australia* (No. 519 of 1981 dated 13 June 1989) and *Howley v Principal Healthcare Finance Pty Ltd* [2014] NSWCA 447 per McColl, Meagher and Barrett JJA, although the latter case concerned whether leave to commence workers' compensation proceedings outside of a statutory time period, should be granted.

- 18 Most cases relied on by the appellant both at first instance and on this appeal, in this respect, deal with dismissal for want of prosecution of proceedings initially commenced within time, but not then proceeded with expeditiously. That is not the case here. The applications the subject of the order of dismissal under s 27(1)(a) of the Act were commenced under s 78(2)(b) of the *Public Sector Management Act 1994* (WA) from decisions to take disciplinary action under s 82A(3)(b) of the PSM Act. Such a matter is able to be referred to the Commission “as if that decision or finding were an industrial matter mentioned in section 29(b) of that Act, and that Act applies to and in relation to that decision accordingly”.
- 19 It would appear that the reference to “section 29(b) of that Act”, in s 78(2)(b) of the PSM Act, is a drafting error as there is no such provision and nor was there at the time of the enactment of s 78(2)(b) of the PSM Act and it seems it was intended to refer to “section 29(1)(b)” instead. This matter was considered in *Johnston v Mr Ron Mance, Acting Director-General Department of Education* [2002] WAIRC 06155; (2002) 83 WAIG 1553. As it is only applications under s 29(1)(b)(i) of the Act that are subject to a statutory time limit of 28 days, with an opportunity for a late claim to be considered by the Commission, there is no time limit on claims made under s 78(2) of the PSM Act. No time limit is referred to in reg 63A of the *Industrial Relations Commission Regulations 2005* either.
- 20 Therefore, strictly speaking, it appears the case that the present appeals are to be determined based upon general considerations in relation to the exercise of the s 27(1)(a) power to dismiss, rather than the application of the cases dealing with dismissal for want of prosecution or the grant of extensions of time to extend statutory time periods to commence proceedings in the Commission. However, it seems to me, that subject to what follows, some guidance can be taken from these cases as to how the general discretion under s 27(1)(a) of the Act should be exercised in the circumstances of the present case.
- 21 The fact that in this jurisdiction there exist time limits for employees to commence proceedings against their present or former employers, whether it be alleging they were unfairly dismissed or, in the case of employment in the public sector, to challenge disciplinary action before the Appeal Board for example, is indicative of the need for timeliness generally. The Commission has the power to extend statutory time limits, but there must be good reason established, with the onus being on the party seeking an extension to persuade the Commission that the discretion to do so should be exercised in their favour.
- 22 In terms of the factor of delay, the general need for timeliness in the commencement of claims in this jurisdiction is a principle of long standing and is illustrated in the decision of Fielding C in *Johnston v Wesfarmers Ltd* [1990] WAIRC 12434; (1990) 70 WAIG 2434. In this matter, the applicant purported to “convert” an unfair dismissal claim into a claim for denied contractual benefits in relation to events that had occurred some three and a half years earlier. The respondent brought an application to dismiss the proceedings under s 27(1)(a) of the Act, by reason of the excessive delay in the institution of the proceedings.
- 23 Whilst at the time of those proceedings before the Commission in that case, no time limits were then imposed within which such claims were to be commenced, as opposed to the present position in relation to unfair dismissal claims for example, the Commission made some general observations in relation to delay generally in commencing proceedings before the Commission. In this respect, Fielding C said at 2435:

Although the Act does not impose time limits, within which a dismissed employee might bring a claim with respect to unfair dismissal, as is the case in comparative legislation in some other States, for example, in Victoria and in South Australia it is obviously essential that such a claim be instituted at or about the time of the dismissal. It is patently obvious that the interests of industrial harmony dictate that the Commission have the benefit of dealing with disputes of this kind whilst the incidents are fresh in the minds of those likely to be called before the Commission. After more than three and a half years it would be surprising if the recollections of those directly involved with the matter were not somewhat blurred.

Moreover, the only practical remedy available for such a claim is reinstatement and that cannot reasonably be effected where a long period of time has elapsed following the dismissal. The Commission has to consider not only the position of the dismissed employee, but that of the employer. It would obviously be unreasonable to expect that an employer make the necessary adjustments to reinstate an unfairly dismissed employee years or even months after the dismissal has taken place. In this respect I adhere to the view I expressed in *Fosbury v. Mt Newman Mining Co Pty Ltd* (1988) 68 WAIG 1882 at 1884, that is, that claims for unfair dismissal should be brought with expedition. Where there has been delay the Commission is entitled to exercise its discretion against the Applicant and either refuse reinstatement or, in more extreme cases, to refuse to proceed with the matter at all.

The Respondent rightly accepts that ignorance of the law is not really an excuse. In his case he made a deliberate decision, albeit based on legal advice which he regards as erroneous, that he should not institute proceedings in the Commission against the Applicant arising out of his dismissal. Having made that deliberate decision he ought not now complain if the Commission exercises the discretion given it by section 27 (1)(a) not to hear an application instituted more than three years later. If the dismissal was indeed unfair it is simply asking too much to expect that at this late stage he be reinstated and, indeed, the Applicant now accepts that. There seems to me to be little point in proceeding with what at best would be an academic exercise. The Commission's charter is to deal with practical solutions and is not such as to invite academic solutions. Furthermore, it is hardly consistent with the public interest that it should be engaged in such an exercise when there are numerous applications by others waiting to be dealt with relating to allegations of unfair dismissal and which have been made expeditiously and in a proper manner.

I do not consider the position to be improved by the Applicant's proposal to abandon his claim for unfair dismissal and convert it to one for denied contractual benefits. Whilst the need to institute proceedings expeditiously is perhaps not as compelling for a claim of denied contractual benefits as it is for a claim for reinstatement, nonetheless the nature of the Commission's jurisdiction is such that disputes of that kind should

be dealt with without delay. In this instance the claim cannot be said to have been made without delay. Indeed, by comparison with similar claims dealt with in the Commission, it could be described as an ancient claim.

- 24 In my view, in the context of s 27(1)(a) of the Act, the considerations guiding Fielding C's decision in *Johnston* are relevant to the determination of the present appeals and with respect, I adopt and apply them in the present circumstances. I also note that in *Barmingo*, Sharkey P, at 3162, noted that in a jurisdiction such as the Commission, emphasis is placed on swift remedies and a lengthy period of delay, as in that case, was "almost inordinate and irrecoverable". Of course, it goes without saying, that by s 26(1)(a) of the Act, the exercise of the discretion by the Commission must be in accordance with equity and good conscience and the substantial merits of the case. By s 26(1)(c), the Commission must also have regard to not just the interests of an employee, but also of the employer too.
- 25 The appellant argued that the learned Commissioner did not have regard to his interests in his decision. The appellant submitted, as a main plank of his argument, that he did not challenge the penalties imposed in applications 11 and 14 of 2019 because of the cost of taking legal action against his then employer. The appellant said that the learned Commissioner failed to properly consider the prejudice to him by the dismissal of the application. He contended that the learned Commissioner did not properly consider the cost of litigation as a barrier to the appellant bringing the claim to challenge the disciplinary decision. The appellant also contended that there was no reference to hardship to the appellant if his claims were dismissed.
- 26 A further strand of the appellant's argument in relation to this ground, was that the employer, sometime after, relied on the disciplinary outcomes in its decision to terminate his employment. The appellant contended that due to the dismissal of applications 11 and 14 of 2019, he will no longer be able to challenge those findings in the proceedings he has commenced to contest his dismissal. The appellant submitted that the respondent now will rely upon these historical matters to support its decision to dismiss. The appellant also referred to the *White* case in the Northern Territory at pp 29 to 30, to the effect that each case is to be evaluated in accordance with its own circumstances. The appellant also referred to s 26 of the Act and the need for fairness and justice to apply.
- 27 There is no doubt from a fair reading of the transcript that the learned Commissioner was well aware of the need to consider the fairness of any decision to dismiss the applications under s 27(1)(a) of the Act (see pp 4 to 5 of the transcript at first instance). In particular, when discussing the circumstances of each case, the learned Commissioner expressly recognised the need to take into account the prejudice to either party as a consequence of the dismissal of the applications: p 5 transcript at first instance. The learned Commissioner referred to taking into consideration factors set out in the "want of prosecution" cases referred to by the appellant. The learned Commissioner expressly referred to taking these matters into account and engaging in a "balancing act": p 5 transcript at first instance. The learned Commissioner expressly referred to the factor of an excessive delay, which may be a decisive factor and the need for timeliness in the context of employment relationships: p 5 transcript at first instance; pars 13 to 17 reasons for decision at 149 AB.
- 28 The learned Commissioner expressly acknowledged the appellant's submissions as to the cost of litigation: pp 10 to 11 transcript at first instance. In his reasons for decision at pars 19 to 21, he referred to the appellant's submissions as to the cost of litigation and the appellant's competence to represent himself in the proceedings to challenge the disciplinary penalties. The learned Commissioner however concluded that the appellant made a conscious choice and a tactical decision to not do so at the time. Those considerations, however, could not overcome the issue of excessive delay and the employer could not be expected to wait for a person to consider themselves able to competently represent themselves in any proceedings: AB149.
- 29 As to the contention that the appellant will be prejudiced now because as a result of the dismissal of the applications, he would not be able to challenge historic disciplinary matters, the learned Commissioner plainly took this into account. He concluded that the appellant was aware of his right to challenge the disciplinary penalties in proceedings before this Commission at the time they were imposed: par 18 reasons for decision AB149. Indeed, the letter informing the appellant of the outcome of the disciplinary proceedings and the imposition of the disciplinary penalty, expressly referred to the right to challenge the employer's decision on an appeal to the Industrial Relations Commission: AB139.
- 30 These matters were clearly taken into account by the learned Commissioner and there was no error demonstrated by the appellant in this respect. Moreover, as in *Johnston*, set out above, the appellant could not now complain about the respondent bringing an application under s 27(1)(a) of the Act that his claims be dismissed and that he will be denied the ability to challenge the historical findings, when he made a conscious decision at the material time to not do so. This ground is not made out.

Ground 2

- 31 This ground asserted that the learned Commissioner did not pay any or sufficient regard to the public interest in his decision to dismiss the application. This contention is unsustainable. I have referred to the relevant cases in relation to the exercise of powers such as s 27(1)(a) of the Act earlier in these reasons. Whilst the learned Commissioner did not identify s 27(1)(a)(ii) of the Act specifically in his reasons for decision, it is clear from his reference to "as a matter of public interest" at par 13 of his reasons (AB148), that he had this provision in mind.
- 32 The test in this jurisdiction is not the Australian Institute of Administrative Law paper as set out in the appellant's submissions, although, as it is clear from the above cases, there is a requirement for the Commission to engage in a balancing process and to weigh up various factors, without necessarily giving equal weight to each. As the transcript references I have already identified make plain, the learned Commissioner was clearly aware of his obligations in this regard.
- 33 At pars 13 to 22 of his reasons for decision, the learned Commissioner did refer to the public interest and the need for certainty in employment relationships and that after the passage of time, an employer should be able to conduct its affairs in accordance with the circumstances then in existence. If an employee, in the case of an employment dispute, has accepted and not challenged a disciplinary outcome, despite the legal right to do so, which legal right has been expressly drawn to their attention, the employer is quite entitled to presume the continued existence of this state of affairs.

34 This is subject to the issue of the length of the delay in the bringing of any proceedings to challenge this state of affairs. In this case, the delay was very lengthy, being more than one year and five months after the imposition of the penalty in application 11 of 2019 and more than one year and eight months after the imposition of the penalty in application 14 of 2019. This was a period of over two and a half years since the relevant events occurred in the case of the former application and almost two years and four months in the case of the latter application. The learned Commissioner concluded, having regard to the length of the delay, that it was not reasonable and there was no good reason advanced by the appellant for it: par 14 reasons for decision at AB149. The length of the delay is plainly a matter of great weight and is to be considered by the Commission as a part of the balancing exercise, in determining where the public interest lay in the context of employment matters. No error has been identified by the appellant in relation to this ground of appeal.

Ground 2A

35 The appellant submitted that the Commission did not take sufficiently into account, the interests of the employee and overly focussed on the interests of the employer, inconsistent with the requirements of the public interest.

36 As I understood it, this ground was somewhat of a modified re-statement of the appellant's contentions in relation to ground 1, that the interests of the employee, and the hardship factor, were not or were not adequately considered by the Commission. The appellant referred to par 13 of the learned Commissioner's reasons (AB148) which dealt with the public interest and focussed on the nature of the employment relationship, which I have referred to above in discussing ground 2. The contention by the appellant was that this conclusion overlooks the position with a large organisation like the respondent. The submission was that it may be applicable to a small business. There was also a further reference by the appellant to an employee not being able to afford legal representation and that self-representation always confers a disadvantage in proceedings before the Commission.

37 As with my conclusions in relation to ground 1, I am far from persuaded that the learned Commissioner did not have regard to the interests of the appellant and only placed weight on the interests of the employer. Whilst the appellant focussed on the Commission's conclusions at par 13 of his reasons (AB148) as being evidence of this, this was central to his conclusion as to where the balance of public interest considerations lay. It does not mean, read in the context of the reasons for decision and the transcript of the proceedings, that the learned Commissioner did not have regard to other factors, particular to the employee. It is clear from the rest of the reasons, although shortly expressed, that the appellant's circumstances were taken into account too.

38 This ground of appeal is not made out.

Ground 2B

39 By this ground it was contended by the appellant that the learned Commissioner did not apply the "fair go all around" principle, as a part of the industrial relations system. The appellant complained of the general imbalance in relation to the financial resources of large employers and difficulty in challenging decisions of employers because of the cost of litigation. According to the appellant, this gives an unfair advantage to employers who may potentially exploit this situation by relying on historical findings of misconduct. It was said that this leads to an undermining of Australian values in society generally.

40 This ground of appeal and the submissions made in support of it by the appellant do not allege or identify any error of the kind in the decision of the learned Commissioner, necessary to make out a ground of appeal. Whilst they may represent a somewhat philosophical approach to what the appellant sees as his grievance, it is not a basis for a ground of appeal and accordingly this ground is not made out.

Ground 3

41 As to this ground, the appellant contended that the learned Commissioner erred because even though he found no actual or presumptive prejudice to be suffered by the employer, he nonetheless dismissed the application. According to the appellant, the Commission's conclusion of no prejudice to the employer should have led to the dismissal of the s 27(1)(a) application. The appellant also submitted that prejudice was a main ground of the respondent's application to dismiss the three matters.

42 At pars 17 and 22 of his reasons for decision (AB149) the learned Commissioner concluded that no prejudice, real or presumptive, to the respondent was established. He also said that the respondent "did not point to any prejudice, actual or presumptive, ..." It is the case that in applications 11 and 14 of 2019, prejudice to the respondent was raised as a ground for the requested exercise of the Commission's discretion under s 27(1)(a) of the Act (see AB30 in FBAs 8 and 10 of 2019). It was contended by the respondent that as "the conduct the subject of the disciplinary action occurred almost three years ago a delay of such length would result in the Applicant suffering serious prejudice at a hearing of Application 11 of 2019" (AB30). Furthermore, in the written submissions filed by the respondent in its application to dismiss, the respondent referred to the request by the learned Commissioner for submissions on this issue, which the respondent then set out at pars 4 to 11 of its outline (AB60 to 61). Reference was made to delay as one of the "five paramount matters" as discussed in *Barmingo*.

43 Prejudice raised by the respondent was said to arise in at least two respects. First, it was contended by the respondent that the passage of time necessarily eroded the reliability of witnesses in terms of their recollections of events and clarity of detail. The second issue raised by the respondent because of delay, was unfairness if the respondent was to call the relevant students as witnesses, several years after the events. It was further said by the respondent that they may not be able to be called as witnesses in any event, as they refused to be interviewed or to participate in the investigation process at the time of the relevant incidents. This would mean prejudice to the respondent, if the substantive applications were heard.

44 The issue of prejudice to the respondent was raised in the proceedings before the learned Commissioner (see pp 22 to 28; 32 to 34; 47 and 47 to 50 transcript at first instance). At 55 to 56 of the transcript at first instance on the second day of the hearing, the learned Commissioner informed the parties that the respondent's application to dismiss the appellant's three applications, was not going to be decided on the basis of prejudice but on the issue of delay. In terms of the learned Commissioner's conclusions at par 22 of his reasons, that the respondent did not point to any actual or presumptive prejudice, this in my view, was not a correct characterisation of the respondent's position. I think the respondent did so as the summary of grounds and

submissions outlined above, referred to the issue of prejudice and proffered an explanation as to why it should be found to exist by the Commission.

- 45 Given the period of time since the relevant conduct complained of by the respondent had occurred, as at the date of the hearing, it is a natural consequence of the passage of time for memories to fade and for relevant events to lack the clarity in the minds of those involved, compared to at or closer to the time of the relevant incident. The question of “presumptive prejudice” was discussed in *Howley*, and reference was made to the judgement of McHugh J in *Brisbane South Regional Health Authority v Taylor* (1996) 186 CLR 541. At 551, McHugh J referred to the potential loss of evidence which was not known to exist where His Honour said “time will diminish the significance of a known fact or circumstance because its relationship to the cause of action is no longer as apparent as it was when the cause of action arose... The longer the delay in commencing proceedings, the more likely it is that the case will be decided on less evidence than was available to the parties at the time the cause of action arose”.
- 46 These considerations were relevant to the matter at first instance. It was open for the learned Commissioner to have reached the conclusion that the respondent had established at least presumptive prejudice, which would contribute to unfairness at the hearing of the three applications.
- 47 Nonetheless, it is still for the appellant to establish error in the decision of the Commissioner at first instance. Prejudice to the respondent, whether it be actual or presumptive, is not decisive and is one but a range of considerations. Even assuming the lack of prejudice of any kind being made out, that does not mean that conclusion, in and of itself, would lead to the refusal to exercise the discretion under s 27(1)(a) of the Act. The learned Commissioner made clear that he considered the passage of time and the delay alone, in terms of a workplace relationship, with the respondent’s entitlement to assume there would be no challenge to its decision to impose disciplinary penalties, to be decisive. Indeed, this factor, of people (in this case the respondent employer) being able to organise their affairs on the basis that no claims would be commenced against them was expressly recognised by McHugh J as part of “The effect of delay on the quality of justice...” in *Brisbane South* at 552.
- 48 No error has been identified by the appellant in relation to this ground of appeal.

Ground 4

Ground 4.1

- 49 As to this ground, the appellant contended that references by the learned Commissioner in the course of the hearing in connection with the Deed in application 13 of 2019 to “a plea of guilty” (see for example p 17 transcript at first instance) tainted his approach to the appellant and amounted to a display of bias against him.
- 50 A review of the transcript at first instance, read with the learned Commissioner’s reasons at par 10 (AB64) make it clear that his conclusions were based on the fact of the entering into the Deed by the appellant, as part of the compromise of his claim, and his agreement to not take further claims against the respondent in connection with the disciplinary action. The terms of the Deed are contained at AB33 to 39. The Deed recites the fact that the appellant was the subject of an Investigation Report in July 2015, leading to the imposition of a disciplinary penalty of a reprimand and a fine of one day’s pay. The appellant disputed the outcome and commenced a claim in this Commission to challenge it. It was common ground that the appellant was represented by a solicitor in those proceedings.
- 51 It was also common ground that as a result of conciliation proceedings before the Commission, the appellant’s claim was settled. Some compromise was reached in relation to aspects of the Investigation Report, as reflected in par 3 of the Deed. Also, the Deed in par 3, recorded that the appellant disagreed with certain conclusions in the Investigation Report, and a submission in relation to this aspect, prepared by the appellant, would be included in his disciplinary file. In accordance with terms usual for such Deeds, the appellant’s application was to be discontinued; he would release and discharge the respondent from “all claims, suits, actions, causes of action and other demands whatsoever which the Employee now has or at any time in the future may have or, but for the execution of this Deed, might have had, against any of the releasees in respect of, arising from, or in any way relating to the Disciplinary Process” (AB36).
- 52 Further, the terms of cl 7 of the Deed contained the provision enabling the respondent to raise the appellant’s entering into the Deed as “as an absolute bar to all future and existing claims, suits, actions, causes of actions and other demands brought, or attempted to be brought, by the Employee in respect of, arising from or in any way relating to the Disciplinary Process.” (AB36)
- 53 When the above provisions of the Deed were highlighted by the Full Bench with the appellant in the course of his submissions on the appeal, the appellant accepted that the terms of the Deed meant what they say; that he did compromise his claim and promised to not bring a fresh claim in relation to the disciplinary proceedings; and in breach of this promise, the appellant did so (see p 21 transcript). It was at this point, that the appellant moved to ground 6, dealing with alleged duress at the time of signing the Deed, which will be dealt with later in these reasons.
- 54 There was no prejudice or bias displayed by the learned Commissioner against the appellant in relation to the Deed issue. He focussed on the facts set out immediately above, and that the Deed, on its face, was conclusive against the commencement of application 13 of 2019. This is subject to what is said below in relation to ground 6. No error has been identified by the appellant and this ground is not made out.

Ground 4.2

- 55 This ground alleges that the material placed before the Commission, in the form of the Investigation Report, which was annexed to an affidavit sworn by the respondent’s counsel, in relation to application 11 of 2019, was so prejudicial to the appellant that it tainted the learned Commissioner’s view of him. As I understood the submission and as it was put, this was said by the appellant to have created in the mind of the learned Commissioner, that the appellant was a “bad person”, found guilty of misconduct, and that the whole proceedings below were accordingly tainted (see p 25 transcript).

- 56 The respondent contended that the Investigation Report was made available at the request of the learned Commissioner at the conclusion of the first day of the hearing. The respondent's counsel accepted that it was her oversight and that this material should have been filed for the purposes of the hearing on 29 April 2019. At pp 27 to 28 of the transcript at first instance, there is a discussion between the learned Commissioner and counsel for the respondent, where the learned Commissioner requests the provision of affidavit material, so that he may properly consider the prejudice issue raised by the respondent. In the course of the proceedings on 29 April 2019, given the way in which the hearing unfolded, the appellant responded to the respondent's application as to why the s 27(1)(a) application should not succeed. The learned Commissioner then informed the appellant at p 29 of the transcript at first instance, that he would be given an opportunity to respond to any material filed by the respondent, by filing further material of his own. It was common ground that the appellant chose to not do so.
- 57 The matter was relisted on 10 June 2019 at which further submissions were made by the respondent in relation to prejudice and which witnesses the respondent may try and call in support of its case. The appellant responded at length to the respondent's submissions on the prejudice issue. Apart from a discussion about potential witnesses referred to in the Investigation Report, there was little or no reference by the parties or the learned Commissioner to the content of the Investigation Report itself. The respondent submitted to the Full Bench that any suggestion that it engaged in inappropriate conduct, by placing this material before the Commission, should be rejected. The respondent contended that the Investigation Report was put before the Commission in order to provide the full background and context of the matters in issue, following the learned Commissioner's request.
- 58 Ultimately, this ground of appeal can be answered in the following way. Regardless of the purposes for the tender of the Investigation Report, and I do not accept the appellant's allegation against the respondent to any extent, even if there was substance to the suggestion that the respondent in some way attempted to "poison the well" against the appellant by the submission of such material, with respect to the appellant, this is irrelevant to the conclusions reached by the learned Commissioner. It was a matter of objective fact, that the two applications relevant to FBA 8 and 10 of 2019 involved a very lengthy delay. It was also the case that the appellant did not provide a reasonable explanation, as a matter of fact, as to why he did not challenge the disciplinary findings in a timely manner, in accordance with the learned Commissioner's conclusions. This was despite that his ability to do so was drawn to his attention by the respondent at the time, meaning the appellant was aware of it. The learned Commissioner's view as to whether the appellant may be a "bad person" or there was created in some way, a negative impression of him, was not germane to these conclusions.
- 59 In relation to the Deed issue, again any suggestion of the appellant that the tender of the Investigation Report negatively impacted on him in the learned Commissioner's eyes, was irrelevant to the objective fact of the entry by the appellant into the Deed and his promise to not commence any further proceedings arising from the disciplinary action, which promise he did not keep.
- 60 Accordingly, this ground of appeal is not made out.

Ground 4.3

- 61 I need not deal with this ground any further and I refer to my reasons above in relation to ground 4.2. Largely the same issues are raised. I reach the same conclusions. This ground of appeal is not made out.

Ground 5

Ground 5.1

- 62 This ground of appeal asserted that the learned Commissioner was biased against the appellant because he gave the respondent an opportunity to adduce further evidence in relation to the prejudice issue, which evidence was the subject of consideration on the second day of the hearing on 10 June 2019. The nub of the appellant's argument in this respect was that the respondent was given a "second chance" to put its case, rather than for the learned Commissioner to decide the matter based on the submissions of the parties on the first day of the hearing on 29 April 2019. This was also said to be contrary to the objects of the Act in s 6(c), in relation to the objective of the resolution of disputes with the maximum of expedition.
- 63 As noted above, the respondent's counsel accepted that she omitted to place relevant material before the Commission for its consideration on the first day of the hearing. In this respect, most of the hearing on this day, as I have mentioned above, was taken up by the appellant's opposition to the respondent's application. It is the case that this material should have been before the Commission as a part of the respondent's application. However, the fact of the adjournment of the application to enable not just the respondent, but also the appellant to file further material in relation to the dismissal application, did not mean that the learned Commissioner was biased against the appellant. The Commission's procedures in dealing with industrial matters under the Act, within limits, are flexible having regard to the nature of the matters coming before it for determination, as s 26(1) of the Act makes clear (see also regs 32A, 33, 34, 37 and 39 *Industrial Relations Commission Regulations 2005*). It is important for the Commission in an application of the kind below, to have all relevant material before it in order that the Commission may make a fully informed decision.
- 64 It is also the case, as the learned Commissioner pointed out in the course of the hearing, if the respondent's application at the end of the first day was simply refused, there would be nothing precluding a fresh application being made under s 27(1)(a) of the Act at a later time. In that sense, the procedure adopted by the Commission enabled the matter to be fully heard and determined in accordance with s 26(1) of the Act.
- 65 Irrespective of this however, the additional material filed by the respondent in the form of the Investigation Report ultimately made no difference to the outcome of the application to dismiss. This is because the Commission decided the matter solely on the basis of delay and that there was no reasonable explanation advanced by the appellant for it. Prejudice, whether it be actual or presumptive, was not relied upon by the learned Commissioner and therefore in the final analysis, there was no prejudice to the appellant by the course adopted by the learned Commissioner. In any event, the appellant was given an opportunity to respond to this further material with further material of his own, which he elected not to do.

66 This ground of appeal is not made out.

Ground 5.2

67 This ground contended that the learned Commissioner showed bias towards the appellant because he refused to consider the tender of documents in support of the appellant's case. The appellant referred to the transcript at first instance at p 13. Reference was made to the Standards and Integrity Initial Reporting Form annexed to the Investigation Report (as part of annexure RMH1 to the affidavit of Ms Hartley (AB33 to 137)). At p 2 of this document, the author, Ms Ward under the heading "Background Information" at par 6, referred to reasons why year 11 students should not engage in the Certificate III course. Whilst it was not entirely clear, the appellant seemed to submit to the learned Commissioner that there may be some records in the school computer system (at the time of the hearing) showing that in 2018 some students had been enrolled in the Certificate III, suggesting inconsistency in approach by the respondent. However, beyond that assertion in submissions, no document or other material was produced, in this connection, that the appellant tried to have tendered.

68 Furthermore, at p 15 of the transcript at first instance, the appellant attempted to refer to documents that he said were relevant to the Deed he signed in relation to application 13 of 2019. The learned Commissioner made it clear to the appellant that he was not prepared to permit the appellant to go behind the Deed or to attempt to undo it in some way, unless he was going to contend that the Deed was signed under duress or he relied on poor legal advice. The appellant confirmed that this was not his argument (see p 16 transcript at first instance). In these circumstances, there was no error in the learned Commissioner's rejection of an attempt by the appellant to go behind the Deed, unrelated to duress or some such contention. The learned Commissioner's approach in this respect was consistent with the conclusiveness of the settlement reached and the principle of finality of litigation.

69 This ground of appeal is not established.

Ground 5.3

70 The appellant maintained in this ground of appeal that the learned Commissioner asked him an excessive number of questions compared to the respondent. This was submitted to be indicative of bias by the learned Commissioner against the appellant. I do not consider this ground has any substance. Whilst on a fair reading of the transcript at first instance on occasions, the exchanges between the appellant and the learned Commissioner could be described as robust, at several points the learned Commissioner was asking the same question repeatedly, as the appellant was not providing a direct answer. On other occasions, the learned Commissioner was attempting to understand the contentions advanced by the appellant and expressing reservations about the points being made. An example of this is at p 41 of the transcript at first instance, cited by the appellant in this ground of appeal, when discussing the Deed and the meaning of the qualifications contained in it. This was referring to what the appellant called his "Form 4A submission", which was the attachment to his application 13 of 2019 at AB41 to 48 in FBA 9 of 2019. At pp 41 to 42 is the following exchange:

MAGYAR, MR: Because - - -

MATTHEWS C: Because you now seek to withdraw your agreement to it and that makes it contentious?

MAGYAR, MR: No, your Honour. The deed refers to a companion document which is my Form 4A submissions. The Form 4A submissions refer to another companion document called Statement of Evidence 19, your Honour. So you need to really to read the bundle of three documents as a whole before you form a view - - -

MATTHEWS C: And what will I learn at the end of doing that? Tell me in a - in a paragraph what will I learn?

MAGYAR, MR: That the employee does not accept that he committed an act of misconduct.

MATTHEWS C: Mr Magyar.

MAGYAR, MR: You haven't - - -

MATTHEWS C: Are you saying that you're on that one - you dispute that you conducted - that you misconducted yourself despite the fact that you signed a deed of settlement and release in which you agreed you had misconducted yourself?

MAGYAR, MR: The - the - - -

MATTHEWS C: Is that what you're trying to tell me? Yes or no?

MAGYAR, MR: This does not contain any admission of guilt, your Honour. There's no admission of guilt in the deed of settlement. And once you read the two companion documents I've mentioned you would see that that position is sustainable.

MATTHEWS C: Sure. And you make that - you make that argument at the hearing.

MAGYAR, MR: Yes. All right, then I will, your Honour. I will then move on to now - - -

MATTHEWS C: But no, but I want to deal with this. You say that under the deed of settlement and release you are exonerated. I want to deal with this now. Tell me how you're exonerated by the deed of settlement and release?

MAGYAR, MR: Well, you need to have before you - - -

MATTHEWS C: Well, give them to me then.

MAGYAR, MR: You need to have before you - - -

MATTHEWS C: Give them to me then.

MAGYAR, MR: - - - three documents.

MATTHEWS C: Yes. Give them to me then.

- MAGYAR, MR:** But once you've read the three documents then you - - -
- MATTHEWS C:** Are you going to give them to me or not?
- MAGYAR, MR:** The three documents. The - well, I asked the question in the email I sent to your Associate.
- MATTHEWS C:** Don't worry about the communication between myself and my Associate. Do you plan to give those documents to me now?
- MAGYAR, MR:** I gave them to you actually at the last hearing, your Honour.
- MATTHEWS C:** All right, so I've got the deed of settlement and release.
- MAGYAR, MR:** And then you've got my Form 4A.
- MATTHEWS C:** I've got the Standards and Integrity Directorate investigation report. I presume that I need that, yes?
- MAGYAR, MR:** You have - I - I tendered and I don't know whether you accepted or not my Form 4A.
- MATTHEWS C:** I wouldn't need to accept that. It would be on the file, would it not?
- MAGYAR, MR:** Well, I would, yes. So then I would be then - then - - -
- MATTHEWS C:** Yes, okay, so what paragraph do you want to take me to on that?
- MAGYAR, MR:** Well, you need to look at the last three pages of my Form 4A.
- MATTHEWS C:** How? Okay.
- MAGYAR, MR:** You need to really read that document - - -
- MATTHEWS C:** I've got the - I've got the pages. I've got - - -
- MAGYAR, MR:** - - - to understand what I'm getting at.
- MATTHEWS C:** I've got the Form 4A now.
- MAGYAR, MR:** And then you see the last three pages, your Honour?
- MATTHEWS C:** How many pages is the document?
- MAGYAR, MR:** It's about six pages. The last three pages is the - is the submissions to the WAIRC.
- MATTHEWS C:** Version 1, yes.
- MAGYAR, MR:** And it says eight reasons why the investigation report is flawed.
- MATTHEWS C:** Yes, okay. Now, you're telling me I need to read the deed of settlement and release taking that into account.
- MAGYAR, MR:** That's the first - you need to read three documents in total.

71 There is no doubt that a party to proceedings before the Commission is entitled to a fair hearing free from bias. Procedural fairness requires a party to proceedings before the Commission to be given every reasonable opportunity to put their case, without any actual or apprehended bias: *Palermo v Rosenthal* [2011] WAIRC 00069; (2011) 91 WAIG 129. In *Palermo*, the Full Bench discussed the issue of the conduct of a fair hearing before the Commission and at pars 124 to 127 Smith AP and Beech CC observed as follows:

- 124 The appellant also raises an issue in grounds 1 and 10 that the hearing was not fairly conducted. This raises the issue whether the appellant has had a proper opportunity to advance his defence to the applicant's claims. In *Michael v The State of Western Australia* [2007] WASCA 100 Steytler P with whom McLure JA and Miller AJA observed [63]: When the contention is one of an unfair trial, the test to be applied, according to Kirby A-CJ and Meagher JA (who agreed with Kirby A-CJ), is whether the impugned behaviour has "created a real danger that the trial was unfair": *Galea* at 281. If so, the judgment must be set aside: *Galea* at 281; *E H Cochrane Ltd v Ministry of Transport* [1987] 1 NZLR 146. In *R v Mawson* [1967] VR 205, in which there had been excessive involvement or interference by the trial judge in the conduct of the case, the Court (Winneke CJ, Adam and Barber JJ) regarded the test as being whether there had been "such a departure from the due and orderly processes of fair trial as to amount to a miscarriage of justice".
- 125 However, when considering the responsibilities of a judicial decision maker, it is important to bear in mind the tension between the need to control the proceedings, on the one hand, and to be, and be seen to be, dispassionate and impartial, on the other, with the result that the line between acceptable and unacceptable behaviour can be difficult to draw. This is compounded when one of the litigants is self-represented: *Michael* (Steytler P) [55]. Whilst the appellant was not self-represented he was and is represented by a lay agent. In *Michael* Steytler P said in relation to acceptable conduct [65] - [66]: [I]t will often be necessary, particularly with self-represented litigants, for a trial judge to intervene in order to stop irrelevant matters being raised (*Love* (1983) 9 A Crim R 1 at 26) and to prevent unnecessary delays or disruptions: *R v Morley* [1988] 2 WLR 963; *Galea* at 279; *Lars* (1994) 73 A Crim R 91 at 125. In *Johnson* at [13] Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ said:

'At the trial level, modern judges, responding to a need for more active case management, intervene in the conduct of cases to an extent that may surprise a person who came to court expecting a judge to remain, until the moment of pronouncement of judgment, as inscrutable as the Sphinx.' Indeed, a trial judge who does not intervene to prevent undue delay and to ensure that the parties focus on the crucial issues may be criticised by an appellate court: *R v Wilson and Grimwade* [1995] 1 VR 163; *Thompson* at [39]. Next, a judge is entitled to ask questions of a witness, not only for the purpose of clarifying evidence, but also to test that evidence (*R v*

Gardiner [1981] Qd R 394 at 406, 415; *R v Senior* [2001] QCA 346 at [36] per McMurdo P, Davies and Thomas JJA), although he or she should do no more than is absolutely necessary in that respect and should be careful not to take on the role of counsel.

- 126 As to conduct by a decision maker that oversteps the mark of acceptable conduct Steytler P said [71] - [72]: Every judge knows that it is his or her duty to proceed in accordance with due process, independently, impartially and fairly. While judges are human, and can be expected to react with impatience or irritation from time to time, they are not expected to be rude: *Lars* at 133 (where the Court said that, while judges may be strong and forceful when necessary, they should, no matter what the provocation, always comport themselves with dignity). In *Love*, at 3, Wickham J said (in what might be a counsel of perfection) that:

‘... [F]ortunately the time has passed in the administration of the law in this State when a litigant, a witness or counsel is expected to put up with impatience or rudeness from the trial judge. Such conduct on the part of the judge may be understandable because of illness or provocation or stress due to the difficulties of the case, but it can never be excused. It is professional misconduct and should be roundly condemned. Such conduct does not necessarily lead to a miscarriage of justice but it might do so particularly where the trial is a trial by jury. Justice however will not often miscarry on that ground alone; usually other factors will be present to lead to that result.’ There is, in this respect, an important distinction between conduct that might be regarded only as discourteous or impatient or even rude (in the sense that it leads to no other consequence), on the one hand, and conduct which (whether or not discourteous, impatient or rude) obstructs counsel in the doing of his or her work (*R v Hircock* [1970] 1 QB 67 at 72 per Widgery LJ; *Love*, at 11) or which invites the jury to disbelieve the accused or his or her witnesses, on the other. A judge's interventions should not be such as to create the impression that he or she has identified himself or herself with one of the parties: *Tousek v Bernat* (1959) 61 SR (NSW) 203 at 209; *Galea* at 280.

- 127 When assessing whether the conduct of a decision maker amounts to actual bias, apprehended bias or results in an unfair trial the conduct is to be assessed in the context of the whole of a hearing: *Michael* [77] (Steytler P); see also *Galea v Galea* [1990] 19 NSWLR 263 (279 - 280) (Kirby ACJ). Judges and arbitrators are human and from time do react to provocation. As Steytler J in *Michael* points out [79]:

It is important, also, to evaluate the conduct of a trial judge in the light of any provocation offered to him or her. Judges are not superhuman. While they are expected to exercise restraint and, in the vast majority of cases, to resist anything other than a measured reaction to provocation, there will be occasions (hopefully, very rare) when this is extremely difficult or even impossible. In such circumstances an isolated outburst, or even a few isolated outbursts, will not necessarily result in a mistrial. So, for example, in *Love* the appellant was told by the trial Judge, on more than one occasion, that he was "sick and tired of him" (at 10). However, the appellant in that case "broke all the rules of fair combat" despite the trial Judge's efforts to maintain order (at 11, per Wallace J) and had defied the trial Judge. He had also taken advantage of the position that had arisen (at 26, per Pidgeon J). The Court was not persuaded that there was any miscarriage in those circumstances.

- 72 The extract of the transcript at first instance above, is an exchange between the appellant and the learned Commissioner in relation to the Deed and a "companion document" that the appellant was, quite insistently, maintaining that in some way exonerated him or minimised his misconduct. This was despite not continuing with application 13 of 2019 and settling it by signing the Deed, which contained qualifications and accepted the penalty of a reprimand. As I have previously indicated, unless the appellant contended the Deed was vitiated by duress or undue influence or some other factor, the learned Commissioner's refusal to countenance what, in essence, were repeated attempts by the appellant to go behind the Deed in some way, is entirely unsurprising. The above exchange and others between the appellant and the learned Commissioner, fall far short of any suggestion of bias by the Commission in favour of the respondent and against the appellant. The questions were not inappropriate, excessive or unduly disruptive, such that the appellant did not receive a fair hearing.

- 73 This ground of appeal is not made out.

Ground 6

- 74 By this ground, which relates only to FBA 9 of 2019, the appellant contended that the learned Commissioner did not have regard or sufficient regard to duress he was placed under by the respondent when he signed the Deed. The alleged duress was said to be the conduct of the respondent in misleading the appellant at the time, that he was responsible for making the school's information technology network unstable. The duress was said to be that the appellant at that time had no way of disproving this.
- 75 This matter was debated at some length between the learned Commissioner and the appellant at pp 15 to 24 of the transcript at first instance. The appellant wanted to introduce into evidence a forensic report in relation to the respondent's information technology system, done it seems, at least a year, perhaps longer, after the relevant incident in September 2015. This incident involved an allegation that the appellant had improperly given a student an IP address for internet access on the school's internet. The allegation was sustained, and the appellant had a penalty of a reprimand and a fine of one days' pay imposed.
- 76 The appellant endeavoured to persuade the learned Commissioner that this forensic report, which seems to have been undertaken by the school itself when investigating another matter, in some way vindicated him. However, as the exchange continued between the learned Commissioner and the appellant at pp 20 to 21 of the transcript at first instance, it became clear that the matter referred to by the appellant in the proceedings below, was the subject of the qualifications which were finally inserted in pars 3(a)(i), (ii) and (b) of the Deed itself. In particular, the reference in par 3.13 to the Investigation Report in this matter, dealt with the conclusion that the appellant's actions led to the instability of the school information technology system. This was disputed by the appellant at the time in his response to the investigation, and the Deed expressly acknowledged this. At p 22 of the transcript at first instance, the learned Commissioner stated to the appellant that if in the final hearing of the

appellant's challenge to his dismissal (the subject of separate proceedings before the Commission), it emerges that the respondent relied upon matters expressly qualified in par 3 of the Deed, then those are matters that the appellant would be able to pursue in those proceedings.

- 77 The learned Commissioner was further of the view expressed at p 23 of the transcript at first instance, that this does not require or involve an "undoing" of the Deed, in effect, because the appellant's position is protected by the qualifications in par 3 of it. The discussion on this point concluded at p 24 of the transcript at first instance with the learned Commissioner asking the appellant "So we are OK on that one then?". The appellant responded "Yes, your honour. Yes".
- 78 An agreement to settle and compromise legal proceedings such as the Deed, is a contract where the parties enter into a legally binding agreement to settle their dispute on the terms set out in it. The general principle is that the subject matter of the dispute, compromised and recorded in a contract of settlement, may not be raised again in a later legal proceeding: *Holsworthy Urban District Council v Holsworthy Rural Council* [1907] 2 Ch 62. As a contract, the Deed is subject to the usual principles of contract if a party to it seeks to have it set aside on proper grounds. In the case of duress, in *Heydon on Contract* 2019, the learned author notes at par [16.10]:

Duress and Related Conduct

[16.10] Definition of "duress"

The doctrine of duress operates both in contract and in other fields. Of late its significance in relation to the law of contract has grown. So far as it operates in contract, duress is a form of pressure: which is regarded by the law as illegitimate; which is usually created by a threat coupled with a demand; which has the purpose of inducing the plaintiff to enter into a contract or a variation to a contract; which leaves the plaintiff no reasonable alternative but to do so; and which operates as a cause of the plaintiff's entry into the contract or the variation.¹ There can be overlap between the ingredients of pressure, illegitimacy and causative effect.² There are enactments which are derived from duress but which are not discussed in this chapter.³

Duress is conventionally grouped into three categories: duress to the person, duress of goods and economic duress. The first two are of some antiquity. Their operation is relatively clear. The third, at least under the name "economic duress", is novel. The courts have endeavoured to develop it in order to meet what they perceive as evils. But in many respects the applicable principles are quite unclear, both in formulation and application. For this reason it has attracted much attention from writers.⁴

- 79 Thus, the essence of duress is an illegitimate threat. A contract affected by duress is voidable and not void. The affected party's will is not overborne but is deflected: *Heydon* at par [16.50]. In this case, there was nothing at first instance to suggest duress in this sense. There was no evidence of a threat or illegitimate pressure being brought to bear on the appellant to enter the Deed. On the contrary, as the discussion between the learned Commissioner and the appellant referred to above reveals, there was a compromise reached and the appellant persuaded the respondent, presumably with the assistance of his solicitor then acting for him, to modify its position where it would no longer rely on certain parts of the Investigation Report. The appellant's objection to certain conclusions reached by the respondent were recorded and acknowledged. No duress was established at first instance and this ground of appeal is not made out.

Conclusions

- 80 No appealable error in the exercise of the learned Commissioner's discretion has been established by the appellant. The appeals are dismissed.

EMMANUEL C:

- 81 I have had the benefit of reading the draft reasons of the Senior Commissioner. I agree with those reasons and have nothing to add.

WALKINGTON C:

- 82 I also have read the draft reasons of the Senior Commissioner. I too, agree with those reasons and have nothing further to add.

2019 WAIRC 00782

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION MR LESLIE MAGYAR	APPELLANT
	-and-	
	DEPARTMENT OF EDUCATION	RESPONDENT
CORAM	FULL BENCH SENIOR COMMISSIONER S J KENNER COMMISSIONER T EMMANUEL COMMISSIONER T B WALKINGTON	
DATE	FRIDAY, 1 NOVEMBER 2019	
FILE NO/S	FBA 8 OF 2019, FBA 9 OF 2019, FBA 10 OF 2019	
CITATION NO.	2019 WAIRC 00782	

Result	Appeals dismissed
Appearances	
Appellant	In person
Respondent	Ms R Hartley of counsel

Order

These appeals having come on for hearing before the Full Bench on Thursday, 26 September 2019, and having heard the appellant on his own behalf, and Ms R Hartley of counsel on behalf of the respondent, and reasons for decision having been delivered on Friday, 1 November 2019, the Full Bench, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders —

THAT these appeals be and are hereby dismissed.

By the Full Bench

(Sgd.) S J KENNER,
Senior Commissioner.

[L.S.]

2019 WAIRC 00754

APPEAL AGAINST A DECISION OF THE COMMISSION IN MATTER NO. CR 10/2017 GIVEN ON 13 NOVEMBER 2018

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

FULL BENCH

CITATION	:	2019 WAIRC 00754
CORAM	:	CHIEF COMMISSIONER P E SCOTT COMMISSIONER T EMMANUEL COMMISSIONER T B WALKINGTON
HEARD	:	MONDAY, 11 MARCH 2019
DELIVERED	:	THURSDAY, 17 OCTOBER 2019
FILE NO.	:	FBA 15 OF 2018
BETWEEN	:	THE DIRECTOR GENERAL, DEPARTMENT OF EDUCATION Appellant AND THE STATE SCHOOL TEACHERS' UNION OF WA (INCORPORATED) Respondent

ON APPEAL FROM:

Jurisdiction	:	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
Coram	:	SENIOR COMMISSIONER KENNER
Citation	:	2018 WAIRC 00844; 98 WAIG 1339
File No	:	CR 10 OF 2017

CatchWords	:	Industrial law (WA) – Appeal against a decision of the Commission – refusal to re-employ or reinstate – Appeal against part of a decision relating to an interim order – Whether the Commission’s jurisdiction is excluded by the Public Sector Standard – Whether a vacancy is required for there to be a refusal to employ – Flawed investigation – Without prejudice privilege – Application of s 41(3) of the <i>Working with Children (Criminal Record Checking) Act 2004</i> – Commission not bound to the remedy sought by a party – Whether there is power to order compensation where there is no relationship of employer and employee for the period covered by order for compensation – Retrospectivity – Consideration of special circumstances – FBA 15 of 2018 appeal dismissed
Legislation	:	<i>Industrial Relations Act 1979</i> , s 39, s 44, s 49; <i>Industrial Legislation Amendment Act 1995</i> , Part 6; <i>Public Sector Management Act 1994</i> ; <i>Working with Children (Criminal Record Checking) Act 2004</i> , s 41(3); <i>Teacher Registration Act 2012</i> s 27(3)(b); <i>School Education Act 1999</i> s 240; <i>Labour Relations Reform Act 2002 (No 20 of 2002)</i> , s 38
Result	:	Appeal dismissed

Representation:

Counsel:

Appellant : Mr R Andretich (of counsel) and Mr J Carroll (of counsel)
Respondent : Mr C Fordham (of counsel) and Mr D Stojanoski (of counsel)

Case(s) referred to in reasons:

Australasian Meat Industry Employees' Union v Belandra Pty Ltd [2003] FCA 910, (2003) 126 IR 165
Balfour v Attorney-General [1991] 1 NZLR 519
BHP Iron Ore Pty Ltd v The Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers – Western Australia Branch (2001) 81 WAIG 1363; 2001 WAIRC 02849
BHP Billiton Iron Ore Pty Ltd v Construction, Forestry, Mining and Energy Union of Workers and Another [2006] WASCA 49
Board of Management, Princess Margaret Hospital for Children v Hospital Salaried Officers' Association WA (1975) 55 WAIG 543
Charles Brett v Sharyn O'Neill, Director General, Department of Education [2015] WASCA 66; (2015) 95 WAIG 429
Coles Myer Ltd trading as Coles Supermarkets v Coppin and Others (1993) 73 WAIG 1754
Construction, Forestry, Mining and Energy Union v BHP Steel (AIS) Pty Ltd [2000] FCA 1008
The Construction, Forestry, Mining and Energy Union of Workers v BHP Billiton Iron Ore Pty Ltd [2005] 85 WAIG 1924; (2005) WAIRC 01797
Director General Department of Justice v Civil Service Association of Western Australia (Inc) (2005) 149 IR 160
Director General, Department of Justice v Civil Service Association of Western Australia Incorporated [2005] WASCA 244; (2005) 86 WAIG 231
Director General, Department of Justice v The Civil Service Association of Western Australia (Incorporated) [2003] WAIRC 07994, (2003) 83 WAIG 908
Falkirk Nominees Pty Ltd t/as Ross Hughes and Company and Australian Property Consultants v Bernard Roy Worthing [2002] WAIRC 06373; (2002) 82 WAIG 2388
Fraser v Fletcher Construction Australia Ltd (1996) 70 IR 117
Kounis Metal Industries Pty Ltd v Transport Workers Union of Australia, Industrial Union of Workers, Western Australian Branch [1992] 45 IR 392
Kounis Metal Industries Pty Ltd v TWU WA Branch (1993) 73 WAIG 14
Kwinana Construction Group Pty Ltd v The Electrical Trades Union of Workers (Western Australian Branch) (1954) 34 WAIG 51
Kwinana Construction Group Pty Ltd v The Electrical Trades Union of Workers (Western Australian Branch) (1954) 34 WAIG 60
Maritime Union of Australia v Burnie Port Corporation Pty Ltd [2000] FCA 1189, (2000) 101 IR 435
Nguyen v Vietnamese Community in Australia trading as Vietnamese Community Ethnic School South Australia Chapter [2014] FWCFB 7198
Norwest Holst Group Administration Ltd v Harrison [1985] ICR 668
Princess Margaret Hospital v Hospital Salaried Officers Association (1975) 55 WAIG 543
Public Transport Authority of Western Australia v The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch (2016) WAIRC; (2016) 96 WAIG 408;
Robe River Iron Associates v Amalgamated Metal Workers and Shipwrights Union of Western Australia (1988) 69 WAIG 990
Robe River Iron Associates v Association of Draughting, Supervisory and Technical Employees Union of Western Australia (1988) 68 WAIG 11
Rodgers v Rodgers (1964) 114 CLR 608
Sealanes (1985) Pty Ltd v John Francis Foley and John Anthony Buktenica (2006) 86 WAIG 1254
SGIC v Terence Hurley Johnson (1997) 77 WAIG 2169
SGS Australia Pty Ltd v Taylor (1993) 73 WAIG 1760
Slonim v Fellows (1984) 154 CLR 505
State Government Insurance Commission v Terence Hurley Johnson (1997) 77 WAIG 2169
State School Teachers' Union of WA (Incorporated) v Director General, Department of Education [2015] WAIRC 00875; (2015) WAIG 1661
Stephens v Australian Postal Corporation [2014] FCA 732

Tip Top Bakeries v Transport Workers' Union of Australia, Industrial Union of Workers, WA Branch (1994) 74 WAIG 1729
Welsh v Anderson (1902) 5 WALR 1

Case(s) also cited:

Automatic Fire Sprinklers Pty Ltd and Another v Watson [1946] 72 CLR 435

Blackadder v Ramsey Butchering Services Pty Ltd [2005] HCA 22; (2005) 79 ALJR 975

Cliffs West Australian Mining Co Pty Ltd v The Association of Architects Engineers Surveyors and Draftsmen 58 WAIG 1067

Csomore and Another v Public Service Board of NSW (1986) 10 NSWLR 587

Independent Education Union of Australia v Canonical Administrators, Barkly Street, Bendigo and Others (1998) 157 ALR 531

Inland Revenue Commissioners v. Duke of Westminster[1936] AC 1; [1935] All ER 259; 19 Tax Cas 490; 104 LJKB 383

Jones v Dunkel (1959) 101 CLR 298

Kidd v Savage River Mines [1984] 6 FCR 398

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

Parsons v Martin (1984) 58 ALR 395

Potter v Minahan (1908) 7 CLR 277

Sargood Bros v Commonwealth (1910) 11 CLR 25

Totalisator Agency Board v Federated Clerks' Union of Australian Industrial Union of Workers (WA) 60 WAIG 624

Reasons for Decision

SCOTT CC

Introduction

1 The Director General, Department of Education appeals against the decision of the Commission issued on 13 November 2018 ([2018] WAIRC 00844). In that decision, the Commission found that the Director General's refusal to employ a member of the State School Teachers' Union of WA (Incorporated) (SSTU), Mr Justin Buttery, was unfair. The Commission ordered that upon Mr Buttery presenting himself at the Director General's head office at a specified time the Director General is to offer him a contract of employment as a primary school teacher at a level and salary commensurate with his qualifications and experience. Finally, it ordered that the Director General pay to Mr Buttery an amount reflecting the salary and benefits he would have otherwise earned had he remained employed by the Director General from 2 October 2017 to the date of the acceptance of any offer of employment by Mr Buttery, less any income received from other employment over the same period. The sum was to be paid to Mr Buttery within seven days of any acceptance by him of an offer of employment.

Background

- 2 Given the scope and nature of the grounds of appeal, it is necessary to set out, in some detail, the history of this matter.
- 3 Mr Buttery commenced employment with the Department of Education (the Department) as a teacher in January 2008. On or about July 2011, he started work as a teacher at Greenfields Primary School (the school).
- 4 In 2016, Mr Buttery taught a split class of Year 2 and 3 students, who were aged between seven and nine. There was a 'buddy-class' in the classroom next door.
- 5 A particular student, referred to in the reasons for decision at first instance as S, was in Year 4 in 2016. He suffered from attention-deficit hyperactivity disorder (ADHD) but, at that time, was not taking medication.
- 6 On 31 August 2016, an incident arose between Mr Buttery and S. In the briefest terms, S had been in his usual class and was disruptive. He was sent to Mr Buttery's classroom, which was his buddy class, where he was again disruptive. S then left Mr Buttery's classroom in an angry state. Ms Patching, the Deputy Principal, came to take S to the principal's office. But first, S went back into Mr Buttery's classroom to collect his book. He entered swiftly. Mr Buttery was teaching students who were sitting on the floor. S entered without knocking, proceeded across the room and was stopped when Mr Buttery shouted at him and grabbed him at the front of the shirt. There was dispute as to whether S was pushed against a bookcase or dropped to the ground. Two people, Ms Patching and Ms Draper, a Special Needs Assistant, each witnessed part of the incident.
- 7 Arising from that incident, in early September 2016, Mr Buttery was charged with one count of common assault in circumstances of aggravation pursuant to the *Criminal Code* (WA) (the criminal charge).
- 8 By letter dated 3 November 2016, the Director General directed Mr Buttery, pursuant to s 240 of the *School Education Act 1999* (WA), to not attend the school or any other state government school until further notice. The letter also advised Mr Buttery that the Director General would conduct an investigation into the incident.
- 9 On 8 November 2016, Mr Buttery was issued with an Interim Negative Notice (INN) pursuant to the *Working with Children (Criminal Record Checking) Act 2004* (WA) (WWC Act). An INN prohibits the recipient of the notice from being engaged in child-related work.
- 10 On 10 November 2016, Mr Buttery's registration as a teacher, pursuant to the *Teacher Registration Act 2012*, was cancelled by the Teacher Registration Board of Western Australia (TRB), because he had been issued with an INN.
- 11 By letter dated 11 November 2016, Mr Cliff Gillam, Executive Director, Workforce, for the Department of Education (the Department) notified Mr Buttery that it had been advised that he had been issued with an INN; that he had repudiated his employment contract by reason of the INN; his employment record had been marked as not suitable for re-hire in child-related

work, and, accordingly, his employment was terminated with immediate effect. The marking of the file is referred to in the proceedings at first instance as being 'red-flagged'.

- 12 By letter dated 25 November 2016, the Department notified Mr Buttery that in the circumstances, there was no reason to continue to investigate the incident.
- 13 The INN did not become final and Mr Buttery was issued with an Assessment Notice on 21 December 2016. The effect on an Assessment Notice was said by the SSTU to remove any restriction on Mr Buttery's working with children.
- 14 In a letter to Mr Buttery dated 4 January 2017, the TRB informed him that the Department for Child Protection and Family Support, Working with Children Screening Unit had informed the TRB that, he had been issued with an Assessment Notice and was permitted to carry out child-related work. His registration as a teacher had been reinstated effective 4 January 2017 as s 27(3)(b) of the *Teacher Registration Act 2012* required it to be reinstated in those circumstances.
- 15 On 24 January 2017, the SSTU wrote to Mr Gillam seeking that Mr Buttery be reinstated to his position. By letter dated 3 February 2017, Mr Gillam advised the SSTU that the Department was unwilling to reinstate him, noting that Mr Buttery still faced the criminal charge.

The application

- 16 On 21 February 2017, the SSTU brought an application under s 44 of the *Industrial Relations Act 1979* (IR Act), application number C10 of 2017, seeking, in effect, that the Director General reinstate or re-employ Mr Buttery effective from 5 January 2017.
- 17 The Commission convened conferences in relation to the application. The SSTU sought interim orders that Mr Buttery be reinstated or re-employed.

First Interim Orders decision

- 18 Commissioner Matthews delivered reasons for decision on 2 May 2017 ([2017] WAIRC 00241; (2017) 97 WAIG 564), which dealt with a jurisdictional issue, but did not finally determine the matter. However, the learned Commissioner said that if he had power to make the orders sought, he would not do so because, at that time, Mr Buttery was facing the criminal charge.

Further request to re-employ

- 19 On 19 June 2017, the criminal charge against Mr Buttery was discontinued. The next day, the SSTU wrote to the Director General. The letter is referred to as the 'without prejudice letter'. It was headed "RE: Mr Justin Buttery – C 10 of 2017", and commenced by briefly setting out the background and noting that:

In summary then the current circumstances are such that Mr Buttery holds the necessary qualifications and clearances enabling him to be employed as a teacher for the Department in child-related employment.

In formalising the present request on behalf of Mr Buttery, the union hereby requests the reinstatement or reemployment of Mr Buttery by the Department at your earliest convenience, as it is just and fair to do so.

- 20 Under the heading 'C 10 of 2017 – WITHOUT PREJUDICE – OFFER TO SETTLE', the letter then proceeded to set out a detailed proposal for reinstatement or re-employment; to 'make good' his lost pay; that certain leave be re-credited to him; that his service be recorded as continuous, and that his employment record be amended to reflect his eligibility to be employed in child-related work. The letter then dealt with the issue of the alleged 'repudiation' referred to in Mr Gillam's letter of 11 November 2016, and the effect of the situation on Mr Buttery.
- 21 By letter dated 5 July 2017, Mr Mike Cullen, Director, Standards and Integrity of the Department responded to the SSTU and advised that the Standards and Integrity Directorate would now commence a disciplinary investigation into Mr Buttery's conduct on 31 August 2016. He noted the endorsement on Mr Buttery's employment record that he was not suitable for future employment with the Department, and that his 'employment status with the Department will not change during this disciplinary matter'.
- 22 On 14 July 2017, the Commission convened a conference at which the SSTU applied to the Commission for interim orders for Mr Buttery's reinstatement pending the outcome of the disciplinary investigation.
- 23 Paul Douglas Milward, Principal Investigator of the Standards and Integrity unit of the Department assisted in preparing a briefing note (Exhibit A7) in relation to the SSTU's request (Exhibit A6 - Affidavit of Paul Douglas Milward). In his affidavit, he said that in the briefing note, he recommended that the request be declined; that 'although a full investigation was still underway, based on information currently held by the Department I did not consider that Mr Buttery was suitable for employment in his former role'. Mr Milward continued that, '(t)he reason he was not suitable is because of the evidence of unnecessary and inappropriate physical contact with a year four student'.
- 24 Mr Milward's recommendation was adopted when, by letter dated 20 July 2017, the Director General wrote to Mr Buttery, care of the SSTU, saying that she had carefully considered the application, however, she rejected the proposal to reinstate Mr Buttery's employment or salary.
- 25 The Director General continued with and concluded the disciplinary investigation. By letter dated 2 October 2017, the Director General advised Mr Buttery that she was satisfied that he had acted in a manner 'inconsistent with the Code of Conduct'; that he had engaged in excessive physical contact with a student; that his employment record would remain marked 'not suitable for future employment by the Department of Education'; imposed a reprimand, and advised him that if he felt aggrieved by the decision, he could appeal to the Commission.

Second Interim Orders decision

- 26 In July 2017, the SSTU applied for orders that Mr Buttery be reinstated or re-employed on an interim basis pending the final hearing and determination of the substantive claim. That claim was that Mr Buttery was harshly and unfairly denied re-employment following the termination of his employment as a consequence of an INN being issued under the WWC Act.
- 27 Senior Commissioner Kenner heard and determined that matter on 18 August 2017 (2017 WAIRC 00737; (2017) 97 WAIG 1497). The first issue was the Commission's jurisdiction and whether s 23(2a) and s 80E(7) of the IR Act excluded the Commission from dealing with the matter, on the basis that there is a public sector standard issued by the Public Sector Commissioner under the *Public Sector Management Act 1994* (the PSM Act) which deals with the matter, the subject of the dispute.
- 28 The learned Senior Commissioner noted that he considered the terms of the Employment Standard (the Standard) in the *Western Australian Prison Officers' Union of Workers v The Minister for Corrective Services* [2014] WAIRC 00313; (2014) 94 WAIG 581. In that matter, he observed that the Standard, in its terms, 'applies when filling a vacancy ...' (paras 1 and 2 of the Standard) [39]. The Standard contains principles dealing with merit, equity and interest. He said that the references under the Merit Principle of the Standard to 'a competitive field', 'outcomes sought' and the 'work-related requirements' could 'only sensibly be understood as referring to the requirements of a vacant position sought to be filled by the employer'.
- 29 The learned Senior Commissioner had examined the Equity and Interest Principles of the Standard as they appear to relate to transfer and said, '(t)he overall sense of this provision seems to be directed towards some matching of the transferee's interests with the requirements of the position into which they may be transferred' [40].
- 30 The learned Senior Commissioner had then proceeded to examine the other parts of the Standard and said that, '(t)he conclusion is compelling, that on its ordinary and natural meaning, the standard is a legislative instrument, directing public sector bodies that where they need to fill a vacancy in their organisation, they are obliged to do so in the manner set out in the Employment Standard ...' [43].
- 31 The learned Senior Commissioner then proceeded to note that the claim before him was characterised as a refusal to reinstate or re-employ Mr Buttery. He found that Mr Buttery's removal as a teacher was as a consequence of the effect of s 22 of the WWC Act and that the respondent's actual reason for dismissal was the issuance of the INN [33]. What the applicant sought was that Mr Buttery be re-employed, related to his former teaching position; that there is no evidence of, or suggestion that, Mr Buttery was required to participate in a merit selection process in relation to the 'filling of a vacancy'. He found that the terms of the Standard were to be read with and understood as part of procedures for filling vacancies in the public sector [34].
- 32 The Senior Commissioner then distinguished this matter from other cases involving teachers. He noted that the dispute in the present case is plainly between the SSTU and the Director General about Mr Buttery's re-employment as a consequence of the termination of his employment resulting from s 22 of the WWC Act, and the Director General's refusal to employ. The Senior Commissioner said, '(t)he respondent has plainly made a decision that it does not wish to employ Mr Buttery any further' [38].
- 33 The learned Senior Commissioner concluded that '(t)he matter before the Commission concerns an industrial dispute between the applicant and the respondent, in relation to an industrial matter concerning the fairness of Mr Buttery's removal as a teacher from his school and the refusal of the respondent to re-employ him. On any view of this case, the circumstances of his removal and the claim for re-employment, are inextricably linked.' He said that this matter was distinguishable from *Director General, Department of Justice v Civil Service Association of Western Australia Incorporated* [2005] WASCA 244; (2005) 86 WAIG 231 (*Jones*), and *State School Teachers' Union of WA (Incorporated) v Director General, Department of Education* [2015] WAIRC 00875; (2015) 95 WAIG 1661 (*Appleton*). He said, 'The Commission's jurisdiction is not excluded, given the terms of s 23(2a) of the Act as explained and applied by the Industrial Appeal Court in (*Jones*)' [40].
- 34 The Senior Commissioner went on to deal with the powers of the Commission to make interim orders under s 44(6)(bb) and then the merits of the matter. He concluded that s 44 did not provide the Commission with the power to make the orders sought and issued a decision '(t)hat the application for interim orders be, and is, hereby dismissed', ([2017] WAIRC 00738; (2017) 97 WAIG 1507).

The outcome of the investigation

- 35 A report of the investigation was concluded by Senior Investigator, Mr Tony Belshaw, on 3 August 2017. By letter dated 18 August 2017, the Director General informed Mr Buttery that she had formed a preliminary view that he had committed a breach of discipline and was inclined to issue him with a reprimand. She noted that his employment record would be endorsed 'Not suitable for future employment by the Department of Education'.

The matter referred for hearing and determination

- 36 On 12 March 2018, the Commission referred the matter for hearing and determination pursuant to s 44(9) of the IR Act. The schedule to that referral is very lengthy. I do not intend to recite all of those terms. However, they set out some of the background referred to above. The SSTU's contentions were set out in relation to two separate periods, the first being the period of Mr Buttery's 'non-employment' from January 2017, when the INN was removed, the Assessment Notice issued and the teacher registration reinstated, to 2 October 2017, when the outcome of the investigation was known. In regard to this period, it contended that the termination of Mr Buttery's employment on 11 November 2016 was unnecessary and unfair; that the respondent ought to have looked for other alternatives; that Mr Buttery ought to have been re-employed when the circumstances which brought about his dismissal changed in January 2017, and that he ought to have been on paid suspension pending the outcome of the criminal and/or internal disciplinary matters. It said Mr Buttery was denied natural justice in the refusal to reinstate him on 2 October 2017, and therefore he ought to receive back-pay and/or compensation for the period of non-employment ended 2 October 2017.

- 37 In relation to the second period dealing with the respondent's letter of 2 October 2017, the SSTU contended that the letter of that date constituted a further and final refusal to employ Mr Buttery; and that the investigation was flawed and did not warrant a finding of misconduct. It sought that the Commission make findings about the conduct and whether that would otherwise justify termination of employment.
- 38 The SSTU sought orders for reinstatement or re-employment and payment for income lost by Mr Buttery from 21 February 2017 until the date of reinstatement. In the event that the Commission found that Mr Buttery had engaged in misconduct sufficient to justify termination of employment, the SSTU sought an order that the Director General pay Mr Buttery for loss of income and superannuation from 21 February 2017 until 2 October 2017.
- 39 The SSTU also sought that the Commission consider a range of questions about the circumstances in the classroom on 31 August 2016 and whether Mr Buttery was denied procedural fairness.
- 40 The Director General's response included that the provisions of the WWC Act excluded any remedy being available. The issues the Director General said ought to be determined related to the questions of a refusal to employ and fairness. The Director General also denied that having refused to employ Mr Buttery on any occasion from 16 January 2017 to 3 February 2017. The Director General contended that the Commission had no power to award compensation absent on legal entitlement; that there was nothing unfair in the refusal to employ Mr Buttery in circumstances where he was facing criminal charges; and that there was no prima facie right to an order for employment where the Commission finds that a refusal to employ is unfair.

The hearing

The SSTU's case

- 41 The SSTU said that there were at least four requests to reinstate or re-employ Mr Buttery. Two of those were acknowledged by the Director General. The third was made in the SSTU's letter of 20 June 2017. The first part of the letter contained a bare request for re-employment and the SSTU says that the second part, under the heading 'Without prejudice', contained an offer to settle.
- 42 A response to a fourth request was made in an email exchange of 7 August 2017 between then-counsel for the Director General and the Senior Commissioner's Associate and copied to the SSTU's Mr Amati (Exhibit A1).
- 43 The SSTU called evidence, including about the incident, from Mr Buttery; Robert Gordon Ransley, the Manager, Corporate Services at the school; Dorothy Catherine Draper, the Special Needs Assistant who witnessed most of the interaction between Mr Buttery and S, and Lance Bradley Gunn, a teacher at the school who had experience in dealing with S.
- 44 The Director General said that it was not appropriate for the Commission to make determinations about the incident, that they had been the subject of the investigation and in the circumstances of the jurisdictional impediments, and the Commission could not overturn them.
- 45 However, the learned Senior Commissioner noted it is the Commission that refers the matter for determination and its terms are determined by the Commission, in accordance with s 44(9) of the Act and he would need to consider those matters.

Application to dismiss under s 27(1)(a)(ii) or (iv)

- 46 At the conclusion of the SSTU's case, the Director General made an application under s 27(1)(a) that the proceedings be dismissed as being not necessary or desirable in the public interest or for any other reason. The basis of the submission was there was no remedy available to the SSTU in light of the evidence that had been led by it; that it was now not open for the Commission to find that it was practicable for Mr Buttery to be employed, and as a matter of law absent an employment relationship, compensation is not available. The Director General referred to the decision of the Industrial Appeal Court in *Robe River Iron Associates v Association of Draughting, Supervisory and Technical Employees* (1988) 68 WAIG 11 (Pepler) and *Kounis Metal Industries Pty Ltd v Transport Workers Union of Australia, Industrial Union of Workers, Western Australian Branch* [1992] 45 IR 392 (Kounis) at (402) – (403), per Owen J. The Director General said that the Commission's jurisdiction rested on the present or future existence of an employment relationship. Unless the relationship actually existed or was expected to come into existence in the future, the element of an industrial matter was missing. Therefore, it was not possible to order freestanding compensation. The Director General said that there was no doubt the Commission had jurisdiction to deal with a refusal to employ but there is no power to award compensation absent an order for employment. The Director General argued that reinstatement or re-employment was impracticable.
- 47 The Director General's second point of principle was that it was impracticable to order re-employment if there has been the destruction of the necessary mutual trust and confidence. She referred to the decision in *Public Transport Authority of Western Australia v The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch* (2016) WAIRC; (2016) 96 WAIG 408 (Vimpany) at [106] and *Nguyen v Vietnamese Community in Australia trading as Vietnamese Community Ethnic School South Australia Chapter* [2014] FWCFB 7198.
- 48 It was submitted that Mr Buttery's uncontested evidence demonstrated his loss of confidence in the administration team at Greenfields Primary School, yet he wanted only the position at that school.
- 49 The Director General said that this meant that it was not practicable for Mr Buttery to be returned to his position. In those circumstances, the Director General said that there was no relief available other than a declaration.
- 50 The Director General confirmed that she is the employing authority, and the employer of teachers, under the PSM Act, not the individual school (AB 631).
- 51 The SSTU said that what it sought was the renewal of the legal relationship between the employing entity and Mr Buttery, whether it be at Greenfields Primary School or to some other position within the Department. The Department is a very large organisation. The fact that relationships at the Greenfields Primary School are at a low ebb did not meet the test for impracticability.

- 52 The SSTU noted that the Director General's argument that, absent an employment relationship, there could be no compensation or other remedy had been overtaken by amendment to the IR Act by the *Industrial Legislation Amendment Act 1995*, Part 6, with the insertion of s 7(1a).
- 53 The Senior Commissioner said that he was not persuaded to dismiss the matter pursuant to s 27(1)(a) at that point, as he was not satisfied as to the impracticability argument, given the stage the proceedings had reached.

The Director General's case

- 54 In the Director General's opening submissions filed on 12 June 2018, the matter of the exclusion from the Commission's jurisdiction by s 23(2a), which was rejected in the Second Interim Orders decision, was re-agitated. At 16.3 of that submission, by the identification of one of the issues for determination being 'is the present matter excluded from the Commission's jurisdiction by virtue of s 23(2a) of the IR Act?', the submission asserted that the learned Senior Commissioner would affirm his view in relation to s 23(2a) but said that one consideration was not brought to his attention in the interim orders hearing. The submission went on to examine the statutory scheme of the IR Act; the provisions of s 97(1)(a) of the *Public Sector Management Act 1994* (PSM Act); the Standard and the case law. It noted that 'a vacancy' for the purposes of the Standard includes the creation of a new office, and concluded that the Arbitrator's jurisdiction was excluded in respect of that matter, being the matter of 'the breach of a very broad standard relating to the appointment of employees', per Wheeler and Le Miere JJ at [53] – [54] in *Jones*.
- 55 The submission examined the Senior Commissioner's comments in the Second Interim Orders decision at [34] and [40], where the Senior Commissioner referred to the Employment Standard dealing, in this particular case, with 'the filling of a vacancy'. It argued that the learned Senior Commissioner, in these observations, failed to take into account the definition of 'vacancy' within the Standard. It says that "(a) 'vacancy' can be created by the 'creation of a new office' or the temporary or permanent movement of another employee from an office" [59].
- 56 It proceeded to argue that '(t)he *only* way the respondent could have acceded to (a request for Mr Buttery to be employed in his former teaching position) would have been to move the another (sic) employee from Mr Buttery's former position in order to create a vacancy. Upon the vacancy being created, the respondent would have been obliged to comply with the Employment Standard if it wished to employ Mr Buttery in the role' [60]. It said that '(a)ccordingly, the present matter *is* covered by the Employment Standard because of what the applicant wanted the respondent to do – that is, employ Mr Buttery (necessarily into a vacant position, even if that required creating a vacancy).' To employ Mr Buttery without complying with the Standard, and the related 'Commissioner's Instruction No 2: Filling a Public Sector Vacancy', the Director General would act unlawfully. An order of the Commission requiring the Director General to employ Mr Buttery could only be achieved by appointing him to a vacant position (or creating a vacant position in which to appoint him). This would require compliance with the Standard.
- 57 Therefore, the Director General again put to the Senior Commissioner in the substantive proceedings at first instance, that the Commission's jurisdiction was excluded by s 23(2a) of the IR Act 1979.
- 58 The Director General presented evidence through Anthony Eric Belshaw, a senior investigator in the Standards and Integrity directorate of the Department, and Lucinda Maxine Barnard, Director, Staff Recruitment and Employment Services in the Department.

Mr Belshaw's evidence

- 59 Mr Belshaw undertook the investigation. At the time he undertook the investigation, Mr Belshaw had been a Senior Investigator in the Department since September 2016 and had previously been employed as a police officer in England and then briefly in Western Australia. He gave some evidence about his qualifications and his knowledge of interviewing children.
- 60 In cross-examination, he said that he was new to this type of investigation, having been in the role for approximately two months. He had not previously investigated any matters involving physical contact between a teacher and a student.
- 61 He agreed 'from a forensic point of view, that repeated interviewing is well known to have the effect of distorting people's memory' (AB 524) and the lapse of time from the incident to the interview meant that the account 'is going to be tainted' (AB 524). The number of times that S had been interviewed; the length of time between the incident and the interview, and the influence of others on S during that time, affected the quality of what he said to the investigator.
- 62 Mr Belshaw could not recall if he had discussed the issue of the reliability of S's evidence with Mr Milward (AB 525).
- 63 Mr Belshaw also agreed that it was important not to ask leading questions, that because children can be easily led, they will often agree with someone they see as powerful, such as a police officer or an investigator. However, S was asked leading questions. He acknowledged that some of S's answers suggested the possibility of adult influence, such as S's use of the word 'insult'.
- 64 Mr Belshaw accepted the account of the incident provided by Ms Patching because her interviews with him and with the police were consistent. Ms Patching's account was more detrimental to Mr Buttery than Ms Draper's account. Ms Draper's account conflicted with her police witness statement so he rejected her account. Mr Belshaw thought that there was a collegial relationship between Ms Draper and Mr Buttery and she was protecting him in some way, even though there was no particular evidence to support this. He said he could not see any way of explaining the differences between her statement to the police and to the investigators. On that basis, Mr Belshaw completely discounted Ms Draper's evidence, finding that it was unreliable.
- 65 He accepted that the description of Ms Patching's evidence as containing very emotive language and colourful expressions including the use of the word 'hysterically' in describing Mr Buttery shouting at S when she had sent S into Mr Buttery's classroom to retrieve his book; and that Mr Buttery was 'red in the face, shaking with saliva on his face and 'out of control''. Mr Belshaw rejected the proposition that Ms Patching's comments ought to be seen as her acknowledging that she had made a

- mistake in not accompanying S into Mr Buttery's classroom when S's behaviour had been very challenging that morning, and that she needed to go in and correct it.
- 66 Mr Belshaw disagreed that the use of the term 'in a very aggressive manner' to describe the way Mr Buttery was holding S's shirt and twisting it up under his chin was an exaggeration.
- 67 Ms Patching had described how S had almost stood on his tiptoes and was near to an L-shaped bookcase in the front corner of the room near her location to the door. Mr Belshaw agreed that the use of the term 'almost stood on his tiptoes' implied that S was being held up to the point where he could not touch the floor with his toes. Mr Belshaw also accepted Ms Patching's evidence that when she came into the room, she believed that S had been pushed back by Mr Buttery but that the pushing back allegation could not be substantiated.
- 68 Mr Belshaw also accepted that 'the incident left Ms Patching feeling really shocked, describing that she would be greatly concerned if Mr Buttery was ever employed working with children again', and he agreed.
- 69 Mr Belshaw said in his report that '(t)he evidence provided by S, Ms Patching and Ms Draper corroborates that S's behaviour was not significantly aggressive at the time he entered Mr Buttery's class.' Yet he acknowledged that in his interview, S had said he was a bit angry when he came into the classroom, but that Mr Belshaw said that his review of the evidence indicated that S was not displaying any significant aggression. He said that, notwithstanding that S had initially said that he 'barged into room', Mr Belshaw then said in his report that '(i)t is probable that S opened the door with some degree of excessive force. However, it is likely this was carried out due to S's excitement to retrieve his book and make his way to the school office with Ms Patching.'
- 70 It was put to Mr Belshaw in cross-examination that the use of the term 'excitement' was a complete misreading of the situation given that the reason that S was going to attend the school office with Ms Patching was because his behaviour had been problematic even before he had gone into Mr Buttery's classroom to retrieve his book. Mr Buttery's statement had included that he had heard a commotion from the classroom next door in which he identified that it was being caused by S. Mr Belshaw said he accepted Ms Draper's word 'excitement'.
- 71 In respect of the allegation of Mr Buttery having pushed S and hurt his back, Mr Belshaw noted in his report that S's mother had taken him to the doctor but there was no medical evidence of any injury to his back. Mr Belshaw acknowledged that it was probable that if S had been held underneath his chin in a very aggressive manner, holding him up so that S was almost standing on tip-toes, that it might be expected that S might be hurt around the neck or head area. However, the complaint of back pain, resulting from S saying that he had been pushed into a bookstand, was not consistent with the prospect that there might be bruising around his chin and that this was never explored. Mr Belshaw agreed that it would have been worthwhile to enquire as to whether or not there was any injury on the S's neck. He had not dealt with that because the account from the S's mother was in relation to the S's back.
- 72 As noted earlier, Mr Belshaw rejected Ms Draper's evidence. She said that S had suddenly dropped to the floor. Ms Draper also said that she believed that S did not appear to be happy with having to go to the office with Ms Patching and ran from his class through the internal door straight back into Mr Buttery's classroom. Mr Buttery was in the middle of teaching his students, some of whom were sitting on the carpet in front of the smart board in the path of where S was running. Ms Draper had said that upon being grabbed by Mr Buttery, S cried out in shock before he dropped to the ground in front of the smart board.
- 73 Mr Belshaw concluded that as Ms Draper had had time to reflect between the two statements, she chose to change her evidence to protect Mr Buttery. However, he did not put that to her, nor did he put to Ms Draper that she had deliberately misled the investigation in order to protect a colleague. Mr Belshaw asked Ms Draper why her police statement was different to the account that she had given to the investigators. He and Mr Milward decided not put to her that she had deliberately misled the investigation. Mr Belshaw said he consulted his manager, Mr Davis, 'regarding lies' but made no note of it and nothing was done about it.
- 74 Mr Belshaw also acknowledged that the briefing note to the Director General regarding the investigation made no reference to Mr Buttery's account of the circumstances and mitigation. He said that the investigation report had already included this information, and he had not drawn any attention to it in the briefing note. Mr Buttery's employment record of over eight years with the Department and a lack of any disciplinary enquiries or concerns was not referred to in the briefing note and was not put to the Director General for her consideration in making her decision. He acknowledged that in retrospect Mr Buttery's employment record might have been a factor that ought to have been brought to her attention.
- 75 Mr Belshaw also acknowledged that all accounts of the incident suggested that it took place over a few seconds; that S was extremely difficult to manage; that he was disruptive on the day, and that Mr Buttery in particular knew that S was capable of pushing furniture around, being violent and generally disruptive in his classroom.
- 76 Mr Belshaw also acknowledged that the red-flagging of Mr Buttery's employment record was not an outcome of a disciplinary enquiry available according to Commissioners Instruction No. 4.
- 77 Mr Belshaw did not recall Mr Buttery ever saying that he was sorry for what happened or showing any indication that he believed that he may have been at fault in any way whatsoever, however he could not recall if he asked Mr Buttery that or not.
- 78 It became clear during the hearing that there had been no written statement by S. There was a recording of the interview with him but there was no transcript. A copy of the recording was provided to the Commissioner, however, some parts of the recording were said to be hard to make out. A transcript of S's interview with the police on 29 September 2016 was attached to Mr Belshaw's statement.

Ms Barnard's evidence

- 79 Ms Barnard gave detailed evidence about the processes adopted by the Department, through school principals, to fill vacancies in teaching positions. She said that the Director General had delegated her authority to engage, transfer and otherwise manage the members of the teaching staff to all school principals, Regional Executive Directors and the Executive Director Workforce.
- 80 Ms Barnard described that when a principal decides that teaching staff need to be recruited to fill a vacancy or recruit new teaching staff for a school, the Department's '5 Step Staff Process' [LMB1] is used. The '5 Step Staffing Process' refers to 'if there is a position to fill'. The principal is required to consider 'internal employees and/or external redeployees' for teacher positions. If a suitable match is found between an internal employee requiring placement and a fixed-term or permanent vacancy, the employee is appointed. If there is no suitable match, the principal proceeds through a variety of processes, depending on whether the principal considers the situation to be one of an increase in hours and not a new position. There are considerations such as whether there is a school-based pool of teachers arising from a previous call for expressions of interest already qualified to be appointed. There may be a graduate pool or a fixed-term pool if no school-based pool exists. The principal may fill a fixed-term vacancy for up to six months without advertising. An assessment of the merit of the individual appointee is required to ensure the person has the required knowledge and skills.
- 81 Ms Barnard said that on 8 May 2018, she accessed the Recruitment Advertising Management System (RAMS), a whole of government online jobs board, which the Department uses to manage vacancies. She examined Greenfields Primary School's recruitments, and determined that:
- a) it does not have a school-based pool;
 - b) when recruiting teachers in the last three years, it had largely used either the Department's fixed-term or graduate pool;
 - c) in 2015, it advertised to fill a permanent teaching position on two occasions; and
 - d) in February 2017, it advertised a permanent teaching position and received 59 applications for the position.
- 82 While she had no involvement in the decisions that were made about Mr Buttery in 2016/17, Ms Barnard's evidence about the respondent's practices and arrangements was that the respondent is able to re-employ Mr Buttery without breaching Public Sector Standards.
- 83 Ms Barnard gave evidence that there are approximately 700 schools operated by the Department, approximately 400 of which are primary schools. There are approximately 30,000 teachers including permanent, temporary and fixed-term contract teachers. That includes both primary and secondary school teachers.
- 84 Two new schools were being built in the Mandurah area where Greenfields Primary School is located. Ms Barnard thought that they were due for commencement in 2019 and that the staffing complement of each school was up to the respective principals of the schools. The principals have a significant degree of discretion in terms of the allocation of their budgets and who is employed.
- 85 Ms Barnard described the difference between being employed and holding a permanent position. She said that it is possible to be employed and to be on leave or not hold a permanent position during that time. An example would include maternity leave where the teacher still holds the permanent position but is on leave. She confirmed that it was common for permanent positions to be held by someone who is on maternity leave or long service leave.
- 86 She said that where a position was made redundant and the person holding that position is surplus to requirements, the person continues to be employed by the Director General. There were between 300 and 400 redeployees on average at any given time. They are placed in various situations across the system. They are placed by the section in which Ms Barnard is employed, the Workforce Directorate, on the basis of need and qualifications.
- 87 Ms Barnard also gave evidence that she was familiar with the situation of a teacher formerly employed by the Department, Ms Hislop, who was the subject of an order of reinstatement pursuant to a decision of the Commission. Her section would have been responsible for finding the placement for Ms Hislop.
- 88 When, for any number of reasons, a person requires placement, the person's details are recorded within RAMS. As schools have vacancies that they need to fill, those vacancies are recorded into RAMS as well. There are case managers who match the employees to the vacancies. Anybody who matches the vacancy in regard to qualifications and location, for example, is referred to those schools. If that school does not select them, then the teacher is referred to another vacancy. In respect of Ms Hislop's reinstatement, Ms Barnard recalled that she was placed in a school and was paid so that she was not left sitting at home.
- 89 If a teacher is not able to be placed through RAMS, they can be placed somewhere else while awaiting a suitable position, according to their qualifications and experience. Ms Barnard gave evidence that the Mandurah area is part of the South Metropolitan Education Region. At the time she prepared her statement, there were 15 surplus primary school teachers requiring placement in that region. That would change from time to time and could be anything between 10 and 30 surplus teachers. Those people find jobs through this system. They are all currently employees of the Department – it is a matter of placing them. They are on the payroll and they are the only people referred through the process that Ms Barnard described.
- 90 In some circumstances, the ED Workforce or the Regional Executive Director may also transfer staff within their area of control. Ms Barnard gave an example of a staff member who may need to be transferred for various reasons and that either the Regional Executive Director or the ED Workforce could 'make that happen' (Appeal Book, 645).

- 91 Ms Barnard also gave evidence about the Department's practice of red-flagging a former employee's employment record. She said it is a complete prohibition on future employment. The flags are not regularly reviewed by the Department but reviewed on application by an individual, the subject of a flag. The Employment Suitability Assessment Committee reviews cases on request. The review will take account of the reason why the flag was put on in the first place; how long ago this occurred and what may have changed since the placement of the flag. The Committee reviews between two and 10 requests per month and upwards of 50 per cent are cleared. The Committee makes a recommendation to the Executive Director of Workforce and if the flag is removed, the individual is then advised of the Committee's decision. If the flag is lifted, the individual is entitled to apply and be considered for employment.
- 92 Ms Barnard gave evidence that where a former employee of the Department makes an application to a non-government school or an educational institution outside of the Department of Education, those prospective employers do not make enquiries of the Department concerning whether or not there is a red flag and the Department treats that information as confidential. The Department provides statements of service for former employees who are looking for work outside of the State education system, including those who have a red flag on their record, but the flag is not disclosed.
- 93 Ms Barnard also explained the breach of Standard claim process. Such a claim is available where a vacancy is advertised. However, if an appointment is made from an existing pool of teachers, a claim of breach of standard is not available to the individual at that point. If there is a permanent position which is vacant in a school, it can be filled by 'whatever process is being used' and others who feel they ought to be considered can make an application. If the position is filled through advertising, they can make an allegation of breach of standard. If it is filled from a pool, the breach of standard process applied at the earlier stage.
- 94 It would appear that the breach of standard provisions applies when a teacher seeks to be included in a pool for potential employment or to take up a permanent position which is vacant. It does not apply where a teacher who was already part of the pool is deployed and appointed to a particular position.
- 95 In reverting to the issue of a person's file being red-flagged, Ms Barnard said she was not sure of where the power came from for the Department to place a flag on someone's record. However, she said that the suitability and eligibility assessment of an employee for a particular job is undertaken through the PSM Act provisions and the Commissioner's Instructions.
- 96 That concluded the evidence called by the parties and they proceeded to make submissions.

Closing submissions

The Director General

- 97 The Director General referred to the decision of the Industrial Appeal Court in *Charles Brett v Sharyn O'Neill, Director General, Department of Education* [2015] WASCA 66; (2015) 95 WAIG 429 (*Brett*) that an employer would not be in breach of the *WWC Act* if it continued to employ an employee who had received an INN provided the employee was not working with children. However, if the employer dismissed the employee for the reason that the employee was the subject of an INN, the employee could not obtain a remedy for the dismissal, that is, the employer is not obliged to consider alternatives to dismissing the employee. That alone provides the employer with protection from the employee obtaining a remedy. The Director General pointed out that the Senior Commissioner had found in the Second Interim Orders decision that Mr Buttery was dismissed because he had been issued with an INN.
- 98 The Director General also said there is no jurisdiction in relation to the refusal to employ because of s 23(2)(a) of the *Industrial Relations Act*. The Director General said notwithstanding that that had been dealt with in the Second Interim Orders decision, it may still be argued on the basis that jurisdiction is always at large and a party cannot be estopped from raising jurisdiction. Secondly, the Second Interim Orders decision was made before the Memorandum was settled and the Memorandum sets the boundaries of the dispute. So the issue may be raised at that stage, as the boundaries of the dispute for determination had been set.
- 99 The third reason was that there is no absolute right of appeal from an interim decision and it needed to be a public interest for it to be appealed at that point. The Director General says it was not estopped from pursuing the argument on appeal.
- 100 The Director General also said that Mr Buttery did not make an application for employment. If the Director General were to accede to the requests by the SSTU on Mr Buttery's behalf to employ him, the Director General would have had to create a vacancy in order to put him into any role or would have to find a vacancy that already existed. On either approach, the Employment Standard applies, particularly noting that the definition of 'vacancy' in the Standard includes within it a creation of the new position.
- 101 The Director General also said there is no power for the Commission to reinstate outside of an unfair dismissal claim and is not a remedy available in the case of an unfair refusal to employ.
- 102 To the extent that there were refusals to employ, the Director General said that there were only two and they occurred in January and February 2017, prior to the s 44 application being made. At the time Mr Buttery was subject to the criminal charges. The Director General said that these refusals were not unfair because at the time Mr Buttery was still facing the criminal charges arising out of the incident. Even taking into account the presumption of innocence, it was reasonable and not unfair to refuse to employ Mr Buttery, as acknowledged by Commissioner Matthews in the First Interim Orders decision (2017 WAIRC 241 [27] – [29]).
- 103 The Director General submitted that in order to refuse to employ within the meaning of the Act, it is necessary that there be a request or some type of application for the employee to be so employed. There does not need to be a formal application to an advertisement but there needs to be some form of request to be employed. No authority has dealt with a situation where a refusal to employ has been considered without there having been some sort of demand, application or request for employment or some previous promise that was broken, such as in the *Board of Management, Princess Margaret Hospital for Children v*

Hospital Salaried Officers' Association WA (1975) 55 WAIG 543. There was no other evidence of a request for employment save for the disputed 'without prejudice' letter which the Director General dealt with later.

- 104 The refusals up to that point were not unfair because neither Mr Buttery nor the SSTU on his behalf applied for an advertised position. According to the Director General, Ms Barnard's evidence was that external applicants are required to go through an application process unless the position is filled through a pool. Otherwise, there is a requirement for advertising and a merit selection process. The Director General said it would be unfair to all other applicants for teaching positions with the Department if Mr Buttery could side-step the usual process for filling positions and come through the back door, so to speak.
- 105 The third reason why the Director General said it was not unfair to refuse the requests was that if the Director General had agreed to Mr Buttery's request for a job without undertaking advertising in a competitive recruitment process, the Director General would have acted contrary to s 9(a)(ii) of the PSM Act by acting contrary to Commissioner's Instruction No. 2.
- 106 The Director General said that there were no further refusals. The only evidence that could establish a request for a job is a letter dated 20 June 2017 which the Director General said was a 'without prejudice' communication. It came after the First Interim Orders application was determined but before the second. It was during the process of the negotiations relating to the s 44 application. The terms of the letter, read in context, constituted a 'without prejudice' offer by the SSTU, with a number of terms or conditions, for Mr Buttery's reinstatement or re-employment. There was no bare request for employment separate to those terms. Those terms included, amongst other things, that Mr Buttery receive backpay for the period including when he was subject to the INN and not entitled as a matter of law to work with children and therefore to teach.
- 107 According to the Director General, the Commission cannot act upon the evidence contained in the without prejudice letter because its proper context is that it was a request made with a view to resolving proceedings on foot and the proper characterisation of any refusal was a refusal to accept an offer of settlement, and not a refusal to employ within the meaning of the Act. The Director General referred to *Norwest Holst Group Administration Ltd v Harrison* [1985] ICR 668, a decision of the English and Wales Court of Appeal where the Court considered whether an employee's purported acceptance of a repudiation by the employer by way of a letter headed 'without prejudice' amounted to an acceptance of the repudiation. Lord Justice Cumming-Bruce at 679 observed:
- The effect of heading the letter (Without Prejudice) was to communicate to the recipient that the letter was to be regarded as a commencement of a process of negotiation or compromise which is a communication of a very different kind from what is commonly called an open letter stating in black and white the final stance taken upon an issue which has arisen between the parties... That is quite a different stance from taking up an unequivocal position upon which the writer seeks to establish his legal rights.
- 108 The Director General said there was no black and white, unequivocal, request for employment. Rather, the SSTU chose to use the cover of a without prejudice letter to open the lines of negotiation and put an offer which included for Mr Buttery to be employed and for backpay and other terms and conditions. Any response by the Director General to that without prejudice offer can only be regarded as a continuation of that negotiation process and cannot be regarded as the Director General taking an unequivocal position upon which to establish legal rights. For that reason, the Director General said the letter and any response to it cannot be regarded as a refusal to employ.
- 109 The Director General said that while the letter appears to be in two parts, those parts preceding and those following the 'without prejudice' heading, should be read together – that the first part is introductory and the second, setting out 'the terms of reinstatement and re-employment sought', following the 'without prejudice' heading, is a clear reference back to the request for reinstatement and re-employment contained above that heading. The terms are those which the SSTU was putting as part of that proposal to settle. Whilst the Director General acknowledged that the manner in which the letter was drafted was unusual, it would not have mattered if the letter did not use the words 'without prejudice' because 'without prejudice' is determined as a matter of substance. The Director General says that the purpose of the communication is self-evidently an attempt to resolve the proceedings.
- 110 The Senior Commissioner put to the Director General that from the commencement of proceedings, in February 2017, until the point of the hearing 'the (Director General) has resisted the re-employment of Mr Buttery at every turn'. The Director General disagreed that this means that the Director General has refused to employ within the meaning of the IR Act during the relevant period. The Director General says that there has been no demand or request for employment in that time.
- 111 The Director General said that the Commission cannot and should not rely on the 'without prejudice' communications and act on the letter as evidence because it would be unfair to the Director General for the Commission to allow the SSTU to engage the jurisdiction of the Commission and use these proceedings on foot to engage in 'without prejudice' discussions and then deploy those 'without prejudice' communications against the other side. This is against equity and good conscience.
- 112 Even if there was an ongoing refusal, or a refusal after the date of the 'without prejudice' letter, the Director General says that any such refusal still was not unfair. It is not the correct approach to start from Mr Buttery's conduct with S and determine whether dismissal was unfair. That is because at least for the purposes of the question of the refusal to employ, it does not necessarily require consideration of whether his conduct could have sustained a dismissal. The Director General says she simply invoked the protection of s 41 of the WWC Act as far as a remedy is concerned. She does not concede that the dismissal was unfair and did not intend to address why it was not unfair.
- 113 The Director General also said that there is no unfairness for any further refusal for five reasons. The first is that the offer to settle by the SSTU was a 'without prejudice' offer and had a package of conditions attached to it. The Director General had and still has no legal obligation to provide those benefits to Mr Buttery. Even if it could be said that the respondent rejected the offer, the only inference that can be drawn is that the Director General rejected the entire package of conditions. Those conditions included paying Mr Buttery for a period of time when he was subject to the INN and could not have lawfully worked with children, so he could not do the job that he was employed for. He therefore would not have any entitlement to be paid even if he did remain employed.

- 114 The Senior Commissioner asked the Director General's counsel whether the employer would be acting unfairly by dismissing an employee subject to an INN when there may be other possibilities to continue to employ the teacher. Counsel said that as a matter of industrial fairness, the employer probably should consider whether any other jobs are available. However, as long as the dismissal was for the reasons set out in s 41 of the WWC Act, no remedy can flow from a claim of unfair dismissal, in the case of the failure to do so. The unfairness might arise because of the terms of the legislation, the objective of which is the protection of children. This could operate in a harsh way. People's careers could be destroyed, wrongly as it turns out, but the unfairness arises because of the legislation. It does not mean that the Director General's actions were harsh or unfair – they simply occurred in the context of the operation of an act of Parliament.
- 115 The Director General's counsel noted Exhibit A12, a letter from the Director General, sets out changes to her approach to teachers whose employment is terminated on account of an INN. However, counsel for the Director General said that what is contemplated in that letter is quite possibly contrary to the PSM Act in terms of the need to comply with the Standard and the Commissioner's Instruction.
- 116 As to the second reason why any refusal is not unfair, the offer put forward on Mr Buttery's behalf sought his employment in the position that he previously held at Greenfields Primary School. Mr Buttery accepted in cross-examination that the requests were all for that particular position at Greenfields Primary School and it is apparent that that position was filled on a permanent basis on 30 January 2017. It would be unfair to the employee in that position if the Director General were to move that person out of their position and parachute Mr Buttery back into his previous role.
- 117 The third reason is that the Director General would have had to either put Mr Buttery into an existing vacancy or create a vacancy. This could not be done consistently with the PSM Act without advertising and conducting a competitive process.
- 118 The fourth reason was set out in Ms Barnard's evidence, that if the employer was to have acceded to Mr Buttery's request, it would have stepped outside of the established processes for recruitment and that would have been unfair to a large number of prospective employees seeking a job.
- 119 The fifth such reason was that it is reasonable for the Director General to have formed the view that Mr Buttery engaged in conduct that amounted to a breach of discipline by using unreasonable force on a student while he was employed by her. This made it necessary for the Director General to traverse some of the evidential material on this point. The Director General examined Mr Buttery's conduct on the day. Mr Buttery's evidence was that he yelled at S regarding entering a room without permission and asked where his manners were. He did not yell at S about any potential danger he was causing to himself or other students. This demonstrated that Mr Buttery's purpose in grabbing S was that he was not happy that S had entered the room without asking permission. If Mr Buttery was concerned about his own or his students' physical safety and that was the reason why he grabbed S, he would have been put in his contemporaneous email to Mr Wright.
- 120 In respect of the investigation report, there was evidence that S was troublesome for a number of reasons. The evidence of Ms Draper was that she did not see the initial part of the interaction between Mr Buttery and S until the point where Mr Buttery was holding S. It is unclear whether or not Ms Draper's original statement is now to be read as suggesting that she had seen the earlier parts of the incident.
- 121 In respect of the remedy, the Director General said that if it were a claim of unfair dismissal, because of s 41 of the WWC Act, no remedy is available.
- 122 If there is an order for employment, there needs to be special circumstances for there to be any backdating, and the earliest it can be is the date of the s 44 application. Any retrospective order for employment should take into account any moneys earned by Mr Buttery in the meantime and any failure to reasonably mitigate losses. Save for one application to a school, not for a teaching position, Mr Buttery has not applied for a job as a teacher, that is, in his trade. Therefore, there has been a failure to mitigate or reasonably mitigate. The Director General also says that an order for employment or reinstatement is impracticable.

Other issues

- 123 The Director General pointed out that as the decision-maker and the ultimate employing authority, she took account of matters of mitigation which were put in Mr Buttery's submission to the investigation, as part of a 50-page response. The Director General's final letter referred to having taken into account matters of mitigation, notwithstanding that reference to the mitigation was not contained in the investigation report.
- 124 Finally, the Director General says that the fact of S's ADHD and challenging behaviours were referred to in the summary of evidence in the investigation report. Therefore, they were matters before her and had been taken into account.

SSTU's closing submissions

- 125 The SSTU said that the task of the Commission was not to consider not only what was before the decision-maker as to what occurred at the time of the incident but also the entire facts which were then before the Commission including the material that was before the investigator or the Director General. Even if the task of the Commission is confined as the Director General suggests, to consider what was before the decision-maker at the time, the SSTU said that when considered in the entire context of the case, the events of 31 August 2016 did not justify the action subsequently taken by the Director General.
- 126 The SSTU said that a *Jones v Dunkel* (1959) 101 CLR 298 inference ought to be drawn from the Director General's failure to call Ms Patching and Mr Wright, the school principal, to give evidence.
- 127 The SSTU said that Mr Wright made two reports of the incident and that they are inconsistent and in error. It is suggested that it was not surprising then that the police took the position they did, to charge Mr Buttery based on what the SSTU says was misinformation.

- 128 The SSTU was also critical of Mr Milward not being called to give evidence. The police running sheet recorded that on 17 October 2016, amongst other things, Detective Senior Constable Earnest spoke to Mr Milward, and queried 'what the Dept of Ed planned to do in relation to the POI (Mr Buttery)'. It recorded Mr Milward as saying that '(t)hey will put their investigation on hold pending Police investigation'. He is recorded as then stating 'that should the Police not pursue the matter the outcome of Dept of Ed is likely that the POI would be dismissed' (AB 213). According to the SSTU, this level of prejudgment of the outcome of the enquiry, which had yet to be commenced, was alarming.
- 129 On 31 October 2016, Mr Buttery was informed that he would be charged with one count of aggravated common assault. It is noted that there has been a tendency during proceedings to refer to the 'criminal charges' in the plural, when in fact there was only one charge.
- 130 The SSTU also noted that there appeared to have been no point at which the investigators considered that the outcome would not involve dismissal. This was notwithstanding that the letter from the Department regarding the requirement for Mr Buttery to leave the school and remain away, pursuant to s 240 of the *School Education Act*, indicating that this was in no way to be interpreted as a prejudgment. This is to be distinguished from Mr Milward's comments to the police only two weeks prior to the date of the letter.
- 131 The SSTU said that the letter to Mr Buttery terminating his employment on the basis that an INN had been issued to him said that he had repudiated his contract of employment. No one from the Department was called to give evidence about why the Department suggested that Mr Buttery had repudiated his contract by being in receipt of an INN produced by a third party. In an exchange with the Senior Commissioner, the SSTU's counsel noted that the Department may rely upon the incident itself to justify its actions, but the concept of repudiation does not meet with the circumstances. The concept of repudiation is that the party has done something to indicate that they consider themselves no longer to be bound by the contract and that this is an unnecessary and confusing approach in response to an action by a third party.
- 132 The SSTU then noted that Mr Buttery's employment record was then annotated to record that he was not suitable for re-hire in child-related work. The SSTU said that the basis for Mr Buttery's dismissal had been entirely swept away by the removal of the INN and the TRB reinstating Mr Buttery's registration. On 16 June 2017, the police discontinued the charge against Mr Buttery and paid his costs. The SSTU drew attention to the reason for the WA Police taking that action was that it considered that there was no evidence to support the charge and that 'paying his costs in the sum of \$800 speaks volumes about why it was that the Police decided to discontinue the charge' (AB 697).
- 133 The SSTU made submissions about Mr Buttery's work and the loss he suffered since the dismissal, and the effect of the red-flagging.
- 134 The investigation of the incident was placed on hold while the criminal charge was dealt with. According to the SSTU, the reason for carrying out the investigation was telling. Mr Belshaw said that it was '(t)o confirm a breach of discipline to support the continued marking of Mr Buttery's employment file' (AB 698), it was not to enquire as to whether or not there had been a breach. This was said to be supported by Mr Milward's telephone call to police on 17 October 2019, which demonstrate a pre-determination of the matter.
- 135 The SSTU said that there were also numerous other flaws in the investigation, demonstrated by Mr Belshaw's evidence, including the repeated interviewing of S, that repeated interviewing of children could have the effect of rehearsing the evidence, corrupting the account, changing their recollections and it was not accepted practice, and the delay after the incident in interviewing him.
- 136 S's mother was present throughout the interview and she interceded on two occasions. The SSTU said that S's recollection was affected by this, placing him in a situation where he would have not wanted his mother to hear of his behaviour and he significantly downplayed his behaviour by a description of it being 'a bit silly'. It was also pointed out that S said that Mr Buttery had 'insulted' him when he meant 'assaulted'. This is said to demonstrate an adult influence over S. Further, the SSTU said that he did not understand the meaning of a word he used in his statement to Mr Belshaw and Mr Milward, that Mr Buttery had 'overwhelmed' him. This was a notion imported into his memory. This was all said by the SSTU to demonstrate that the interview with S was deeply flawed. The audio of the interview demonstrated that S was calm, focussed, compliant and cooperative during a fairly lengthy period, something like 47 minutes. This is completely contrary to the evidence of his behaviour described as being 'out of control' in 2016, when he was not taking his medication for ADHD.
- 137 (I note for completeness that in his interview with the police on 29 September 2016 (Exhibit R2), S said that Mr Buttery had 'overcome' him.)
- 138 Mr Belshaw reached his conclusion that Mr Buttery showed no remorse because Mr Buttery did not say he was sorry during his interview. However, the SSTU noted that Mr Buttery's response to the investigation report contained an expression that it was regrettable that he had had physical contact with S, and that this was overlooked by Mr Belshaw (see Attachment AB 8 of Belshaw's witness statement at 116).
- 139 In terms of his acceptance of Ms Patching's evidence, Mr Belshaw did not consider that she had a tendency to overstate matters even though she used colourful and exaggerated language. He did not see or investigate any suggestion that she may have had a motive to exaggerate her evidence given at the time that she was responsible for S and had sent him back into Mr Buttery's classroom unaccompanied. Her words to herself when she heard him shouting was that she needed to get in there. Mr Belshaw did not consider the possibility that if Ms Patching's account was correct, S would have been likely to have complained about soreness to the neck and chin area when he complained only of soreness to his back.
- 140 The SSTU pointed out that Mr Belshaw gave evidence that he preferred Ms Patching's account to the more measured account by Ms Draper because he believed Ms Draper was deliberately misleading him due to her friendship with Mr Buttery. However, at no point was this belief documented. He did not put it to Ms Draper for her response. Mr Belshaw claimed to have discussed this misleading with Mr Milward but there is no record of such a discussion. It was not put to Ms Draper in her

evidence in the witness box that she had mislead anyone about anything. Mr Belshaw said he believed Ms Draper was lying to him notwithstanding that Ms Draper's account was not particularly partial or favourable to Mr Buttery. The fact that Ms Draper's statement to police and her statement to the investigation contained some inconsistency, the SSTU said, was a demonstration of the fallibility of human memory and that recollections change over time. It would be of concern if they were identical particularly given the lengthy period of time between those events.

- 141 Mr Belshaw is said to have accepted Ms Draper's opinion that S was excited rather than angry when he entered the classroom the second time, in spite of the fact that S himself said in his interview that he was angry when he re-entered the classroom, and despite the fact that Mr Belshaw believed in respect of other matters that Ms Draper was lying to him. He could not accept the obvious proposition that a child being sent to the principal's office as punishment is unlikely to be excited.
- 142 The SSTU said that Mr Belshaw accepted that he was required to consider mitigating circumstances but did not do so in respect of Mr Buttery's otherwise clear record.
- 143 The SSTU also noted that negotiations between the SSTU and the Director General had resulted in a change in the policy of the Department in respect of teachers who have been the subject of INNs and those notices having been withdrawn, demonstrated by Exhibit A 12. This is notwithstanding that counsel for the Director General said that the arrangement may contravene the PSM Act and the Standards.

Refusal to employ

- 144 The SSTU said the Director General refused to employ Mr Buttery on six occasions, including when his employment record was marked 'do not employ' and by the defence of the application during the hearing, over a period of four days.
- 145 The SSTU said that this repeated refusal must be considered to be an actual refusal to employ. Any denial of this is said to be form over substance. If the Director General had come to the SSTU at any stage during the proceedings and offered him a job, there would be no matter to proceed.
- 146 The SSTU said a sensible reading of the 'without prejudice' letter leads to the conclusion that the first part of the letter was open and the second part, underneath the heading, in bold on page two, was without prejudice. If the letter had simply ended after the first part it would have clearly indicated that the SSTU was seeking, on an open basis, reinstatement or re-employment. That part of the letter under the heading of 'without prejudice' was there for a reason. It referred to the proceedings then before the Commissioner in conciliation and was an offer to settle the proceedings. The SSTU said that it was clear that by that time, 20 June 2017, the SSTU had referred the dispute to the Commission and was seeking Mr Buttery's re-employment or reinstatement and the heading included the number of the application before the Commission. The SSTU said that it was not open on a plain, ordinary reading of the document itself to conclude that the entire letter was 'without prejudice'.
- 147 The SSTU dealt with the issue of Mr Buttery's failure to find alternative employment and said that he had been doing what he could to find employment in the context of the red flag against his personal file.
- 148 As to the question of the application of the Standard, the SSTU said Ms Barnard's evidence was that teachers can be transferred, employed, moved around, supernumerary or surplus to requirements, or placed in schools without a vacancy being advertised, on the basis of the circumstances that face individual teachers at various times during their careers. There were teachers who were surplus to requirements in the South Metropolitan area, according to Ms Barnard. The SSTU said there was a distinction between the employment contract between the Director General and the individual teachers and the vacancies which are created within schools by principals in order to carry out their duties to educate students. The SSTU said that it is obvious from Ms Barnard's evidence that the Director General reserves to herself the right to move teachers around, to employ them and transfer them without the need for a particular vacancy to arise. Large numbers of the individuals had moved around by the Department, due to their special or unusual circumstances. Mr Buttery's circumstances were said to be very special and unusual.
- 149 The SSTU said that it was conceded in the event that the Commission were to order that Mr Buttery be offered a contract of employment, that he would be offered that contract and he would be found work to do. That might be in Mandurah, where he lives, in one of the two new schools opening up in the area as no decisions had yet been made to fill those positions, or somewhere else in the region generally.
- 150 The SSTU noted that in the decision of the Industrial Appeal Court in *Brett* at [40], Le Miere J commented on the distinction between the performance of work and the terms of the ongoing contract of employment. His Honour made the point that s 23 of the WWC Act does not mandate termination of the contract of employment. The SSTU noted the words that if an employer suspends an employee from carrying out child-related work, or all work or orders the employee to stay away from the premises which the child-related work is carried out then the employer would not be contravening the WWC Act notwithstanding that the contract of employment subsists. There was no evidence that the Director General actively considered alternatives to dismissal.

Director General in reply

- 151 The Director General in reply referred the Senior Commissioner to [33] of the Second Interim Orders decision where he noted that it was accepted between the parties that the reason for dismissal was as a consequence of s 22 of the WWC Act.
- 152 The Director General also said that it is not open on the evidence to infer that Mr Milward said what was suggested in the police running sheet regarding a note of a phone call with Mr Milward. It is said that this is because it is effectively double hearsay. It is not open, the Director General said, to find that Mr Milward, in fact, used those words.

Substantive decision at first instance

- 153 The substantive decision in this matter (2018 WAIRC 00820) issued on 6 November 2018. The learned Senior Commissioner set out what he described, and what can readily be accepted, as a 'lengthy, and somewhat torturous history'.

Section 44

- 154 The learned Senior Commissioner noted the broad jurisdiction and powers of the Commission pursuant to s 44 of the Act, and that they should not be read down (*Robe River Iron Associates v Amalgamated Metal Workers and Shipwrights Union of Western Australia* (1988) 69 WAIG 990 (*Robe River*) per Nicholson J at 999). He set out the process for a matter under s 44, being the subject of a compulsory conference and the drafting of the Memorandum of matters to be heard and determined where matters remain in dispute. He noted that the source of power for the Commission to grant relief or redress at s 26 of the IR Act includes that the Commission is not bound to the specific claim in deciding the matter.
- 155 The learned Senior Commissioner observed that the s 44(9) referral set out a lengthy and complicated recitation of the SSTU's contentions of fact and the orders sought. They included that termination of Mr Buttery's employment was unnecessary and unfair; that the Director General ought to have had regard to practical alternatives to dismissal; that when the circumstances which caused Mr Buttery's dismissal had ceased to exist in January 2017, the Director General ought to have re-employed Mr Buttery and suspended him on pay pending the resolution of the criminal and/or internal disciplinary matters; that Mr Buttery was denied natural justice in the refusal to reinstate his employment pending the final decision; that he ought to receive backpay and/or compensation for the period of non-employment ended 2 October 2017.
- 156 The SSTU's second contentions were that the Director General's finding and comments articulated in the letter of 2 October 2017 constituted a further and final refusal to employ Mr Buttery and that this was based on findings of misconduct. Mr Buttery denied the allegation of misconduct. The investigation was flawed, and no finding of misconduct could reasonably have been established. If the Commission found that Mr Buttery had not committed an act of misconduct that would otherwise justify termination of employment, then he should have been provided with relief by way reinstatement and compensation for lost wages and superannuation.
- 157 The orders sought were:
1. Mr Buttery's reinstatement or re-employment on terms and conditions no less favourable than his previous employment with the respondent;
 2. That the Director General pay Mr Buttery an amount reflecting the income, including superannuation, that he would have earned for the period 21 February 2017 until the date of the determination;
 3. Alternatively, if he was found to have engaged in misconduct sufficient to justify termination of employment, that the Director General pay Mr Buttery an amount that reflected income and superannuation he would have earned from 21 February 2017 until 2 October 2017, being the date that the Director General finalised its investigation and determination of the matter.
- 158 The Commissioner set out the parties' contentions and arguments. He noted that there had been two applications for interim relief, which had been rejected. He noted that the issue of refusal to employ is within the scope of the Commission's jurisdiction, being within the definition of industrial matter. He set out Burt J's comments in *Princess Margaret Hospital* in which his Honour had agreed with the reasons in *Kwinana Construction Group Pty Ltd v The Electrical Trades Union of Workers (Western Australian Branch)* (1954) 34 WAIG 51. In that case, Jackson J commented on the scope of the definition of industrial matter as including issues of dismissal and reinstatement. The learned Commissioner examined the cases regarding reinstatement and refusal to employ.
- 159 He went on to note:
- What these earlier cases demonstrate is the breadth of the definition of "industrial matter" as it has been successively cast in the Act and its predecessors for many years and, in particular, the breadth of the terms "matters affecting or relating or pertaining to work ... of employers and employees" and of "any matter affecting or relating or pertaining to ..." (e) "the dismissal of or refusal to employ any person or class of persons".
- The present matter, properly characterised, is an industrial dispute between the applicant and the respondent, in relation to the applicant's member Mr Buttery, and the ongoing refusal of the respondent to employ him, despite repeated requests by the applicant, on behalf of Mr Buttery, as an organisation for the purposes of s 7 of the Act, with standing to make an application under s 44(7)(a)(i) of the Act. The question, dispute or disagreement between the applicant and the respondent as to the respondent's ongoing and persistent refusal to employ Mr Buttery was not resolved by conciliation and by s 44(9), was referred for hearing and determination. By s 23(1) of the Act, read with s 44(9), the Commission has ample jurisdiction and power to enquire into and deal with the industrial matter so referred for determination [31] – [32].

WWC Act

- 160 The Senior Commissioner then went on to examine s 41 of the WWC Act and in particular the decision in *Brett* at [20]. He noted the parties' arguments on that issue.
- 161 In respect of the SSTU's argument, that because he had already dealt with the issue of s 41(3) of the WWC in the Second Interim Orders proceedings, this constituted and acted as an estoppel against the Director General and that the Commission was unable to depart from that decision. The learned Senior Commissioner said at [42]:
- This submission must fail. Firstly, the Interim Order proceedings were just that, they were proceedings commenced in relation to a claim for interim relief and the observation made by me in those proceedings was clearly obiter. Secondly, and more fundamentally, there could not be an estoppel in circumstances where the effect of the WWC Act was not raised or argued before the Commission in the Interim Order proceedings. That issue was not essential for a disposition of these proceedings and 'only a decision about a matter which it was necessary to decide – a decision which is fundamental or cardinal to the judgment – can create an issue estoppel. (See *Cross on Evidence* Loose Leaf Australian Edition Vol 1, 1996 at par [5080]).

162 The learned Senior Commissioner went on to examine ss 22, 23 and 41 of the WWC Act. He commented that these provisions were considered in *Brett*. He said, '(i)n that case the issue for determination was the meaning of s 41(3)(b) as to how the words 'the reason' an employer dismisses a person are to be construed. In considering this provision, the Court noted that Parliament had, by s 41(2), subject to the savings provisions in s 41(3), abrogated an employee's rights in cases where they are dismissed by their employer to comply with the WWC Act; *Brett* at par [20]'. At [50], he noted that:

Section 41(2) affords an employer protection from any liability where the employer dismisses an employee to comply with s 22 of the WWC Act. This is so, irrespective of whether other alternatives were open to an employer in order to comply with the WWC Act, if, on the evidence, it is established as a fact that the operative reason, subjectively determined, is that the person making the decision to dismiss did so to comply with the WWC Act; *Brett* at pars [15], [16] and [21]. Whilst it was not necessary to decide the matter before it, the Court considered the arguments of the parties and held that the WWC Act does not require the termination of a contract of employment for there to be compliance with s 23 of the legislation, if compliance may be achieved in other ways: at pars [39] – [40].

163 The learned Senior Commissioner considered that 'Section 41(3) of the WWC Act extends to include claims under the Act brought by the SSTU on behalf of an employee as well as claims made by employees themselves, assuming sub-pars in (a), (b) and (c) are met' [53].

164 The learned Senior Commissioner went on to consider the terms of s 41(3)(a) and found that the claim of the SSTU is one relating to unfair refusal of the Director General to employ Mr Buttery after the WWC Act prohibition on him had been revoked, his Working with Children authority and teacher registration had been returned. He said given the remedy claimed, he did not consider that s 40(1) and (3)(a) of the WWC Act was satisfied in this case, that is that the remedy sought of re-employment is not one that is prevented by s 41 of the WWC Act. He confirmed that the reason Mr Buttery was dismissed was the issuance to him of the INN and that therefore subjectively viewed, the operative reason for Mr Buttery's dismissal was for the employer to comply with s 22 of the WWC Act and in the circumstances, s 41(3)(b) would appear to be satisfied. He went on to conclude that s 41(3) did not preclude the SSTU's claim, or Mr Buttery obtaining relief in this matter, as it relates to re-employment. The learned Senior Commissioner also noted that the actual relief, if any, would be a matter for the Commission exercising discretion under s 26(1) and (2) of the Act.

The s 23(2a) point

165 Under this heading, the Senior Commissioner noted that in the Second Interim Orders decision he had rejected the Director General's argument that the Commission's jurisdiction is ousted by s 23(2a) of the IR Act. He referred to his reasons at [20] – [41] of that decision and said that he did not propose to repeat them but adopted and relied on them. He said he remained of the same view. However, he went on to deal 'furthermore and alternatively' with the fact that the Director General had previously informed the Commission that the reason for refusal to employ on 16 January 2017 and 3 February 2017 were different to the reason Mr Buttery was refused employment on 20 July 2017. He noted:

On the two earlier dates, the respondent maintained, in a communication from Mr van Hattem of the State Solicitor's Office to my Chambers, that the refusals involved the respondent declining to appoint Mr Buttery to a vacant position. Accordingly, those two requests, which were the subject of the initial application by the applicant on 21 February 2017, were claimed as excluded from the Commission's jurisdiction because of s 23(2a) of the Act. The refusal to employ of 20 July 2017 was not claimed to be based on any need to fill a vacancy: Exhibit A1 [61].

166 The learned Senior Commissioner then went on to note the Director General's reliance on the evidence of Ms Barnard and to discuss that evidence. He said:

... However, in cross-examination of Ms Barnard, it appears that in many cases, the respondent takes a flexible approach to employment arrangements for teachers. The evidence of Ms Barnard was to the effect that teachers regularly move within the school system, by way of transfer, and promotion, without the need to proceed through the formal process of filling a vacancy in accordance with the Employment Standard. It seems that the respondent has a very broad discretion as to how it deploys teaching personnel throughout the State, without the formalities of filling a vacancy, in response to a specified need for a position at a school. The number of teachers moved around the education system in this manner seemed to be considerable, on Ms Barnard's evidence.

Also, and importantly, the change in policy of the respondent set out in its letter to the applicant of 9 April 2018, which I deal with below, and which emerged late in these proceedings, is directly contrary to the contention advanced in opposition to Mr Buttery's claim that any re-employment or employment of him would trigger a jurisdictional barrier, by way of the need to "fill a vacancy". This is because the Director General of the respondent herself, as the employing authority of teachers under the PSM Act, has determined that the respondent will re-employ teachers who have had notices issued to them under the WWC Act, subject to the conditions set out in the letter, none of which involve a process even remotely resembling that set out in the Employment Standard and other such processes, as described by Ms Barnard in her witness statement.

Thus, apart from my conclusions above adopted from the interim order proceedings, I am not persuaded by the respondent's contentions in this regard, based on the totality of the evidence of Ms Barnard and the respondent's own policy position. It is manifestly clear that Mr Buttery can be offered a contract of employment with the respondent, who is ultimately responsible for running and staffing hundreds of primary schools in the State, and he can be placed at a school as a teacher, without the need to "fill a vacancy" [63] – [65].

167 The learned Senior Commissioner then went on to deal with the application by the Director General to dismiss pursuant to s 27(1)(ii) or (iv) of the Act. He concluded that 'absent an order for employment, there would not be power to order the respondent to pay compensation as a stand-alone order' [71]. However, he went on to find that there is no basis to dismiss the

matter at that stage and observed that in any event, dismissing the application at a relatively late stage of proceedings would not, in the context of the history of the matter, be in the public interest.

The incident

168 The Senior Commissioner noted that the evidence of Mr Buttery in relation to the incident was relevant, as the Director General's ongoing refusal to employ him was based on his alleged misconduct in using unreasonable force in restraining S. He looked at the evidence of Mr Buttery; of Mr Gunn in relation to S's conduct; or Ms Draper's and Ms Patching's observations of the incident and the investigation.

169 He then noted the criminal charge that had been raised, including the Police Incident Report of 9 September 2016 (Attachment E to Mr Buttery's witness statement). The Senior Commissioner noted that '(i)t is immediately apparent from the material raised in these proceedings that the narrative is inaccurate in a very material respect. It referred to Mr Buttery pushing S 'into the wall' and 'against the book rack on the wall' of the classroom.' He said that this is simply wrong and did not occur. He noted that none of the other evidence identified this as occurring. The learned Senior Commissioner also noted the statement of Mr Wright, the principal, to the police and that Mr Wright reported what he had heard from Ms Patching. He also noted the Police Statement of Material Facts contained certain false allegations which were then included in the investigation report and annexed to the witness statement of the investigator, Mr Belshaw. He concluded that the reports used as the basis for the Police Statement of Material Facts were both incomplete and inaccurate [98]. He also noted that whilst comments reported to have been made by Mr Milward to the police 'cannot be taken to be evidence of a pre-determined outcome, given all relevant events, it certainly is indicative of a state of mind predisposed towards removing Mr Buttery from the respondent's workforce' [99].

170 The learned Senior Commissioner went on to note that Ms Draper was not interviewed by police until 13 January 2019, some time after the charges were brought against Mr Buttery.

171 Under the heading 'The investigation starts and Mr Buttery is banned from the School', the learned Senior Commissioner set out some further background information. He concluded by noting that there was no explanation for the delay between the incident taking place on 31 August 2016 and any further action two months later. He said in the meantime Mr Buttery continued to teach as normal and:

There was no suggestion in the respondent's letter of 3 November 2016, or in the evidence before the Commission, aside from awareness of the laying of criminal charges, how it was that Mr Buttery was said to pose a risk to students at the School ... If the respondent regarded the matter as seriously as was suggested when the Initial Reporting Form was lodged, then one would have expected the respondent to react almost immediately. It is quite extraordinary that this did not happen. This does not make any sense [103].

172 The learned Senior Commissioner then went on to note the INN and teacher registration matters, Mr Buttery's dismissal and his file being red-flagged. In respect of the red-flagging, the Senior Commissioner noted that the basis for such red flagging was not clear and that it was not at all clear how such a practice is consistent with the respondent's obligations under the PSM Act.

173 The Senior Commissioner then went on to note the terms of the letter (Exhibit A1) which the Director General wrote to the SSTU on 9 April 2018, the effect of which was to change the respondent's approach to teachers who have received INNs or NNs under the WWC Act.

174 He said that:

The letter appears to go much further than the mere removal of 'red flags' inappropriate cases. It commits the respondent to re-employing teachers where the conditions set out in the letter have been met. The letter also does not refer to any process of 'filling a vacancy' allegedly under the Employment Standard, which the respondent has emphasised in the proceedings in this application [110].

175 The Senior Commissioner then noted the initial disciplinary investigation ceased, the WWC Act assessment notice was issued and the teacher registration restored. He said that from this point, on 21 December 2016, there was no legal impediment to Mr Buttery resuming child-related work.

Refusals to employ on 16 January and 3 February 2017

176 The Senior Commissioner noted that these refusals to employ were during the period when the criminal charge was still pending and that was the reason for those two refusals. He noted that the Director General did not indicate what her position might be following the resolution of the charge.

177 The Senior Commissioner then considered the further requests for re-employment on 20 June 2017 and 14 July 2017 and the new disciplinary action. In examining the 'without prejudice' letter, the Senior Commissioner concluded that '(t)he first part of the letter of 20 June 2017 may properly be regarded as a further request by the applicant for the respondent to re-employ or reinstate Mr Buttery' [125] and that the Director General not only refused the further request but also informed the applicant in the letter of 5 July 2017, that a disciplinary investigation would be conducted.

Further refusals on 20 June 2017 and 14 July 2017

178 The learned Senior Commissioner then noted the conciliation process that commenced. He said:

It has long been the view that matters discussed in and arising from a s 44 conference may not be later relied upon by parties once the conference has concluded. To do so would discourage the exchange of views to which I have referred and would be contrary to the objects of the Act in s 6, to promote and encourage the settlement of disputes through conciliation. Accordingly, I do not propose to have regard to what was put by the applicant in the conciliation conference of 14 July 2017. Despite this however, there can be no doubt that as a practical matter, the

parties were and remained in dispute as to the circumstances of the termination of Mr Buttery's employment and the applicant's claim that he be once again employed by the respondent. That is what these proceedings have been about from their inception [128].

The disciplinary investigation

179 The Senior Commissioner then examined the disciplinary investigation and its outcome and Mr Belshaw's evidence. He noted that the Director General failed to answer the issue of Mr Buttery's primary reason for acting as he did was that S barged into him with students sitting on the floor at his feet. He agreed that the investigation was flawed and that no finding of misconduct could reasonably be justified [143].

180 He noted the difficulties caused by repeated interviews of child witnesses, especially in the presence of authority figures. He said:

No allowance appears to have been made for this in the analysis stage of the investigation or importantly, for the type of behaviour S engaged in on the day of the Incident, rather than his demeanour in the interview with the investigators on 19 July 2017. The latter stood in stark contrast to how S was behaving on the day in question on 31 August 2016 [144].

181 The learned Senior Commissioner noted that there was almost complete reliance in the investigation on Ms Patching's version of the events and that this was problematic. He said that her initial description of S being forced into the wall was wrong; that Mr Belshaw accepted that Ms Patching's statements were highly emotive; that if S was almost up on his "tiptoes" when being held by the shirt by Mr Buttery this would mean that he was almost elevated off the ground and would seem difficult to achieve without the shirt slipping over the child's head. He also said that such an aggressive hold under the chin in the circumstances where it was supporting the child's body weight was more likely to have resulted in S complaining of soreness and bruising, if not injury, in that area and yet no complaint or injury was reported.

182 He also noted other inconsistencies regarding Ms Patching's statements including about how S would have fallen to the floor while being held as she described. He said, '(o)n the other hand, it is far more logical and more in accordance with the basic laws of physics, that S may have fallen to the floor when moving forward and being restrained in the manner described by Mr Buttery. S moving forward in the classroom was entirely consistent with Ms Draper's version of events' [147].

183 The Senior Commissioner noted that Mr Belshaw discounted Ms Draper's version of the events on the basis that there were some inconsistencies between her statement to the police in January 2017, compared to her interview with Mr Belshaw in July 2017. The Senior Commissioner did not consider the differences to be so great as to warrant not accepting any of her account, particularly compared with Ms Patching's account and the emotive descriptions given by her. He considered this discounting was unreasonable.

184 Mr Belshaw also rejected Ms Draper's account because he considered that she had deliberately mislead the investigation because of her friendship with Mr Buttery. The Senior Commissioner found that this was problematic. Firstly, it was not mentioned in the investigation report. If it were so it would have stood out as a strong basis for questioning Ms Draper's credibility. He said that:

... to deliberately mislead an investigator in such matters is a very serious issue. It is surprising that no disciplinary action was taken against Ms Draper by the respondent. Mr Belshaw did say that he discussed the possibility of this with Mr Milward, but there was no other evidence to confirm that this occurred. Also, as the applicant pointed out, this allegation was never put to Ms Draper at any stage of either the disciplinary investigation, or in these proceedings [149].

185 The learned Senior Commissioner concluded that by the time he had grabbed S, Mr Buttery was angry and shouting but he did not accept Ms Patching's description of Mr Buttery being 'hysterical'. He accepted that physical contact ought to be a last resort and that Mr Buttery's reaction was instinctive and was directed to stopping S from potentially colliding with students seated on the floor.

186 He also noted that Ms Patching was not called to give evidence, but for reasons he had already identified, he regarded her statement of events with considerable caution.

187 The learned Senior Commissioner commented that Mr Wright's statement to police contained serious factual errors. None of Mr Wright's assumptions about Mr Buttery's state of mind were put to Mr Buttery and were self-evidently prejudicial towards him. He said that in his view 'both Mr Wright and Ms Patching's accounts of the Incident were highly prejudicial to Mr Buttery' [159]. He described some of Mr Wright's references as problematic and untrue. The Senior Commissioner went on to comment:

Having regard to the evidence and the other material before the Commission, including the content of the Investigation Report, the question to be determined is whether the ongoing refusal of the respondent to employ Mr Buttery was industrially unfair. I am not persuaded that Mr Buttery committed an act of misconduct that would warrant the summary termination of his employment, the placing and retention of a red flag on his employment record and the ongoing refusal of the respondent to employ him. Even if one accepts that Mr Buttery may have over reacted, as a one-off in the circumstances in which the Incident occurred, in the context of an otherwise exemplary employment record, summary dismissal would not be a proportionate response in my view.

I do not propose to revisit my conclusions in relation to the Investigation Report, set out in some detail above. In my view, there were substantial flaws in the findings and conclusions that made reliance by the respondent on it unreasonable. As I have noted, the crucial issue of why Mr Buttery reacted the way that he did and the conduct of S immediately prior to Mr Buttery grasping S's shirt, were not the subject of any findings nor was there consideration of any exculpatory or mitigating factors.

It was also part of the applicant's case in this matter, that prior to the dismissal of Mr Buttery, because of the issuance of the INN, no consideration was given to alternatives to dismissal. It is the case, as noted by Le Miere J at para 40 in *Brett* that the effect of s 23 of the WWC Act does not require the termination of a contract of employment. Section 23 prevents a person from continuing in child-related work. The INN was not, of itself, a direction to the respondent to dismiss Mr Buttery. Compliance with the WWC Act at the time, that being between 8 November and 21 December 2016, a relatively short period of time as it turned out, could have been achieved by other means. This could have included by giving Mr Buttery other work if available to do; by maintaining the order for Mr Buttery to stay away from the School under s 240 of the SE Act; or by suspending him from employment under s 82 of the PSM Act. Unlike on the facts in *Brett*, there was no evidence in this case of any consideration of alternatives to the dismissal of Mr Buttery. However, the difficulty with the applicant's contention in this respect is that the Court in *Brett*, as noted earlier in these reasons, concluded that a dismissal may be found to be for reasons of compliance with the WWC Act, despite alternatives being open. I have already found in this case, that the initial action of the respondent in dismissing Mr Buttery was, as the subjective and operative reason, to comply with the WWC Act [161] – [163].

188 As to the SSTU's submissions that the Director General's failure to call Mr Wright and Ms Patching, and possibly also Mr Milward, ought to lead to *Jones v Dunkel* inferences against the Director General, the Senior Commissioner said:

I incline to the view that the absence of these witnesses is more related to the approach of the respondent to its case. That is, its contentions, as set out earlier in these reasons, that the evidence of Mr Buttery in relation to the incident was not relevant to the disposition of these proceedings, rather than any conscious decision to avoid scrutiny [165].

189 The learned Senior Commissioner had found that there was a refusal to employ and that it was not industrially unfair for the respondent to refuse to employ Mr Buttery on 16 January 2017 and 3 February 2017 when Mr Buttery was facing a charge of aggravated assault. He said that this was despite, as he had mentioned earlier, Mr Buttery being left in charge of his class for over two months after the incident.

190 As to the refusal to employ after June 2017, while the Director General undertook the investigation, the learned Senior Commissioner did not consider that also to be industrially unfair. He went on, though, to say that by the time of the conclusion of the disciplinary investigation and the preparation of the investigation report, and the decision to red flag Mr Buttery's employment record, the ongoing refusal to employ was unfair. From that point, he said, given the erroneous and unreasonable conclusions reached in relation to the incident, it was industrially unfair. He noted that taken in its full context and having regard to the action of S and Mr Buttery's concern for his own students, it was excessive and did not warrant ending his career as a primary school teacher in government schools, given his very good teaching record.

191 Finally, the Senior Commissioner noted that in respect of remedy, this was not an unfair dismissal claim but a refusal to employ. The appropriate remedy would be for the Commission to order that on Mr Buttery presenting himself at the Director General's workplace, the Director General offer him a contract of employment as a teacher. He also found that an order ought to be made that Mr Buttery be paid an amount representing his salary that he would have earned from 2 October 2017 (being the date of the disciplinary investigation outcome) to the date of reinstatement.

192 The Senior Commissioner then considered an alternative, if he had been incorrect and the Commission had no jurisdiction or power to deal with the applicant's claim to award a remedy because of s 23(2a) of the Act and/or s 41(3) of the WWC Act. He considered that Mr Buttery should be re-employed in accordance with the new policy of the Director General. He said '(t)his man has been dealt with very harshly and he has had his career as a public school primary teacher ended in circumstances that did not warrant it. It would be unjust for the respondent not to act.' [170]

The appeal

193 The grounds of appeal as filed were amended by consent.

Ground 1 of the appeal.

194 This ground of appeal contends that the Senior Commissioner made an error of law in finding that the proceeding was within the Commission's jurisdiction, given the exclusion set out in s 23(2a) of the IR Act. A preliminary issue arises in this ground of appeal. The SSTU says that this ground of appeal arises from the Second Interim Orders decision, [2017] WAIRC 00737; (2017) 97 WAIG 1497 ([20] – [40]), where the Senior Commissioner dealt in detail with the jurisdictional impediment of s 23(2a) and it is not now appropriate for it to be raised in this appeal.

195 In the Second Interim Orders decision, the learned Senior Commissioner summarised the issue by saying:

Therefore, on the face of it, if a matter before the Commission concerns (in the words of the Standard) 'the filling of a vacancy (by way of recruitment, selection, appointment, secondment, transfer and temporary deployment (acting) in the WA Public Sector' then by s 23(2a) of the Act, the Commission is deprived of jurisdiction to enquire into and deal with such a matter [26].

He then posed the question whether this case was properly characterised as such a matter. He examined the facts of the matter, beginning with the application under s 44 being in relation to a 'refusal of the respondent to reinstate or re-employ' Mr Buttery. He noted that '(t)here is no doubt that the reason the respondent dismissed Mr Buttery was because of an effect of' (s 22 of the WWC Act). He continued that, '(i)t is clear that the applicant has brought the s 44 application it has, alleging 'unfair refusal to re-employ' because, by reason of the exception in s 41(3) of the WWC Act, an unfair dismissal claim cannot be made to the Commission, if the elements of pars (a), (b) and (c) of s 41(3) are met, which they no doubt are in this case' [33].

196 He continued that:

Despite repeated requests, the respondent has declined to employ Mr Buttery. There is no suggestion in this case of a competitive field for appointment in which Mr Buttery was required to, or would be required to participate in, which would normally be expected. There is no necessity, as established by the decision of the Court in *Jones* for there to be a particular allegation of a breach of the Standard. However, properly characterised, and taken in context, the present matter before the Commission is not one dealing with the filling of a public sector vacancy... Ultimately, the matter before the Commission concerns an industrial dispute between the applicant and the respondent, in relation to an industrial matter concerning the fairness of Mr Buttery's removal as a teacher from his school and the refusal of the respondent to re-employ him. On any view of this case, the circumstances of his removal and the claim for re-employment, are inextricably linked [40].

197 He went on to distinguish *Jones* and *Appleton*, and to conclude that the Commission's jurisdiction was not excluded 'given the terms of s 23(2a) of the Act, as explained and applied by the Industrial Appeal Court in *Jones*' [40].

198 In the final, substantive, reasons, under the heading of 'The s 23(2a) point', the Senior Commissioner noted that he had previously rejected the Director General's argument and did not propose to repeat the reasons for his conclusion; he said that he adopted and relied on those reasons for present purposes and remained of that view. He then went on to set out, briefly, a view expressed as '(f)urthermore, and alternatively', that the refusals to employ on 16 January and 3 February 2017 were explained as involving the Director General declining to appoint Mr Buttery to a vacant position. Those two refusals were claimed as being excluded from the Commission's jurisdiction because of s 23(2a) of the IR Act. The refusal to employ on 20 July 2017 was not claimed to be based on any need to fill a vacancy [61] and reference was made to Exhibit A1. This was an email chain, the last of which was from the Director General's then-counsel, to the Senior Commissioner's Associate, dated 7 August 2017. This email noted that:

The Respondent also notes that the 'reasons for its refusal to re-employ Mr Buttery as at 20 July 2017 are distinct from the reasons for its decision on 16 January 2017 and 9 February 2017... the Respondent declined to appoint Mr Buttery to a vacant position, and these decisions are excluded from the Commission's jurisdiction as per the respondent's submissions of 2 August 2017'.

199 As noted earlier, attached to the email was Mr Milward's affidavit dated 7 August 2018, the same date as the email. In it, Mr Milward explained that following the receipt of the without prejudice letter of 20 June 2017, he assisted in preparing a briefing note which was ultimately submitted to the Director General. Mr Milward's recommendation in that briefing note was to decline to re-employ Mr Buttery. He said:

6. The reason for the recommendation was, although a full investigation was still underway, based on information currently held by the Department I did not consider that Mr Buttery was suitable for employment in his former role.
7. The reason he was not suitable is because of the evidence of his unnecessary and inappropriate physical contact with a year four student.

200 Mr Milward went on to record that:

10. On 20 July 2017, the Director General wrote to the SSTU WA in terms adopting my recommendation.

201 Therefore, while the refusals of 16 January and 3 February 2017 were said to be refusals to appoint to a vacant position, the final reason for the refusal was because the employer had concluded, some weeks before the final interviews in the investigation, that Mr Buttery was unsuitable for re-employment because of 'unnecessary and inappropriate physical contact with a year four student'. Therefore, while the Director General complains that s 23(2a) which provides a jurisdictional impediment where there is a procedure for review in respect of a breach of Standard, the final reason why the Director General refused to re-employ Mr Buttery did not relate to any issue associated with filling a vacancy as would arise under the Standard, it related to the view of Mr Buttery's conduct.

202 The SSTU objects to the Director General being able to appeal one of the conclusions in the reason for the Second Interim Orders decision, the finding which went against it when the decision itself was in its favour. The SSTU says that it is relevant that no appeal was lodged in respect of the Second Interim Orders decision and that the Director General is seeking to argue the same issues by way of a very belated appeal. It says that an appeal against a decision must be brought within 21 days and must be based on the evidence raised in the proceedings. It is not now open to the Director General to seek to overturn the finding. Further, it says that having decided that matter, the learned Senior Commissioner is estopped from re-deciding the matter.

Consideration and conclusion regarding preliminary point to Ground 1

203 Is the Director General now prevented from appealing against a part of a decision relating to an interim order? I am of the opinion that she is not.

204 Firstly, I note that the issue of the s 23(2a) is squarely a challenge to the Commission's jurisdiction and jurisdiction is always at large (*Welsh v Anderson* (1902) 5WALR 1 at (5) – (6) cited in *SGS Australia Pty Ltd v Taylor* (1993) 73 WAIG 1760).

205 Secondly, the Second Interim Orders reasons for decision is under the number C 10 of 2017 and was dated 18 August 2017. The "C" prefix in the application number indicates that at this time, the matter was still in the conciliation stage of the process under s 44 of the IR Act and prior to the final referral for hearing and determination under s 44(9) of the IR Act. This occurred on 12 March 2018, some seven months before the referral. The question arose in the context of the application for interim orders, not for the determination of the matters ultimately reflected in the referral for hearing and determination.

- 206 Whilst the matter of s 23(2a) was dealt with at the Second Interim Order stage and formed part of the reasons for decision in that matter, it was a finding and therefore, not subject to an appeal at that stage. An appeal might have been pursued if it were demonstrated to be in the public interest. In *Falkirk Nominees Pty Ltd t/as Ross Hughes and Company and Australian Property Consultants v Bernard Roy Worthing* [2002] WAIRC 06373; (2002) 82 WAIG 2388, his Honour, Sharkey P explained the reason for the requirement for leave for an appeal against a finding. This is 'to prevent proceedings for the resolution by arbitration of industrial matters and disputes being interrupted by appeals against decisions which do not finally dispose of the matter, unless the matter of appeal is of such importance that it is warranted' [76]. Given that the ultimate conclusion of the Second Interim Orders matter was in the Director General's favour, that is, not to grant the interim order, it is hardly surprising that the Director General would not want to disturb that order at that time and would await the final outcome. In that context, it is a primary example of the circumstances identified by Sharkey P.
- 207 One can also understand the practicalities, and as a matter of policy, that leave is required for there to be an appeal against a finding. This, no doubt, is at least partly on the basis that whilst the finding might go against a party, the ultimate result may not. Therefore, there may be no practical purpose to be served in appealing at that point and time and expense may be wasted for an appeal to be pursued.
- 208 In any event, the issue did not die with the Second Interim Orders decision, because the Director General pursued it in the substantive hearing. In his final decision, the Senior Commissioner referred to his Reasons in the Interim Orders decision under the heading 'The s 23(2a) point'. He said he did not propose to repeat them, but that he adopted them and relied on them 'for present purposes', and that he remained of that view [60].
- 209 Also, the evidence of the respondent's witness, Ms Barnard, again ventilated the issue in the substantive hearing. Ms Barnard's evidence included how formal vacancies are dealt with. While I note that Ms Barnard's evidence was not about the question of law, but about the practical application of the Director General's procedures for deploying teachers, it appears to have been called to bolster the Director General's argument about the filling of vacancies. However, as I will explain later, it did not entirely have that effect.
- 210 In all of those circumstances, I am of the view that, even though this ground of appeal relates mainly to a matter dealt with in the Second Interim Orders decision, although not exclusively so, there is no impediment to the issue being pursued on appeal at this stage.

Consideration and conclusions regarding Ground 1

- 211 Returning to the substance of this ground of appeal, I am of the view that, for the following reasons, the circumstances of the case do not meet the circumstances which are dealt with in the Standard and therefore, the Commission's jurisdiction is not excluded.
- 212 At [63] of the substantive Reasons, the Senior Commissioner noted that '(t)he respondent has a very broad discretion as to how it deploys teaching personnel throughout the State, without the formalities of filling a vacancy, in response to a specified need for a position at a school. The number of teachers moved around the education system in this manner seemed to be considerable, on Ms Barnard's evidence.
- 213 The learned Senior Commissioner then went on to note the change in the Director General's policy, notified to the SSTU in a letter of 9 April 2018, which is directly contrary to the contention advanced by the Director General that any re-employment or employment of Mr Buttery would trigger the jurisdictional barrier of the need to fill a vacancy. This is because the Director General, as the employing authority of teachers under the PSM Act, had determined that she will re-employ teachers who have had notices issued to them under the WWC Act, subject to conditions set out in that letter, none of which involves a process resembling that set out in the Standard and other processes as described by Ms Barnard in her evidence.
- 214 The Senior Commissioner went on to note that, apart from his conclusions adopted from the interim orders proceedings, he was not persuaded by the Director General's contentions. He said:
- It is manifestly clear that Mr Buttery can be offered a contract of employment with the respondent ... without the need to 'fill a vacancy' [65].
- 215 There is no doubt that, but for the question regarding the application of s 23(2a), the Commission has jurisdiction to deal with a refusal to employ. Section 23 - jurisdiction of Commission, of the IR Act provides, in subsection 1(1), that:
- Subject to this Act, the Commission has cognisance of and authority to enquire into and deal with any industrial matter.
- 216 'Industrial matter' is defined in s 7(1)(c) as including the 'refusal to employ any person'.
- 217 However, s 23(2a) provides that 'the Commission does not have jurisdiction to enquire into or deal with any matter in respect of which a procedure referred to in s 97(1)(a) of the *Public Sector Management Act 1994* is, or may be, may be prescribed under that Act'. Section 97(1)(a) of the PSM Act sets out that one of the functions of the Public Sector Commissioner is:
- (a) to make recommendations to the Minister on the making, amendment or repeal of regulations prescribing procedures, whether by way of appeal, review, conciliation, arbitration, mediation or otherwise, for employees and other persons to obtain relief in respect of the breaching of public sector standards
- 218 The *Public Sector Management (Breaches of Public Sector Standards) Regulations 2005* (PSM (BPPS) Regulations) are regulations prescribing procedures referred to in s 97(1)(a) of the PSM Act.
- 219 In *Jones, Wheeler and Le Miere JJ* concluded that there was a public sector standard dealing with recruitment, selection and appointment, and that was a matter in respect of which a procedure was prescribed pursuant to s 97(1)(a) of the PSM Act. Therefore, the Commission's jurisdiction to deal with the matter of the fairness or otherwise of Mr Jones not being appointed to a position was excluded (see [502] – [506]).

220 The Standard, published in the Government Gazette of 11 February 2011, says that it ‘applies when filling a vacancy (by way of recruitment, selection, appointment, secondment, transfer and temporary deployment (acting)) in the Western Australian Public Sector’. Its purpose is clear. It defines “vacancy” as being:

‘a vacant post, office or position within the public sector. A vacancy can result from the creation of a new office, post or position or by the temporary or permanent movement of another employee’.

221 ‘Recruitment’ is defined as ‘the process used by an agency to attract, assess and select applicants to fill a vacancy.

222 It is to ensure that decisions to fill a vacant post, office or position are made on the basis of merit and equity, and are transparent. Employing authorities are expected, except in limited circumstances, to appoint from a competitive field of candidates.

223 There is also an instruction issued by the Public Sector Commissioner pursuant to the PSM Act, which sits alongside the Standard. It is Commissioner’s Instruction No. 2 – Filling a Public Sector Vacancy (CI 2). This sets out a range of directions to Chief Executive Officers and employing authorities in deciding to fill a vacancy and how they are to go about it. It sets out a number of requirements which supplement the Standard. They include options for filling a vacancy, by way of permanent or fixed-term contract of service; redeployment; transferring an employee at level; secondment, or an acting opportunity. It sets out certain considerations in respect of the use of fixed-term appointments and contracts of service. It deals with advertising requirements, whether they be general advertising, targeted advertising, quarantining or expressions of interest. Interestingly, it provides for circumstances where a Chief Executive Officer/employing authority may not be required to advertise to establish a competitive field or conduct a competitive assessment of merit to fill a vacancy. Those circumstances include:

1. acting, secondment or fixed-term contract opportunities less than six months, where there is no likelihood that these opportunities will be extended;
2. where the Chief Executive Officer/employing authority is satisfied that advertising will not attract a competitive field due to the specialist nature of the position;
3. and other conditions.

224 Most significantly, CI 2 provides:

- 4.1(g) Where a previous permanent employee of an agency (not in the Senior Executive Service) is to be appointed to a vacancy that is the same or similar (same level and same or similar job requirements) to a previous role held by the employee, and the following criteria are met:
 - i. the employee must have worked for the agency for a period of no less than 12 months;
 - ii. the employee must have a documented record of satisfactory performance in their previous role; and
 - iii. if applicable the employee is to have met any severance or redundancy conditions,
- 4.2 The decision not to advertise and conduct a competitive assessment of merit should be documented and endorsed by the Chief Executive Officer/employing authority.

225 CI 2 also deals with appointment pools. The Chief Executive Officer/employing authority may form an individual agency pool of potential appointees who have already applied for a position and been assessed as meeting the criteria for a particular position, or they may combine with other Chief Executive Officers/employing authorities to form a shared appointment pool. There is also the capacity for suitability lists to be established as part of an open pool. There are other arrangements for appointing to a vacancy which means that an employer does not have to go through a formal advertising and competitive selection process.

226 The Director General says two things about the Standard. Firstly, she says that she would breach the Standard and, consequently, the Commissioner’s Instruction No. 2 if she re-employed Mr Buttery. Secondly, she says the Standard excludes the Commission’s jurisdiction to deal with the claim to require her to re-employ Mr Buttery.

227 The question that arises is whether the current circumstances require or relate to the filling of a vacancy as covered by the Standard. Those circumstances are that Mr Buttery had been an employee of the Director General. He was removed from that employment. When the reasons for his removal ceased, he sought to be re-employed. But for the exclusion of his capacity to achieve a remedy, because of the WWC Act, he could have challenged that removal as constituting an unfair dismissal. Such a dismissal could result in an order of reinstatement or re-employment pursuant to s 23A of the IR Act. Such a reinstatement or re-employment would not require the employer to fill a vacancy. Even if the employer had filled the position from which the employee had been dismissed, it would not be open for the employer to say it could not reinstate or re-employ because of a requirement to comply with the Standard to fill a vacancy. This much was confirmed by Ms Barnard’s evidence about what occurred when Ms Hislop was required to be reinstated. It would be a matter for the employer to manage, as is always the case with reinstatement. In the circumstances of this matter, it is not reasonable to object to an order of reinstatement as being impracticable on the ground that the job has since been filled.

228 Further, Ms Barnard’s evidence demonstrates the practical application of the Standard. As correctly characterised by the Senior Commissioner, it demonstrates the flexibility with which the Director General may approach the employment and deployment of teachers.

229 Ms Barnard says that the Director General acts in a very flexible way in finding positions for teachers for whom transfers need to be made. Her evidence relates to a number of different circumstances. They include appointments and transfers including from pools of pre-assessed candidates.

- 230 I understand her evidence to be that there is no capacity to allege a breach of Standard where a teacher is already in a pool and is appointed to a vacancy or is otherwise allocated work. But to get into the pool, the teacher must go through a competitive process and have their skills, knowledge and abilities, and other considerations, assessed. This assessment and appointment to a pool appears to be in line with the Standard and with CI 2. A teacher may then be appointed to a particular position from the pool. It is entry into the pool which may be subject to complaint of breaches of Standard and to review, not the appointment from the pool to the position. In this way, there is a competitive field established and an assessment of merit and equity.
- 231 In my view, if the Director General had properly assessed Mr Buttery for appointment in accordance CI 2 4.1(g), she could reasonably have concluded that he could be appointed. He had performed the same or a similar role previously and had worked for the Director General for no less than 12 months. As I will conclude later, had the investigation not been so flawed, there would be no question that Mr Buttery had misconducted himself in such a serious manner as to constitute misconduct. He had a documented record of satisfactory performance in his previous role. All the requirements of 4.1(g) would be met. The Director General could have acceded to a request to employ Mr Buttery without being in breach of the Standard.
- 232 However, the question remains as to whether the Commission's jurisdiction is excluded by the existence of the Standard and the provision for review under the PSM (BPPS) Regulation.
- 233 What is sought in the matter referred for hearing and determination is that the Director General re-employ Mr Buttery. The Standard and CI 2 are specified as dealing with the filling of a vacancy. They appear to cover all possible options relating to filling a vacancy. However, they do not say that a person cannot be employed without there being a vacant position.
- 234 Ms Barnard's evidence demonstrates that when positions are abolished, some teachers remain employed, that is, in a contract of service with the Director General, until they can be formally allocated to a position, whether that position be vacant due to the incumbent, for example, acting up, taking leave or being on secondment. Alternatively, there may be a vacant position into which they can be transferred at level.
- 235 In this case, the Commission was asked to order the Director General to re-employ Mr Buttery in his former position. However, the Commission is not bound to the limits of the remedy sought (s 26(2) of the IR Act). In this case, the SSTU made clear that while it sought re-employment in Mr Buttery's former position at Greenfields Primary School, another position in the area would be acceptable.
- 236 In the circumstances, then, what was sought was the re-establishment of the employment relationship. It might mean that Mr Buttery would be supernumerary until he could be placed in a particular position. The re-employment, that is, the re-establishment of the employment relationship, would be a step prior to the filling of a vacancy, or the other steps dealt with in the Standard. The Standard would come into play after the re-establishment of the employment relationship, if Mr Buttery is to be placed in a vacant position.
- 237 In this way, the learned Senior Commissioner did not err. The matter excluded by s 23(2a) relates to procedures prescribed for the filling of a vacancy. It is to be distinguished from the creation or re-establishment of the employment relationship. The filling of the vacancy is the next step. It is the next step which is the matter excluded due to the prescribed procedure.
- 238 Therefore, where the ground of appeal alleges error in two ways, firstly regarding the Commission's jurisdiction being excluded by s 23(2a) and secondly, that the Director General could not accede to a request to re-employ because of the Standard, I would dismiss this ground.

Further Ground 1 issues

1. 'Conflating' issues

- 239 The Director General argued that in the way the learned Senior Commissioner described the matter in dispute, in [40], he erred by conflating the issues. (For convenience, I have set that paragraph out at [195] above.) This was the characterisation of the industrial matter as 'concerning the fairness of Mr Buttery's removal as a teacher from his school and the refusal of the respondent to re-employ him'. He went on to describe the circumstances of Mr Buttery's removal and the claim for re-employment as being 'inextricably linked'.
- 240 I respectfully agree with the Senior Commissioner that the circumstances of the removal and the claim for re-employment are inextricably linked, both arising from the incident on 31 August 2016. Without the first, the second does not require consideration and, in any event, would be irrelevant.
- 241 However, merely because the Senior Commissioner described the claim before him at that point as concerning the fairness of the removal and the refusal to re-employ does not conflate them. They are two separate issues and while inextricably linked, can be and were dealt with separately. The first issue, of the fairness of Mr Buttery's removal, is not a matter for which there can be a remedy due to the provisions of s 41(3) of the WWC Act and the learned Senior Commissioner concluded accordingly.
- 242 However, the Director General went on to do something else – she refused to re-employ Mr Buttery and did so a number of times and for different reasons. The issue of those reasons and whether there can or should be a remedy relating to those different reasons is a separate matter from the dismissal itself.
- 243 As the Senior Commissioner found, and in my respectful view, correctly, the reason for the dismissal was to comply with the WWC Act. The reason why the Director General undertook an investigation after all of the impediments to Mr Buttery's reinstatement were otherwise removed was, in spite of what Mr Belshaw said, to decide whether it wanted to re-employ him. I think it is fair to draw the inference, and I do, that the investigation would not have been undertaken but for the fact that the SSTU was persisting in seeking Mr Buttery's re-employment. The timing of the recommencement of the investigation confirms this. The reason for the refusal, as set out by Mr Milward in his affidavit (Exhibit A6), was because the Director General concluded that Mr Buttery was not suitable to be employed as a teacher.

2. Necessity for a vacancy

244 Another point raised in this ground is that the Director General says that there cannot be a refusal to employ without there being a vacant position and referred to the decision of the Federal Court in *Stephens v Australian Postal Corporation* ([2014] FCA 732) as authority for that proposition. This case involved the application of s 342(1) of the *Fair Work Act 2009* (Cth) which defines 'adverse action'. In item 2 of that definition, 'adverse action' is that action taken by a prospective employer against a prospective employee if the prospective employer refuses to employ the prospective employee. Flick J cited observations made by Moore J in *Fraser v Fletcher Construction Australia Ltd* (1996) 70 IR 117 at [119]:

It is necessary to consider the phrase 'refuse to employ' in context. Its immediate context is 'one in which two aspects of an employer's conduct are identified in the prefatory words in s 334(2). The expression 'refuse to employ' identifies the first. The remainder of the prefatory words identify the second. They concern conduct where an offer is made to employ a person on discriminatory terms... It concerns actual and not theoretical employment. That is, employment by an employer to perform work for the employer albeit on discriminatory terms or conditions. Thus the companion words to the expression 'refuse to employ' concerns actual employment and they constitute a fairly compelling pointer of the subject matter Parliament intended to address in s 334(2). They indicate that the expression 'refuse to employ' deals with the same subject matter, that is, actual employment where there is a refusal to employ a person in circumstances where, apart from the refusal, employment might or would arise. I refer to situations where employment might arise to allow for circumstances where a vacant position exists and a refusal to employ arises before the employer has ascertained whether the person applying for the job or position, who is victimised for a proscribed reason, is qualified or equipped to do the job.

245 Flick J went on to quote from Wilcox J in *Construction, Forestry, Mining and Energy Union v BHP Steel (AIS) Pty Ltd* [2000] FCA 1008 where his Honour observed:

A refusal to employ somebody involves discrimination or victimisation only if there was, at the relevant time, a vacancy or prospective vacancy [50].

246 Other examples of refusal to employ were cited by Flick J such as '(w)here there is in fact a vacant position and where another person is appointed in preference to the claimant: e.g., *Maritime Union of Australia v Burnie Port Corporation Pty Ltd* [2000] FCA 1189, (2000) 101 IR 435'.

247 His Honour also examined cases where '(s)uch statements have not gone unchallenged' and he referred to *Australasian Meat Industry Employees' Union v Belandra Pty Ltd* [2003] FCA 910, (2003) 126 IR 165, where North J held that there were two available constructions, one of which was if there was no vacancy. He said:

(I)t can be said that there is no refusal to do something if that result cannot be achieved. A person cannot refuse to do that which cannot be done. If there is no vacancy, then there can be no refusal to employ... Alternatively, it can be said that even if the outcome is not available, the decision not to provide it is nonetheless a refusal to provide an outcome. That is, whether the outcome can be achieved should be considered separately from whether there was a decision not to achieve the outcome. Thus, there can still be a refusal to employ even if there is found to be no available vacancy (the latter construction) [49].

248 North J preferred the latter construction. However, his Honour went on to note:

... In this case there was a refusal to employ the Belandra employees when Belandra said, in September 2001, that it would not offer re-employment to the Belandra employees. The question whether there were any vacancies to be filled by the Belandra employees, then, is a matter which the respondent can raise in relation to the existence of a proscribed reason for the refusal, with a view to rebutting the presumption that the refusal was for a proscribed reason. However, if it is shown that Belandra contrived to have no vacancies through its decision not to employ, this argument might not succeed...[67].

249 Flick J observed that what North J's comments 'make self-evident is that much depends upon the facts and circumstances to which the statutory language is sought to be applied'. His Honour went on to note a number of circumstances where there might be a contrivance resulting in there being no available vacant position to which one or other of the employees could have been appointed.

250 His Honour noted, in the paragraph [30] referred to by the Director General in these proceedings, that:

First, if the reasoning of Moore J in *Fraser*, supra, and that of Wilcox J in *BHP Steel*, supra, be accepted without reservation, the fact is that as at 22 December 2011 there was no vacant position which Mr Stephens could have filled. On their Honours' approach, there has been no 'refusal to employ' for the purposes of Item 2 of s 324(1) of the *Fair Work Act*.

251 What the decision of Flick J in *Stephens* and North J in *Australasian Meat Industry Employees Union* make clear is that the facts of the case are most important. I also note that those decisions deal with the phrase 'refuse to employ' in a particular statutory context of the *Fair Work Act*, for a demonstration of adverse action being taken against an employee. That is not the context in the case before the Full Bench.

252 What can be taken from *Stephens*, however, is that a contrivance on the part of the employer for there to be no vacancy is not sufficient to justify a conclusion that there was no refusal to employ because there was no vacancy.

253 Further, while the Director General argues that there was a requirement for a vacancy, Ms Barnard's evidence clearly suggests that the requirement for there to be a vacancy may be the sort of contrivance referred to by North J in *Australasian Meat Industry Union*.

254 The Director General is an employer of a very large number of teachers in a very significant number of schools. The Department facilitates the movement of teachers from one position to another, from one school to another and from one district to another where circumstances require it. Any argument that the position that Mr Buttery had held had been filled was overcome by the fact that there were about to be positions available in the area. New schools were about to open. The fact that Mr Buttery, through the SSTU, sought re-employment in the position he had held before does not mean that the Commission is limited to or bound by that preference.

255 Therefore, in my view, the first ground of appeal fails.

Grounds 2 and 5

256 In ground 2 the appellant says that the Senior Commissioner made an error of law in failing to find that the letter dated 20 June 2017 was wholly covered by without prejudice privilege and could not be relied upon by the respondent as evidencing a request for employment.

257 In ground 5, the appellant puts an alternative to Ground 2. It says that if the letter was not wholly covered by without prejudice privilege, the Senior Commissioner erred by failing to consider a relevant consideration, namely that the letter was not a bare request for employment; it contained a number of conditions; and the Senior Commissioner failed to consider whether it was unfair for the appellant to have refused to accede to those conditions.

258 The Senior Commissioner concluded that 'the first part of the letter may properly be regarded as a further request by the applicant for the respondent to re-employ or reinstate Mr Buttery' and that the Director General not only refused the further request but also informed the SSTU that a disciplinary investigation would be conducted.

259 He noted that the conciliation process had commenced and said:

It has long been the view that matters discussed in and arising from a s 44 conference may not be later relied upon by parties once the conference has concluded. To do so would discourage the exchange of views to which I have referred and would be contrary to the objects of the Act in s 6, to promote and encourage the settlement of disputes through conciliation. Accordingly, I do not propose to have regard to what was put by the applicant in the conciliation conference of 14 July 2017. Despite this however, there can be no doubt that as practical matter, the parties were and remained in dispute as to the circumstances of the termination of Mr Buttery's employment and the applicant's claim that he be once again employed by the respondent. That is what these proceedings have been about from their inception [128].

Consideration and conclusion regarding Ground 2

260 The without prejudice letter was dated 20 June 2017 and was headed 'Re: Mr Justin Buttery – C 10 of 2017'. The number C10 of 2017 is the number of the application made by the SSTU pursuant to s 44 of the IR Act. By 10 June 2017, the Commission had convened conferences to deal with the application by conciliation. By that time, the First Interim Orders application had been made and dealt with. The parties continued to communicate, both in conference before the Commission and in writing.

261 The first sentence of the letter says 'I refer to all previous correspondence with you in regards to Mr Buttery and the abovementioned application currently before the WA Industrial Relations Commission'. It proceeded to set out some of the background in relation to a letter to Mr Buttery dated 3 November 2016 in which he was directed to leave the school premises, pursuant to s 240 of the *School Education Act 1999*; it referred to the criminal charge and that it had been withdrawn. It said that in those circumstances, Mr Buttery was able to be employed as a teacher and '(i)n formalising the present request on behalf of Mr Buttery, the union hereby requests the reinstatement or re-employment of Mr Buttery by the Department at your earliest convenience, as it is just and fair to do so'.

262 What followed is a heading of 'C 10 of 2017 – WITHOUT PREJUDICE – OFFER TO SETTLE'.

263 Two things lead me to the conclusion that the whole of the document is to be read as a without prejudice communication and therefore, was inadmissible. The first is that the whole of the letter dealt with the negotiations between the parties to resolve the dispute that was referred to the Commission as application C 10 of 2017. All communications between the parties aimed at settlement of such a dispute may attract without prejudice privilege even if they are not expressed in that way by a letter containing a heading to claim the privilege (*Rodgers v Rodgers* (1964) 114 CLR 608 at (614)).

264 Secondly, the first part of the letter, above the 'without prejudice' heading, relates directly and explicitly to the dispute the subject of the s 44 application and the last paragraph of the first part may be seen as an introduction to the without prejudice offer that follows.

265 Therefore, ground 2 is made out. However, it does not warrant the overturning of the decision. This is because the Director General responded to the letter rejecting the proposal for re-employment it contained. That a without prejudice offer to settle was made, and the terms of that offer, do not alter the fact that throughout the time from Mr Buttery's dismissal until the determination of the substantive matter, the Director General refused to re-employ Mr Buttery. The refusals were for a variety of reasons.

266 It is also clear that, whatever else was contained in the letter, and whatever was said in the conciliation conferences, the parties were in dispute because the SSTU wanted the Director General to re-employ Mr Buttery and the Director General was refusing to do so. There appears to be no argument that the conditions put in the without prejudice part of the letter were unacceptable to the Director General. The email of 7 August 2017 and Mr Milward's affidavit of the same date make clear that the Director General was refusing to re-employ Mr Buttery. This was not because of the conditions attached to the request in the without prejudice communication. It was because Mr Buttery was considered not suitable to return to teaching because of the Director General's conclusion about what happened in the incident. Mr Milward's recommendation was reflected in the Director General's response to that letter.

267 Mr Milward's affidavit demonstrates that at this point, before the investigation had been completed, he had formed the view that Mr Buttery should not be re-employed and was not suitable for employment in his former role. This was 'because of the evidence of his unnecessary and inappropriate physical contact with a Year four student'. This was in August 2017 before Mr Buttery had been provided with an opportunity to comment.

268 I also note that, according to Mr Milward's affidavit, Mr Buttery's former position had been filled by way of a 12-month fixed term contract as at 2 February 2017. This would mean that by 2 February 2018, Mr Buttery's former position would be vacant.

269 All of this makes very clear that the Director General had no intention of re-employing or reinstating Mr Buttery. The Director General had formed a view that he had misconducted himself and that view was formed even before the conclusion of the investigation and before Mr Buttery had an opportunity to respond. The decision not to re-employ did not relate to the terms of the without prejudice letter.

270 Therefore, while I would uphold this ground, it does not affect the outcome.

Consideration and conclusions regarding Ground 5

271 This ground is overtaken by the fact that Mr Milward's affidavit makes very clear that the Director General was not going to re-employ Mr Buttery on the basis that he was not suitable for employment as a teacher. This was regardless of whether there were or were not conditions placed on any proposal for settlement. Mr Milward prepared a briefing note to the Director General, which contained a recommendation. That recommendation was that Mr Buttery not be re-employed. The Director General adopted the recommendation and, in response to the letter of 20 June 2017, said she would not be reinstating his employment or salary.

272 There was no evidence before the Senior Commissioner that the conditions attached to the without prejudice letter were given any consideration by the Director General or were the reason for the refusal to employ. Therefore, there was no requirement for the issue to be considered.

273 I would dismiss this ground.

274 Ground 3.

275 In ground 3, the appellant contends that the Senior Commissioner made an error of law in finding that s 41(3) of the WWC Act did not preclude Mr Buttery obtaining relief in the proceedings.

276 The Director General says that the learned Senior Commissioner erred in finding that s 41(3) of the WWC Act did not preclude Mr Buttery from obtaining relief in the proceedings. The point the Director General relies upon is that the employer cannot incur any liability because in complying with the provisions of the WWC Act, the employer does not start or continue to employ the person. It is said that this protects the Director General against a remedy by the person.

Consideration and conclusion regarding Ground 3

277 Section 41 of the WWC Act provides:

Employer to comply with Act despite other laws etc.

- (1) If it would be a contravention of a provision of this Act for a person (the *employer*) to employ another person in child-related employment, the employer is to comply with the provision despite another Act or law or any industrial award, order or agreement.
- (2) The employer does not commit an offence or incur any liability because, in complying with the provision, the employer does not start or continue to employ the person in child-related employment.
- (3) Nothing in this section operates to affect a person's right to seek or obtain a remedy under the *Industrial Relations Act 1979* unless –
 - (a) the remedy is for the dismissal of the person by the employer; and
 - (b) the reason the employer dismissed the person was to comply with this Act; and
 - (c) the grounds on which the person seeks the remedy relate to the fact that the person was dismissed for that reason.

278 This provides that no remedy is available if all three conditions are met. Those conditions relate to a remedy for the dismissal.

279 The Memorandum of matters referred for hearing and determination sets out the SSTU's contentions. The first was that the termination of Mr Buttery's employment on 11 November 2016 was unnecessary and unfair. The SSTU relied on the decision of the Industrial Appeal Court in *Charles Brett v Sharyn O'Neill, Director General, Department of Education* [2015] WASCA 66; (2015) 95 WAIG 429 at [40]. In that matter, the Court noted that a person with an INN must not be 'employed' in child-related employment. The purpose of s 23 is said to be to prevent a person holding a current INN from carrying out child-related work by prohibiting people who have been charged with or convicted of relevant offences from carrying out child-related work whilst in an employment-like relationship. The Court noted that the WWC Act is not concerned with regulating a contract of employment:

... or requiring contracts of employment to be terminated. If an employer suspends an employee from carrying out child-related work, or all work, or orders the employee to stay away from the premises on which child-related work is carried out then the employer would not be contravening WWC Act s 22(3) notwithstanding that the contract of employment continued to subsist. The terms 'employ' in s 22(3) and 'employed' in s 23(a) relate to the work performed or to be performed by the person in question, as distinct from the contractual or other relationship between the person and the employer. [40]

280 In this way, the SSTU said that dismissal was not required.

281 The learned Senior Commissioner found that the reason Mr Buttery was dismissed was the issuance to him of the INN and that therefore, subjectively viewed, the operative reason for Mr Buttery's dismissal was for the employer to comply with s 22 of the WWC Act. In those circumstances, s 41(3)(b) would appear to be satisfied. The learned Senior Commissioner found at [50] that s '41(2) affords an employer protection from any liability where the employer dismisses an employee to comply with s 22 of the WWC Act'.

282 The Senior Commissioner said at [56]:

The applicant in this case argued that it does not seek to alter or modify the respondent's decision to dismiss Mr Buttery. Rather, the claim of the applicant is one relating to the unfair refusal of the respondent to employ Mr Buttery after the WWC Act prohibition on him had been revoked and his working with children authority and teacher registration returned. I agree with this. Given the remedy claimed, I do not consider s 41(3)(a) is satisfied in this case.

283 He went on to note in [58] that:

(T)he respondent's refusal to employ Mr Buttery was not to comply with the WWC Act. It refused to employ him because, even some time after any prohibition on his employment in child-related work no longer applied, it considered his prior conduct made him unsuitable to be employed as a primary school teacher...'

284 An employee may seek re-employment at any stage. The question is the fairness or otherwise of the refusal to re-employ. That requires separate consideration from the dismissal, unless, of course, the reason for the refusal to employ is the same as the reason for dismissal. Therefore, in my view, any consideration of re-employment on the basis of the fairness or otherwise of the refusal of the request to employ can be distinguished from the issue of whether the dismissal itself was unnecessary or unfair given that the reason for dismissal was to comply with the WWC Act.

285 The learned Senior Commissioner appears to have considered whether the dismissal itself was unfair. In [161], he said that 'I am not persuaded that Mr Buttery committed an act of misconduct that would warrant the summary termination of his employment, the placing and retention of a red flag on his employment record and the ongoing refusal of the respondent to employ him'. Read apart from the overall context of the claim, the first part, the conclusion regarding the justification for the dismissal, may appear to be in error. However, that phrase, read in the context of the sequence of events that he was describing, and of the issue which was being considered, of a refusal to employ, must be seen as also answering the question of whether the conduct was justification for the ongoing refusal to employ.

286 In my respectful view, it was quite valid for the Senior Commissioner to examine the circumstances and determine whether those circumstances acted as a proper basis for the Director General to refuse to re-employ.

287 Mr Milward's affidavit and the evidence before the Senior Commissioner make it clear that the Director General treated Mr Buttery unfairly in that the decision to refuse to re-employ was made on the basis of what was alleged in the incident with S and that this meant that he was not suitable for re-employment. What the Senior Commissioner found was that the investigation which resulted in the findings about his conduct was deeply flawed. The incident, and later the findings, were used to support the decision not to re-employ.

288 Section 44(3)(a) of the WWC Act prevents a remedy when the remedy sought is for the dismissal. The remedy sought was, in part, for the dismissal and in that case, s 44(3)(a) prevents that remedy. However, the claim also included a claim for re-employment on the basis of an unfair refusal to re-employ. While the matter referred for hearing and determination contended, amongst other things, that 'the termination ... was unnecessary and unfair', the matter proceeded on the basis of the refusals to employ and their fairness. That last issue was the issue the Commission determined.

289 I would dismiss this ground.

290 **Ground 4.**

291 In this ground, the appellant says that in finding that the appellant unfairly refused to employ Mr Buttery, the Senior Commissioner erred by failing to consider relevant considerations. These are:

- (a) Mr Buttery only sought to be employed in the position he previously held at Greenfields Primary School, and did not seek employment with the appellant in any other position;
- (b) the position in which Mr Buttery was previously employed at Greenfields Primary School was filled on a permanent basis on 30 January 2017;
- (c) none of Mr Buttery's "requests" for employment were made through the usual process of applying for an advertised position; and
- (d) whether it would be unfair to other applicants for teaching positions with the appellant if the appellant was to appoint Mr Buttery to a teaching position without him applying through the usual process which all other applicants for teaching positions with the appellant are required to do.

Consideration and conclusions regarding Ground 4

292 As I have already noted, the Commission is not bound to the remedy sought by a party (s 26(2) of the IR Act). Secondly, it became very clear that the SSTU did not limit the remedy to the position previously held by Mr Buttery.

293 As to the first matter that the learned Senior Commissioner is said to have failed to consider, it was quite clear with respect to the Director General, that whether Mr Buttery was willing to be re-employed and posted to another school, she had no intention of re-employing him. At no time did the Director General indicate that she was prepared to enter into discussions

with the SSTU with a view to an alternative position being found for him. Further, if the position that he had previously held had been filled on a 12-month basis then by 3 February 2018, the position would have come vacant.

294 The third basis upon which the Director General says the Senior Commissioner failed to consider relevant considerations is that none of Mr Buttery's 'requests' for employment were made by his applying for an advertised position. The second part of this is that it would be unfair to other applicants for teaching positions with the appellant if the Director General were to appoint Mr Buttery to a teaching position without him applying through the usual process. These two aspects, in my view, once again rely on form over substance. As I noted in respect of the Standard, the evidence of Ms Barnard makes quite clear that the Director General could have found an opportunity for Mr Buttery to be employed and undertake meaningful work until he could apply for a position. Had Mr Buttery formally applied for a particular position, he could not have succeeded due to his red-flagging.

295 Further, the Director General could have appointed Mr Buttery to a vacancy in compliance with s 4.1(g) of CI 2.

296 I would dismiss this ground.

297 **Ground 6.**

298 The appellant says that the Senior Commissioner erred by having regard to irrelevant considerations, namely:

- (a) that the appellant's refusal to employ Mr Buttery "end[ed] his career as a primary teacher in government schools": [168], and
- (b) that the conduct of Mr Buttery did not warrant summary termination of his employment: [161].

299 The Director General notes that Mr Buttery had no prima facie right to be re-employed and that the Director General's views concerning Mr Buttery's suitability for employment were valid. It is said that the Full Bench accepted this in *The Construction, Forestry, Mining and Energy Union of Workers v BHP Billiton Iron Ore Pty Ltd* [2005] 85 WAIG 1924; (2005) WAIRC 01797 at [251] – [252]. In that matter, Sharkey P noted:

The Commissioner at first instance found that it was not logical to approach the matter on the basis that, because he was an experienced and competent driver and therefore an experienced driver he ought to be employed...

I agree that there is some flaw in that reasoning. There are, of course, many reasons why a 'contractor' may fairly not be offered employment which may not have anything to do with his competence or incompetence.

300 The Director General goes on to say that during the time after the lifting of the INN, the Director General remained concerned about restoration of Mr Buttery's registration and discontinuance of the assault charges, as to his suitability to be employed as a teacher.

301 The Director General also refers to the decision of the New Zealand Court of Appeal in *Balfour v Attorney-General* [1991] 1 NZLR 519 where Hardie Boys J observed:

The second point is one that must not be lost sight of, and it is the great care that educational authorities must exercise when made aware of an allegation, even a rumour, of this kind. Their prime duty must be the protection of the children, if possible to prevent problems rather than await their occurrence. They also have a duty to their employees, to act justly and with discretion. The duties may conflict, and to maintain a balance between them can be a delicate matter. There can be no criticism of action taken in the interests of the children, even if there is no more than suspicion, provided the action is appropriately restrained and rational, and the ultimate need for a balanced judgment on the validity of the suspicion is not lost sight of. It is clear that in the present case it was lost sight of.

302 At (528), his Honour went on to observe that an employer is free to form its own judgments about employees or prospective employees and record them for possible future reference. He said that the law must recognise 'the balance to be preserved between a teacher's rights and the Department's wider responsibilities. Particularly in the case of moral suitability clear proof may be difficult to obtain. Yet to ignore possible warning signs may be irresponsible.' The Director General says that the Senior Commissioner gave no consideration to the Director General's duties in deciding it was unfair to refuse Mr Buttery employment.

303 The Director General says that the hearing at first instance in large part took the form of a hearing de novo concerning the allegation, the subject of the disciplinary proceedings. The Director General says in her submissions that '(i)t cannot be reasonably contended that material upon which a prospective employer relies to decide whether to employ or not should be subjected to that degree of scrutiny. The appellant was entitled to rely upon the evidence then available to decide whether to employ Mr Buttery or not.'

304 The Director General says that the evidentiary test is not that which is applied in a de novo hearing to determine whether the misconduct relied upon did occur in relation to dismissal but whether at the time the employment was refused the Director General could still reasonably suspect Mr Buttery was unsuitable for employment as a teacher. This is to be considered in the circumstances that prevailed at the time the refusal decision was made having regard to the duties of the Director General and the nature of Mr Buttery's employment.

Consideration and conclusions regarding Ground 6

305 As to the first issue, I am of the view that the characterisation of the Senior Commissioner's considerations, said to be irrelevant, in the way they are by the Director General, takes them out of the context of the dispute.

306 Firstly, Mr Buttery was not a person, unknown to the Director General, with no prior relationship with the Director General, who was simply demanding to be employed. He was a former employee whose employment had come to an end in circumstances where he had been issued with an INN because of his alleged conduct towards a student. Secondly, the issue of refusal to employ was squarely in dispute. Thirdly, the final reason for the refusal to employ was his unsuitability to be

employed as a teacher given his alleged conduct, the conduct said to have justified the INN. Given these circumstances, it was necessary for the Commission to examine the conduct to determine if it justified the Director General's reason for the refusal. It required a hearing de novo. The Director General chose to conduct her case at first instance without dealing with the conduct itself. As the Senior Commissioner noted, it was a deliberate decision, and it was a strategic one. However, the conduct and the investigation were issues clearly within the matter referred for hearing and determination.

- 307 The learned Senior Commissioner approached the matter as a hearing de novo by undertaking a review of the employer's actions and decision-making process. He did so for the purpose of determining whether the decision was an unfair exercise of the employer's contractual, and in this case statutory, right to refuse to employ to determine if it was necessary to intervene in that decision. This approach is in conformity with the approach set out in *Tip Top Bakeries v Transport Workers' Union of Australia, Industrial Union of Workers, WA Branch* (1994) 74 WAIG 1729 per Sharkey P. To do so, it was necessary to examine all of the material before the decision-maker. The Memorandum of matters referred for hearing and determination set out the very broad scope of the issues in contention. They included an examination of what occurred in the classroom during the incident.
- 308 As to the question of whether Mr Buttery's career as a primary school teacher was ended by the refusal to employ, the Director General is the largest employer of teachers in Western Australia. She is the employer in all government schools. If the Director General refuses to employ a teacher, one with a number of years of service in government schools, then unless something significant changes, a teacher's career as a primary teacher in government schools is at an end. This was a consideration relevant to the fairness in the refusal to employ.
- 309 The refusal to employ, which the Senior Commissioner found to be unfair, was unfair because of the flawed investigation which resulted in erroneous conclusions about Mr Buttery's conduct. Even before the investigation was concluded, the Department had made a decision about that conduct.
- 310 In respect of the comments made in *Balfour*, I note that this case arose almost 30 years ago and related to rumours about the teacher's morality. Where the judgment deals with the balance between the teacher's rights and the Department's wider responsibilities, it is clear that the present case is distinguishable. Firstly, this matter involves a conclusion by the employer about a particular incident which it investigated. But for the erroneous conclusion, Mr Buttery ought to have been considered to be a teacher in good standing. It was not a matter of rumour or suspicion about a general unsuitability. In this case, the conclusions about Mr Buttery's conduct which lead to the decision to refuse to employ were demonstrably in error.
- 311 The Director General must have a reasonable and rational basis for her actions and cannot deflect responsibility for managerial decisions based on the content of an investigation report that the Director General has produced, particularly when the reliability and findings of that report were squarely placed in issue in the Memorandum of matters referred for hearing. Given the scope of that dispute, it was entirely appropriate for the Commission to carry out an objective assessment regarding Mr Buttery's conduct in circumstances where the SSTU was seeking orders that he be returned to child-related work.

312 I would dismiss this ground.

313 **Ground 7.**

- 314 In finding that the appellant unfairly refused to employ Mr Buttery, the Senior Commissioner is said to have failed to properly exercise his discretion by making a decision which was manifestly unreasonable. This is said to be in a range of circumstances relating to Mr Buttery having no legal right to be employed; that the position for which Mr Buttery requested employment was not vacant, and the appellant would have had to transfer the person employed in that position to another position; that Mr Buttery did not apply for, or request to be placed in, any other position with the appellant; that Mr Buttery did not apply for a position through the usual process and there was no legal obligation for the appellant to comply with the conditions contained in the without prejudice letter.

Conclusions and consideration regarding Ground 7

- 315 With respect to the Director General, the bases for this ground of appeal are generally reformulations of other grounds of appeal. The following comments are made in the context of my earlier comments where those issues have arisen in other grounds of appeal.
- 316 In my view, this matter was never about the Director General's formal processes and Mr Buttery's compliance with them in terms of re-employment. It is about whether the Director General's decision in refusing to re-employ Mr Buttery was unfair.
- 317 It is true that Mr Buttery had no legal right to be employed. However, the issue before the Commission at first instance was not about a legal right, it was a question of fairness in the refusal to employ. Merely because he had no legal right does not mean that as a matter of fairness, the Director General ought to have refused to re-employ him given all of the circumstances. The Commission's role was not to determine existing legal rights but to deal with fairness (s 26(1) IR Act).
- 318 In respect of the position for which Mr Buttery requested re-employment not being vacant, the Director General again asserts that this would have required the transfer of a person who was in the position he had vacated. I have dealt with these matters earlier regarding other appeal grounds. In any event, Mr Buttery did not need to apply for or request to be placed in any other position with the Director General. He made very clear his request for re-employment. There is no evidence that it was suggested that the Director General might re-employ him in any position.
- 319 The question of fairness in this process has always been a primary consideration. The Director General's reliance on this issue demonstrates a reliance on form rather than substance.
- 320 The same applies in respect of the particular that Mr Buttery did not apply for a position through the usual process. Ms Barnard's evidence makes clear that that was not necessary. Even if he did apply through the usual process, his employment record was red-flagged.

321 The letter contained a package of conditions including backpay which the Director General said she had no legal obligation to meet. However, as noted earlier, the evidence is clear that the Director General's reason for refusal was not about the conditions attached to the proposal. It was about the Director General's view of Mr Buttery's conduct, set out in Mr Milward's affidavit.

322 This ground ought to be dismissed.

Ground 8.

323 The appellant contends that the learned Senior Commissioner erred in law in ordering that the appellant pay Mr Buttery an amount reflecting salary and benefits that he would have earned from 2 October 2017 until the date of any acceptance of an offer of employment, when there is no power for the Commission to make such an order.

Particulars

- (a) *Mr Buttery had no legal right to be employed on 2 October 2017, nor did the appellant have a legal obligation to employ him.*
- (b) *The order requiring the appellant to pay Mr Buttery an amount reflecting salary and benefits that he would have earned from 2 October 2017 until the date of acceptance of any employment contract was an order for compensation.*
- (c) *The remedial powers of the Commission are limited to making orders to "deal with" an industrial dispute which is before it, which requires that orders made by the Commission be "sufficiently related" to the jurisdictional fact giving rise to the Commission's jurisdiction.*
- (d) *The Commission can also make orders for "incidental matters" as the Commission considers "just and equitable", however, such incidental orders must still be made to "deal with" the industrial dispute, and be "sufficiently related" to the jurisdictional fact giving rise to the industrial dispute.*
- (e) *The jurisdictional fact giving rise to the industrial dispute was a refusal to employ Mr Buttery.*
- (f) *The only order that could be made to "deal with" that industrial dispute was to "reverse" any refusal and order the appellant employ Mr Buttery.*
- (g) *An order for substantial compensation not connected to any legal right cannot be characterised as an order to "deal with" a refusal to employ, nor can it be characterised as an incidental order.*

324 One element of this ground, while not explicit in the Particulars, is that if the Commission were to order compensation in the nature of a retrospective order, then the Senior Commissioner was required to consider whether there were special circumstances which make it fair and right to do so.

325 As noted earlier, the Memorandum of matters referred for hearing and determination (the Memorandum), drawn up at the conclusion of the conciliation, subject to s 44(9) of the IR Act, in this matter is lengthy. It set out the applicant's contentions including the history of the matter. It speaks of Mr Buttery's dismissal on 11 November 2016, the SSTU's requests for the Director General to reinstate or re-employ him and says that the dismissal was unfair. The orders sought were:

- 1. that the respondent reinstate or re-employ Mr Buttery on terms and conditions that are no less favourable than his previous position; and
- 2. that the respondent pay Mr Buttery the amount that reflects the income (including superannuation) he would have earned for the period from 21 February 2017 to date.
- 3. If Mr Buttery was found to have engaged in misconduct sufficient to justify termination of his employment, the respondent pay Mr Buttery an amount that reflects the income and superannuation he would have earned from 21 February 2017 to 2 October 2017.

326 In its response, set out in the Memorandum, the respondent said that '(t)he matter before the Commission properly relates to a refusal to employ', and that the issues for determination were:

- (a) was there a refusal to employ;
- (b) if so, was such a refusal unfair; and
- (c) if yes, what relief should be granted.

327 The respondent went on in the Memorandum to contend that 'the Commission has no power to award compensation absent a legal entitlement, in conformity with the decision of the Industrial Appeal Court in *Pepler*.

328 The appellant's submissions filed on 12 February 2019, covering the 8 grounds of appeal, are relatively brief. The submission dealing with ground 8 contains no reference to the ground of appeal as filed, that is, about the power to make the order. Its focus is the issue of retrospectivity.

329 The respondent's written submissions treat the question raised in this appeal as being answered by the scope of the Memorandum, that is, that it provides the necessary jurisdiction and power.

330 In oral submissions, Mr Andretich for the appellant said "(w)e say that there's no power to make a bare order for compensation and in dealing with the matter that he did, the Senior Commissioner didn't purport to make a retrospective order of the type that could be made under s 44' (ts 20). The submissions then proceeded to deal with the issue of the appropriate test for retrospectivity. However, in submissions in reply, Mr Andretich said:

Now, I don't know why compensation wasn't an issue. There's been much reference back to the Memorandum of matters, and page 14 of the appeal book, the respondents say is in paragraph 3:

The Commissioner has no power to award compensation, absent a legal entitlement.

So it was something that was raised, and it was something that was argued. You will see it in the reasons for decision, reference to those old cases like *Pepler*, where it was thought, at one stage, there was no power to award compensation, were raised. So it definitely was – at large, it was not a non-issue, and it shouldn't come as any surprise' (ts 37).

- 331 In the appellant's (respondent's) Opening Submissions at first instance, filed on 12 June 2018, under the heading Compensation, in [88] – [90], the appellant raised the issue, and did so by reference, once again, to *Pepler's* case (at footnote 41).
- 332 At the hearing at first instance, Mr Carroll for the appellant (respondent) noted that sections of the IR Act have been amended to overcome the issue identified in *Pepler*, ss 7(1a) and 23A for unfair dismissal claims, but that they do not 'apply to these proceedings' (ts 166).
- 333 The learned Senior Commissioner considered the Commission's jurisdiction and powers, taking account of the definition of industrial matter, as well as case law. He concluded that 'By s 23(1) of the Act, read with s 44(9), the Commission has ample jurisdiction and power to enquire into and deal with the industrial matters so referred for determination' [32].

Consideration of Ground 8

- 334 The scope of the matters for hearing and determination, and for which an order may be made is to be that which is set out in the Memorandum. It is to be that which was explicitly part of that matter or was an issue raised by the parties or the Commission. It must be an industrial matter, it must be within the scope of the Memorandum and the orders made must be within the powers of the Commission to make (see *BHP Billiton Iron Ore Pty Ltd v Transport Workers Union, Industrial Union of Workers, Western Australian Branch* 2006 WAIRC 04239; (2006) 86 WAIG 1211 at [75] per Ritter A/P with whom Beech CC and Gregor SC generally agreed).
- 335 In considering this ground, I note the sparse nature of the appellant's submissions, and the lack of any attempt to address the matter in much detail apart from merely identifying a significant jurisdictional issue. However, I think the issue raised is quite clear. It is that there is no power to order compensation in the circumstances of there being no relationship of employer and employee for the period covered by the compensation order. Therefore, it is said, there was no industrial matter to ground in order for compensation. This is said to be analogous to the situation applying in claims of unfair dismissal prior to 1987, and identified in *Pepler*.

The history of the Commission's jurisdiction and powers relating to unfair dismissal claims

- 336 In 1987, the IR Act did not contain the current s 7(1a) which explicitly provides that an unfair dismissal or a denied contractual benefits claim are industrial matters even though the employment relationship has ended. Nor did it contain the detailed considerations required by the Commission in providing a remedy for an unfair dismissal, currently contained in s 23A of the IR Act.
- 337 I set out below, a good deal of significant case law that relates to the Commission's jurisdiction and powers on a claim of unfair dismissal. There is very little case law on point dealing with the remedy of compensation for a refusal to employ. However, the cases from *Pepler* onwards and the changes to the IR Act in response, demonstrate the distinction between the Commission's powers in dealing with an unfair dismissal as compared with a refusal to employ.
- 338 In 1987, the Industrial Appeal Court issued its decision in *Pepler*. It was a case about the Commission's jurisdiction and powers in dealing with unfair dismissal claims. Kennedy J noted, '(i)t is necessary always to bear in mind that the purpose of the *Industrial Relations Act* is to give the Commission wide powers to affect the common law rights of employers in cases where an industrial matter exists – see per Gibbs CJ in *Slonim v Fellows* (1984) 154 CLR 505 at p. 510' (12-13).
- 339 His Honour set out in considerable detail, the history of unfair dismissal claims and the Commission's (and previously, the Court of Arbitration's) jurisdiction and powers to deal with them. He then noted at page 17 that:

The Commission exercising jurisdiction conferred by the Industrial Relations Act has the powers expressly or by implication conferred by the legislation. In addition, it has the powers which are incidental and necessary to the exercise of the jurisdiction or the powers so conferred – see *Parsons v Martin* (1984) 58 ALR 395 at p. 401.

If it be accepted, as I consider it should, that the Commission has jurisdiction to order an employer to re-employ a recently dismissed employee, does it follow, as the respondent contends, that, if it declines to exercise that jurisdiction, it has the jurisdiction to make an order that the employer compensate the employee, and, in particular, that the employer compensate the employee beyond any amount which the employee could reasonably have recovered at common law. This is not a conclusion which sits easily with section 29(b) of the Act, for it would mean that, under paragraph (i) the Commission's jurisdiction to order compensation is at large, whereas, under paragraph (ii) it is strictly limited to allowing an entitlement arising out of the employee's contract of service. The preferable view appears to me to be that the jurisdiction under paragraph (i) is limited to ordering re-employment whilst the remedy under paragraph (ii) is restricted to the employee's contractual rights.

The words of Gibbs CJ in *Slonim v Fellows* at p. 510 are apposite here: 'The dispute in the present case concerns whether the (employee) was fairly dismissed, and if not, whether (he) should be reinstated'. In other words, the jurisdiction of the Commission to deal with the recent unfair dismissal of an employee extends to ordering the employer to re-employ him; but it does not extend to making an order for compensation at large, quite unrestricted to the legal entitlement of the employee at the time of his dismissal. If that power exists, it is difficult to set any limits to it. ... In my opinion, if the Parliament desires the Commission to have such a power, it should legislate to that effect, as indeed it has already done in the limited context of section 96I.

340 I interpose here, to note that in 1987, s 96I of the IR Act to which Kennedy J referred contained a provision empowering the Industrial Magistrate to transmit a case to the Commission where a person had been convicted of an offence under s 96B or s 96F. The powers of the Commission under s 96I(a) were to order the employer to reinstate the complainant or 'to pay the complainant such sum as the Commission considers adequate as compensation for loss of employment or loss of earnings', or both of those things. That provision has since been deleted.

341 Kennedy J went on at page 17 to observe:

This conclusion is not one which I have reached without difficulty, and it has been reached in an appreciation of the apparent width of the jurisdiction conferred on the Commission by section 23(1) of the Act to inquire into and 'deal with' any industrial matter [except any matter provided for in paragraph (a)]. It should, however, be observed that the jurisdiction is conferred 'subject to this Act'. Furthermore, to deny the power to order compensation in this case is not to deny the Commission power to deal with the industrial matter. It is simply to deny that its power to do so is unconstrained in any manner. It may deal with a complain (sic) of unfair dismissal in the most appropriate manner, by ordering re-employment in a proper case. If the respondent's argument were correct, it is not difficult to envisage a vast range of powers which would be available to the Commission which it can never have been thought to have been conferred upon it.

342 Olney J in *Pepler* also set out the history of unfair dismissal cases and dealt with the Commission's jurisdiction and powers in a claim of refusal to employ. In referring to Burt J's comments in *Princess Margaret Hospital v Hospital Salaried Officers Association* (1975) 55 WAIG 543, he noted that:

... the main argument centred around the question of whether the failure of the employer to employ a person whom it had previously engaged was within the meaning of the Act as it then stood an industrial matter. That issue was decided adversely to the employer and consistent with the decision in *Kwinana Construction Group*. The appellant also raised a second ground, namely that the Commission was wrong in law and had acted in excess of its jurisdiction in making an order reinstating the contract of employment of the named worker and entitling him to payment from the date upon which the matter was brought to the Commission. In dealing with this aspect of the matter Burt J (as he then was) said that the order should be an order directed to the employer requiring it upon the worker presenting himself for work at a particular place and time to engage and so to employ the worker on the agreed terms and in the agreed location. His Honour approved the form of order made in *Kwinana Construction Group* as amended by the Court of Arbitration. He then went on to say at p. 545:

I assume that the second limb of the order is designed to create in the worker a right to wages as from 6 September. If this is so, then again I would have thought it better to make an order for a money sum as was done in the *Kwinana* case. The amount ordered to be paid may well be less than the total amount which the worker would have earned had he been employed pursuant to the agreement. It may be that in the meantime he has found employment elsewhere – cf. the measure of damages had the worker sued for breach of the contract.

It would seem with respect that the comments last quoted may well have been misconstrued in subsequent cases by the Commission. It is true that in *Kwinana Construction Group* the order was for the payment of a money sum but it was 'a sum of money equal to the amount of wages (the reinstated employee) would normally have received had his employment continued for (the period of non employment)'. And one can understand why the order was framed in that way. It would have been inappropriate to order that the reinstated employee be paid his 'wages' or his 'ordinary wages' during the relevant period as there is no question that during that time he was not employed and therefore was not entitled to wages. In *Kwinana Construction Group* Jackson J expressed the opinion that 'the Court has power to make an order for reinstatement and such other incidental matters, including payment of wages from the time of dismissal, as the Court considers just and equitable' but when it came to frame the order more precise draftsmanship was called for and hence the form of words that was adopted. In *Princess Margaret Hospital* all that Burt J was saying in the passage last quoted was that if in the period of non employment the employee had found employment elsewhere any earnings so derived ought to be brought into account. In so doing he referred to the practice adopted in actions for wrongful dismissal in which the measure of damages takes into account any post dismissal earnings of the employee. His Honour's comments cannot be interpreted as authority for the proposition advanced by Commissioner Collier in *Cliffs West Australian Mining Co Pty Ltd v The Association of Architects Engineers Surveyors and Draftsmen* 58 WAIG 1067 at p. 1070:

This Commission is charged with the responsibility of acting according to equity, good conscience and the substantial merits of the case when exercising its jurisdiction under the Act. In my view it would be an inequitable decision and one devoid of good conscience if the Commission found that the termination of a worker's service was harsh and unjust yet took no action to reinstate the worker or provide some alternative remedy. Where the employer has been found to have acted harshly or unjustly in a termination he should not be able to maintain his decision simply on the assertion of irretrievable breakdown of relationship unless he is prepared to fairly compensate the worker for the loss of his job. What the compensation should be would depend on the circumstances of the individual case but the nature and salary of the position together with the likelihood of gaining similar employment elsewhere, housing and related matters, disruption to family life are factors which come readily to mind.

And nowhere in the Act can there be found any authority for such a proposition. It is trite but perhaps ought to be repeated that the statutory requirements of section 26(1) directing the Commission in the exercise of its jurisdiction under the Act to act according to equity, good conscience and the substantial merits of the case without regard to technicalities or legal forms is a direction as to the manner in which it must exercise its jurisdiction. That section does not confer a general jurisdiction to do whatever is thought to be in accordance with equity, good conscience and

the substantial merits of a particular case. There must first be a foundation in the Act itself for the exercise of the jurisdiction before section 26 operates.

There is another aspect of the reasoning and of the order made in **Kwinana Construction Group** which deserves scrutiny. It is clear that Jackson J took the view that the power of the Court to order payment of wages from the time of dismissal was a power incidental to the power to make an order for reinstatement. The order originally made by the Conciliation Commissioner that was subject to appeal provided for the reinstatement of the named employees in their previous employment and for the payment to them of the money equivalent of the wages they would normally have received had the employment not been terminated. [See (1954) 34 WAIG 60.] Upon appeal the Court of Arbitration amended the Conciliation Commissioner's order so as to make it apply only to such of the named persons who presented themselves for duty and the order for payment of the equivalent of wages was in favour of 'each of such persons so reinstated'. It is patent that the Court of Arbitration deliberately restricted *the entitlement to the payment of money to persons who were in fact reinstated as a result of the order. To restrict the entitlement in this way was consistent with the President's view that the power to order payment was incidental to the power to order reinstatement and was not a separate head of power.*

...

In my opinion there is nothing in the Act to justify the exercise of a jurisdiction to award a dismissed employee compensation or any other money payment except as an incident to an order for reinstatement or re-employment (19 - 20). (Emphasis added)

343 After commenting that he saw no reason to revisit the issue of the Commission's power to order reinstatement of a dismissed worker as being within an industrial matter, at page 22-23, Rowland J observed:

... On the other hand, I can see no charter to extend the power of the Commission to make an order directing a former employer to make payments to an ex-employee where no order for re-employment is made simply because it may be thought to follow from the reasoning in such earlier decisions that it arises from an industrial dispute between other parties.

If it be accepted, and as stated for the purpose of this exercise I do accept it, that the Commission has power to direct the former employer to re-employ the ex-employee, then there is clear jurisdiction for the Commissioner to embark upon the enquiry he first embarked upon in this case. *There is, however, no express power in the Act to award 'compensation' in this type of circumstance. And once the finding is made that the employee shall not be reinstated, then it seems to me that, even if the matter started off being an industrial dispute in the sense that it was a matter affecting or relating to the rights of employer and employee, the matter is no longer an 'industrial matter' as defined because the termination of that employment has been confirmed by the Commissioner's finding that he be not re-employed. That settled that particular industrial dispute.* The Union sought reinstatement. It was not granted. It is recognised that by section 26(2), in granting relief or redress under the Act, the Commissioner is not restricted to the specific claim or to the subject matter of the claim; but that section does not authorise the exercise of a power that is not otherwise within power. *One can well understand an argument that the power to order re-employment connotes an ancillary power to award lost wages because the relationship of employer and employee is to be reactivated by the order that resolves that industrial dispute; but, whatever the merits of that argument, it seems to me that there is no argument to support a claim for compensation unrelated to the contract of employment just ended, at least in this case where the sole and only industrial dispute related to the way in which the former employer treated the particular ex-employee.*

In my view, there is simply no nexus between an employer and a Union, concerned for an employee wrongly dismissed who is not reinstated, whatever the reason for failure to direct re-employment, so as to say that an industrial matter still exists to found an order for the payment of anything, call it what one likes, to such an ex-employee where there is nothing else involved in the dispute. There is simply no live 'industrial matter' to condition the making of such an order. There is no express power in the Act to justify such an order. Nor can I find any power by necessary implication.

...

... I accept, of course, that section 26(1)(a) sets out the basis on which the Commissioner can act. That section is, however, not a source of jurisdiction to give power which otherwise would not exist. Nor can I understand how the Commissioner can rely upon that provision to justify an award to an employee that completely ignores both his and his employer's rights under his contract of employment which is terminated and remains terminated. To set the common law and the law of contract aside is no mere disregard of a technicality or a legal form and it seems to me that to call in aid the rather elusory idea of equity and good conscience to justify such action simply does not assist. It is well settled as a matter of construction that 'it is in the last degree improbable that the legislature would overthrow fundamental principles, infringe rights or depart from the general system of law without expressing its intention with irresistible clearness', per O'Connor J in *Potter v Minahan* (1908) 7 CLR 277 at p. 304, where he was quoting Maxwell on Statutes with approval. See also *Sargood Bros v Commonwealth* (1910) 11 CLR 25 at p. 279.

The power of the Commission in the exercise of its jurisdiction is not at large. It has to be exercised within the framework of the Act.

...

The resolution of an industrial dispute by an order reinstating or ordering the re-employment by a former employer of a recently dismissed ex-employee will, of course, cut across the accepted common law remedies. A Court of Equity would not normally grant such relief. The only basis, therefore, to justify such an order is that it does resolve

that industrial dispute or, alternatively, the power to so order exists as a matter of construction of the Act or because it is necessarily implied in the Act. By parity of reasoning, it could be argued that the grant of alternative relief is open because that also apparently would resolve the industrial dispute. In logic, that may be accepted. It seems to me, however, that the difference between the two orders for relief is that in the first case the order *for reinstatement or re-employment retains or reactivates the industrial basis for the dispute, ie the relationship of employer and employee. There is no such nexus involved with relief that does not retain that relationship.* Where the dispute, like the present, is resolved solely on the issues in the dispute between the particular former employer with the particular ex-employee, there is no charter to make orders that are not part of a reactivated industrial relationship. Put another way, an order cannot be made which affects rights and obligations arising out of an industrial matter when the finding of the Commissioner has confirmed that the 'industrial' element involved has ended. For these reasons, I would allow the appeal and discharge the order directing the appellant to pay compensation to Mr Pepler. (Emphasis added)

344 In 1992, the Industrial Appeal Court issued its decision in *Kounis Metal Industries Pty Ltd v TWU WA Branch* (1993) 73 WAIG 14. Owen J, with whom Nicholson and Wallwork JJ agreed, considered whether *Pepler* was confined to compensation for unfair dismissal. At p 19, His Honour said:

... In my view the ratio decidendi of *Pepler* extends beyond unfair dismissal and covers redundancy.

In my view, the judgments in *Pepler* suggest that the decision rests upon a point of principle, namely, that jurisdiction depends on the present or future existence of the employer/employee relationship. Unless, at the time when the application is made, the relationship actually exists, or is expected to come into existence in the future, or did exist and is to be restored, the key element of an 'industrial matter' is missing. The very language of the judgments carries this implication. Particular regard should be had to those parts from the judgements which are underlined in the passages which I have set out earlier in these reasons. While it may be possible to say that the context of those statements in the reasons of Kennedy J might suggest that his Honour was referring specifically and solely to unfair dismissal, the same cannot be said of the reasons of Olney J and of Rowland J.

There are a number of propositions which can be extracted from the judgments and which, in my view, point to the ratio of *Pepler*.

1. The jurisdiction and powers of the Commission are limited to the terms of the Act.
2. The powers of the Commission extend to those which are incidental and necessary to the exercise of the jurisdiction so conferred.
3. The Commission is confined to dealing with an 'industrial matter' as defined.
4. A claim that a dismissed employee should be reinstated or re-employed is an industrial matter.
5. *The power to award compensation to an employee whose contract of employment has been brought to an end is not a power at large. It can be exercised only as an incident to the restoration or re-activation of the contract of employment.*

In my opinion, there is nothing in earlier authority of a binding nature which is inconsistent with this conclusion. *Slonim v Fellows* (*supra*) dealt with the jurisdiction to order reinstatement, not compensation, and it arose from a dispute in a jurisdiction which has a definition of 'industrial matter' which is wider than that in the Act. Similarly, decisions under the South Australian legislation (which, of course, would not be binding) have no direct application because of the legislative context. *Kwinana Construction Group Pty Ltd v ETU* (*supra*) can be explained on the basis that the power to order payment of wages from the time of dismissal was a power incidental to the power to make an order for reinstatement. In *Princess Margaret Hospital v HSOA* (*supra*), the order for payment was made upon the worker presenting himself for work. In other words, once again the order for payment was an adjunct to the order reinstating the contract of employment. The point at issue in *Totalisator Agency Board v FCU* (*supra*) was whether certain conditions should be inserted in an award, which conditions were to apply to retrenchment notices which might be served in the future. It seems to me that this is a very different situation to that with which we are confronted in this appeal. The provisions under consideration in that case applied to employees who were subject to the award, and who had, or might in the future have, a contract of employment. It was a provision of general application made prior to the termination of the contracts of employment to which it sought to attach. Accordingly, there is, in my view, nothing in earlier authority which would justify reading down the *Pepler* doctrine.

I should also say that I have some difficulty with the distinction drawn by the Full Bench between a 'dismissal' and a 'redundancy'. The foundation for the *Pepler* principle is that the relationship of employer and employee no longer exists. It seems to me not to matter whether the termination of that relationship occurs because the job no longer exists or whether the employer no longer wishes the particular employee to carry out the job. (Emphasis added)

345 Then, in 1993, in *Coles Myer Ltd trading as Coles Supermarkets v Coppin and Others*, (1993) 73 WAIG 1754, the Industrial Appeal Court considered claims for increased redundancy payments made by three former employees of the appellant, arising out of their retrenchments. The Commission, having found that there was an implied term in each contract of service concerning redundancy, made orders that each of the applicants be paid the redundancy payments claimed.

346 The Court set out some of the history of decisions and legislation regarding re-employment or reinstatement of an ex-employee as being an industrial matter. At 1756, it said:

... It has also been held that coincidental with an order directing re-employment in the resolution of an industrial matter the Commission may direct that any wages lost or contractual benefits lost may be ordered to be paid by the employer. The justification for this has usually been that the industrial matter arises out of a dispute which has been referred under s 44 of the Industrial Relations Act. Cases under the earlier legislation are *Kwinana Construction*

Group Pty Ltd v The Electrical Trades Union (1954) 34 WAIG 51 and *Princess Margaret Hospital for Children v The Hospital Salaried Officers Association of WA* (1975) 55 WAIG 543.

In *Robe River Iron Associates v The Association of Drafting Supervisory and Technical Employees of Western Australia (Pepler's Case)* (1987) 68 WAIG 11, Kennedy J traced the history both of the legislation and the case law. That case concerned a dispute that was referred under s 44 concerning a claim of unfair dismissal where no order for reinstatement was made but the Commissioner granted compensation which was unrelated to any contractual rights. That order was set aside as being incompetent.

347 The Court then noted what I have quoted above from *Kounis*, and said:

In *Kounis* at p 19, the Industrial Appeal Court decided that ‘*unless, at the time when the application is made, the relationship [of employer/employee] actually exists, or is expected to come into existence in the future, or did exist and is to be restored, the key element of an industrial matter is missing*’.

What this line of authority indicates is that there must be a continuation of an industrial relationship between the parties to constitute an industrial matter. The interpretation provisions of the Act speak in terms of an existing employer employee relationship. Paragraph (b) of the interpretation section defines ‘industrial matter’ to include any matter relating to the ‘conditions of employment which are to take effect after the termination of employment’. The exercise of power under that provision is limited to the making of the conditions whilst the contract of employment is in existence.

The provision in paragraph (c) of the interpretation section ‘industrial matter’ which gives power to deal with any matter relating to ‘the dismissal ... of any person ...’ should also be read in the context of the opening words of the definition, and thereby limited in the same way to an existing or prospective continuing relationship of employer and employee. The only extension of this has been where an industrial dispute has been resolved by orders directing re-employment and in some cases where re-employment is sought on the basis of unfair dismissal.

...

Absent any industrial dispute and a claim to reinstate a dismissed employer (sic) the Commission does not have jurisdiction to deal with the common law contract between an ex-employer and his ex-employee. (Emphasis added)

The law amended

348 The IR Act was subsequently amended to overcome the limitation on the Commission’s power to award compensation in the absence of an ongoing employment relationship in the circumstances of a claim of unfair dismissal or denied contractual benefits. The *Industrial Legislation Amendment Act 1995* did three things of note. Firstly, it inserted a new subsection 7(1a) which provided that:

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

349 Secondly, it amended s 23(3) by inserting as new paragraph (h) which prohibited the Commission from making “any order except an order that is authorized by s 23A” when dealing with a claim of unfair dismissal.

350 Thirdly, it amended s 23A to provide that, in effect, a claim of unfair dismissal could be dealt with by the Commission ordering the employer to pay compensation for loss or injury caused by the dismissal, if it found that reinstatement or re-employment was impracticable. According to Hansard, this was in response to *Pepler* and to *Coles Myer* (Hansard – Tuesday, 20 December 1994 p. 10047, at 10049, Mr Kierath, Minister for Labour Relations).

351 The current form of s 23A – *Unfair dismissal claims, Commission’s powers* – of the IR Act is a result of *Labour Relations Reform Act 2002* (No 20 of 2002), s 138. It provides a step by step method of determining a remedy for an unfair dismissal and the considerations to be had in the determination of compensation.

Refusal to employ – order with retrospective effect

352 This matter is to be distinguished from an order creating an employee-employer relationship with retrospective effect, as occurred in *BHP Billiton Iron Ore Pty Ltd v Construction, Forestry, Mining & Energy Union of Workers and Anor* [2006] WASCA 49. In that case, the Industrial Appeal Court dealt with an industrial matter of a refusal to employ. A dispute was referred to the Commission for hearing and determination under s 44(9). The Union had claimed that BHP Billiton had unreasonably refused to employ Mr Brandis, a former employee, and sought a decision that Mr Brandis ‘has been and is employed by BHP Billiton’ and ‘an order that BHP Billiton employ Mr Brandis on the award’.

353 The Commission at first instance dealt with the matter and his decision was subsequently appealed to the Full Bench. The Full Bench issued a declaration that BHP Billiton had unfairly refused to employ Mr Brandis, whom it had previously employed, and that refusal was as and from 7 May 2004. It issued an order requiring BHP Billiton to employ Mr Brandis as and from that date. Its effect was retrospective.

354 Le Miere J, with whom Wheeler and Pullin JJ agreed, noted in respect of the power to deal with a refusal to employ 'may be an industrial matter even though that person is not employed by the employer and had never been employed by that employer in the past' [78]. He said:

Section 232A(3) of the Act empowers the Commission to order an employer to reinstate an unfairly dismissed employee to the employee's former position on conditions at least as favourable as the conditions on which the employee was employed immediately before dismissal.

The Act does not expressly confer upon the Commission the power to order an employer to 'reinstate' a person it has unfairly refused to employ. Indeed, it could not. The power 'to reinstate' in the context of an employee unfairly dismissed means that the employment situation, as it existed immediately before the termination, must be restored. It requires restoration of the terms and conditions of the employment in the broadest sense of those terms: *Blackadder v Ramsey Butchering Services Pty Ltd* [2005] HCA 22; (2005) 79 ALJR 975 per McHugh J at [14]. There was no contract of employment between BHPB and Mr Brandis prior to the decision of the Commission at first instance. That is, there was no employment situation to be reinstated.

An order to employ should generally take the form of the order referred to by Burt J in the *Princess Margaret Hospital* case, that is, an order directed to the employer requiring it upon the worker presenting himself for work at a particular place and time to engage and so to employ the worker on the agreed or specified terms and in the specified position. The question is whether the Commission has power to order an employer to employ a person as and from a date preceding the order.

An order that an employer employ a person as and from a date preceding the order is truly retrospective. Such an order changes the rights and obligations of the employer and the person to be employed with effect prior to the making of the order. The courts have frequently declared that, in the absence of some clear statement to the contrary, an Act will be assumed not to have retrospective operation. Similarly, in the absence of some clear statement to the contrary, an Act will be assumed not to confer upon a court or tribunal the power to make orders that have retrospective operation. However, there is nothing preventing the Western Australian Parliament from making laws having retrospective operation or conferring upon the Commission the power to make orders with retrospective operation.

...

The effect of subsection 44(13) together with subsection 39(3) of the Act is to expressly confer upon the Commission the power to give retrospective effect to an order made under s 44. An order that an employer employ a person it has refused to employ is an order that may be made under s 44. There is nothing in s 44 of the Act or other relevant provisions of the Act that requires subsection 44(13) to be construed so as not to confer upon the Commission the power to order that an employer employ a person as and from a date preceding the date of the order. To the contrary, upon its proper construction subsection 44(13) together with subsection 39(3) confers that power upon the Commission.

That is not the end of this ground of appeal. The Union concedes that the order of the Full Bench was beyond power for a different reason. Subsection 39(3) of the Act provides that the Commission may give retrospective effect to an award if in the opinion of the Commission there are special circumstances which make it fair and right to do so but not beyond the date upon which the application leading to the making of the award was lodged in the Commission. The application to the Commission was made on 10 June 2004. Hence, subsection 39(3) did not, in any event, empower the Commission to give effect to its order as from 7 May 2004.

The Commission erred in law in the construction or interpretation of subsection 44(13) and subsection 39(3) of the Act in the course of making the decision appealed against. It is a necessary implication from the fact that the Commission gave retrospective effect to its order beyond the date upon which the application was lodged that it construed or interpreted the statutory provisions as conferring upon the Commission the power to give retrospective effect to its order beyond the date upon which the application leading to the making of the order was lodged in the Commission. This ground of appeal is competent by reason of par 90(1)(b) of the Act.

Furthermore, the Commission is only empowered to give retrospective effect to an award if in its opinion there are special circumstances which make it fair and right so to do. The Full Bench did not find that there were special circumstances which made it fair and right to give retrospective effect to its order.

Further, no party before the Commission or the Full Bench submitted that the Commission or the Full Bench should give retrospective effect to its order. The issue was never raised before the Commission or the Full Bench. By making the retrospective order in circumstances where the matter was not raised at first instance or on appeal, the Full Bench denied BHPB the right to be heard in relation to that matter. BHPB did not allege that it had been denied the right to be heard in relation to that matter in its grounds of appeal. However, the Union concedes that the retrospective order was beyond power and must be quashed. The fact that no party sought the retrospective order and that it was not raised at first instance or on appeal is relevant to the order that this Court should now make [80] – [90].

355 Therefore, the order in that matter retrospectively established the employment relationship. That was within power. However, to do so, the Commission was required to consider whether there were special circumstances which made it fair and right to do so. Without such a determination, the order to retrospectively create the employment relationship was beyond power and was quashed.

356 A number of points arise from *Pepler, Kounis, Coles Myer*; the amendments of the IR Act and *BHP Billiton v CFMEU* that are of particular significance in this case:

1. The Commission is a creature of statute; its powers are expressly or impliedly conferred by that legislation. It also has powers which are incidental and necessary to the exercise of the jurisdiction or the powers so conferred. Its powers, in the exercise of jurisdiction, are not at large, but are to be exercised within the framework of the IR Act.
2. Prior to the amendments to the IR Act to remedy the limitations in the Commission's powers identified in *Pepler* and *Coles Myer*:
 - (a) the Commission had jurisdiction to deal with an industrial matter which included the dismissal of an employee, the denial of a contractual benefit or the refusal to employ;
 - (b) in respect of an unfair dismissal, the Commission had power to remedy the unfair dismissal by reinstating the employment relationship. Absent the reinstatement of the employment relationship, there was no power to order compensation for loss occurring as a result of the dismissal because there was no employment relationship, or industrial matter, to which the jurisdiction could attach;
 - (c) 'to deal with an unfair dismissal' extended to ordering the employer to re-employ, but did 'not extend to making an order for compensation at large, quite unrestricted to the legal entitlement of the employee at the time of his dismissal. If that power exists, it is difficult to set any limits to it', per Kennedy J in *Pepler*;
3. The amendments to the IR Act affected only claims of unfair dismissal and denied contractual benefits. There was no amendment to set out the Commission's powers in dealing with a refusal to employ.
4. Burt J's order for overcoming a refusal to employ, set out in *Princess Margaret Hospital*, of the employee presenting himself to the employer and the employer being required to employ him, is the appropriate formulation. However, as Olney J concluded in *Pepler*, Burt J's comments in respect of what Burt J referred to as the second limb of the order after the order to employ, an order for a money sum, 'may well have been misconstrued in subsequent cases by the Commission' (p 20) and that there was nothing then in the IR Act to justify an exercise of jurisdiction to award a dismissed employee compensation or any other money payment except as an incident to an order for reinstatement.
5. The amendments to the IR Act expressly provide the Commission with jurisdiction to deal with a claim of unfair dismissal or denied contractual benefits, as they remain industrial matters even though the employment relationship has ended (s 7(1a)).
6. The IR Act expressly provides the Commission with powers to deal with an unfair dismissal by ordering reinstatement (s 26A(3)).
 - (a) If reinstatement is impracticable, then employment in another available position, and either or both of orders maintaining the continuity of employment and for the employer to pay the employee the remuneration lost because of the dismissal (s 26A(4) and (5));
 - (b) if, and only if, reinstatement or re-employment would be impracticable, subject to the consideration in s 23A(7) to (12), order the employer to pay the employee an amount of compensation for loss or injury carried by the dismissal. In deciding on the amount to be ordered, the Commission:
 - (i) is required to consider issues of mitigation of loss and any other redress the employee has obtained and any other relevant matter (s 26A(7));
 - (ii) is required to cap the amount of compensation at six months' remuneration (s 26A(8));
 - (iii) may calculate the amount by reference to an average rate received by the employee (s 26A(9));
 - (iv) may order the payment to be made in instalments (s 26A(10));
 - (v) may require the order to be complied with within a specified time (s 26A(11));
 - (vi) 'may make any ancillary or incidental order that the Commission thinks necessary for giving effect to any order made under this section' (s 26A(12)).
7. An order to remedy an unfair refusal to employ may have retrospective effect provided it meets the test of special circumstances set out in s 39(3).

No general compensation power

357 Other than s 23A(6), no other power is express in the IR Act for the Commission to award compensation. The power to award compensation set out in s 23A in the case of an unfair dismissal is expressly limited. The words used in s 23(3)(h) are that the Commission "shall not" make any order except that which is authorised by s 23A or s 44. S 23A(6) provides, in the use of the emphatic language, 'if, and only if, the Commissioner considers reinstatement or re-employment impracticable, the Commission may', subject to specified conditions, order the remuneration lost or likely to have been lost by the employee because of the dismissal. This is a very specific power. Section 23A goes on to set out the consideration to be had in deciding on the amount of compensation including efforts to mitigate the loss, and a limit of six months' remuneration.

The manner of calculation is set out. There is specific provision for the payment of the compensation in instalments, and for payment to be made within a specified time.

- 358 Subsection (12) then provides that the Commission may make any ancillary or incidental orders necessary to give effect to an order under that section.
- 359 Given the scheme of the IR Act, and that the only power to award compensation sets out a very detailed process, I am of the view that the provisions for compensation for unfair dismissal do not then set out a scheme that may be implied as a general power for the Commission to award compensation as an incident to an order to remedy the unfair refusal to employ. In an unfair dismissal, compensation is for the loss or injury caused by the dismissal (and I emphasise here that it is not compensation for the dismissal itself but for the loss or injury caused by it). Given, too, what was said by the Industrial Appeal Court in *Pepler*, it is contrary to the other powers set out in the IR Act that there should be an implied power which contains none of the constraints of s 23A.
- 360 In *SGIC v Terence Hurley Johnson* (1997) 77 WAIG 2169, the Industrial Appeal Court dealt with the jurisdiction and powers of the Public Service Appeals Board (PSAB). That jurisdiction and the powers are set out separately in the IR Act from any relating to the Commission's jurisdiction and powers in dealing with industrial matters. However, Anderson J's observed that in regard to a claim before the Board, which had power to "adjust" the employer's decision:

The most obvious way to do that would be to reverse it. Whether there may be other ways of adjusting such a decision is perhaps an open question ... He made only a claim for monetary compensation on the grounds that the decision of dismissal itself was unfair. Hence the Board was not asked to change the decision in any way. To give compensation to a dismissed employee is perhaps to change and thus adjust the rights and obligations flowing from the decision to dismiss, or to super-add a consequence to the decision to dismiss, but it is not to adjust the decision to dismiss' (2170 - 2171).

- 361 I do not make reference to this decision to draw any particular parallels between the Commission's jurisdiction in dealing with the industrial matter of a refusal to employ and the PSAB's jurisdiction to adjust the employer's decision. To be clear, I do so only for the purpose of drawing the analogy between the use of the remedy within power of the PSAB of 'adjusting' the employer's decision to dismiss and the Commission's power to deal with the appellant's refusal to employ.
- 362 To provide compensation for loss or injury caused by that refusal is to 'super-add a consequence to the decision to refuse to employ', that is, it is not clearly an ancillary or incidental power. While Olney J in *Pepler* and the Court in *Kounis* suggested that an order for compensation in an unfair dismissal may be an incident to the order for reinstatement, or "the restoration or re-activation of the contract of employment," these comments were made before the amendments to the IR Act.
- 363 Further, given that the order in *Sealanes (1985) Pty Ltd v John Francis Foley and Another* [2006] WAIRC 04431; (2006) 86 WAIG 1254 for repayment of monies paid to the employee on dismissal is not an ancillary or incidental order to an order reinstating the employee, I find that an order for compensation, being a matter of some substance, is not an ancillary or incidental order.
- 364 This is consistent with Kennedy J's conclusion in *Pepler* that 'to deny the power to order compensation in this case is not to deny the Commission power to deal with the industrial matter. It is simply to deny that its power to do is unconstrained in any manner. It may deal with a complaint of unfair dismissal in the most appropriate manner, by ordering re-employment in a proper case' (p 18). In Rowland J's words, the order for compensation is one where there is no "nexus involved" in the relief of an order for employment.
- 365 Therefore, for the reasons I have set out, I am of the view that there is no power for the Commission to award compensation to Mr Buttery as the claim could not be related to an unfair dismissal due to the WWC Act, which brings in the statutory remedy including compensation for loss or injury. The refusal to employ which the Commission found to be unfair was many months after the dismissal. There had been no employment relationship during that time. No employment relationship would exist until the prospective order 2 came into effect. Nor was Mr Buttery in an employer-employer relationship with the appellant during the period for which compensation was awarded, and in accordance with *Pepler*, there is no capacity for such a remedy. The inadequacy in the Commission's power was rectified by legislation, in respect of two types of industrial matters only, and neither of them is a refusal to employ.
- 366 Given the very prescribed process and considerations set out for the determination of compensation in unfair dismissal cases, and there being no express power in other cases, in my view, no such power can be implied. Given the way in which the Parliament chose to provide power to award compensation in the case of unfair dismissal, I am of the view that the award of compensation is a substantive one.

In the alternative

- 367 If I am wrong and there is power to make an award of compensation, I find it has not been exercised according to the IR Act. Le Miere J, in *BHP Billiton* found that s 44(13) together with s 39(3) expressly confers on the Commission the power to give retrospective effect, but it requires the Commission to form an opinion that there are special circumstances which make it fair and right to do so. The learned Senior Commissioner did not deal with the issue of whether special circumstances arose. To the extent that there has been a failure to consider that matter, and if I am wrong that there is no power to make such an order, it is appropriate to uphold this ground of appeal.
- 368 Section 49(5)(b) and (6a) of the IR Act set out the Full Bench's powers in disposing of an appeal. They include that if an appeal is upheld, the Full Bench may suspend the operation of the decision and remit the case to the Commission for further hearing and determination. Alternatively, it may vary the decision.

369 In my view, the material is before the Full Bench to enable the Full Bench to come to a conclusion, and to do so on terms which could have been awarded by the Commission.

370 Although he did not address the matter directly, it is clear to me that the Senior Commissioner found that there were special circumstances to warrant paying Mr Buttery that sum which he had lost due to the appellant's unfair refusal to employ him from 2 October 2017, if such constitutes a retrospective order. I am of the view that special circumstances warrant such an order. They are manifest in these reasons for decision regarding the unfairness suffered by Mr Buttery and the loss he has endured. In my respectful view, there are indeed special circumstances.

371 I would uphold this ground of appeal and quash Order 3.

Ground 9.

372 The appellant says that the Senior Commissioner erred in fact and law in finding that there was a "refusal to employ" within the meaning of s 7 of the Act other than on two discrete occasions, being 16 January 2017 and 3 February 2017. She says that the Commission's reliance on the parties having been in dispute since January 2016 is not 'evidence'. She also argues that it is not open to infer from the appellant's conduct in defending the proceedings that the appellant engaged in an 'ongoing refusal to employ'. Rather, the only inference that can be drawn from such conduct is that the appellant maintained her position that she did not unfairly refuse to employ Mr Buttery on 16 January 2017 and 3 February 2017. The appellant says that there was otherwise no evidence to support a finding that there was an 'ongoing application for employment' coupled with an 'ongoing refusal'.

Consideration and conclusions regarding Ground 9

373 The Director General did not address this ground of appeal in her written submissions or at the hearing on 11 March 2019 except to say that up until 2 October 2017 there was no unreasonable refusal to employ, as found by the Senior Commissioner. After that point, the Senior Commissioner found that there was a basis upon which there should be employment.

374 Whether the characterisation of ongoing and persistent refusal to employ is correct, in my respectful view, there were repeated requests and repeated refusals. The final refusal was because of an erroneous conclusion regarding Mr Buttery's conduct.

375 I think it is fair to say that the evidence demonstrates that from the outset, the Director General refused on a number of occasions to employ or re-employ Mr Buttery. As the Senior Commissioner found, at least one of those refusals was not unreasonable.

376 I would dismiss this ground of appeal.

Ground 10.

377 The Director General says that where the Commissioner said at [170] of the reasons for decision, that the Director General's change of policy in the 9 April 2018 letter constituted an alternative basis for finding that there was an unfair refusal to employ, then the Director General says she was denied a fair hearing and she was not put on fair notice of a claim based on that document.

378 At (218 – 220) of the transcript at first instance, Mr Carroll for the Director General addressed the letter of 9 April 2018. The Senior Commissioner and Mr Carroll had an exchange in which Mr Carroll said that he had not intended to address the letter but said he would make one brief submission. It was that the terms of the letter were 'quite possibly contrary to the *Public Sector Management Act* in a need to comply with the Standard and the Commissioner's Instruction'.

379 What the Senior Commissioner said was that, as an alternative and if he was incorrect and the Commission had no jurisdiction or power to deal with the SSTU's claim or to award a remedy because of s 23(2a) of the Act and/or s 41(3) of the WWC Act, or otherwise because there was no relevant refusal to employ then, 'given the respondent's change of policy as set out in its letter of 9 April 2018, referred to above, without hesitation, I consider Mr Buttery should be re-employed in accordance with the new policy'.

380 Such a comment has no binding effect. It was merely an indication that if the Commission had no jurisdiction to deal with the matter, the Director General ought to do what was fair.

381 As to the question of the Director General not having a fair hearing on that issue, it became clear during the course of the hearing that the Director General had changed her policy in regard to the potential re-employment of employees dismissed for compliance with s 41(3) of the WWC Act. The Director General was represented by experienced and diligent counsel. There was no request for time to consider the matter, nor a reasonable suggestion that counsel was taken by surprise. A submission was made about one issue only.

382 I would dismiss this ground of appeal.

Conclusion

383 I have found the appeal to be unsuccessful except in grounds 2 and 8. Ground 2 does not result in the overturning of the decision. In respect of ground 8, Order 3 ought to be quashed.

384 I feel compelled to note that I agree entirely with the learned Senior Commissioner's final comments in his reasons for decision. He said '(t)his man has been dealt with very harshly and he has had his career as a public school primary teacher ended in circumstances that did not warrant it. It would be unjust for the respondent not to act.' Whilst I agree with the Director General that the provisions of the WWC Act prevent a remedy for an unfair dismissal, that does not prevent the Director General re-employing Mr Buttery on the basis that he had been unfairly dealt with and unfairly denied re-

employment. The WWC Act may prevent him obtaining a remedy for the dismissal itself but it does not prevent Mr Buttery obtaining a remedy for the refusal to employ.

EMMANUEL AND WALKINGTON CC

385 We have had the benefit of reading a draft of the Chief Commissioner's reasons for decision. We respectfully agree with her reasons other than in relation to grounds 2 (specifically at [263] – [264]), 8 and 9.

Ground 2

386 We disagree with the Director General's argument that the only interpretation of the letter dated 20 June 2017 is that the whole letter was an attempt to settle. It was open to the Senior Commissioner to find that the letter was in two separate parts. The first part of the letter was an open communication and on the record. It included a request for 'reinstatement or re-employment'. The second part of the letter was an offer made without prejudice.

Ground 8

387 The Director General says Mr Buttery had no legal right to be employed on 2 October 2017 and she did not have a legal obligation to employ him. She argues there is no power to make an order that provides compensation in connection with the refusal to employ. The only order that can 'deal with' the industrial dispute is to reverse any refusal and order that the Director General employ Mr Buttery. An order for compensation not connected to any legal right cannot be an order to 'deal with' a refusal to employ and it cannot be an incidental order. Further, the effect of her submission is that order 3 is an order for retrospective employment. To make such an order, the Senior Commissioner would have to have found that there are special circumstances which make it right and fair to do so, but he did not.

388 Those submissions by the Director General raise a number of issues, central to which is that the Senior Commissioner had no power to make order 3 because effectively it required the Director General to pay Mr Buttery as though he was employed from 2 October 2017. As outlined below, we consider that argument misunderstands the nature of order 3 and the Senior Commissioner's reasons. In our view, the Senior Commissioner had jurisdiction to deal with the industrial matter arising from the treatment of Mr Buttery and he appropriately exercised his powers by making order 3 subject to the employment relationship being restored under order 2.

389 The Commission's jurisdiction under s 23(1) and s 44(9) is broad. Under s 23(1) of the IR Act, the Commission can 'enquire into and deal with' any industrial matter before it. It is common ground that refusal to employ is an industrial matter: s 7 of the IR Act.

390 In accordance with the reasoning of Le Miere J in *BHP Billiton Iron Ore Pty Ltd v Construction, Forestry, Mining & Energy Union of Workers & Anor* [2006] WASCA 49; (2006) 86 WAIG 1193 (**Brandis**), the Commission's jurisdiction was enlivened by the refusal to employ. The Commission has power to make an order to 'deal with' that industrial matter. Any order must be sufficiently related to the jurisdictional fact enlivening the Commission's jurisdiction: **Brandis** at [78]. We consider the Senior Commissioner's orders are sufficiently related to and deal with the dispute that remained when the matter was referred for hearing and determination.

391 We respectfully adopt the reasoning of Matthews C in *Public Transport Authority of WA v The Australian Rail, Tram and Bus Industry Union of Employees, WA Branch* [2017] WAIRC 00452; (2017) 97 WAIG 1329, (**PTA v ARTBIU**) from [177] – [188]:

In my view, so long as those questions, disputes or disagreements are in relation to an industrial matter the Western Australian Industrial Relations Commission, pursuant to section 44(9) *Industrial Relations Act 1979*, "may hear and determine" them and "may make an order binding...the parties..." in relation to them.

So that the Western Australian Industrial Relations Commission and parties know the exact nature of the questions, disputes and disagreements regulation 31 *Industrial Relations Commission Regulations 2005* provides as follows:

Where at the conclusion of a conference under section 44 of the Act a matter is to be heard and determined by the Commission, the Commission is to draw up or cause to be drawn up and sign, a memorandum of the matter requiring hearing and determination and for that purpose may direct parties to file statements of claim, answers, counter-proposals and replies in such manner and within such time as the Commission sees fit.

It is obvious that the parties entering arbitration must know the boundaries of that arbitration. If regulation 31 *Industrial Relations Commission Regulations 2005* did not exist there would be a good argument that the boundaries of arbitration must be found in the Notice of Application and that section 44(9) *Industrial Relations Act 1979* cannot have been intended to extend those boundaries beyond it.

The conference process under section 44 *Industrial Relations Act 1979* is too dynamic and fluid for parties to, in each case, come away from it, where settlement is not achieved, knowing the exact questions, disputes and disagreements which remain, especially given that the issues discussed may be wider than those raised by a strict reading of the initiating document.

However, that potential problem is avoided by regulation 31 *Industrial Relations Commission Regulations 2005*.

Section 44(9) *Industrial Relations Act 1979* gives the Western Australian Industrial Relations Commission the power to hear and determine, and make binding orders, on **any** question, dispute or disagreement in relation to an industrial matter that is not settled by agreement and regulation 31 *Industrial Relations Commission Regulations 2005* ensures that the parties know the particulars of the question, dispute or disagreement to be ventilated at the hearing and resolved by orders made following it.

A Commissioner, of course, would have to ensure, in drawing up the memorandum under regulation 31 *Industrial Relations Commission Regulations 2005*, or agreeing to hear matters included in the memorandum he or she has caused to be drawn up, and in authorising the hearing of those matters by his or her signature, that the questions, disputes or disagreements contained therein were questions, disputes or disagreements in relation to an industrial matter and which were not settled, after attempts to do so, by agreement between all of the parties at the section 44 conference.

Subject to those things however, section 44(9) *Industrial Relations Act 1979*, in my view, clearly gives the Western Australian Industrial Relations Commission the power to make orders on what is included in the memorandum signed pursuant to regulation 31 *Industrial Relations Commission Regulations 2005*.

In *BHP Billiton Iron Ore Pty Ltd v Transport Workers' Union, Industrial Union of Workers, Western Australian Branch* (2006) 86 WAIG 642 at 652 the Full Bench said, without needing to decide, that:

It may be that an order of the type which was made could be within jurisdiction if the making of such an order was explicitly part of the dispute remaining for determination under s44(9) of the Act, following the conclusion of a conference. Alternatively, if during the hearing of a dispute under s44(9), the issue of the making of such an order was raised by the parties or the Commission, the order could perhaps be made, by the Commission, in reliance upon s26(2). (my emphasis)

In my view the Western Australian Industrial Relations Commission may, within jurisdiction, make an order that was "explicitly part of the dispute remaining under section 44(9) of the Act." That is, I consider that the comment of the Full Bench in bold above was clearly correct.

The only question then in this matter is whether the issue in relation to which the Acting Senior Commissioner made orders was "explicitly part of the dispute remaining under section 44(9)."

Whether or not the issue was "explicitly" part of the dispute is a matter, in my view, of determining whether it was "clearly expressed" (Macquarie Dictionary 3rd edition) in the memorandum signed pursuant to regulation 31 *Industrial Relations Commission Regulations 2005*.

392 Smith AP, with whom Scott CC agreed, applied similar reasoning in the same case at [148]:

Having made a finding that dismissal was not a proportionate penalty (leaving aside the disposition of this appeal raised in ground 4 of the appeal), and then determining a demotion was a proportionate and appropriate penalty, these findings were findings that were squarely part of or put another way explicitly part of the industrial matter referred for hearing and determination pursuant to s 44(9) of the Act. Consequently, by the power conferred in s 44(9) to hear and determine a dispute, it was open to the learned Acting Senior Commissioner to make the order reinstating Mr Merlo to a position of transit officer, level 3, and to make the order for loss of remuneration assessed at the rate of pay, entitlements and benefits applicable to the position of transit officer, level 3.

393 Clearly the Commission has power to make an order that is 'explicitly part of the dispute remaining under s 44(9) of the IR Act': *BHP Billiton Iron Ore Pty Ltd v Transport Workers' Union, Industrial Union of Workers, Western Australian Branch* [2006] WAIRC 03908; (2006) 86 WAIG 642 at 652.

394 Paragraph [5] on page seven of the Memorandum explicitly states that part of the dispute remaining under s 44(9) included:

- (a) whether there was an unfair refusal to employ and, if so,
- (b) what relief should be granted.

The dispute was not limited to whether there was a refusal to employ. The parties were in dispute about how to resolve the matter if the refusal was found to be unfair.

395 Accordingly, an order determining what relief should be granted upon a finding that there was an unfair refusal to employ was explicitly part of the dispute remaining under s 44(9) of the IR Act.

396 We are not persuaded by the Director General's submission that the Commission has no power under s 44 to make an order for compensation. The Commission may only exercise powers conferred under relevant legislation, in this case the IR Act. A power to make an order for compensation may be expressly or implicitly authorised: *State Government Insurance Commission v Terence Hurley Johnson* (1997) 77 WAIG 2169. Section 44 of the IR Act does not confer a power that expressly authorises the making of an order for compensation. However, when read with s 23(1), in our view s 44(9) of the IR Act implicitly authorises the making of an order for compensation.

397 We agree Mr Buttery had no legal entitlement to be paid salary in circumstances where he did not provide service to his employer. Accordingly, Mr Buttery could not claim unpaid salary under his contract of employment. But that does not mean that there was no power for the Senior Commissioner to create an obligation on the Director General by making order 3. The Commission has that power as long as doing so deals with what is explicitly part of the dispute remaining for determination.

398 The Senior Commissioner did not find that Mr Buttery *had* a legal entitlement to be paid salary from 2 October 2017 until he accepted an offer of employment. Rather the Senior Commissioner *created* an obligation on the part of the Director General by ordering payment of an amount representing the salary and benefits that Mr Buttery would have otherwise earned had he remained employed by the Director General, from 2 October 2017 until the date of any acceptance of an offer of employment by Mr Buttery under order 2.

399 Contrary to the Director General's submission, in our view simply ordering that she employ Mr Buttery would only deal with part of the industrial dispute. It would resolve the refusal to employ, but not the unfairness of the refusal. It is clear from the Senior Commissioner's reasons, in particular at [169], that he considered an order for employment alone would not adequately

deal with the industrial dispute. An order for compensation was necessary to deal with the industrial dispute. Orders 2 and 3 are both sufficiently related to the industrial matter to be within power.

Is there no power to order compensation because there was no employment relationship on 2 October 2017?

400 We agree with the Chief Commissioner that the submissions on appeal in relation to ground 8 were sparse and opaque, and that the Director General's submissions focussed on retrospectivity and the need for special circumstances.

401 In our respectful view, the issue identified by the Chief Commissioner at [335] as there being no power to order compensation in circumstances where there is no relationship of employer and employee for the period covered by the compensation order, because there is no industrial matter to ground the order for compensation, was not an issue in the appeal. We understand the Director General's reference to *Pepler* was a reference to the argument she made at first instance, that there is no power to order compensation absent an order to employ.

402 In a matter of this type, the Commission's powers come from s 23(1) and 44(9) of the IR Act. Section 23(3) of the IR Act limits the exercise of those powers: *Australian Liquor, Hospitality and Miscellaneous Workers' Union, Miscellaneous Workers Division, WA Branch v Augusta-Margaret River Tourist Bureau* (1995) 75 WAIG 372. In our view, nothing in s 23(3) prevents the Commission from making an order for compensation in the circumstances.

403 Further, the industrial matter in this case was an unfair refusal to employ, not an unfair dismissal, therefore the Commission was not restricted to the powers set out in s 23A of the IR Act. That s 23A of the IR Act prescribes the limits of the Commission's power to order compensation on a finding of unfair dismissal does not restrict the Commission's broad powers under s 23(1) and s 44(9) of the IR Act where the matter is not about unfair dismissal. Section 23A of the IR Act was not relevant to the matter before the Senior Commissioner and in our view does not bear on the Commission's powers to deal with the industrial dispute in question.

404 As argued in this matter and set out in the Chief Commissioner's reasons, s 23A of the IR Act was introduced by Parliament to extend the Commission's jurisdiction in unfair dismissal cases to award compensation in circumstances where the key element of the industrial relationship between the parties has come to an end and is not restored by an order of the Commission. The circumstances of this case are different in two fundamental ways:

- (a) this case relates to refusal to employ and not unfair dismissal; and
- (b) there was an expectation by the union of the employment relationship being restored in the future, as set out in the application and Memorandum, and the consequence of order 2 is that the employment relationship between the Director General and Mr Buttery continues to constitute an industrial matter.

405 Respectfully, we would not apply *Robe River Iron Associates v Association of Draughting, Supervisory and Technical Employees of Western Australia* (1987) 68 WAIG 11 (*Pepler*), *Kounis Metal Industries Pty Ltd v Transport Workers' Union of Australia, Industrial Union of Workers, Western Australian Branch* (1993) 73 WAIG 14 (*Kounis*) and *Coles Myer Ltd v Coppin* (1993) 73 WAIG 1754 (*Coles Myer*) as the Chief Commissioner has done. As was said in *Kounis*, 'the foundation of the *Pepler* principle is that the relationship of employer and employee no longer exists' (at 19) and is not expected to come into existence or be restored (at 21).

406 It has long been accepted that the Commission had power under s 23 of the IR Act to order compensation in circumstances where reinstatement, re-employment or employment was ordered, notwithstanding that no provision of the IR Act expressly authorised the making of such an order. Burt J in *Board of Management, Princess Margaret Hospital for Children v Hospital Salaried Officers Association of Western Australia* (1975) 55 WAIG 543 (*PMH*) observed as much at 545, and his reasons related to a situation of refusal to employ and an order that the employer employ the worker upon him presenting himself to the workplace. *Pepler* did not overturn that authority.

407 We consider that, consistent with *Pepler*, *Kounis* and *Coles Myer*, as long as 'when the application is made, the relationship actually exists, or is expected to come into existence in the future, or did exist and is to be restored' (per *Kounis* at 19), the Commission has power to order compensation where, as here, the making of such an order is explicitly part of the dispute remaining for determination. Such an order for compensation is implicitly authorised by s 23(1) and s 44(9) of the IR Act.

408 The 'reactivated industrial relationship', as it was put by Rowland J in *Pepler*, ensures the key industrial element is present. In this matter, unlike in *Pepler*, there was no finding that it was impracticable to restore the employment relationship. Indeed, the Senior Commissioner considered the relationship ought to be restored and accordingly made order 2. In this matter, unlike in *Coles Myer*, the application did not 'recognise that the relationship was irretrievably at an end'. To the contrary, the application and the Memorandum make it clear that the union sought to restore the employment relationship.

409 Our reasoning is consistent with that in *Kounis*, where Owen J, with whom Nicholson and Wallwork JJ agreed, considered the principle to be:

...the jurisdiction depends on the present or future existence of the employer/employee relationship. Unless, at the time when the application is made, the relationship actually exists, or is expected to come into existence in future, or did exist and is to be restored, the key element of an 'industrial matter' is missing. (19)

410 We note that in *Kounis*, Owen J characterised the order in *PMH* that restored the employment relationship as 'an order reinstating the contract of employment', although it was, like order 2 in this matter, an order that the worker be employed upon presenting himself for work.

411 Here, the key element of an industrial matter was present. The employment relationship existed in the past and the union expected it to come into existence in future. The union sought orders to restore the employment relationship. There is 'a continuation of an industrial relationship between the parties to constitute an industrial matter', because of order 2 which ensures the 'prospective continuing relationship of employer and employee.' (*Coles Myer* at 1757)

412 There is no need for an employment relationship from 2 October 2017 to ground order 3. The Commission's power to order compensation was not dependent on there being an employment relationship from 2 October 2017. Rather, the Commission could make the order for compensation as long as:

- (a) the industrial basis for the dispute, being the employment relationship, was restored; and
- (b) the order for compensation 'deals with the industrial matter' and was explicitly part of the dispute remaining under s 44(9) of the IR Act.

413 The union sought an order that Mr Buttery be employed, there was no finding that employment was impracticable and that order 2 was made. The industrial element involved did not end and the *Pepler* principle therefore does not preclude an order for compensation. Order 2 kept the industrial matter 'live', grounding order 3.

414 The Director General said the Commission could not order compensation without ordering employment and an order for employment would be impracticable. She argued that even if an order for employment were practicable, it would require a retrospective order which the Commission can only make in special circumstances.

415 We do not agree that an order for employment required a retrospective order.

Did the Senior Commissioner order retrospective employment?

416 Plainly order 2 orders prospective employment. It does not order that Mr Buttery be employed from a past date. On its face, order 3 orders compensation and not retrospective employment.

Does order 3 otherwise have retrospective effect?

417 Order 3 depends on order 2 being fulfilled at a future date. Further, while order 3 arises to address past conduct, it is not retrospective as explained by Le Miere J in *Brandis*. It does not '[change] the rights and obligations of the employer and the person to be employed with effect prior to the making of the order': [83].

418 Order 3 does not require the Director General to pay Mr Buttery for work done in the past. It is not an order for salary earned in the past. Rather, after the parties comply with order 2, thus re-establishing the employment relationship, then in order to deal with the industrial matter the Director General is obliged to pay Mr Buttery an amount which is to be established by reference to a sum he would have earned across a particular period. That the sum is to be established by reference to a period that includes a past period does not give the order retrospective effect. Rather, the Senior Commissioner's orders relate to future employment and the payment of a sum to resolve the broader industrial dispute about the treatment of Mr Buttery, calculable by reference to a past period.

419 Order 3 is not for retrospective employment. It is a payment to resolve the part of the industrial matter that remains in dispute after the parties comply with order 2, being the Director General's treatment of Mr Buttery in unfairly refusing to employ him.

420 If we are wrong and order 3 is a retrospective order, we still consider there was no error.

421 The Commission has power to give retrospective effect to an order made under s 44: Le Miere J in *Brandis*, Wheeler J agreeing. The Commission is only empowered to give retrospective effect to *an award* if in the Commission's opinion there are special circumstances which make it fair and right to do so: [89] (and s 39 of the IR Act). In our view, 'award' in that context means an award that is an industrial instrument.

422 Le Miere J's reasoning at [89] was in the context of that particular matter, where the impugned order had the effect of ordering that the employee in question be employed on the industrial instrument from a past date. The circumstances of this matter are different. The Senior Commissioner did not order that Mr Buttery be employed from a past date or give retrospective effect to an industrial instrument.

423 It is clear that an order made under s 44 of the IR Act that gives retrospective effect to *an award* can only be made if in the Commission's opinion there are special circumstances which make it fair and right to do so. But that does not necessarily mean that the same applies in relation to *any order* made under s 44 with retrospective effect.

424 If we are wrong about that, and the Commission only has power to give retrospective effect to any order made under s 44 if it finds there are special circumstances which make it fair and right to do so, did the Senior Commissioner err in making order 3?

425 There was no express finding about special circumstances, but it is clear that the Senior Commissioner considered the order was fair and right, being in accordance with s 26(1)(a) of the IR Act, because of the unique circumstances of this matter. He considered:

- (a) Mr Buttery was a teacher with an exemplary teaching record of 9 years;
- (b) the Director General ended his employment to comply with the WWC Act;
- (c) because of the statutory scheme, there was no avenue for Mr Buttery to appeal the termination of his employment; and
- (d) he was dealt with very harshly by the Director General, and his career as a primary school teacher in government schools was ended, as a result of reliance on a substantially flawed investigation report that included erroneous and unreasonable conclusions.

426 If special circumstances are necessary to warrant retrospectivity, a fair reading of the Reasons for Decision establishes that at least those are the special circumstances that the Senior Commissioner considered make it fair and right to order that Mr Buttery be paid an amount reflecting the salary and benefits Mr Buttery would have earned had he remained employed from 2 October 2017, less any income earned.

427 We agree order 3 was not an incidental or ancillary order. We consider that order 3 was within power. It was an order to deal with the industrial matter before the Commission, properly made under s 44(9) and s 23(1), and in accordance with s 26(1)(a) of the IR Act. We would dismiss ground 8.

Ground 9

428 The Director General says the only material relied on by the Senior Commissioner to find that there was an ongoing refusal to employ was his conclusion that the parties have been and remain in dispute about the termination of employment and the claim that Mr Buttery be employed or re-employed. We disagree.

429 We consider the Senior Commissioner found that the statement in the letter dated 2 October 2017, referring to what is colloquially known as 'flag' or a 'red flag', that Mr Buttery's employment record would remain endorsed 'Not suitable for future employment with the Department', amounted to a refusal to employ. That finding was correct, based on the letter and Ms Barnard's evidence that the effect of a flag is a 'complete prohibition on future employment'. Moreover, in our view the statement in the letter about the flag amounted to an ongoing refusal to employ.

430 For these reasons, we would dismiss the appeal.

431 Beyond the reasons above for dismissing the appeal, we understand why both the Senior Commissioner and Chief Commissioner chose to conclude their reasons with further comment about the treatment of Mr Buttery. In the circumstances, Mr Buttery has been treated harshly and unjustly indeed.

CONCLUSION

432 Given the majority decision which rejected all of the grounds of the appeal, the appeal is to be dismissed.

2019 WAIRC 00755

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION THE DIRECTOR GENERAL, DEPARTMENT OF EDUCATION	APPELLANT
	-and-	
	THE STATE SCHOOL TEACHERS' UNION OF WA (INCORPORATED)	RESPONDENT
CORAM	FULL BENCH CHIEF COMMISSIONER P E SCOTT COMMISSIONER T EMMANUEL COMMISSIONER T B WALKINGTON	
DATE	THURSDAY, 17 OCTOBER 2019	
FILE NO/S	FBA 15 OF 2018	
CITATION NO.	2019 WAIRC 00755	
Result	Appeal dismissed	
Appearances		
Appellant	Mr R Andretich (of counsel) and Mr J Carroll (of counsel)	
Respondent	Mr C Fordham (of counsel) and Mr D Stojanoski (of counsel)	

Order

This appeal having come on for hearing before the Full Bench on Monday, 11 March 2019, and having heard Mr Andretich and Mr Carroll on behalf of the appellant, and Mr Fordham and Mr Stojanoski on behalf of the respondent, and reasons for decision having been delivered on Thursday, 17 October 2019, the Full Bench, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders THAT —

The appeal be and is hereby dismissed.

By the Full Bench

(Sgd.) P E SCOTT,
Chief Commissioner.

[L.S.]

FULL BENCH—Procedural Directions and Orders—

2019 WAIRC 00796

APPEAL AGAINST A DECISION OF THE COMMISSION IN MATTER NO. U 97/2018 GIVEN ON 21 JUNE 2019

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

THE MINISTER FOR CORRECTIVE SERVICES

APPELLANT

-v-

MR GARY HAWTHORN

RESPONDENT**CORAM**CHIEF COMMISSIONER P E SCOTT
COMMISSIONER D J MATTHEWS
COMMISSIONER T B WALKINGTON**DATE**

FRIDAY, 8 NOVEMBER 2019

FILE NO.

FBA 7 OF 2019

CITATION NO.

2019 WAIRC 00796

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

Direction

WHEREAS this is an appeal against the decision of the Commission in Application U 97/2018; and
 WHEREAS at the hearing of the appeal, the appellant sought leave to add a further ground of appeal; and
 WHEREAS the parties are in dispute as to the terms of the proposed ground of appeal.

NOW THEREFORE the Full Bench, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby direct:

1. By no later than 4.00 pm on Friday, 15 November 2019, the appellant is to:
 - (a) File its application for leave to raise a new ground of appeal;
 - (b) Set out in precise terms the proposed new ground;
 - (c) Provide reasons why leave ought to be granted;
 - (d) Make submissions in support of the proposed new ground of appeal in the event that the Full Bench grants leave.
2. By no later than 4.00 pm on Friday, 22 November 2019, the respondent file its submissions in response;
3. By no later than 4.00 pm on Friday, 29 November 2019, the appellant file any reply.

By the Full Bench

(Sgd.) P E SCOTT,
Chief Commissioner.

[L.S.]

AWARDS/AGREEMENTS AND ORDERS—Interpretation of—

2019 WAIRC 00806

INTERPRETATION OF THE ANGLICAN SCHOOLS COMMISSION SUPPORT STAFF ENTERPRISE AGREEMENT 2015

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	:	2019 WAIRC 00806
CORAM	:	COMMISSIONER D J MATTHEWS
HEARD	:	TUESDAY, 15 OCTOBER 2019
DELIVERED	:	TUESDAY, 12 NOVEMBER 2019
FILE NO.	:	APPL 25 OF 2019
BETWEEN	:	THE INDEPENDENT EDUCATION UNION OF WESTERN AUSTRALIA, UNION OF EMPLOYEES Applicant AND SWAN VALLEY ANGLICAN COMMUNITY SCHOOL Respondent

CatchWords : Industrial law (WA) - Interpretation of agreement - Questions answered
 Legislation : *Western Australian Industrial Relations Act 1979*
 Result : Agreement interpreted

Representation:

Applicant : Mr J Fiala
 Respondent : Mr M Jensen (of counsel)

Reasons for Decision

- 1 On 21 March 2017 the Anglican Schools Commission Support Staff Enterprise Agreement 2015 was registered as an industrial agreement under the *Industrial Relations Act 1979*.
- 2 There had not previously been an industrial agreement applying to the employees to whom the Anglican Schools Commission Support Staff Enterprise Agreement 2015 applied.
- 3 Immediately prior to registration of the Anglican Schools Commission Support Staff Enterprise Agreement 2015 some employees of the respondent eligible to be members of the applicant were subject to the Independent Schools' Administrative and Technical Officers' Award 1993. This included Mr Justin Oxford, who had commenced with the respondent on or about 2 February 2015.
- 4 As at the time of the registration of the Anglican Schools Commission Support Staff Enterprise Agreement 2015, Mr Justin Oxford had progressed to Level 2.1 under the Independent Schools' Administrative and Technical Officers' Award 1993.
- 5 The Anglican Schools Commission Support Staff Enterprise Agreement 2015 provided at clause 17(1)(a) as follows:
 Salaries for the various classifications are contained in schedule 1 of this Agreement.
- 6 It was agreed that the reference to “schedule” should read “appendix” and that nothing turns on this.
- 7 Going to Appendix 1 there is a “first” table headed:
 Staff Employed under the Independent Schools' Administrative and Technical Officers' Award 1993
- 8 The “first” table contains a remuneration figure for Level 2.1, the level Mr Justin Oxford had reached under the Independent Schools' Administrative and Technical Officers' Award 1993.
- 9 The applicant says, however, that that figure does not apply to Mr Justin Oxford. It says that the “second” table containing pay rates applies. That “second” table is headed:
 Staff Employed under the Independent Schools' Administrative and Technical Officers' Award 1993 – Salary Ranges Above ATO Award Levels 1 to 4
- 10 The table goes on to specify remuneration for certain positions with the amount of that remuneration being affected by the size of the school. In short, the bigger the school, the more money a person in a certain position gets.
- 11 The applicant says, referring to the “second” table, that Mr Justin Oxford works in a position of “IT Support Staff” at a school that has between 601 and 1250 students and is, accordingly, entitled to the remuneration specified against that descriptor.
- 12 The applicant says that interpretation is plainly correct and is bolstered by a note at the bottom of the “second” table which reads:
 Staff members employed in these roles in schools with fewer than 300 enrolled students are accommodated in the ATO scales Levels 1 to 4 set out [in the first table].
- 13 The applicant says that under the Anglican Schools Commission Support Staff Enterprise Agreement 2015 a person who is employed in an IT support staff position is entitled to be paid according to the size of the school at which they work.
- 14 If the school has less than 300 students, the “first” table applies. If the school has more than that number, the “second” table applies.
- 15 I have been asked to declare whether or not this is the true interpretation of the Anglican Schools Commission Support Staff Enterprise Agreement 2015 pursuant to section 46 *Industrial Relations Act 1979*.
- 16 I follow what Beech J said at [50] of *Re Harrison; ex parte Hames* [2015] WASC 247. I also have regard to my observations at [20] and [21] of my reasons for decision in *Public Transport Authority of Western Australia v Australian Rail, Tram and Bus Industry Union of Employees, Western Australian Branch* (2017) 97 WAIG 354.
- 17 As I read the Anglican Schools Commission Support Staff Enterprise Agreement 2015, I find that I do not, from a mere consideration of the text alone, understand the heading to the “second” table and in particular its reference to “Salary Ranges Above ATO Award Levels 1 to 4”. This is because the Independent Schools' Administrative and Technical Officers' Award 1993 only provides for Levels 1 to 4.
- 18 Absent other information, I would be left to wonder how someone could be employed under the Independent Schools' Administrative and Technical Officers' Award 1993 and yet have a salary range above it?
- 19 Fortunately, other information provided to me at the hearing allows me to formulate an answer.

- 20 Mr Jason Paul Bartell, the Principal of John Septimus Roe Anglican Community School, gave evidence that some people employed under the Independent Schools' Administrative and Technical Officers' Award 1993 were, before registration of the Anglican Schools Commission Support Staff Enterprise Agreement 2015, paid at over award rates. He gave evidence that there was a table that set out the positions that were paid the over award rates and the salaries attached to those positions. He said the contents of that table appear to be similar to what is in the "second" table at Appendix 1 in the Anglican Schools Commission Support Staff Enterprise Agreement 2015.
- 21 I reproduce Mr Bartell's evidence under cross-examination. The reference to paragraph 7 is a reference to the paragraph in his witness statement in which Mr Bartell gave evidence about the table:
- Okay, Mr Bartell. In your paragraph 7, you mentioned that informal table of salaries, is it reflective of the EBA what's in now? And I've got a copy I can hand to the witness if he'd like to have a look of the EBA. Thank you?---So, Mr Fiala, through my recollection, ah, there was always a – a discussion around the Principal's tables – thank you – around the Principal table, that there was an above award, ah, rate applied to some positions, um, and applied at the Principal's discretion, um, before the formal adoption of the EBA in, ah, 2017.
- Okay. So looking at page 27 - - -?--- Twenty-seven, sorry, of the, ah – of the - - -
- Of the enterprise agreement, yes?---Yes, thank you.
- So, to the best of your recollection, does that table reflect the informal – what you understood to be the informal table?--
- Um, through the discussion which was the, ah – had between, I guess, Anglican Schools Commission and the Independent Education Unit of Western Australia, um, my sense there was that this is reflective of the, ah, informal table, its form, its, um, ah – the manner it's presented here. Um, I cannot, ah, tell you whether it, ah, reflects the informal.
- Okay?---But to my knowledge, that is the, um - - -
- MATTHEWS C:** You weren't involved in negotiations with the EBA?---No, I wasn't, Commissioner.
- You had seen the informal table before the EBA was registered?---That's correct.
- Does what now appears at 27 look like what was in the informal table that you saw - - -?---And - - -
- - - prior to the EBA being registered?---I couldn't tell you whether they were the same – one in the same, and that's what I'm saying.
- MATTHEWS C:** Does it look similar?---Similar, yes.
- Okay.
- 22 I find that paragraph 7 of Mr Bartell's witness statement and the passage above solves the mystery as to the title of the "second" table and its reference to "Salary Ranges Above ATO Award Levels 1 to 4".
- 23 The tables in Appendix 1 work this way. If prior to the registration of the Anglican Schools Commission Support Staff Enterprise Agreement 2015 you were employed under the Independent Schools' Administrative and Technical Officers' Award 1993 and paid at Levels 1 to 4 you would, after registration, be paid as per the "first" table.
- 24 If, prior to the registration of the Anglican Schools Commission Support Staff Enterprise Agreement 2015, you were employed under the Independent Schools' Administrative and Technical Officers' Award 1993 but paid at an above award level, that is if you were paid according to the table to which Mr Bartell referred, you would, after registration, be paid according to the "second" table in the Anglican Schools Commission Support Staff Enterprise Agreement 2015.
- 25 Under the "second" table the size of the school and the position you hold is relevant to the level of remuneration you receive. It appears that if you were on the informal table but the school at which you work had less than 300 students that would make a difference to whether you come under the "first" or "second" table, but that is not something I need to decide.
- 26 I am emboldened in my conclusion by the evidence that if the "second" table applied to Mr Jason Oxford his salary would have jumped more than \$20,000 per annum (or by over 40 per cent) overnight. Interpretations that accord with industrial reality are preferable. Such an interpretation would completely offend industrial reality.
- 27 The applicant asks me to answer two questions in the application filed 9 May 2019 (as amended at the hearing):
1. Should IEU member Mr Justin Oxford be classified as School Category 7/6 IT Support Staff employee in accordance with Appendix 1 – Support Staff Salary Scales and Classifications under the table named "Staff Employed under the Independent Schools' Administrative and Technical Officers' Award, 1993-Salary Ranges Above ATO Award Levels 1 to 4" in accordance with the Anglican Schools Commission Support Staff Enterprise Agreement 2015, AG 42 OF 2016 (2017 WAIRC 00163)?
 2. Should the Commissioner make a determination in favour of 1 above, is Mr Oxford entitled to be paid the determined salary rate effective from the 1 July 2015?
- 28 The answer to question 1 is no. There is no need to answer question 2.
- 29 I make no declaration in these reasons for decision but will do so if a request is made under section 46(2) *Industrial Relations Act 1979*.

UNFAIR DISMISSAL/CONTRACTUAL ENTITLEMENTS—

2019 WAIRC 00753

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES TRISTAN COCKMAN **APPLICANT**

-v-

POLIWKA LEGAL PTY LTD **RESPONDENT**

CORAM SENIOR COMMISSIONER S J KENNER

DATE THURSDAY, 17 OCTOBER 2019

FILE NO/S B 88 OF 2019

CITATION NO. 2019 WAIRC 00753

Result Order issued

Representation

Applicant Ms V Long-Droppert of counsel

Respondent Mr P Poliwka of counsel

Order

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

THAT the application be and is hereby discontinued by leave.

[L.S.]

(Sgd.) S J KENNER,
Senior Commissioner.

2019 WAIRC 00748

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION : 2019 WAIRC 00748

CORAM : COMMISSIONER T B WALKINGTON

HEARD : WEDNESDAY, 15 MAY 2019; THURSDAY, 6 JUNE 2019

DELIVERED : THURSDAY, 10 OCTOBER 2019

FILE NO. : U 152 OF 2018

BETWEEN : ANNIE DERKACS
Applicant
AND
TETYANA PODKAS TRADING AS PHOENIX PODIATRY
Respondent

CatchWords : Termination of employment - whether dismissal harsh, oppressive or unfair - whether applicant an employee or independent contractor - consideration of indicia of employment - *Industrial Relations Act 1979 (WA) s 29(1)(b)(i)*

Legislation : *Industrial Relations Act 1979 (WA)*

Result : Application dismissed

Representation:

Applicant : In person

Respondent : Mr C Beetham (of counsel)

Case(s) referred to in reasons:

Abdalla v Viewdaze Pty Ltd; (2003) 53 ATR 30; (2003) 122 IR 215

ACE Insurance Ltd v Trifunovski [2013] FCAFC 3; (2013) 235 IR 115

Blyth Chemicals Limited v Bushnell (1933) 49 CLR 66

Bruce v AWB Ltd (2000) 100 IR 129; [2000] FCA 594

Hollis v Vabu Pty Ltd (2001) 207 CLR 21; [2001] HCA 44

Jiang Shen Cai trading as French Accent v Michael Anthony Do Rozario [2011] FWAFFB 8307; (2011) 215 IR 235

John Lysaght (Australia) Pty Ltd v Federated Ironworkers Association (1973) 15 AILR 323

Neale v Atlas Products (Vic) Pty Ltd (1955) 94 CLR 419

On Call Interpreters and Translators Agency Pty Ltd v Federal Commissioner of Taxation (No 3) [2011] 214 FCR 82; (2011) 206 IR 252

Paul Ernest Dallaston v Canon Foods [2005] WAIRC 01978; (2005) 85 WAIG 2999

Personnel Contracting Pty Ltd t/as Tricord Personnel v The Construction Forestry Mining and Energy Union of Workers [2004] WASCA 312; (2004) 85 WAIG 5

Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance [1968] 2 QB 497

Stevens v Brodribb Sawmilling Company Pty Ltd (1986) 160 CLR 16; [1986] HCA 1

The Director of The Fair Work Building Industry Inspectorate v Linkhill Pty Ltd (No 7) [2013] FCCA 1097

Undercliffe Nursing Home v Federated Miscellaneous Workers' Union of Australia, Hospital, Service and Miscellaneous, WA Branch (1985) 65 WAIG 385

Yaraka Holdings Pty Ltd v Giljevic (2006) 149 IR 339

Reasons for Decision

- 1 On 16 December 2018 Ms Annie Derkacs made application for a claim that she had been harshly, oppressively or unfairly dismissed by Tetyana Podkas trading as Phoenix Podiatry.
- 2 The Respondent, Phoenix Podiatry, contends that the relationship of the parties was one of a principal and independent contractor and not that of employer and employee and objects to the Commission determining the claim.
- 3 As a question of the Commission's jurisdiction has been raised it is necessary to consider this matter before considering the circumstances of the termination of the relationship.

Background

- 4 Between March 2015 and November 2018, Ms Annie Derkacs (the Applicant) worked as a podiatrist at Phoenix Podiatry (the Respondent). Phoenix Podiatry is owned by Ms Tanya Podkas and is a small practice.
- 5 On 28 November 2018, Ms Derkacs and Ms Podkas engaged in an exchange that resulted in Ms Podkas advising Ms Derkacs that her services were no longer required.
- 6 Ms Derkacs says she was unfairly dismissed. However, Ms Podkas says she was entitled to terminate the relationship because Ms Derkacs was an independent contractor and not an employee.

The Question to be Decided

- 7 The question that I must answer is was Ms Derkacs an employee of Phoenix Podiatry?

Principles

- 8 Section 29 of the *Industrial Relations Act 1979* provides the Commission with power to determine claims brought by employees and provides as follows:

29. Who may refer industrial matters to Commission

- (1) An industrial matter may be referred to the Commission —
 - (a) in any case, by —
 - (i) an employer with a sufficient interest in the industrial matter; or
 - (ii) an organisation in which persons to whom the industrial matter relates are eligible to be enrolled as members or an association that represents such an organisation; or
 - (iii) the Minister;
 and
 - (b) in the case of a claim by an employee —
 - (i) that he has been harshly, oppressively or unfairly dismissed from his employment; or
 - (ii) that he has not been allowed by his employer a benefit, not being a benefit under an award or order, to which he is entitled under his contract of employment,
 by the employee.

9 Section 7 defines an “employee”:

7. Terms used

(1)

...

employee means —

- (a) any person employed by an employer to do work for hire or reward including an apprentice; or
- (b) any person whose usual status is that of an employee; or
- (c) any person employed as a canvasser whose services are remunerated wholly or partly by commission or percentage reward; or
- (d) any person who is the lessee of any tools or other implements of production or of any vehicle used in the delivery of goods or who is the owner, whether wholly or partly, of any vehicle used in the transport of goods or passengers if he is in all other respects an employee,

but does not include any person engaged in domestic service in a private home unless —

- (e) more than 6 boarders or lodgers are therein received for pay or reward; or
- (f) the person so engaged is employed by an employer, who is not the owner or occupier of the private home, but who provides that owner or occupier with the services of the person so engaged;

10 In *Stevens v Brodribb Sawmilling Company Pty Ltd* (1986) 160 CLR 16; [1986] HCA 1, the High Court held that determining whether a relationship is that of an employer and employee or principal and independent contractor requires the consideration of a number of factors including, but not limited to, control, mode of remuneration, the provision and maintenance of equipment, the obligation to work, the hours of work and provision of holidays, the deduction of income tax and the delegation of work.

11 The principles set out in *Stevens v Brodribb* have been adopted and applied by this Commission in *Personnel Contracting Pty Ltd t/as Tricord Personnel v The Construction Forestry Mining and Energy Union of Workers* [2004] WASCA 312; (2004) 85 WAIG 5. *Abdalla v Viewdaze Pty Ltd* (2003) 53 ATR 30; (2003) 122 IR 215, provides a useful summary of the factors or indicia to be considered when determining the nature of the relationship.

12 The question to ask when determining whether a worker is an employee or contractor is ultimately whether the worker is a servant of another in that other's business, or whether the worker carries on a business of her or her own account. The answer to the question comes from an examination of the relationship as a whole as established in *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21 [24]; [2001] HCA 44. That includes not merely any terms formally agreed by the parties, but the ‘actual work practices’ they have adopted as per *ACE Insurance Ltd v Trifunovski* [2013] FCAFC 3; (2013) 235 IR 115 [107] - [108].

Contract

13 In relation to the assessment of the extent of control one party has over another, in *Stevens v Brodribb* (29) it was held that the test has shifted from the actual exercise of control to the right to exercise which may ‘only in incidental or collateral matters’.

Delegation

14 In *On Call Interpreters and Translators Agency Pty Ltd v Federal Commissioner of Taxation (No 3)* [2011] 214 FCR 82; (2011) 206 IR 252, the Federal Court at [283] considered the right to delegate and held that:

the mere right to delegate in the absence of the likelihood or actuality of delegation occurring may be of little consequence: *Neale v Atlas Products (Vic) Pty Ltd* (1955) 94 CLR 419 (428)

citing *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance* [1968] 2 QB 497 (515), the Federal Court observed that limited or occasional delegation may not preclude a finding that the relationship is one of employee and not a contractor.

A Business, Working for Others and Advertising for Alternate Practice

15 In *Paul Ernest Dallaston v Canon Foods* [2005] WAIRC 01978; (2005) 85 WAIG 2999, the Full Bench of the Commission held that it was correct to find that Mr Dallaston was an independent contractor because Mr Dallaston in purchasing a round of business clients from another person engaged by Canon Foods and in attempting to sell his own round including the goodwill of a purported business and equipment Mr Dallaston was conducting a business of his own. In addition, the equipment provided by Mr Dallaston was a van with a freezer unit, which involved a comparatively large capital outlay.

16 The existence of a separate location for the operations of a business indicates an independent contractor as considered in *Stevens v Brodribb* (37) and similar to the inclusion in an industry directory in *Abdalla v Viewdaze* [35] the promotion of their own business will point to an independent contractor.

17 Where an employee is able and does work for others this may point towards an independent contractor. However, a casual employee or part time employee may also be entitled to work for others as found in *Yaraka Holdings Pty Ltd v Giljevic* (2006) 149 IR 339 [34].

Payment, Taxation, Superannuation and Benefits

18 Payment by results or completion of a task may be indicative of a contractor however it is not uncommon for employees to be paid commissions as in *ACE Insurance v Trifunovski*. Payment on submission of an invoice suggests a business but carries less weight if the employer provides the form and dictates the content. *The Director of The Fair Work Building Industry Inspectorate v Linkhill Pty Ltd (No 7)* [2013] FCCA 1097.

- 19 The non-payment of superannuation contributions, workers compensation levies, deductions of income tax, holiday pay or sick leave is dependent on the view taken by the putative employer, and whether these are done depends on the whether the relationship is viewed as one of employment and not the other way around as established in *ACE Insurance v Trifunovski* [37].

The Contract Itself

- 20 In *Abdalla v Viewdaze* [34] the Full Bench of the Australian Industrial Relations Commission held that:

- (3) The terms and terminology of the contract are always important and must be considered. However, in so doing, it should be borne in mind that the parties cannot alter the true nature of their relationship by putting a different label on it. In particular, an express term that the worker is an independent contractor cannot take effect according to its terms if it contradicts the effect of the terms of the contract as a whole: that is, the parties cannot deem the relationship between themselves to be something it is not. Similarly, subsequent conduct of the parties may demonstrate that relationship has a character contrary to the terms of the contract. If after considering all other matters, the relationship is ambiguous and is capable of being one or the other, then the parties can remove that ambiguity by the very agreement itself which they make with one another.

- 21 Subsequently the Full Bench of the Fair Work Commission (FWC) in *Jiang Shen Cai trading as French Accent v Michael Anthony Do Rozario* [2011] FWA FB 8307; (2011) 215 IR 235, considered the principles articulated in *Abdalla v Viewdaze* and the apparent tension between the consideration of the description of the relationship in a written agreement where an assessment of all other matters results in a conclusion that is ambiguous and the alternative test, in the face of ambiguity, of being:

- (5) ... guided primarily by whether it can be said that, viewed as a practical matter the individual in question was or was not running his or her own business or enterprise with independence in the conduct of his or her operations as distinct from operating as representative of another business with little or no independence in the conduct of his or her operations. [10].

In this matter the FWC found that the absence of a reference to a dealer arrangement in the written contract between the two parties supported the finding that there was an additional separate business arrangement with the employee to that of the relationship between them of employer and employee [39].

Consideration

- 22 At the commencement of their relationship the parties' own discussions about the nature of the relationship were superficial, with limited details of the arrangements having been agreed.
- 23 Ms Derkacs made the following arguments in support of her contention that she was an employee:
- (a) There was no written contract in relation to her engagement;
 - (b) Ms Derkacs considered herself to be an employee at all times;
 - (c) Phoenix Podiatry exerted control over the hours that she worked;
 - (d) Phoenix Podiatry bore the risk in relation to the work that she performed;
 - (e) Ms Derkacs was not able to nominate another podiatrist to perform her hours of work;
 - (f) Ms Derkacs was representing Phoenix Podiatry when working at the clinic, her name appeared on promotional materials such as the website and business cards with no distinction being made in respect of being an independent contractor nor business; and
 - (g) Phoenix Podiatry provided all the equipment, instruments and specialist supplies needed.
- 24 Phoenix Podiatry maintained that the nature of the relationship was that Ms Derkacs was at all times an independent contractor, based on the following contentions:
- (a) At the commencement of their relationship Ms Derkacs indicated that her preference was to be engaged as a contractor;
 - (b) Throughout her engagement with Phoenix Podiatry, Ms Derkacs also provided podiatry services at other establishments;
 - (c) Ms Derkacs was paid according to the revenue she generated through client treatments and products sold;
 - (d) Phoenix Podiatry did not determine Ms Derkacs' hours of work, as they were agreed between the parties;
 - (e) Phoenix Podiatry did not deduct income tax or make superannuation contributions on behalf of Ms Derkacs;
 - (f) Phoenix Podiatry never paid Ms Derkacs for periods of leave that she took in relation to both illness and recreation;
 - (g) Phoenix Podiatry did not pay for Ms Derkacs' training and professional development;
 - (h) The personal nature of the services provided would not create goodwill for Phoenix Podiatry; rather business would be created for Ms Derkacs as an individual whom clients would follow to another practice;
 - (i) In 2015 Ms Podkas provided a draft of an Agreement that characterised the relationship as an independent contractor to Ms Dercaks; and

- (j) Subsequently in 2017 and again in 2018 Ms Podkas provided a draft of an Agreement to Ms Derkacs which included terms that defined Ms Derkacs as a contractor. When Ms Derkacs entered into negotiations on the terms of the Agreement, she sought changes to some of the terms but did not seek to change the description of her as a contractor.

25 It is useful to initially consider the various indicia under general headings to inform the overall assessment of the relationship.

Control

- 26 Ms Derkacs agreed that generally in the day to day conduct of her practice she was not closely supervised, was not instructed on the nature of treatments of clients and was left largely on her own (ts 47).
- 27 Ms Derkacs says the hours of work were set by Phoenix Podiatry and that Ms Podkas was able to instruct that Ms Derkacs not attend at the clinic when there were insufficient clients booked (ts 94). Ms Podkas says that Ms Derkacs was able to choose her own hours within their agreed arrangements established for the practical requirements of a podiatry practice (ts 94). That is, the times in which a client could make a booking were dependent on the hours of the clinic: being the times when the Receptionist attended the clinic for the taking of bookings and the hours for treatments were during the advertised hours of the practice (ts 87). The days on which Ms Derkacs worked were discussed and agreed on a longer-term basis to facilitate clients repeat bookings and the nature of a podiatry practice (ts 89). The days of attendance at the clinic were agreed subject to the availability of Ms Derkacs, the availability of a room in the clinic and sufficient bookings (ts 86). The days and hours of service varied during the engagement – one day a week to three days a week – these were set by agreement between Ms Podkas and Ms Derkacs based on bookings by clients. Ms Podkas advised Ms Derkacs that she would need to cancel some days she was rostered to work as there were insufficient bookings (ts 92-94). I find that the days and hours Ms Derkacs worked were agreed between the two parties as a result of negotiations held to accommodate the needs of each party and the overall parameters of the days and hours of operation in which Ms Derkacs worked were made by Ms Podkas.
- 28 Where there were no client bookings for Ms Derkacs on a particular day or the first booking was for some time after the usual opening time of the clinic, Ms Podkas would text Ms Derkacs to advise her of the lack of bookings or later start time. This arrangement, whereby the lack of bookings resulted in Ms Derkacs' services not being required, is more consistent with that of a contractor (ts 95-96).
- 29 Ms Derkacs says she was required to seek permission to be absent from Phoenix Podiatry (ts 49). Ms Podkas says Ms Derkacs discussed any periods of proposed absences with her but did not seek approval for periods of absences. Instead Ms Podkas says Ms Derkacs would notify that she was not available rather than request leave. Ms Podkas would make arrangements to ensure clients were attended to during Ms Derkacs absences. (Witness Statement of Tetyana Podkas (TP [38, 83])). Ms Derkacs says she sought approval from Ms Podkas for any extended absences from the practice (ts 69). I find that Ms Derkacs did not request approval for leave and extended absences and the communication provided to Ms Podkas concerning leave and extended absences is more appropriately described as notification. Given the effect of Ms Derkacs being absent resulted in receiving no income for that period. These circumstances are similar to that of an independent contractor however they are also similar to that of a causal employee.
- 30 Ms Derkacs contends that Ms Podkas controlled the allocation of patients and that Ms Podkas had allocated some clients who had requested an appointment with Ms Derkacs to another podiatrist (ts 47-48). Ms Derkacs says she discussed this with Ms Podkas, however Ms Podkas could not recall the conversation (ts 101). Phoenix Podiatry contend that Ms Derkacs was able to decline to attend to particular clients and cited two occasions (TP [46-47]). Ms Derkacs says the first occasion was the result of the client being aggressive toward her and the second occasion was as a result of the client running late and the usual practice was for the client to be rebooked at another time. On this occasion the client was re-booked with Ms Podkas. I find that the two examples do not demonstrate that Ms Derkacs controlled the allocation of her own clients.
- 31 There are some elements of control more consistent with that of an employment relationship, however, the absence of any direct supervision over her work must be taken into account.

Business Goodwill, Working for Others and Advertising for Alternate Practice

- 32 Ms Derkacs says she was free to work at other locations and did so in other practices and in her own business (ts 24, 45). Ms Derkacs also advertised her services at least for one alternative location (ts 46).
- 33 Ms Derkacs says the repeat bookings by clients she attended at Phoenix Podiatry was goodwill for that practice and not for herself or any alternate practices she worked in (ts 48). It is Ms Podkas' evidence that it was agreed with Ms Derkacs at the start of their relationship that any goodwill generated in the form of clients at Phoenix Podiatry would remain with Phoenix Podiatry (TP [15]).
- 34 Ms Derkacs did not supply equipment or specialised supplies and Phoenix Podiatry supplied all equipment and specialist supplies.
- 35 In her evidence in chief Ms Derkacs refers to operating her own business (ts 24, 42). However, under cross examination Ms Derkacs contradicts her evidence saying she does not have a business (ts 44). I found Ms Derkacs to be evasive when being cross examined and her attempts to paint her own business operations as something different unpersuasive.
- 36 Ms Derkacs worked at other practices, advertised her services independently of Phoenix Podiatry and operated her own business which suggests that she was a contractor. However, Ms Derkacs did not provide a significant investment through the provision of capital or equipment for the operation of a practice at Phoenix Podiatry indicating an employment relationship. The goodwill generated at Phoenix Podiatry was for that practice and not for Ms Derkacs personally or any business owned by her suggests that Ms Derkacs was an employee.

Delegation

- 37 Ms Derkacs says she did not delegate or sub-contract her work at Phoenix Podiatry to any other person. Ms Derkacs says while Ms Podkas 'makes quite plain that I was free to sub-contract I refused to believe that she would ever let a third party take over my patient for a given shift' (ts 24). It is not known if Ms Podkas would have prevented any delegation only that Ms Derkacs held the belief that she would have. Ms Podkas agrees that Ms Derkacs did not sub-contract another podiatrist at any time, however she says that Ms Derkacs had the right to do so (ts 101). Similar to *On Call Interpreters v Federal Commissioner of Taxation* the right to delegate in the absence of acting upon it is of little consequence in assessing the nature of the relationship between Ms Derkacs and Phoenix Podiatry. On the one occasion Ms Podkas requested that Ms Derkacs arrange for an alternative podiatrist to cover her absence, Ms Derkacs declined to do so (ts 101). Whenever Ms Derkacs was unable to attend at Phoenix Podiatry, it was Ms Podkas who arranged for another podiatrist to attend (ts 101-102) and I infer the relationship would be between Ms Podkas and the alternate podiatrist and not with Ms Derkacs.
- 38 An assessment of this factor points towards the relationship being that of employer and employee.

Integration

- 39 Ms Derkacs' name was listed on the website as one of the team of Phoenix Podiatry and on Phoenix Podiatry's business cards along with other podiatrists at the practice. The website and business cards were designed and provided by Phoenix Podiatry (ts 32).
- 40 Ms Derkacs says she had a name badge which displayed the logo of Phoenix Podiatry. Ms Podkas says Ms Derkacs' name badge only had her name on it and did not contain a reference to Phoenix Podiatry. Ms Derkacs' badge was not produced however a client recalls that Ms Derkacs' badge displayed a logo that she mistakenly took for a dog's face when it actually was a bird (ts 136). I infer this would be the Phoenix Podiatry logo.
- 41 Phoenix Podiatry did not have a uniform or corporate wardrobe and Ms Derkacs wore casual clothes without a logo.
- 42 Clients seen by Ms Derkacs were followed up by Phoenix Podiatry if they, or Medicare, failed to make payments for services. Monies not able to be recovered were not deducted from Ms Derkacs payments nor did Ms Derkacs pay Phoenix Podiatry the loss (ts 23, 104).
- 43 An assessment of these factors suggests Ms Derkacs was an employee.

Payment, Taxation, Superannuation and Benefits

- 44 Phoenix Podiatry did not deduct income tax from any remuneration paid to Ms Derkacs (ts 24) and when cross examined on matters concerning taxation arrangements Ms Derkacs was evasive, however Ms Derkacs did concede that she reported her income to the Australian Taxation Office as business income (ts 45).
- 45 Phoenix Podiatry paid Ms Derkacs on submission of an invoice by Ms Derkacs that was calculated by using a day sheet completed by the Receptionist. Ms Derkacs says the invoice included an ABN number because Ms Podkas requested that it do so (ts 37). Ms Derkacs received payment for treatment of a client regardless of whether the client paid Phoenix Podiatry (ts 23).
- 46 Phoenix Podiatry also did not make any superannuation contributions for Ms Derkacs (ts 24).
- 47 Ms Derkacs did not receive paid holiday leave nor paid sick leave (TP [31]).
- 48 The non-deduction of income tax from remuneration, payment of an invoice supplied by Ms Derkacs to a financial institution account under a business name point towards Ms Derkacs being a contractor. The non-payment of superannuation contributions, along with the non-receipt of holiday pay and sick leave also suggests Ms Derkacs was a contractor and not an employee. However, these conclusions need to be considered with some caution as in *ACE Insurance v Trifunovski* [37] and other indicia will have more weight.

Express declaration of the Parties

- 49 Ms Podkas says that the arrangement between Phoenix Podiatry and Ms Derkacs was discussed between them in 2015 and it was agreed that it would be one of contractor or an arrangement akin to a partnership. Ms Podkas says that Ms Derkacs requested that the relationship be that of an independent contractor (TP [20-25]). Ms Podkas confirmed this under cross examination when she says 'Ms Derkacs insisted she wants to be a contractor' (ts 110). Ms Derkacs did not refute Ms Podkas' evidence that it was Ms Derkacs who expressed a preference to be a contractor because this was beneficial to her (TP [24]). When cross examined Ms Podkas confirmed this to be the case and that she agreed as a result of their close friendship and because the arrangement was to be trialled (ts 110).
- 50 Ms Podkas says she first provided a draft Agreement to Ms Derkacs in August 2015 (TP [67]). Ms Podkas says she raised the draft Agreement with Ms Derkacs on several occasions until November 2015 when she retrieved the draft Agreement from Ms Derkacs' correspondence tray and placed it on Ms Derkacs' desk with a note requesting that she email any issues before the end of the week (TP [70-71]). Ms Podkas says as a result of medical concerns she did not pursue this matter until June 2017 when she reminded Ms Derkacs about the Agreement. Ms Podkas' recollection is that at that time Ms Derkacs advised she wished to discuss the termination restriction (TP [75]).
- 51 Mr MacHunter says he saw the draft Agreement in Ms Derkacs' correspondence tray a number of times until November 2018 (Witness Statement of Paul Anthony MacHunter [12]).
- 52 Ms Derkacs says she was not provided with a written draft Agreement before August 2017 which she found on her desk on return from a holiday (ts 26).

- 53 On 11 August 2017 Ms Podkas texted Ms Derkacs requesting Ms Derkacs outline any issues she had with the draft Agreement so that they could discuss them (TP [76–77]). Ms Derkacs did not respond, and Ms Podkas did not pursue the matter because on 19 August 2017 Ms Derkacs advised that she was resigning from Phoenix Podiatry providing twelve weeks' notice (TP [78]). Subsequently, in October 2017, Ms Derkacs advised that she would continue until Easter 2018 (TP [79]). In fact, Ms Derkacs did not terminate her relationship with Phoenix Podiatry at Easter and continued to work until November 2018.
- 54 On 14 November 2018 Ms Podkas requested Ms Derkacs look at the draft Agreement and there was a discussion about superannuation contributions. Ms Derkacs advised that she would not be able to look at the draft Agreement for a further few weeks.
- 55 On 19 November 2018, Ms Podkas sent Ms Derkacs a text message advising she would email the Agreement and requested that Ms Derkacs look at the draft Agreement and finalise their negotiations by 21 November 2018. As Ms Derkacs responded by text message that she would not have time before 21 November 2018, to review the draft Agreement Ms Podkas advised, by text message, that she would block the appointments for a period in the afternoon to enable Ms Derkacs to be free for this task.
- 56 Ms Podkas emailed Ms Derkacs an amended draft Agreement with reduced terms, on 19 November 2018 reiterating her text messages to contact her with any amendments to be done by the end of the day on 21 November 2018.
- 57 Early on 21 November 2018 Ms Derkacs emailed Ms Podkas saying it was unfair to demand that the Agreement be signed in a short period of time and that she would review it on the weekend, call her with any issues and have it back by the next week. Ms Podkas responded by text advising she had blocked appointments for forty minutes in the morning and she would pay Ms Derkacs normal rates for this time. Ms Derkacs responded by text saying she would not be looking at the draft Agreement that day and claiming Ms Podkas was bullying 'your employee into rushing to sign your document!' (TP [98]). Ms Podkas responded by text saying Ms Derkacs was not an employee but a contractor (TP [99]).
- 58 On 26 November 2018, Ms Derkacs emailed Ms Podkas requesting changes to the draft Agreement for remuneration, period for notice and the restrictions on termination (TP [100]). Ms Podkas responded by email accepting two of the proposed changes and rejecting the proposed change to the restrictions on termination (TP [101]).
- 59 The two versions of the draft Agreement described the relationship as one of contractor and principal. Ms Derkacs did not raise the issue of the description of the nature of the relationship in 2017 nor in 2018. In proposing changes to the draft Agreement in November 2018, Ms Derkacs did not seek to change the description of the relationship to that of an employee.
- 60 In addition, Phoenix Podiatry contend that Ms Derkacs considered herself a contractor as she described her relationship as a 'locum' on the invoices submitted for payment (ts 43).
- 61 I find that initially in 2015 the parties characterised their relationship as that of a principal and contractor, albeit the details of the arrangements were scant. I am persuaded by Ms Podkas' evidence that at the time Ms Derkacs expressed a preference to be engaged as a contractor. I find that the draft Agreement and subsequent variations described Ms Derkacs as a contractor. I find that Ms Derkacs did not seek to be classified as an employee during her engagement with Phoenix Podiatry of three years and eight months, only expressing her concerns that she was in fact an employee latterly in circumstances in which it is apparent the negotiations to document their relationship were increasingly tense. However, as in *Abdalla v Viewdaze* and *Jiang Shen Cai v Michael Anthony Do Rozario*, the parties in this matter cannot deem the relationship to be something it is not, and their descriptions of their relationship is one consideration along with a range of other factors.
- 62 In answering the question of whether Ms Derkacs is a servant of another and whether Ms Derkacs carried on a business on her own behalf in the context of her engagement with Phoenix Podiatry, I have assessed the multiple factors. Viewing the totality of the relationship is a practical matter and I am on balance satisfied that in relation to work undertaken at Phoenix Podiatry, Ms Derkacs was not conducting a business of her own. I find that Ms Derkacs was working within the business established as Phoenix Podiatry and her services were provided as part of that business.

Question to Be Determined – Unfair Dismissal

- 63 Having found that Ms Derkacs was an employee the question is whether the termination of Ms Derkacs' employment was harsh, oppressive or unfair.

Principles

- 64 An employer has a right to terminate an employee's employment provided the termination is not an abuse of the contractual right to terminate as established in *Undercliffe Nursing Home v Federated Miscellaneous Workers' Union of Australia, Hospital, Service and Miscellaneous, WA Branch* (1985) 65 WAIG 385.
- 65 The power to summarily dismiss depends upon first, determining whether there has been a breach by the employee of the express or implied terms of the contract or demonstrated intention not to be bound by those terms and secondly, an assessment of whether the breach is sufficiently serious to allow summary termination of the contract *Bruce v AWB Ltd* (2000) 100 IR 129 [15]; [2000] FCA 594.
- 66 *Blyth Chemicals Limited v Bushnell* (1933) 49 CLR 66 (81-82) establishes that it is the conduct of the employee that must be considered:

"Conduct which in respect of important matters is incompatible with the fulfilment of an employee's duty, or involves an opposition, or conflict between his interest and his duty to his employer, or impedes the faithful performance of his obligations, or is destructive of the necessary confidence between employer and employee, is a ground of dismissal.....But the conduct of the employee must itself involve the incompatibilities, conflict, or impediment, or be destructive of confidence."

67 In *John Lysaght (Australia) Pty Ltd v Federated Ironworkers Association* (1973) 15 AILR 323 it was found that abusive language at the workplace may be sufficiently serious to warrant dismissal when directed toward challenging the authority of a supervisor or employer.

Consideration

- 68 In this matter on 28 November 2018 Ms Derkacs says she arrived at work expecting to attend to clients. However, Ms Podkas informed her that she was required to immediately sign the draft Agreement otherwise she would not be working at the clinic and in effect would terminate her employment unless the Agreement was signed (ts 31). Ms Podkas' version of events differs from that of Ms Derkacs. Ms Podkas says that on arrival at the clinic Ms Derkacs asked how she was and Ms Podkas had responded that she was not good because they had not as yet agreed on the Agreement (TP [105]) and that she had come into the clinic to discuss the Agreement and that until they could arrive at signed agreement Ms Derkacs was suspended (TP [106]). Ms Podkas says she had attended at the clinic that morning with the intention of discussing the one issue in the draft Agreement that she had understood remained to be settled between them, intending to compromise on this matter, and if necessary, treat a client booked with Ms Derkacs to enable Ms Derkacs to have that time to consider the terms and sign the Agreement (ts 116). The differences in the recollections of these exchanges are important and I find that Ms Podkas' version is preferable. Ms Podkas' written and oral evidence was consistent and not diminished under cross examination. Ms Derkacs' evidence was muddled and inconsistent and, at times, evasive.
- 69 In response to being told she was not to see clients, Ms Derkacs raised her voice to the level of a shout and swore at Ms Podkas. Ms Derkacs shouting for another member of staff to witness their exchange loudly demanded Ms Podkas say she was firing her (TP 108-110). A client who overheard the exchanges says Ms Derkacs was yelling at Ms Podkas in a disrespectful, abusive, intimidating and threatening manner. (Witness Statement of Kerry Valentine).
- 70 Ms Podkas responded by asking Ms Derkacs to return her keys to the clinic and leave the premises (TP [111]). Ms Derkacs briefly left the clinic to retrieve her keys from her vehicle remarking with profanities to a client as she passed through the waiting area that she had been sacked (TP [114]) (ts 66).
- 71 In this matter I conclude that Ms Derkacs was not dismissed unfairly, harshly or unreasonably in the circumstances. Ms Derkacs did not comply with a lawful direction from her employer to not attend clients of the clinic, in order to use that time to consider a revised draft Agreement and further discuss any issues in response to Ms Podkas' instructions. Ms Derkacs used abusive language to directly challenge her supervisor and employer. I find Ms Derkacs' conduct was destructive of the necessary confidence between employer and employee.
- 72 I find that Ms Podkas was entitled to summarily terminate the contract of employment and I dismiss the application.

2019 WAIRC 00749

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION	
PARTIES	ANNIE DERKACS	APPLICANT
	-v-	
	TETYANA PODKAS TRADING AS PHOENIX PODIATRY	RESPONDENT
CORAM	COMMISSIONER T B WALKINGTON	
DATE	THURSDAY, 10 OCTOBER 2019	
FILE NO/S	U 152 OF 2018	
CITATION NO.	2019 WAIRC 00749	
Result	Application dismissed	
Representation		
Applicant	In person	
Respondent	Mr C Beetham (of counsel)	

Order

HAVING HEARD the applicant on her own behalf and Mr C Beetham (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.

[L.S.]

(Sgd.) T B WALKINGTON,
Commissioner.

2018 WAIRC 00765

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION	
	DAVID PERRIN	FIRST APPLICANT
	COLIN HOLDEN	SECOND APPLICANT
	DARREN AHEARN	THIRD APPLICANT
	-v-	
	PILBARA IRON COMPANY (SERVICES) PTY LTD	RESPONDENT
CORAM	SENIOR COMMISSIONER S J KENNER	
DATE	TUESDAY, 25 SEPTEMBER 2018	
FILE NO.	B 70 OF 2018, B 71 OF 2018 AND B 73 OF 2018	
CITATION NO.	2018 WAIRC 00765	

Result	Directions issued
Representation	
Applicant	Mr A Bukarica of counsel
Respondent	Mr G Giorgi of counsel

Direction

HAVING heard Mr A Bukarica of counsel on behalf of the applicant and Mr G Giorgi 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 herein applications be joined and heard and determined together.
- (2) THAT evidence adduced in one application, so far as is relevant, shall be taken to be evidence in each other application.
- (3) THAT the applicants and the respondent file an agreed statement of facts (if any) by no later than 4.00pm on 9 October 2018.
- (4) THAT the applicants by letter request from the respondent the production of specified documents or classes of documents in relation to the herein applications by no later than 4.00pm 15 October 2018.
- (5) THAT subject to any objection to production, the respondent provides to the applicants the documents requested by no later than 4.00pm 22 October 2018.
- (6) THAT evidence in chief in this matter be adduced by way of signed witness statements which will stand as the evidence in chief of the maker. Evidence in chief other than that contained in the witness statements may only be adduced by leave of the Commission.
- (7) THAT the applicants file and serve upon the respondent any signed witness statements upon which they intend to rely by no later than 4.00pm 29 October 2018.
- (8) THAT the respondent file and serve upon the applicants any signed witness statements upon which it intends to rely no later than 4.00pm 26 November 2018.
- (9) THAT the applicants file and serve upon the respondent any signed witness statements in reply upon which they intend to rely no later than 4.00pm 3 December 2018.
- (10) THAT the applicants file and serve an outline of submissions and any list of authorities upon which they intend to rely no later than 4.00pm 29 October 2018.
- (11) THAT the respondent file and serve an outline of submissions and any list of authorities upon which it intends to rely no later than 4.00pm 26 November 2018.
- (12) THAT the applicants file and serve any outline of submissions in reply by no later than 4.00pm 3 December 2018.
- (13) THAT the matters be listed for hearing for two days in Perth on dates to be fixed by the Commission.
- (14) THAT either party may apply for leave of the Commission for the evidence of witnesses to be taken by video-link.
- (15) THAT the parties have liberty to apply on short notice.

[L.S.]

(Sgd.) S J KENNER,
Senior Commissioner.

2019 WAIRC 00137

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION : 2019 WAIRC 00137
CORAM : SENIOR COMMISSIONER S J KENNER
HEARD : TUESDAY, 25 SEPTEMBER 2018, MONDAY, 10 DECEMBER 2018
DELIVERED : WEDNESDAY, 20 MARCH 2019
FILE NO. : B 70 OF 2018, B 71 OF 2018, B 73 OF 2018
BETWEEN : DAVID PERRIN;
COLIN HOLDEN;
DARREN AHEARN
Applicants
AND
PILBARA IRON COMPANY (SERVICES) PTY LTD
Respondent

Catchwords : *Industrial Relations Law (WA) - Contractual benefits claim - Claim for "Role Service Allowance" when roster disrupted - Claim for payment for ad hoc night shift work - Claim for lack of notice of roster change - Interpretation of contracts - Incorporation of external documents into contracts - Principles applied - Claim for "Role Service Allowance" upheld for two applicants - Claim for payment for ad hoc night shifts and roster change refused*

Legislation : *Industrial Relations Act 1979 (WA)*

Result : Applications upheld in part

Representation

Counsel:

Applicants : Mr A Bukarica of counsel and with him Mr S Crawford of counsel

Respondent : Mr A Longland of counsel and with him Mr G Giorgi of counsel

Solicitors:

Applicants : Construction Forestry Maritime Mining & Energy Union

Respondent : Herbert Smith Freehills

Case(s) referred to in reasons:

Australian Mutual Provident Society v Chaplin (1978) 18 ALR 385
Black Box Control Pty Ltd v Terravision Pty Ltd [2016] WASCA 219
Bowtell v Goldsbrough, Mort & Co Ltd (1905) 3 CLR 444
BP Refinery (Westernport) Pty Ltd v The Shire of Hastings (1977) 180 CLR 266
Charrington & Co Ltd v Wooder [1914] AC 71
Codelfa Construction Pty Ltd v State Rail Authority of New South Wales (1982) 149 CLR 337
Construction, Forestry, Mining and Energy Union v Pilbara Iron Company (Services) Pty Ltd [2011] FCAFC 91
Ferguson v TNT Australia Pty Ltd [2014] WAIRC 00020; (2014) 94 WAIG 110
Franklins Pty Ltd v Metcash Trading Ltd [2009] NSWCA 407
Goldman Sachs JB Were Services Pty Ltd v Nikolich (2007) 163 FCR 62; [2007] FCAFC 120
Hancock Prospecting Pty Ltd v Wright Prospecting Pty Ltd (2012) 45 WAR 29
Hotcopper Australia Ltd v David Saab [2001] WAIRC 00102; (2001) 81 WAIG 2704
Hvalfangerselskapet Polaris Aktieselskap Ltd v Unilever Ltd (1933) 39 Com Cas 1
King v Griffin Coal Mining Company Pty Ltd (2017) 97 WAIG 527
Lewis v Great Western Railway Co (1877) 3 QBD 195
L Schuler AG v Wickman Machine Tool Sales Ltd [1974] AC 235
McCormick v Riverwood International (Australia) Pty Ltd (1999) 167 ALR 689; [1999] FCA 1640
Narich Pty Ltd v Commissioner of Pay-Roll Tax (1983) 50 ALR 417
Reardon Smith Line v Hansen-Tangen [1976] 1 WLR 989

Riverwood International Australia Pty Ltd v McCormick (2000) 177 ALR 193; [2000] FCA 889

Schenker & Co (Aust) Pty Ltd v Maplas Equipment and Services Pty Ltd [1990] VR 834

Soliman v University of Technology Sydney [2008] FCA 1512

The Movie Network Channels v Optus Vision Pty Ltd [2009] NSWSC 157

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

QBE Insurance Australia Ltd v Vasic [2010] NSWCA 166

Walker v Citigroup Global Markets Australia Pty Ltd (2006) 233 ALR 687

Walton and Frank v BHP Billiton Iron Ore Pty Ltd [2019] WAIRC 00089

Case(s) also cited:

Australian Broadcasting Commission v Australasian Performing Right Association Limited (1973) 129 CLR 99

Balfour v Travelstrength Ltd (1980) 60 WAIG 1015

Brynes v Kindle (2011) 243 CLR 253

Cantor Fitzgerald International v Callaghan [1999] ICR 639; 2 All ER 411

Collum v Opie (2000) 76 SASR 588

Commonwealth of Australia v Barker (2014) 253 CLR 169

Electricity Generation Corporation v Woodside Energy Ltd (2014) 251 CLR 640; [2014] HCA 7

Goldie v Getley (No 3) [2011] WASC 132

Lindsay Petroleum Co v Hurd (1874) LR 5 PC 221

Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd (2015) 256 CLR 104; [2015] HCA 37

Murray v Hamersley Iron Pty Ltd [2004] WAIRC 10967

Portius Pty Ltd v Transport Workers' Union of Australia, Industrial Union of Workers, Western Australian Branch [1991] WAIRC 10019

RACV Road Service Pty Ltd v "Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union" known as Australian Manufacturing Workers' Union (AMWU) [2014] FWCFB 1629

Reardon Smith Line v Hansen-Tangen [1976] 3 All ER 570

Romero v Farstad Shipping (Indian Pacific) Pty Ltd [2014] FCAFC 177

Rowley v BHP Billiton Iron Ore Pty Ltd [2014] WAIRC 244

Spunwill Pty Ltd v Bab Pty Ltd (1994) 36 NSWLR 290

The Federated Miscellaneous Workers' Union of Australia, WA Branch v Gromark Packaging [1991] WAIRC 13150

Westpac Banking Corporation v Wittenberg [2016] FCAFC 33

Yousif v Commonwealth Bank of Australia (2010) 193 IR 212

Zafirou v Stain-Gobain Administration Pty Ltd [2013] VSC 377

Reasons for Decision

The applications

- 1 The respondent mines iron ore in the Pilbara region of the State. It operates 16 mines, four port terminals and an extensive rail network. The respondent is a wholly owned subsidiary of Rio Tinto and is the employing entity of employees engaged in Rio Tinto's iron ore mining operations in Western Australia.
- 2 The applicants, Mr Perrin, Mr Holden and Mr Ahearn are employed by the respondent in its area of operation known as the "Cranes and Transport team". The applicants are employed on a fly in fly out basis, and are engaged on an eight day on, six day off roster. Whilst the applicants were originally employed to work at Tom Price, they are now based at the respondent's Greater Brockman operation. As a part of their duties, they are required to undertake work across the respondent's Pilbara mining operations, wherever necessary.
- 3 The applicants bring claims for denied contractual benefits under s 29(1)(b)(ii) of the *Industrial Relations Act 1979*. The applicants allege that the respondent has denied to them benefits under their contracts of employment in relation to three alleged entitlements. They are:
 - a. payments at a higher rate in respect of a "Role Service Allowance" in respect of being "Called Out" (commonly understood and described as "disruptions");
 - b. payment for ad hoc night shifts (as part of a "disruption"); and
 - c. lack of notice for a roster change.
- 4 By agreement between the parties and the Commission, the threshold issue of entitlement having regard to the applicants' terms and conditions of employment, is to be determined first. Should the Commission find favour with any of the applicants' claims, the quantum of any benefits will be determined in further proceedings before the Commission, if necessary.

Agreed facts

- 5 Helpfully, the parties have compiled a statement of agreed facts which sets out in some detail, the relevant background. Whilst somewhat lengthy, it places the subsequent discussion and analysis in context and I set it out in full as follows:

Statement of Agreed Facts

This Statement of Agreed Facts is an agreed document of the applicants and respondent prepared for the purposes of these proceedings only, in accordance with the orders of the Western Australian Industrial Relations Commission dated 25 September 2018.

A. The first applicant

1. Mr David Perrin (**'the first applicant'**) is a resident of the State of Western Australia. His residential address is 83 Tallarook Way, Waggrakine.
2. The first applicant is 45 years old. His date of birth is 19 February 1973.
3. The first applicant is and was at all relevant times, a permanent employee of Pilbara Iron Company (Services) Pty Ltd (**'the respondent'**).
4. The respondent is a wholly owned subsidiary of the dual listed resources company Rio Tinto Ltd/Rio Tinto PLC (**'Rio Tinto'**).
5. The respondent is the primary employing entity of employees engaged in the iron *ore* operations of Rio Tinto in the State of Western Australia.
6. The first applicant commenced employment with the respondent on 1 November 2014 as an "*Operator Cranes and Transport*".
7. The first applicant and the respondent are party to a written contract of employment entered into on or about 20 October 2014 comprising an "Offer of Employment" and a "Schedule of Remuneration, Benefits and Employment Conditions". A true and correct copy of this contract is attached and marked "**Attachment 1**".
8. At the commencement of his employment, the first applicant's usual work location was the respondent's Tom Price site.
9. On 22 August 2018, the first applicant's usual work location was altered to the Greater Brockman mine.
10. As at the date of this statement, the first applicant is employed on the basis of a fly-in, fly-out (**'FIFO'**) employment arrangement and commutes to the Greater Brockman mine located approximately 60 kilometres from Tom Price.
11. The travel and accommodation costs associated with the first applicant's FIFO work arrangements are arranged and paid for by the respondent.
12. At the commencement of employment with the respondent, the applicant's remuneration consisted of a base annual salary of \$72,000 and the following allowances were identified in his written contract as forming part of his Fixed Remuneration:
 - a. Commute allowance - \$ 4,120 per annum
 - b. National FIFO allowance - \$2,000 per annum
 - c. Function allowance - \$21,600 per annum
 - d. Role service allowance - \$3,937.20 per annum
13. The applicant's total fixed remuneration at commencement of employment (excluding superannuation) was \$113,657.20

B. The second applicant

14. Mr Colin Holden (**'the second applicant'**) is a resident of the State of Western Australia. His residential address is 11 Headland Road, Leschenault.
15. The second applicant is 50 years old. His date of birth is 1 January 1968.
16. The second applicant is and was at all relevant times, a permanent employee of the respondent.
17. The respondent is a wholly owned subsidiary of Rio Tinto.
18. The respondent is the primary employing entity of employees engaged in the iron ore operations of Rio Tinto in the State of Western Australia.
19. The second applicant commenced employment with the respondent on 21 August 2014 as an "*Operator Cranes and Transport*".
20. The second applicant and the respondent are party to a written contract of employment entered into on or about 14 August 2014 comprising an "Offer of Employment" and a "Schedule of Remuneration, Benefits and Employment Conditions". A true and correct copy of this contract is attached and marked "**Attachment 2**".
21. At the commencement of his employment, the second applicant's usual work location was the respondent's Tom Price site.
22. On 5 June 2018, the second applicant's usual work location was altered to the Greater Brockman mine.

23. As at the date of this statement, the second applicant is employed on the basis of a FIFO employment arrangement and commutes to the Greater Brockman mine located approximately 60 kilometres from Tom Price.
24. The travel and accommodation costs associated with the second applicant's FIFO work arrangements are arranged and paid for by the respondent.
25. At the commencement of employment with the respondent, the second applicant's remuneration consisted of a base annual salary of \$72,000 and the following allowances were identified in his written contract as forming part of his Fixed Remuneration:
 - a. Commute allowance -\$14, 120 per annum
 - b. Function allowance - \$21,600 per annum
 - c. Role service allowance - \$3,937.20 per annum
26. The second applicant's total fixed remuneration at commencement of employment (excluding superannuation) was \$111,657.20

C. The third applicant

27. Mr Darren Ahearn ('the third applicant') is a resident of the State of Western Australia. His residential address is 6 Batavia Place, Geraldton.
28. The third applicant is 47 years old. His date of birth is 23 September 1970.
29. The third applicant is and was at all relevant times, a permanent employee of the respondent.
30. The respondent is a wholly owned subsidiary of Rio Tinto.
31. The respondent is the primary employing entity of employees engaged in the iron ore operations of Rio Tinto in the State of Western Australia.
32. The third applicant first commenced employment with Hamersley Iron Pty Ltd, a related entity of the respondent, in around 1990.
33. The third applicant is currently employed by the respondent as an "Operator Cranes and Transport".
34. The third applicant and the respondent are party to a written contract of employment entered into on or about 8 November 2010. A true and correct copy of this contract is attached and marked "**Attachment 3**".
35. The third applicant's contract of employment refers to the *Pilbara Iron Employee Agreement ("PIEA")*. A true and correct copy of the PIEA is attached and marked "**Attachment 4**".
36. The respondent lodged the PIEA with the Workplace Authority Director for approval on 1 August 2008. On 18 November 2008, the respondent was notified that the PIEA had been approved.
37. On 25 July 2011, by order of the Full Court of the Federal Court of Australia, the PIEA was quashed *ab initio* (*Construction, Forestry, Mining and Energy Union v Pilbara Iron Company (Services) Pty Ltd* [2011] FCAFC 91).
38. A letter was issued to the third applicant by the respondent dated 23 May 2012. A true and correct copy of this letter is attached and marked "**Attachment 5**".
39. At the commencement of his employment, the third applicant's usual work location was the respondent's Tom Price site.
40. On 6 June 2018, the third applicant's usual work location was altered to the Greater Brockman mine.
41. As at the date of this statement, the third applicant is employed on the basis of a FIFO employment arrangement and commutes to the Greater Brockman mine located approximately 60 kilometres from Tom Price.
42. The travel and accommodation costs associated with the first applicant's FIFO work arrangements are arranged and paid for by the respondent.
43. At the commencement of his employment contract dated 8 November 2010, the third applicant's remuneration consisted of a base annual salary of \$69,613 and the following allowances were identified in his written contract as forming part of his Fixed Remuneration:
 - a. Commute allowance - \$16,810.00 per annum
 - b. Function allowance - \$41,767.80 per annum
 - c. Role service allowance - \$3,610.00 per annum
44. Immediately following the letter issued to the applicant by the respondent on 23 May 2012, the applicant's total fixed remuneration (excluding superannuation) was \$122,476.50.

D The applicants

45. The first, second and third applicants (**collectively, 'the applicants'**) are employed as part of the respondent's Cranes and Transport Division. Their duties are primarily associated with the operation of cranes and related plant.
46. As at the date of this statement, there are 48 employees engaged in the respondent's Cranes and Transport Division (including the applicants), of which:
 - a. 19 are residential employees; and
 - b. 29 are FIFO employees.

47. Under the respondent's remuneration structure, the applicants are employed within Band 1C.
 48. As at the date of this statement, the applicants are employed pursuant to an 8- days on, 6-days off, work roster which requires work on rostered days on any of the 365/6 days of the year.
 49. As at the date of this statement, the applicants' normal working hours average 48 per week over the roster cycle.
 50. As at the date of this statement, the applicants' normal shift length is 12 hours.
 51. The applicants are currently employed under a "day work" roster and are not required to work night shifts as part of their normal roster pattern.
 52. Whilst rostered on for work at Greater Brockman, the applicants reside in camp accommodation provided by the respondent (**'home camp'**).
 53. The respondent also provides accommodation at any other site where the applicants are required to reside in the course of their employment (**'away camp'**).
 54. Whilst the applicants are primarily employed out of the respondent's Greater Brockman depot at the date of this statement, they are required to temporarily relocate to other locations in the Pilbara and to reside in locations other than Greater Brockman at the direction of the respondent.
 55. The applicants are also required from time to time to work night shifts at the direction of the respondent.
 56. Since at least 5 May 2008, the respondent has had in place an "Allowances Policy" (Version 1, Issue 7). As at the date of this statement, the following versions of the Allowances Policy exist:
 - a. 3 October 2013 (Version 2);
 - b. 5 November 2013 (Version 2.1);
 - c. 10 February 2014 (Version 2.2);
 - d. 13 May 2014 (Version 2.3);
 - e. 17 June 2014 (Version 2.4);
 - f. 5 August 2014 (Version 2.5);
 - g. 19 September 2014 (Version 2.6); and
 - h. 1 April 2016 (Version 2.7).

Copies of each of the above versions of the Allowances Policy, other than Version 2.3, are attached and marked **"Attachment 6"** to **"Attachment 13"**, respectively.
 57. The version of the Allowances Policy in place as at 1 October 2015 was Version 2.6 (Attachment 12).
 58. Since around August 2014, the respondent has had in place a "HR Guidance Note - Applying Allowances". A true and correct copy of the HR Guidance Note is attached and marked **"Attachment 14"**.
 59. From the commencement of the applicants' employment with the respondent in the Cranes and Transport Division and until 30 September 2015:
 - a. Each single day involving an overnight stay in an away camp by the applicants was counted as a separate 'disruption' in terms of calculating the quantum of Role Service Allowance paid; and
 - b. If required to work a night shift, the applicants received a flat night shift allowance for each night worked; and
 - c. The level of night shift allowance paid was different depending on whether the night shift fell on a week day, a weekend and a public holiday.
 60. A true and correct copy of a PowerPoint presentation dated 8 July 2015, titled "Cranes & Transport: Ad-hoc nights & disruptions" is attached and marked **"Attachment 15"**.
 61. A true and correct copy of Word document titled "Cranes & Transport: FAQ's - Recognition of nights & disruptions" is attached and marked **"Attachment 16"**.
 62. From 1 October 2015 to the date of this statement:
 - a. Only the first and last nights of an overnight stay in an away camp by the applicants has been counted as a separate 'disruption' in terms of calculating the quantum of Role Service Allowance paid; and
 - b. No additional shift allowance has been paid for working night shifts as directed.
- 6 Annexed to the SOAF, are several key documents relevant to the determination of the present claims. I will refer to them subsequently when considering the terms of the applicants' contracts of employment, in the context of the respondent's relevant policies. These assume some significance for the purposes of the disposition of the applicants' claims.
- 7 The issues in dispute in this case involve consideration of the applicants' various contract of employment documents, read with policies of the respondent dealing with allowances. They involve some difficult issues. The relationship between the various instruments, and how they have been and should be applied, has involved extensive legal argument in this case by counsel for the parties. That relationship, as the subsequent discussion will illustrate, is, regrettably, not clear. I should also acknowledge the parties filed detailed and helpful written submissions in these matters, which I have carefully considered. The fact that all the various arguments are not set out in the following reasons, does not mean they have been overlooked in any respect.

The contract of employment documents

- 8 The contracts of employment for Mr Perrin and Mr Holden are in common terms. In relation to Mr Ahearn's contract, there is a twist. I will deal with those issues now.
- 9 Mr Perrin and Mr Holden's contracts comprise a letter of offer and a document described as "Schedule of Remuneration, Benefits and Employment Conditions". They are materially the same. It is convenient to set out the relevant parts of the contract documents now. I will use Mr Perrin's, dated 20 October 2014, for present purposes. Mr Perrin's letter of offer of employment of that date, formal parts omitted, relevantly provided as follows:

Offer of Employment

We are pleased to confirm our offer of Permanent, Full Time employment to the role of Operator Cranes & Transport with Pilbara Iron Company Services Pty Ltd.

Your fixed annual remuneration will be **\$124,454.63** per annum which includes base salary, applicable allowances and superannuation. The total estimated annual remuneration including bonuses is targeted at **\$132,119.63**.

Full details of your remuneration including Incentive Payments, are outlined in the Summary of Remuneration and Benefits. The terms and conditions of your employment are recorded in the attached Schedule of Remuneration, Benefits and Employment Conditions. If there are any aspects of the offer on which you would like clarification or additional information, please contact Shantomona Bhardwaj, on 08 9425 9181.

If you accept this offer of employment your start date in the role will be 1 November 2014. Please review the attached Schedule of Remuneration, Benefits & Employment Conditions. To indicate your acceptance, please follow the hyperlink in the e-mail sent to you and complete all required information online by 27 October 2014. This offer of employment will be deemed to have lapsed if your acceptance is not received by this date.

I look forward to working with you in this role.

- 10 As mentioned above, it was common ground that the contracts of employment in the case of Mr Perrin and Mr Holden comprised the letter of offer and the attached Schedule. Several parts of the Schedule are relevant for the purposes of these proceedings and I set them out as follows:

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Schedule of Remuneration, Benefits and Employment Conditions

Name:	David Perrin
Role Title:	Operator Cranes & Transport
Band:	1C
Department:	Cranage and Transport Services
Employer:	Pilbara Iron Company Services Pty Ltd ("the Company")
Location:	Tom Price
Reports To:	Supervisor Cranage and Transport
Employment Status:	Permanent, Full Time
Date of Commencement:	1 November 2014
Roster:	8 days on, 6 off
	Average hours per week 48

This Schedule should be read in conjunction with the covering letter. The policies governing these benefits and their terms and conditions may be varied from time to time.

- Terms of Offer** This Schedule and the covering letter form part of your terms and conditions of employment.
- Pilbara Iron is associated with Rio Tinto Iron Ore which includes a range of other related companies involved in iron ore mining, processing smelting, reducing and refining of ores and ancillary operations. These companies include Hamersley Iron Pty Limited, Pilbara Iron Pty Limited, Robe River Iron Associates, Robe River Mining Co Pty Ltd and may involve other companies related to Rio Tinto Limited or Rio Tinto plc.
- It is a term and condition of employment that you may be deployed to work in any of these associated companies as directed by Pilbara Iron. In these circumstances, this document continues to apply to your employment and you agree to work under the direction of the manager you are assigned in the associated company and abide by the all the policies and procedures of that company as updated, superseded or issued from time to time.

- 11 Under the heading "**Remuneration**" is the following:

Full details of your remuneration including Incentive Payments, are outlined in the Summary of Remuneration and Benefits.

Your Fixed Role Remuneration (excluding superannuation):

- is inclusive of payment for all hours of work required to perform your role, penalties, annual leave loading and all other allowances; and
- is inclusive of payment for any entitlements that may otherwise be payable under a Modern Award or any other applicable industrial instrument; and
- May be applied and apportioned against entitlements otherwise payable under any applicable industrial instrument.

12 Specific consideration also needs to be given to the “**Allowances**” section of the Schedule. It is in the following terms:

Allowances

Allowances are determined by role requirements and are paid in accordance with applicable policies. Allowances are subject to periodic review.

Commute Allowance

Where you are rostered to work a commute working arrangement, you will be paid a Commute Allowance. The Commute Allowance is paid to compensate you for the disabilities and roster requirements (including shift work) associated with the role, including the nights that you are away from your normal place of residence and the disruption that a commute working arrangement can cause to your family and social life.

Function Allowance

When you work on a roster that requires you to work additional mandatory rostered hours in excess of 40 hours per week including if you are regularly required to work a handover at the start or finish of a shift, you will be paid a Function Allowance. Function Allowance is paid in accordance with the Allowance Policy.

Role Allowance

A Role Allowance is paid where you are required to provide regular service or support outside your normal rostered hours. The Role Allowance is made up of a Standby Payment and/or a Call Out Payment.

Where as part of your roster, you are required to be on Standby for more than ten weeks per annum you will receive an allowance. Where you do not qualify for the Standby allowance, but are required to perform Standby, you will be entitled to a pro rata allowance on a daily basis.

Where you are Called Out on twelve or more occasions per annum, you will be entitled to receive a higher allowance.

13 The hours of work section of the Schedule prescribes base hours, rosters and shift work, work outside normal rostered hours, rest periods and meal breaks. Relevantly, the “**Rosters and Shift Work**” section provides as follows:

Rosters and Shift Work

The Company may carry out all operations 24 hours per day, seven days of the week and implement and change roster systems to meet the needs of the site and that will consider the health and safety needs of employees. Prior to the introduction of any new roster system, the Company will consult with the majority of employees directly affected. The Company will genuinely attempt to reach agreement with these employees and give prompt consideration to any matters raised by those employees.

You may be required to perform a handover for communication and work continuity.

The Company may require you to change roster and will give you as much notice as possible of any such change. An employee may be required to change between day work and shift work, shift work and day work, or from one form of shift or shift roster to another.

Where 7 days’ notice is not provided, then for the shortfall in the period of notice, you will be paid for each roster worked the higher of the allowances applicable to the employee’s former or new roster.

14 Finally, a part of the Schedule which assumed some significance in the arguments of counsel related to “**Policies, Procedures and Other Conditions**”, especially the fourth par. That part of the Schedule relevantly provides in the following terms:

**Policies,
Procedures and
Other Conditions**

In addition to the terms and conditions outlined in this contract, it is a condition of your employment that you are required to comply with all reasonable directions by the Company and policies, procedures and standards that apply to your employment. Such policies include (but are not limited to) The Way We Work.

You must familiarise yourself with the Company’s policies, procedures and standards. The Company retains the discretion to vary the policies, procedures and standards.

Failure to comply with Company policies, procedures and standards could result in disciplinary action, which may include termination of your employment.

The benefits provided to you under our policies are discretionary in nature and do not form part of your contract of employment.

No duty of trust and confidence imposing obligations on the Company can be implied into this contract of employment.

Details of our policies, procedures and standards are available from Human Resources or on the Company intranet.

- 15 There was also a further document provided to Mr Perrin and Mr Holden entitled “**Remuneration and Benefits Summary**” which set out a breakdown of their estimated total remuneration and benefits. It was common ground that this document was provided to Mr Perrin and Mr Holden as a summary of their remuneration and benefits as contained in their contracts of employment and did not have independent contractual effect. It is comprised of a fixed annual remuneration amount and a variable component, including an incentive scheme and superannuation contribution. It may be useful to also set out the table to which some reference was made by the parties during the case. The table is in the following terms:

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Remuneration and Benefits Summary

The following is a breakdown of your estimated total Remuneration and Benefits.

David Perrin - Band 1C

Remuneration Component	Value
Annual Base Salary	\$72,000.00
Commute Allowance	\$14,120.00
Function Allowance	\$21,600.00
National FIFO Allowance	\$2,000.00
Role Service Allowance	\$3,937.20
Superannuation (Ordinary Time Earnings x 9.50%)	\$10,797.43
Fixed Annual Remuneration Total	\$124,454.63
Target Employee Incentive Scheme Amount (EIS)	\$7,000.00
Superannuation value on Target Employee Incentive Scheme Amount (EIS)	\$665.00
Total Estimated Annual Remuneration and Benefits at Target	\$132,119.63

- 16 In the case of Mr Ahearn, who was employed in November 2010, his contract documents were quite different. This is because instead of the Schedule, his contract of employment incorporated an agreement known as the “Pilbara Iron Employee Agreement”, which, as noted above, was found to be invalid by the Federal Court. Nonetheless, Mr Ahearn’s letter of offer of employment said that both the letter and the Agreement formed part of his contract of employment. This was not contested in these proceedings. Mr Ahearn’s letter of offer dated 8 November 2010 relevantly provided as follows:

We have pleasure in offering you a transfer to the position of Crannage & Transport Operator with Pilbara Iron Company (Services) Pty Ltd (Pilbara Iron) on the following basis.

Job Classification	1 C - Crane Operator
Department:	Cranage & Transport Tom Price
Work Location:	Tom Price
Employment Status:	Permanent - Full Time
Reporting to:	Gary Duss, Cranage & Transport Supervisor
Working Arrangement:	Commute
Roster:	14 days on, 7 off, Average 56 hour week
Start Date:	30th December 2010

1. Terms of Offer

Your employment is subject to the Pilbara Iron Employee Agreement (attached). Other key terms and conditions of your employment are set out below. Both this letter and the Pilbara Iron Employee Agreement form part of your terms and conditions of employment.

- 17 The remuneration provision of Mr Ahearn’s letter of offer was set out somewhat differently to that of Mr Perrin and Mr Holden and was as follows:

3. Remuneration

The total annual on-target value of your package is \$151,292.87.

Following is a breakdown of how this package has been valued:

Fixed Remuneration:

Base Salary:	\$	69,613.00
Commute Allowance:	\$	16,810.00
Function Allowance:	\$	41,767.80
Role Service Allowance:	\$	3,610.00

Incentives:

Current on target Employee Incentive (Level 1 B - 1 E Employees)	\$	7,000.00
Sub-total (Role Remuneration)	\$	138,800.80
Superannuation	\$	12 492.07
Total	\$	151,292.87

18 Mr Ahearn's letter of offer did not contain a "policies and procedures" provision, as did those for Mr Perrin and Mr Holden. The relevant part of the letter of offer simply said, "You must abide by all the policies and procedures of the Company, as updated, superseded or issued from time to time." Parts of the Agreement are relevant too. Allowance provisions for present purposes were set out at clauses 5.7 and 5.8 and they read as follows:

5.7 Residential Employees' Allowances

An employee's allowances will be dependent upon the employee's roster and their particular role and will be paid in accordance with the following terms:

...

5.7.2(a) Shift Allowance

When a residential employee is required to work on a shift roster, they shall be paid a Shift Allowance. The Shift Allowance compensates for all disabilities and working hours associated with the role, including the requirements of the roster and work on any afternoon or night shift, weekend or public holiday that is required as part of the role.

The calculation for the Shift Allowance is set out in Annexure 2.

...

5.7.3 Role Allowance

A Role Allowance is paid to an employee where that employee provides regular service or support outside their normal rostered hours. The Role Allowance is made up of a Standby Payment and/or a Call Out Payment.

Where as part of their roster, an employee is required to be on Standby for more than ten weeks per annum they will receive an allowance of \$3243.10 per annum. Where an employee does not qualify for the Standby allowance, and they are required to perform Standby they will be entitled to \$324.31 per week or pro rata on a daily basis for part of a week.

Where an employee is Called Out on twelve or more occasions per annum, they will be entitled to receive an allowance of \$3,540 per annum.

...

5.8 Commute Employees Allowances

Allowances for commute (fly in fly out) employees will be dependent upon the employee's roster and role and will be paid in accordance with the following terms:

5.8.1 Commute Allowance

When an employee is rostered to work a commute working arrangement they will be paid a Commute Allowance. The Commute Allowance is paid to compensate an employee for the disabilities and roster requirements associated with the role, including the nights that an employee is away from their normal place of residence and the disruption that a commute working arrangement can cause to an employee's family and social life.

The calculation for the Commute Allowance is set out in Annexure 4.

5.8.2 Function Allowance

When an employee works on a roster that requires the employee to work additional mandatory rostered hours in excess of 40 hours per week, or an employee is regularly required to work a handover at the start or finish of a shift, the employee will be paid a Function Allowance. Function Allowance is paid as time and a half for rostered hours in excess of 40 hours per week expressed as a percentage of Minimum Annual Base Salary.

An example of the calculation of Function Allowance is set out in Annexure 3.

19 The shift work provision of the Agreement was also referred to in argument and it provides as follows:

6.1.4 Shift Work

An employee may be required to change between day work and shift work, shift work and day work, or from one form of shift or shift roster to another.

The Company will give an employee as much notice as possible of any change. Where less than 48 hours notice is provided, then this event will be treated as a Call Out for the purposes of clause 5. 7.3.

- 20 Also relevant in the case of Mr Ahearn, is a letter dated 23 May 2012, which confirmed a roster change, effective 1 June 2012. That letter, formal parts omitted, is in the following terms:

Letter of Confirmation – Roster Change

Please accept this letter as confirmation of a change to your roster effective 1 June 2012. Your new roster will be 8 days on, 6 days off, which is based on an average 48 hours per week. As a result of this change your total fixed remuneration (TFR) will be altered.

Your revised remuneration is as follows:

Remuneration Component	CURRENT	NEW
Base Salary	\$ 78,905.00	\$ 78,905.00
Commute Allowance	\$ 17,920.00	\$ 16,040.00
Function Allowance	\$ 47,343.00	\$ 23,671.50
Role Service Allowance	\$ 3,860.00	\$ 3,860.00
Sub Total (Role Remuneration)	\$ 148,028.00	\$ 122,476.50
Superannuation	\$ 13,322.52	\$ 11,022.89
Total Fixed Remuneration	\$ 161,350.52	\$ 133,499.40
Employee Incentive Scheme	\$ 7,000.00	\$ 7,000.00
Superannuation	\$ 630.00	\$ 630.00
TOTAL Remuneration	\$ 168,980.52	\$ 141,129.40

All other terms and conditions of your current Contract of Employment remain unchanged.

Please return a signed copy of this letter to Lauren Prosser, Human Resources within 7 days of receiving this letter.

Should you have any queries regarding this letter, please do not hesitate to contact Lauren on 6279 6594.

We look forward to your continued contribution to the team.

- 21 The meaning and effect of the applicants' letters of offer of employment, the Schedule and the Agreement, will be considered later in the context of the parties' submissions and the evidence.

Allowances Policy

- 22 As already noted, relevant provisions of the respondent's Allowances Policy assumed some significance in argument. It is also convenient to set them out now. The respondent's Allowances Policy documents are lengthy and somewhat complicated. They have had various iterations. The version of the Allowances Policy agreed as most relevant for present purposes was version 2.6, in effect as at 1 October 2015. Relevant to the applicants' claims in relation to payment for ad hoc night shifts is that part of the Allowance Policy set out in cl 3.2.3 dealing with "Shift Allowance" payments, and cl 3.2.7 dealing with "Commute Allowance". Those clauses are as follows:

3.2.3 Shift Allowance

Eligible employees:

- Residential and Perth Operations Centre bands 1B to 1E

Intent:

To compensate for the requirement to work on nights, weekends and public holidays as determined by the employee's roster.

Basis of calculation:

Set dollar amount per night, weekend and public holiday. Shift allowance (\$ amount for each WSR) = (Average number of nights, weekends and public holidays per year for WSR) x (\$ rate per night, weekend and public holiday respectively).

...

3.2.7 Commute Allowance

Eligible employees:

- FIFO employees in bands K to 1E not receiving a construction allowance.
- FIFO employees in bands I & J on a roster of more than an average 40 hours per week. Note that FIFO employees in bands I & J on a roster of 40 hours and in bands F to H do not receive commute allowance, but do receive F-J Special Allowance.

Intent:

To compensate FIFO employees for disabilities and roster requirements associated with the role, including for the time spent away from their normal place of residence and the disruption that a commute working arrangement can cause to an employee's family and social life.

Basis of calculation:

Fixed payment for each night away from home per annum working day shift plus fixed payment for each night away from home working night shift. That is, commute allowance (set dollar amount) = 365.25 / days in roster cycle x nights away x applicable rate.

- 23 Relevant to the role allowance claims is cl 3.2.13, which provides for a Role Service Allowance and is in the following terms:

3.2.13 Role Service Allowance*Eligible employees:*

- Residential employees band K to 1E
 - Perth Operations Centre Information Technology employees in bands K to 1E
- who do not receive a Work Pattern Allowance and are required to be called out to work outside their normal roster arrangements (“disruptions”) on 12 or more occasions per annum.

Intent:

To compensate employees on standby being called out to work.

Basis of calculation:

For 0 to 11 disruptions per annum, zero allowance. For 12 to 24 disruptions per annum, set annual dollar allowance. Additional set dollar allowance for further blocks of 12 disruptions per annum, up to a cap of 49 or more disruptions as per the table below:

0 – 11 disruptions	nil
12 – 24 disruptions	\$3,937 per annum
25 – 36 disruptions	additional \$1,968 per annum
37 – 48 disruptions	additional \$1,968 per annum
49 or more disruptions	additional \$1,968 per annum

The evidence

- 24 In addition to the agreed facts, the parties led evidence from several witnesses, in the form of witness statements which stood as their evidence in chief. In addition to themselves, evidence on behalf of the applicants was led from Mr Cunniffe, a residential employee based at Tom Price. For the respondent, evidence was led from Mr Carrick, the Superintendent Planning and Engineering in the Warehousing, Cranes and Logistics team and Mr McStea, a Human Resources Business Partner for the respondent.
- 25 None of the applicants nor Mr Cunniffe were required for cross examination. At the outset of the proceedings, objections were raised by the respondent to some of the applicants’ evidence. These were set out in a Schedule filed prior to the commencement of the hearing. Having heard counsel in relation to these matters, I indicated that I would consider the objections raised, as matters of weight. Where evidence may be of questionable relevance or infringe other principles applicable to evidence generally, then little weight would be accorded to it. In other respects, I will deal with the evidence of the applicants and other witnesses as follows, to the extent not otherwise canvassed in the statement of agreed facts.

Mr Perrin

- 26 Mr Perrin gave evidence as to how he came to be employed by the respondent. He said that he had been working for a contractor to the respondent for some time. An opportunity arose for direct employment. He received a copy of a contract from the respondent’s human resources department on 20 October 2014. Mr Perrin testified some aspects of it troubled him, so he did not sign it at that time. A few weeks later he met with Mr Carrick. Mr Perrin said he told Mr Carrick that he thought the salary in the offer should be greater, as he was going to operate both cranes and trucks. Mr Perrin’s evidence was that Mr Carrick told him in words to the effect that he would be able to “make up the difference in disruptions and night shift payments”. Mr Perrin said that Mr Carrick further told him that he would get a “disruption” for each night spent away from Tom Price working at other sites. Additional payments would be made for each block of 12 disruptions up to a maximum of 49 disruptions. He would also get a night shift payment. Mr Perrin said that after these discussions with Mr Carrick, he signed the contract and started working for the respondent straight away.
- 27 In terms of working at other sites, Mr Perrin testified that whilst based at Greater Brockman, he may be required at any time to work at other locations including Paraburdoo, Marandoo, West Angelas, Yandi and Hope Downs. He said he never gets seven days’ notice of these changes and often will be given a direction to travel to a different location on the same day as starting his shift. When working away from his “home camp”, Mr Perrin said that he often works night shift as the work often involves assisting with shutdowns or maintenance.
- 28 In terms of the position prior to October 2015, Mr Perrin regularly received additional payment for “disruptions” for each night spent working away from home camp. Night shift payments were made for night shifts worked as well. Mr Perrin testified that he found out about the changes to these allowances in a telephone call from Mr Montague, the Cranes and Transport Manager. Mr Montague told him that he would no longer get all “disruptions”, rather only one for both the first and last night away. Also, no more night shift payments would be made. Mr Perrin was told that budget cuts were being made and that the company thought some of these payments were covered by the commute allowance, applying to fly in fly out employees anyway. Mr Perrin said that he was not told of these changes prior to that time and he was not happy with them.

Mr Holden

- 29 As with Mr Perrin, Mr Holden also worked with a contractor to Rio Tinto prior to his employment by the respondent as a crane driver. In about July 2014, Mr Holden became aware of a permanent position available with the respondent. He said he was offered the position by Mr Carrick. A copy of a contract of employment was sent to him in August 2014 and Mr Holden spoke to Mr Carrick, along with his supervisor Mr Duss, in late August 2014. Mr Holden testified that he recalled Mr Duss explaining that he would work the same roster that he had previously worked with the contractor. He would be based at Tom Price but would have to work away at other locations, for which he would get a disruption payment for each day. The disruptions would be payable in blocks of 12 and he would also receive a night shift payment, the rate depending on whether he worked a weekday, weekend or public holiday. Mr Holden said that there was no indication given in this meeting that these allowances were able to be changed by the respondent. Mr Holden said he took these payments to be part of his job. He signed the contract of employment given to him on the same day.
- 30 As to how the disruptions worked, Mr Holden said when arriving at Greater Brockman, his home camp, he would generally have a meeting with his supervisor. He would then be told of other locations that he would have to travel to for work, the same as Mr Perrin. Most such work is on night shift. The duration of the work could be for an overnight job or for a whole roster swing. This often occurs at short notice and seven days' notice is never given to him.
- 31 When he returns to his home camp, Mr Holden said the procedure was that he completed a "disruption form", which was signed by his supervisor and then forwarded to the superintendent. Mr Holden confirmed that he was paid on this basis from the start of his employment in August 2014 up to when the changes were made in October 2015. Mr Holden testified that he too was told of this change to payment of allowances by Mr Montague. Mr Holden said the matter was disputed at the time and he referred to Mr Cunniffe and another employee, on behalf of the Cranes and Transport group, taking the matter up with the company.
- 32 Mr Holden said the change has led to a decrease in income for him and has had an impact on his lifestyle.

Mr Ahearn

- 33 The third of the applicants, Mr Ahearn, has been a long-term employee of the Rio Tinto group of companies. He has been employed as a crane driver. As with Messrs Perrin and Holden, Mr Ahearn is required to work at locations other than his home camp, on a regular basis. He testified that he is normally informed of this at the start of his swing, when arriving at the airport or at the mine site. In other circumstances, Mr Ahearn may be told that he will be at his home camp for the swing, but this may then suddenly change due to unforeseen circumstances. He said that he is never given seven days' notice in such circumstances either.
- 34 Mr Ahearn testified that as best as he could recall, disruptions were introduced in about 2000, when other mines commenced. Mr Ahearn's evidence was that he was not sure how this process was formalised, but disruptions became common knowledge and the employees were required to complete a form to claim payment. Each night that the employees were directed to work away from their home camp at Tom Price, this was recorded as a disruption and was accrued. Mr Ahearn also confirmed that he got paid for each night shift worked and the rate of payment depended on whether the work was performed on a weekday, a weekend or a public holiday.
- 35 As with Messrs Perrin and Holden, Mr Ahearn was informed by Mr Montague in October 2015 that the allowance payments were to change and that he would only get the first and last night when working away as a disruption. He would no longer receive payments for working night shift. Mr Ahearn said that he and other crane drivers were not happy with these changes and they tried to oppose them through the union. Mr Ahearn said that he never understood that the payment of a commute allowance, as a fly in fly out employee, compensated for night shift work. He said that he was never told by the respondent that these payments could be changed. Mr Ahearn thought that they were part of his entitlements, as they had been paid to him from 2000 to 2015.

Mr Carrick

- 36 Mr Carrick is responsible for managing the planning of the work done by Cranes and Transport across the East and West Pilbara operations of the company. The work performed by the Cranes and Transport team includes shutdown maintenance, capital improvement works, the building of equipment and the transportation of equipment around the Pilbara region. All employees in the East Pilbara operations are employed on a fly in fly out basis. Most employees in the West Pilbara operations are too.
- 37 Mr Carrick gave some evidence about his contact with Messrs Perrin and Holden when they were first recruited by the respondent. He said it was his usual practice to speak with a prospective employee about their terms and conditions of employment. Mr Carrick said that Mr Perrin did request to speak with him regarding his contract document that he had been provided before he started. A meeting took place in Mr Carrick's office at Tom Price. Mr Carrick confirmed Mr Perrin's evidence that Mr Perrin raised the issue of his proposed salary and whether it may be able to be increased. There was some discussion about allowances. Mr Carrick said that he told Mr Perrin of the respondent's "current policy" in relation to payment of night shift allowance and disruptions. Mr Carrick testified that he based his comments on information he received from the respondent's human resources department about the application of the Allowances Policy and his experience, that the respondent's policies are subject to change. Mr Carrick said that Mr Perrin seemed happy with this and signed the contract of employment document. Mr Carrick denied that he said, "you know where the gate is" and denied that he made comments in the meeting relating to making up the difference in salary through disruptions and night shift payments, as contended by Mr Perrin.

- 38 Mr Carrick also gave evidence in relation to the employment of Mr Holden. Whilst, as with Mr Perrin, Mr Carrick said he would normally have spoken with Mr Holden as a new prospective employee, he had no recollection of the meeting to which Mr Holden referred. Nor could Mr Carrick recall any subsequent discussion with Mr Holden, about his terms and conditions of employment.
- 39 Mr Carrick also gave some evidence about the payment of allowances prior to and after October 2015. As far back as 2008, Mr Carrick said he noticed that all employees working in the West Pilbara region, regardless of whether they were fly in fly out or residential, got paid night shift allowance and disruptions. Mr Carrick did not think this was the case with employees in the East Pilbara region. When the two areas were merged in January 2015, the allowances were paid uniformly. Mr Carrick testified that he queried this with the respondent's human resources department. He was told that everyone who worked in the Cranes and Transport department got paid the allowances. As, on his reading of the policy, he thought only residential employees were supposed to be paid these allowances, Mr Carrick said he assumed that this had developed as a practice over time. This had continued from 2008 to 2015. When the documents were put to him by counsel for the applicants, Mr Carrick accepted that the reference to "Role Allowance" in Messrs Holden's and Perrin's contracts of employment was intended to be compensation for disruptions.
- 40 Mr Carrick referred to the changes made to payment of allowances introduced in October 2015. This was described, at the time, as being an initiative to align rosters and allowances across the company's Pilbara operations. A consequence of this was that the fly in fly out employees in the Cranes and Transport team no longer got paid for all nights away from their home camp as disruptions. Only the first and last nights were paid for. Also, there would no longer be any additional payment made for working night shifts.
- 41 These changes obviously did not go down well with some of the employees. Mr Carrick said Mr Petty, the General Manager at Tom Price, announced the changes to employees over the course of several meetings, which were accompanied by "a bit of disharmony", to use Mr Carrick's words, in both the meetings themselves and at subsequent prestart meetings on the job. Mr Carrick said that some employees came to see him to say they were not happy with the changes. Whilst Mr Carrick said the formal grievance system at the company was not pursued, he noted a "sense of dissatisfaction" amongst the team and the issues seemed to always be "simmering in the background". I should observe at this juncture, that I do not accept, when this evidence is taken with the applicants' testimony, and Mr Cunniffe's evidence, that the issue of allowances was later unsuccessfully raised in enterprise bargaining negotiations with the respondent, that the applicants had in some way accepted the changes to what they say were terms and conditions in their contracts of employment.
- 42 In response to the applicants' evidence that they never receive seven days' notice of a requirement to work at different locations, Mr Carrick said that it was not his understanding that this would apply. The requirement to give such notice, according to Mr Carrick, applies to changes to the roster pattern itself, such as moving from a two week on, one week off to eight days on and six days off. In such cases the company always gives as much notice as it can. He said that day to day changes to work arrangements at Tom Price, such as being required to work away from home camp or on night shift at short notice, have always been part and parcel of the job as he saw it.

Mr McStea

- 43 Mr McStea outlined his role as a Human Resources Business Partner for the respondent. For a time, one of his responsibilities was the Cranes and Transport area. Part of his then role involved giving advice to managers and employees of the company on terms and conditions of employment.
- 44 Mr McStea outlined the two broad bases of employment at the company, fly in fly out or residential. He said both groups of employees have different allowances regimes under the respondent's policies. Mr McStea described fly in fly out employees as having two main allowances, commute and function. The commute allowance is intended to compensate employees for disabilities and roster requirements, and for general disruption to home and social life by being away while working. The function allowance is intended to compensate employees for working more than a nominal 40 hours per week.
- 45 On starting his then position in 2015, Mr McStea said that he became aware of an inconsistency in the application of the Allowances Policy. Employees in the West Pilbara were paid for all disruptions and for all ad hoc night shifts. Other fly in fly out Cranes and Transport employees were not so paid. Mr McStea described this as an "exception" that seemed to have come about because employees in the Cranes and Transport area had a Role Service Allowance in their contracts of employment. Mr McStea said that he considered this to be inconsistent with the intent of the Allowances Policy and fly in fly out work generally, where employees are already away from home for the duration of their working shifts.
- 46 The upshot of this was that a review was undertaken. A decision was made by senior management of the respondent to align the Cranes and Transport employee allowances to be more consistent with other employees of the respondent. Mr McStea said that he attended meetings on site where these changes to be made were announced, where some concerns were raised, but in the main the employees remained passive. Mr McStea did become aware of some level of discontentment raised with local management. He was involved in subsequent negotiations for an enterprise agreement. Mr McStea further said that at no stage during that process, did representatives of relevant unions assert that the changes made to the allowances for the affected employees, involved a contravention of their contracts of employment.
- 47 Mr McStea was familiar with the Allowances Policy, especially version 2.6, which is most relevant in these proceedings. He accepted that for the purposes of the Allowances Policy, a reference to a Role Service Allowance was the same thing as Role Allowance, as referred to in Messrs Perrin's and Holden's contracts of employment. Mr McStea also accepted that the reference to being in receipt of a "higher allowance", referred to in the Role Allowance clause in the Schedules to Messrs Perrin's and Holden's contracts of employment, was a reference to the "12 disruptions" concept set out in cl 3.2.13 of the Allowances Policy. In connection with this, Mr McStea also accepted that when the October 2015 changes were implemented for Cranes and Transport employees, this did not involve any change in the Allowances Policy itself, rather, a change as to how the policy was applied.

Consideration

Relevant principles

48 The principles to apply in this case, both as to denied contractual benefits, contractual interpretation and incorporation issues, are not in dispute. Very recently, in *Walton and Frank v BHP Billiton Iron Ore Pty Ltd* [2019] WAIRC 00089, I set out the approach to denied contractual benefits claims and the interpretation of contracts. At pars 23 - 24 of that decision I observed as follows:

23 The principles in relation to denied contractual benefits claims are well settled. The relevant claim must relate to an “industrial matter”; the claimant must be an employee; the claimed benefit must be a “contractual benefit” as being one to which the employee is entitled under their contract of service; the relevant contract must be one of service; the benefit must not arise under an award or order of the Commission; and the benefit must have been denied by the employer: *Hotcopper Australia Ltd v David Saab* [2001] WAIRC 00102; (2001) 81 WAIG 2704 at 2707.

24 As to the approach to the interpretation of contracts generally, in *King v Griffin Coal Mining Company Pty Ltd* (2017) 97 WAIG 527 I said at pars 11-13 as follows:

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

Construction of contracts: general principles

42 The principles relevant to the proper construction of instruments are well known, and were not in dispute in this case. In summary:

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

12 One question addressed in this matter was the most recent debate in the cases in relation to the need for ambiguity or differences in meaning, in order for a court to have regard to extrinsic evidence. This arises from the principles discussed in *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales* (1982) 149 CLR 337. In this case, Mason J, in what is described as the “true rule” said at par 22:

22 The true rule is that evidence of surrounding circumstances is admissible to assist in the interpretation of the contract if the language is ambiguous or susceptible of more than one meaning. But it is not admissible to contradict the language of the contract when it has a plain meaning.

13 As to the application of the “true rule”, in *Hancock Prospecting Pty Ltd v Wright Prospecting Pty Ltd* (2012) 45 WAR 29 McLure P observed as follows at pars 74-80:

The scope of the “true rule” of construction

74 Both parties rely on extrinsic material in support of their submissions as to the proper construction of the 1984 and 1989 Agreements. Accordingly, it is necessary to enlarge on the scope of the “true rule” in *Codelfa*.

75 The role of the court in construing a written contract is to give effect to the common intention of the parties. The common intention of the parties is to be ascertained objectively. That is, the meaning of the terms of a contract in writing is to be determined by what a reasonable person would have understood them to mean: *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165. The subjective intention or actual understanding of the parties as to their contractual rights and liabilities are irrelevant in the construction exercise.

76 The practical limitation flowing from the *Codelfa* true rule is that surrounding circumstances cannot be relied on to give rise to an ambiguity that does not otherwise emerge from a consideration of the text of the document as a whole, including whatever can be gleaned from that source as to the purpose or object of the contract.

77 The word “ambiguous”, when juxtaposed by Mason J with the expression “or susceptible of more than one meaning”, means any situation in which the scope or applicability of a contract is doubtful: *Bowtell v Goldsbrough, Mort & Co Ltd* (1905) 3 CLR 444, 456 - 457. Ambiguity is not confined to lexical, grammatical or syntactical ambiguity.

78 Moreover, the extent to which admissible evidence of surrounding circumstances can influence the interpretation of a contract depends, in the final analysis, on how far the language of the contract is legitimately capable of stretching. Generally, the language can never be construed as having a meaning it cannot reasonably bear. There are exceptions (absurdity or a special meaning as the result of trade, custom or usage) that are of no relevance in this context.

79 Further, on my reading of *Codelfa*, pre-contractual surrounding circumstances are admissible for the purpose of determining whether a term is implied in fact. That may be because the stringent test for the implication of a term in fact excludes any possibility of an implied term contradicting the express terms.

80 If extrinsic evidence is admissible, the next issue is the scope of the “surrounding circumstances” for the purpose of construction. Mason J in *Codelfa* also answered that question. He said:

“Generally speaking facts existing when the contract was made will not be receivable as part of the surrounding circumstances as an aid to construction, unless they were known to both parties, although ... if the facts are notorious knowledge of them will be presumed.

It is here that a difficulty arises with respect to the evidence of prior negotiations. Obviously the prior negotiations will tend to establish objective background facts which were known to both parties and the subject matter of the contract. To the extent to which they have this tendency they are admissible. But in so far as they consist of statements and actions of the parties which are reflective of their actual intentions and expectations they are not receivable (352).”

49 In *King*, cited in *Walton and Frank* above, I also commented on the approach to be adopted to the “reasonable observer” test. At pars 58 and 59 I added the following:

In adopting an objective approach to interpretation, the ascertainment of the views of a reasonable observer, in the position of the parties at the material time, from their mutual dealings, can be elusive. In *QBE Insurance Australia Ltd v Vasic* [2010] NSWCA 166, when discussing the scope of permissible material to which regard may be had in the interpretation of an agreement, Allsop P (Giles and MacFarlan JJA agreeing) said at pars 26-28:

26 The notion of what is known to the parties does not require the facts to be present to the mind and consciousness of the contracting parties at the time of contracting. But the whole construct is one that places the reasonable person, whose understanding is critical, in the mutual position that the parties were in. This involves attributing to the reasonable person what the parties knew in the context of their mutual dealings. I do not take the analysis of Macfarlan JA in *The Movie Network Channel v Optus* as stating a principle otherwise than in conformity with the essential elements of the binding High Court principles to which I made reference in *Franklins v Metcash* at [14]-[24] and to which Macfarlan JA himself referred in *The Movie Network Channel v Optus*. The relevant circumstances in that process are those with which the reasonable person should be attributed in order that **one** objectively correct meaning can be ascribed to the text.

- 27 Were it not for the misconceptions (if I may say so, without intending disrespect) in the submissions on behalf of QBE and MMI, I would not find it necessary to say any more. In the circumstances, however, the matter should be put beyond doubt by reference to binding High Court authority.
- 28 It is appropriate, first, to set out the passages from Lord Wilberforce in *Reardon Smith Line v Hansen-Tangen* [1976] 1 WLR 989 at 996-997 (relevant parts of which were set out by Macfarlan JA in *The Movie Network Channel v Optus* at [100]). The relevant passages that have been deeply influential in Australia are as follows:

“It is often said that, in order to be admissible in aid of construction, these extrinsic facts must be within the knowledge of both parties to the contract, but this requirement should not be stated in too narrow a sense. When one speaks of the intention of the parties to the contract, one is speaking objectively – the parties cannot themselves give direct evidence of what their intention was – and what must be ascertained is what is to be taken as the intention which reasonable people would have had if placed in the situation of the parties. Similarly when one is speaking of aim, or object, or commercial purpose, one is speaking objectively of what reasonable persons would have in mind in the situation of the parties. It is in this sense and not in the sense of constructive notice or of estopping fact that judges are found using words like ‘knew or must be taken to have known’ (see, for example, the well-known judgment of Brett LJ in *Lewis v Great Western Railway Co* (1877) 3 QBD 195.

[His Lordship then referred to *Hvalfangerselskapet Polaris Aktieselskap Ltd v Unilever Ltd* (1933) 39 Com Cas 1 and *Charrington & Co Ltd v Wooder* [1914] AC 71 and summarised the position as follows.]

... what the court must do must be to place itself in thought in the same factual matrix as that in which the parties were. All of these opinions seem to me implicitly to recognise that, in the search for the relevant background, there may be facts which form part of the circumstances in which the parties contract in which one, or both, may take no particular interest, their minds being addressed to or concentrated on other facts so that if asked they would assert that they did not have these facts in the forefront of their mind, but that will not prevent those facts from forming part of an objective setting in which the contract is to be construed.”

Furthermore, his Honour continued at par 35 as follows:

- 35 It is clear from the binding Australian authorities that the scope of the surrounding circumstances, knowledge of which is to be attributed to a reasonable person in the situation of the contracting parties (not one or some only of them), is to be understood by reference to what the parties knew in the context of their mutual dealings. As Lord Wilberforce said, this does not involve a species of constructive notice. Constructive notice implies a degree of enquiry by reference to some external standard. Just because something is available to be found does not make it relevant, if the parties did not know of it. The reasonable person may be taken to know of things that go beyond those that the parties thought to be important or those to which there was actual subjective advertence by the parties. Further, the circumstances may include such things as the legal context to the transaction, especially if a market is involved. Nevertheless, the scope of the relevant material is necessarily bounded by the objective task of the reasonable person giving meaning to the words used by the parties in the circumstances in which the contract came to be written, by reference to what the parties knew in the sense stated by Lord Wilberforce in *Reardon Smith*, by Mason J in *Codelfa* and by the High Court in the various cases since *Codelfa*. This is how I read the reasons of Macfarlan JA in *The Movie Network Channel v Optus*, with which I agree.

- 50 An issue arising in *King*, as in these cases, was the incorporation of documents into contracts of employment. Whilst in *King*, the question was whether the terms of a federal award were incorporated, I commented more generally as follows at pars 60 and 61:

There have been a number of recent employment cases, both at first instance and on appeal, that have dealt with the question of whether an industrial instrument of some kind, such as an award, agreement or a policy document, is expressly incorporated into a contract of employment. Whilst each case will turn on its own facts and circumstances, in *Soliman v University of Technology* Sydney [2008] FCA 1512, Jagot J commented at pars 64-65 as follows:

- 64 *Riverwood International Australia Pty Ltd v McCormick* (2000) 177 ALR 193; [2000] FCA 889 (North and Mansfield JJ) confirmed the principles applying to incorporation of documents by reference into employment contracts (adopting the principles identified by Weinberg J in *McCormick v Riverwood International (Australia) Pty Ltd* (1999) 167 ALR 689; [1999] FCA 1640 at [70] to [78]). First, it must be assumed that the contract of employment was made in good faith with the object of at least potential mutual benefit by due performance. Secondly, the meaning of the contract is to be determined objectively, the essential question being what reasonable business people in the position of the parties would have taken the clause to mean (citing *Schenker & Co (Aust) Pty Ltd v Maplas Equipment and Services Pty Ltd* [1990] VR 834 at 840). Thirdly, parties may be bound by the meaning to be reasonably inferred in the circumstances even if that meaning is not advanced by either party. Fourthly, the meaning of contractual terms is ascertained by considering them in context (including the “objective background of the transaction...its factual matrix, genesis and aim, and the common assumption of the parties” (citing *Cheshire & Fifoot’s Law of Contract*, 7th Aust ed, 1997). Fifthly, the terms of the contract are those the parties intended to incorporate including express terms, inferred terms based on actual intention, and implied terms based on presumed intention. Sixthly, “it is not enough that it is reasonable to imply a term; it must be necessary to do so to give business

efficacy to the contract” (citing *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales* (1982) 149 CLR 337 at 346). Seventhly, “evidence of surrounding circumstances is admissible to assist in the interpretation of the contract if the language is ambiguous or susceptible of more than one meaning. But it is not admissible to contradict the language of the contract when it has a plain meaning” (citing *Codelfa* at 352).

- 65 In *Goldman Sachs JB Were Services Pty Ltd v Nikolich* (2007) 163 FCR 62; [2007] FCAFC 120 at [287] Jessup J described the approach in *Riverwood* as one where “all the facts and circumstances surrounding the making of the contract in question” should be considered in ascertaining whether any terms should be inferred based on intention. Black CJ, also in *Goldman Sachs* at [23], observed that:

The principles to be applied in determining whether any, and if so what, parts of WWU were terms of the contract of employment are not in doubt. It is well established that if a reasonable person in the position of a promisee would conclude that a promisor intended to be contractually bound by a particular statement, then the promisor will be so bound. This objective theory of contract has been repeatedly affirmed as representing Australian law by the High Court. Thus, in *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* [2004] HCA 52; (2004) 219 CLR 165, 179, the Court said:

It is not the subjective beliefs or understandings of the parties about their rights and liabilities that govern their contractual relations. What matters is what each party by words and conduct would have led a reasonable person in the position of the other party to believe. References to the common intention of the parties to a contract are to be understood as referring to what a reasonable person would understand by the language in which the parties have expressed their agreement. The meaning of the terms of a contractual document is to be determined by what a reasonable person would have understood them to mean. That, normally, requires consideration not only of the text, but also of the surrounding circumstances known to the parties, and the purpose and object of the transaction.

- 51 I adopt and apply these principles for present purposes. I return to the consideration of the applicants’ claims, in the context of the relevant surrounding circumstances. In the determination of these claims, different considerations apply to Messrs Perrin and Holden on the one hand, and to Mr Ahearn on the other. I will consider Messrs Perrin and Holden first.

Messrs Perrin and Holden

- 52 The terms of the contract documents have been set out above. First and foremost, the reference to “the terms and conditions of your employment are recorded in the attached Schedule of Remuneration, Benefits and Employment Conditions” is plainly a statement having contractual effect. In the covering letter, which in my view is also contractual in nature, the respondent, as offeror, extended to Messrs Perrin and Holden, as offerees, an offer of employment principally in the terms of the Schedule. By the terms of the covering letter, the respondent was manifesting an intention to be contractually bound to provide the benefits and entitlements to Messrs Perrin and Holden, as set out in the Schedule, subject to its terms.
- 53 The second par of the letters of offer refers to remuneration. There is a “fixed” component and a “variable” component. The fixed component “includes base salary, *applicable allowances* and superannuation” (my emphasis). These contractual remuneration benefits are summarised in the attached Summary, also set out above. Again, this is expressed in terms of the fixed and variable remuneration component. Among the fixed elements, is the Role Service Allowance amount, which the respondent accepted may not be changed. While reference is made to the Role Service Allowance in the Summary, it was common ground that this refers to the Role Allowance as set out in the Schedule. The Role Allowance is a part of Messrs Perrin’s and Holden’s fixed remuneration.
- 54 The nature of the fixed remuneration is also emphasised in the “Remuneration” section of the Schedule, which is also referred to above. This mentions yet another remuneration term, “Fixed Role Remuneration”, which includes payment for all working hours, penalties, etc and *all other allowances* (my emphasis). This element is paid for the performance of the relevant role, which in the case of Messrs Perrin and Holden, is that of an Operator Cranes and Transport. In other words, the Operator Cranes and Transport role, occupied by Messrs Perrin and Holden, has contractual entitlements to the prescribed base salary and those allowances set out in the Schedule.
- 55 Thus, prior to considering the effect of the references to the introductory words and the policies and procedures in the Schedule, which was a central part of the respondent’s case, Messrs Perrin and Holden’s contract of employment documents, specifically included a Role Allowance, as a contractual entitlement, despite the general position being that such an allowance, at least as specified in the relevant part of the Allowances Policy set out above, was limited only to residential employees and not fly in fly out employees. Put another way, the respondent, notwithstanding the content of its various policy documents, plainly made a conscious decision, for reasons which were not entirely clear on the evidence, to expressly include in its offer of employment to Messrs Perrin and Holden, the entitlement to an allowance, which now forms part of their Fixed Role Remuneration, which was not otherwise payable to fly in fly out employees generally. There was no suggestion that this was an error in contractual drafting and nor could there be. This conclusion is crystal clear on the face of the contract documents. Whilst the reason was somewhat elusive, it does appear from material in evidence, in particular the respondent’s presentation documents to employees announcing the change in treatment of disruptions (see Attachment 15 to the SOAF), that it was in recognition of the somewhat unique position of employees in the Cranes and Transport area, that the allowance was initially paid to them from 2000.

Role Allowance

- 56 Turning specifically to the Role Allowance in the Schedule. Its terms have been set out above. As I have already mentioned, it was common ground that the Role Allowance, as reflected in the Schedule, and as contained in the Summary as a specified sum, is a contractual benefit payable to Messrs Perrin and Holden. The issue is what is the meaning of the words in the Role Allowance section of the Schedule, where it is provided “Where you are Called Out on 12 or more occasions per annum, you

will be *entitled* to receive a higher allowance” (my emphasis). The reference in the Role Allowance section of the Schedule to pay a “Standby Payment” appeared not to be relevant to the issues in dispute between the parties in these proceedings.

- 57 There can be no question in my view that the sentence just referred to is framed in language which is contractual in nature. It is language of obligation and entitlement. The word “entitle” means to “...to give a rightful claim to anything...² To regard as having a title to something...”: *Shorter Oxford English Dictionary*. “Entitled” in the sense used in the contract means something as a legal right. This is unambiguously clear and is the plain and ordinary meaning of the words used. Furthermore, again as a matter of simple construction, it is also manifestly plain that the reference to a “higher allowance” when read with the terms of the Schedule as a whole, and the content of the Summary, was intended to be an additional benefit to the specified sum for a Role Service Allowance, in the summary document. This is so because the reference to “A Role Allowance is paid” at the outset of this provision, is plainly referring to the amount set out in the Summary as “Role Service Allowance”. The reference to “you will be entitled to a higher allowance” in the last par of this section, is clearly referring to something more. Any other construction would be nonsensical.
- 58 However, the conclusion that this is a contractual term entitling Messrs Perrin and Holden to a “higher allowance”, begs the following two further questions. Firstly, what is the meaning of being “Called Out”? Secondly, what is the “higher allowance” referred to and where would a reasonable observer, as prospective employees, such as Messrs Perrin and Holden find any reference to it? In the Schedule under the heading “Allowances”, there is reference to allowances “being paid in accordance with applicable policies”. These words were fastened onto by the applicants as a part of their incorporation argument.
- 59 The Allowances Policy itself is not specified in this part of the Schedule however, there was no suggestion in argument that some other policy was relevant in this respect. This language tends to confirm that at least in respect of those allowances specified in the Schedule, and in turn taken to have contractual effect according to the letter of offer and the terms of the Schedule itself, that answers to the type of question posed above as to the role allowance, are to be found in the relevant part of the Allowances Policy. If this were not so, the words referred to immediately above would be superfluous and have no work to do. This approach is also supported by the language used in the Function Allowance provision of the Schedule. As set out above, it refers to the payment of the allowance “in accordance with the Allowance Policy”. My views in this respect apply equally to the Commute Allowance, as a specified contractual allowance. This does not require, despite the detailed and helpful submissions of the applicants, an inference that the entirety of the Allowance Policy is taken to be incorporated into the contracts of employment. In my view, in accordance with the discussion to follow, it is in respect of the allowances specified as terms and conditions of employment, that the issue arises.
- 60 In support of the incorporation of the whole of the Allowances Policy into the contracts, the applicants focused on language in the Remuneration provision, set out above, when read with the introductory words to the Allowances section of the Schedule. It was contended that the reference to “role requirements” of a position, as expressed in the Fixed Role Remuneration provision, where it refers to “all other allowances”, when read with the words “Allowances are determined by role requirements and are paid in accordance with applicable policies”, as words of entitlement, supports the conclusion that the mutual intention of the parties, objectively considered, was that the Allowances Policy in toto would be contractually binding. Furthermore, the applicants contended that the evident intention of the parties to these transactions, was to regard the applicants as if they were residential employees for the purposes of some of the benefits under the Allowances Policy. Added to this general argument, was the further contention that the reference to “role requirements”, in the context of the contracts, gave the respondent significant scope to alter the nature of an employee’s role, and, as a consequence, the applicable allowances to go with it.
- 61 As to the last point, I have considerable doubts that the contracts of employment of Messrs Perrin and Holden, in relation to “role”, provide the level of flexibility inherent in the applicants’ submissions, without the need for a contractual variation. Whilst the contracts are broad in terms of employing entities, work location, duties to be performed, shift rosters etc, a fundamental change to an employee’s job, as set out in the header to the Schedule, may be a different question. Secondly, the reference to “all other allowances” in the Remuneration provision, is to be read in the context of the Schedule as a whole. In my view, this is referring to the specified allowances in the contract itself, as set out in the Summary. This is so because the reference to “Fixed Role Remuneration (excluding superannuation)”, must be sensibly read as the same thing as “Fixed Annual Remuneration”, (which includes superannuation), set out in the covering letter and the Summary. That is, the allowances are contract specific.
- 62 Thirdly, from the terms of version 2.6 of the Allowances Policy itself, cl 1 Introduction and Purpose, cl 3.1 Application of allowances and cl 3.2 Allowance Overview, use language consistent with the policy as a tool to explain and inform the reader as to the application of various allowances that are applicable to an employee’s employment. For example, amongst others in a similar vein, in cl 3.2, reference is made to “Whether or not an allowance will actually apply to an eligible employee and the amount payable *will depend on the circumstances of the work arrangement*” (my emphasis). There follows a statement of each allowance and its eligibility and intent. The language used is that of information and explanation and not entitlement. What in my view the scheme of this document illustrates, is not the provision of benefits conferred in their own right by the policy, but rather, an evident link back to the relevant contract of employment, as the source of the entitlement. It is this way in my view, that both the contracts of employment and the Allowances Policy documents interrelate and are to be read. It is also for this reason also, as developed below, that the argument for partial incorporation is on stronger ground.
- 63 In terms of the contracts for Messrs Perrin and Holden, it is clear from the first par of the Role Allowance provision, that the contract specifies the payment of a Role Allowance for service outside of their normal rostered hours. As the Standby Payment is not relevant, the conclusion must be, again as a matter of sensible construction, that Messrs Perrin and Holden, by the terms of their contracts of employment, are paid a Role Allowance in recognition of the fact that they may be “Called Out”. In circumstances where the threshold of 12 such events is reached, then according to the terms of the contract, a further payment is to be made by the respondent.

- 64 At this point, consideration is required to be given to the Allowances and the policies and procedures etc part of the Schedule. It is in connection with this issue that the parties are most at odds. It is necessary to endeavour to give a common sense and business like meaning to the terms of the contract of employment, as primarily set out in the Schedule. It requires one to examine the respondent's Allowances Policy to obtain an answer to the questions that I have posed. Also annexed to the SOAF, was a document described as a HR Guide to the application of the respondent's various allowances. However, for present purposes, I will confine myself to the terms of the Allowances Policy itself. It was common ground that version 2.6 was in effect as at 1 October 2015. I refer to cl 3.2.13 set out above, which deals with the Role Service Allowance.
- 65 As I have mentioned earlier, it was common ground that as a matter of practice, a "disruption" for Cranes and Transport employees has been traditionally paid for each night that an employee is required to work away from their home camp. This is how it was and is paid presently, for residential employees. From the terms of the contracts of employment, read with the Allowances Policy, Messrs Perrin and Holden, as set out in the Summary, are compensated for 12 to 24 disruptions already, because they are both paid the allowance of \$3,937.20. Thus, the language in the final par of the Role Allowance provision is somewhat confusing and, in my view, must be read as if the reference to "12 or more occasions per annum" says "25 or more occasions". It was not suggested by the applicants that they were entitled to a further payment of \$3,937.00 per annum, on top of any other higher allowance, and nor could that be so in my view.
- 66 The relevance of the Role Allowance provision of the Allowance Policy is plainly intended to provide the method of calculation in cases where either Mr Perrin or Mr Holden are "Called Out" for more disruptions per annum than they are compensated for in accordance with the Schedule. As I have mentioned, this must be for 25 or more disruptions. No calculation is required for a lesser number of disruptions, because payment is already made for this as a fixed sum, as specified in the Summary.
- 67 The provisions of the Role Allowance part of the Schedule are, as set out above, to be read with the provisions appearing above it in relation to Allowances. As set out above too, the preamble to the Schedule provides "The policies governing these benefits and their terms and conditions may be varied from time to time." Furthermore, the Policies, Procedures and Other Conditions section also set out above, are heavily relied upon by the respondent. In particular, the words "the benefits provided to you under our policies are discretionary in nature and do not form part of your contract of employment" were particularly emphasised by the respondent as a part of its case.
- 68 Despite this however, these parts of the Schedule in relation to the effect of the respondent's policies, especially as to allowances, cannot be construed in absolute terms. This is because the respondent accepts that some allowances, as for commute, function and role allowances, to the extent that they form part of the fixed annual remuneration of Messrs Perrin and Holden, as referred to in the covering letters and in the Summary, are contractual. That is, these allowance amounts are not able to be changed at the discretion of the respondent under its policy. When one goes to the Commute Allowance and Function Allowance provisions of version 2.6 of the Allowances Policy, in clauses 3.2.7 and 3.2.1 respectively, there is reference to those employees who are eligible. This includes employees such as Messrs Perrin and Holden. A basis of calculation of payment of the allowances is then set out in both clauses. It is not apparent how that could be changed, if the respondent's discretionary argument holds water, without impacting on the amounts payable to Messrs Perrin and Holden as their fixed remuneration, which the respondent concedes, as I have said, are contractual entitlements.
- 69 Returning then to the Role Allowance. The starting point must be the contract of employment. Objectively considered, a reasonable person in the position of the parties at the time of the entering into of the contracts of employment with Messrs Perrin and Holden, when seeing the Role Allowance provision, in the final par, would ask the question "how is my entitlement to a higher allowance to be worked out"?
- 70 The reasonable person armed with the knowledge of and in the position of the parties to the transaction at the time it was entered into, and reading the preceding parts of the Allowances provision, would be informed that the answer to this question is to be found by looking at the applicable part of the Allowances Policy, in this case, cl 3.2.13 specifying the Role Service Allowance. For this additional benefit under Messrs Perrin and Holden's contracts of employment to be ascertained, and thus the contractual entitlement as referred to in the Schedule to be given meaning and effect, the Role Allowance provision of the Allowance Policy must be inferred to be incorporated into the contract. The Role Allowance provision in the Schedule would be simply unworkable and deprived of any meaningful contractual effect without it. If the Role Allowance provision in the policy could be changed at the respondent's complete discretion, as it contended, then the "entitlement" conferred by the Schedule would be illusory and have a mirage like quality. It would be able to be removed or altered at the whim of the respondent. I do not consider that this is how the contract of employment should be construed.
- 71 Whilst the respondent focussed on the terms of the Schedule referring to the ability of the respondent to vary policies and such policies being entirely discretionary and not forming part of the contract of employment, the Schedule needs to be read in its entirety. Importantly, the first sentence to the Policies, Procedures and Other Conditions provision of the Schedule commences with the words "*In addition to the terms and conditions outlined in this contract...*" (my emphasis). In my opinion, construed as a whole and to achieve a harmonious interpretation with the benefits specified in the Schedule, which are plainly intended to have contractual effect, this refers to the benefits other than those that are contractual entitlements. That is, this provision contemplates two species of benefits, those intended to have contractual effect, and those that do not. I also consider that there is merit in the applicants' submission, that the general exclusion clause should be read down, consistent with the approach that specifically negotiated provisions of a contract should be given greater weight when interpreting the contract, than more general provisions: *Walker v Citigroup Global Markets Australia Pty Ltd* (2006) 233 ALR 687 at par 77.
- 72 By way of further exposition on this point, there are those benefits provided to Messrs Perrin and Holden which are expressly said to be part of their terms and conditions of employment and are contractual in effect. This includes the commute allowance, the function allowance, and the role allowance. There are then other benefits and no doubt obligations too, contained in other policy, procedure and standards documents which are not terms and conditions in the contract of employment and are plainly not intended to be so. In a large organisation like the respondent, there are no doubt many such policy and procedure

documents. One is mentioned “The Way We Work”. There may be others too that do no more than reflect an employee’s obligation to comply with the employer’s lawful and reasonable directions, as an incident of the employment contract. In my view, approaching the interpretation of the contract in this way is consistent with the foundation constructional principle that the terms of a contract be viewed as a whole. An approach should be adopted which enables the various parts of the contract to operate harmoniously and to give effect to all its terms, not just some of them.

- 73 Importantly, and this goes to the applicants’ global incorporation argument also, the introductory words used in the first sentence of the “exclusion clause” provision, if I can describe it that way, as highlighted above, refers to “the” terms and conditions “outlined” in the contract of employment. That is, the terms and conditions of Messrs Perrin and Holden’s contracts of employment, are those specifically referred to in the contract document, as supplemented by way of exposition, with those parts of the Allowance Policy that apply and explain the allowances contained in the contracts, as express terms.
- 74 In relation to the above discussion, the respondent in its written submissions referred to my decision in *Ferguson v TNT Australia Pty Ltd* [2014] WAIRC 00020; (2014) 94 WAIG 110. In that case a claim was made by the applicant that she was entitled to the benefit of a commission and bonus scheme, as part of her contract of employment. The Commission found that a term of the applicant’s contract of employment, that the companies’ policies and procedures were not incorporated into her contract, along with an “entire contract” provision, meant the claim could not succeed. However, the circumstances in *Ferguson* are distinguishable from the present cases. Firstly, in *Ferguson*, the benefit claimed was only to be found in the relevant policy. There was no reference to a commission or bonus entitlement in the contract of employment document. Thus, the claim could only have succeeded if it was established that the relevant policy document, or part of it, was incorporated into the contract. In was in this context, that I found the exclusion clause fatal to the applicant’s claim in that case. That is not the situation here. At least in the case of the role allowance claims, the entitlement to such an allowance is expressly provided in the contracts of employment themselves. Secondly, as opposed to these matters, in the applicant’s contract in *Ferguson*, there was an “entire agreement clause”, which I concluded provided additional weight to the conclusion that the relevant policy should not be incorporated into the contract in that case.
- 75 The adoption of that part of the Allowance Policy in cl 3.2.13 as having contractual effect, to be inferred having regard to the circumstances surrounding the making of the contract, is entirely consistent with the objective approach to contract interpretation as determined in *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165 at [40]-[41]. It is permissible in this context to have regard to the parties’ words and conduct at or around the time the contract was entered into, not to place any reliance on a party’s subjective intention, which is not permissible, but to inform the views of a reasonable person in the position of the parties at that time.
- 76 In this case, both Messrs Perrin and Holden and Mr Carrick gave evidence as to discussions they had prior to the contracts of employment being signed. The evidence of the respondent through Mr Carrick was as to his knowledge of the Allowance Policy and the fact that “disruptions” would apply. This was qualified as being the “current policy”. In other respects, the fact of the discussion and the reference to payment for disruptions, was not disputed. Taken with Mr Perrin’s evidence, no doubt a reasonable person in the position of the parties would understand that a Cranes and Transport employee, such as Mr Perrin, would be entitled to receive additional payments for working away from his home camp as a part of the job.
- 77 Furthermore, in the alternative, and whilst it is not strictly necessary to consider the issue, despite the submissions of the respondent to the contrary, I consider that in applying *BP Refinery (Westernport) Pty Ltd v The Shire of Hastings* (1977) 180 CLR 266, there is a sound basis to imply a term into the contracts of employment based on cl 3.2.13 of the Allowance Policy. The relevant principle as cited in this well-known authority is as stated by Lord Simon:

Their Lordships do not consider it necessary to review exhaustively the authorities on the implication of a term in a contract which the parties have not thought fit to express. In their view, for a term to be implied, the following conditions (which may overlap) must be established: (1) it must be reasonable and equitable; (2) it must be necessary to give business efficacy to the contract so that no term will be implied if the contract is effective without it; (3) it must be so obvious that ‘it goes without saying’; (4) it must be capable of clear expression; (5) it must not contradict any express term of the contract.

- 78 In this instance, I consider that these criteria are satisfied. Firstly, it must be reasonable and equitable for a term to be implied into the Role Allowance provision of the Schedule that specifies the level and criteria of an allowance which is contractual in nature. Secondly, it must also be the case, that an *entitlement* to an unspecified allowance, as an enforceable benefit is, on its face, incomplete and ineffective. Thirdly, as I have endeavoured to explain, a reasonable bystander, as a prospective employee, would ask the obvious question, what is the amount of the higher allowance that I am contractually entitled to and how is it worked out? Fourthly, self-evidently, such a provision is capable of clear expression because it is spelled out in the Allowance Policy. Finally, as to the exclusion provisions of the Schedule, read down in the manner I consider they should be, when interpreted in the context of the entirety of its terms, there is no contradiction with any express term of the contract and the provisions can be read harmoniously.
- 79 The next issue is, on the basis that cl 3.2.13 of the Allowance Policy is to be inferred or implied as a part of Messrs Perrin and Holden’s contracts of employment, what is meant by a “Call Out”? It was common ground that there is no definition of a “Call Out” in either the Schedule or the Allowance Policy. However, it also seemed to be common ground that historically, at least since 2000 when the Cranes and Transport fly in fly out employees have been paid for disruptions, that the two concepts have been treated synonymously.
- 80 Despite this, the parties are now in dispute as to what the term means under the contracts of employment. The applicants contended that the words should be given their ordinary and natural meaning of being “summoned to action”. The respondent contended that if this is so, then it works against the applicants’ case. The respondent submitted that it would be an absurd interpretation to suggest that when a fly in fly out employee is required to work away from their home camp, that each day they are away should be regarded as a separate “Call Out”. The respondent maintained that this would be tantamount to a “call out from a call out”, as the submission was put. This is because such employees are already working away from home on their

commute cycle. This is opposed to residential employees who, when on disruptions, are in fact away from their homes each night and thus, it is logical to treat each night as a disruption.

- 81 The terms of cl 3.2.13 of the Allowance Policy provide for the payment of disruptions in blocks of 12, beyond the baseline of 0-11 disruptions. Messrs Perrin and Holden are already compensated for 12-24 disruptions per annum, by the payment of the amount of \$3,937 per annum. A “disruption” is described as a requirement to be “called out” to work outside of an employee’s *normal roster arrangements* (my emphasis). Contractually, the “normal roster arrangement” for Messrs Perrin and Holden, is to work eight days on, six days off, with the home camp location being Greater Brockman. However, as part of their roles in Cranes and Transport, due to the nature of the work, Messrs Perrin and Holden have been and are regularly required to work at other locations in the Pilbara, often at short notice. Furthermore, in accordance with the Role Allowance term in the contracts, it is paid for “regular service or support outside your normal rostered hours”. In my view, when reading this term and cl 3.2.13 together, it is reasonable to conclude that this benefit is intended to apply where employees are required to work outside of their normal or usual rostered working arrangements.
- 82 It is to be accepted that fly in fly out employees are already compensated generally for working away from their homes. That is what the commute allowance covers. However, this is not what a “disruption” is, as defined in cl 3.2.13. Messrs Perrin and Holden’s “normal or usual rostered working arrangement” is set out in the headings to the Schedules. They are commute employees located at Tom Price (subsequently Greater Brockman) and work on an eight on, six off roster. Their contracted normal rostered working arrangement is not to travel all over the Pilbara at short notice, sometimes working nights as well. That is not what their contracts of employment say. The notion of a “Call Out” must be understood in the context of the terms of the contract of employment and cl 3.2.13. This is consistent with the surrounding circumstances and context of the transaction, whereby the apparent reason that Cranes and Transport employees, being in somewhat of an unusual situation, would be provided this additional benefit.
- 83 Insofar as residential employees are concerned, an employee’s requirement to work away from home (their home camp), is accompanied by an entitlement to receive a disruption for each day so worked, where they are required to stay overnight (see SOAF Attachment 16). I see no difference in point of principle between a residential employee being required to be away from their “home camp” (being the workplace they are required to attend each day) to work and the Cranes and Transport fly in, fly out employees doing the same thing. In both cases, as far as cl 3.2.13 is concerned, the employees are being “called out”. Both are required to work away from their usual place of work. I also accept that if one was to apply the ordinary and natural meaning of the words used, as contended by the applicants, when being required to work away from their home camp, the employees are being “summonsed to action”, in the sense described. With respect to the respondent’s arguments, I see no reason to artificially limit this concept to residential employees only. Nor, for the same reasons, do I see any justification to limit the payment of a call out (or a disruption) to only the first and last day, as now seems to be the practice. Applying the terms of the Role Allowance for disruptions to Messrs Perrin and Holden in this fashion, is in accordance with their contracts of employment and their entitlement.
- 84 Even if I am incorrect in this analysis, the fact remains that the terms of the contracts of employment for Messrs Perrin and Holden specifically entitle them to receive payments for Call Outs, even though they are commute employees. The term of the contract must be given full effect. There is no warrant to read down the entitlement in the case of Messrs Perrin and Holden, compared to residential employees. This in my view, is sufficient to defeat the respondent’s argument that the concept should be limited as it contended. To hold otherwise would render the contractual benefit of Call Outs for these employees otiose and of no effect. It is trite that all terms of a contract should be given meaning and effect, not just some of them. Another way of looking at the issue is that for the purposes of the application of the Role Allowance, Messrs Perrin and Holden are to be treated as if they are residential employees, which was part of the applicants’ more general argument.
- 85 It was not open for the respondent to unilaterally vary the contracts of employment to reduce the entitlement in this way. They are not discretionary benefits in terms of the Schedule.

Night shift payment

- 86 Messrs Perrin and Holden maintained that prior to 1 October 2015, when they worked ad hoc night shifts, they were paid an additional allowance for this. The rate of payment depended on whether the work was performed on night shift on a weekday, a weekend or a public holiday. Messrs Perrin and Holden contended that the foundation for this claim lay in the Allowance Policy. Also, some reference was made to the contracts of employment being made against the background of the application of the relevant federal award, providing for additional payments for night shift. This was submitted to support the contention that at the time the contracts of employment were formed, there was the expectation of the same higher rate to be paid for night shift.
- 87 These contentions cannot be accepted. As I have already concluded, I do not accept that the Allowance Policy in its entirety, is to be incorporated and is to be regarded as contractual in nature. For present purposes, it is only that part of it dealing with the Role Allowance, as brought into play in the Schedule, that so applies. Despite the reference to the rosters and shift work provision of the Schedule, Messrs Perrin and Holden, as day shift fly in fly out employees, were not able to identify any specific provision in the contracts of employment, as opposed to that for the Role Allowance, that conferred a contractual entitlement to payment for a higher rate when they may be required to work night shifts on ad hoc basis. That a payment may have been paid to them by the respondent, as a matter of past practice, and as a part of conduct subsequent to the formation of the contracts of employment, is a different question to whether there exists an entitlement, under the contracts of employment, for the payment to be continued and prior losses to be made good. As a general rule, subsequent conduct of parties to a contract cannot be taken into account in the determination of its terms: *L Schuler AG v Wickman Machine Tool Sales Ltd* [1974] AC 235 at 261; *Australian Mutual Provident Society v Chaplin* (1978) 18 ALR 385 at 392; *Narich Pty Ltd v Commissioner of Pay-Roll Tax* (1983) 50 ALR 417 at 420. It was not part of the applicants’ cases as I understood them, that there was in some way, a variation to their contracts of employment after they were employed.
- 88 Also, as contended by the respondent, the Fixed Role Remuneration provision set out in the Schedule, contains words of significant breadth and that the remuneration paid to Messrs Perrin and Holden is “inclusive of payment for all hours of work

required to perform your role ...". Additionally, the respondent drew attention to that part of the Schedule referring to Work Outside of Normal Rostered Hours and also that part of the Commute Allowance provision, providing that it is paid to "compensate for disabilities and roster requirements (including shift work) associated with the role ...". Whilst the later was criticised by Messrs Perrin and Holden, the language used in the contracts of employment in relation to these matters is broad. Insofar as Messrs Perrin and Holden refer to the Shift Allowance provision of version 2.6 of the Allowances Policy, given that I have concluded that there is no contractual basis to incorporate the Allowance Policy as a whole, this is not to be taken in their favour.

89 In any event, even if I am incorrect and the entirety of the Allowance Policy should be incorporated into the contracts of employment, then that still does not get the applicants home on this issue. The terms of cl 3.2.3 set out above, are confined to residential employees and do not apply to fly in, fly out employees. Additionally, Messrs Perrin and Holden are employed on a day shift roster and are not rostered to work night shift.

90 Accordingly, these claims must fail.

Roster change

91 As to the contention that the respondent failed to provide seven days' notice to Messrs Perrin and Holden when they may be required to work an ad hoc night shift, I am not persuaded that this constitutes a denied contractual benefit.

92 It is trite to observe that a contract of employment must be construed as a whole and in context. The Rosters and Shift Work part of the Schedule have been set out above. In my view, on its ordinary and natural meaning, when reference is made to "roster" this is intended to apply to the "roster system" referred to in the provisions. The concept of a "roster" is well understood in industrial parlance. In the case of Messrs Perrin and Holden, their roster is specified at the top of the Schedule as being "8 days on, 6 off. Average hours per week 48". They are both day shift employees. That is, they have a working hours pattern or cycle of working eight days of day shift at work and then followed by six days off work. In my view, that is the "roster" and the "roster system" worked by Messrs Perrin and Holden which is the concern of the Rosters and Shift Work provision of the Schedule. It is this system of work as described which requires the respondent to give employees "as much notice as possible" of any change but at least seven days.

93 There was no suggestion that any such change has taken place on the facts and therefore this claim also is not made out.

Mr Ahearn

Role allowance

94 The relevant contract of employment documents for Mr Ahearn have also been set out above. As mentioned earlier, Mr Ahearn's situation is quite different to that of Messrs Perrin and Holden, as his terms and conditions of employment are not governed by the Schedule but by the Agreement and his letter of offer of employment. This is significant. As I have also noted earlier, and as accepted by the respondent, the terms of Mr Ahearn's letter of offer of employment made it clear that the Agreement, along with the letter, have contractual effect. Thus, it is to the letter of offer and the Agreement that one must first look to examine Mr Ahearn's denied contractual benefits claims.

95 Unlike Messrs Perrin and Holden, Mr Ahearn's letter of offer and the Agreement do not contain a separate role allowance provision that would otherwise apply to him. An allowance of a fixed sum of \$3,610 is specified in his Fixed Remuneration referred to in the Remuneration provision of his letter of offer, set out above. In the Agreement, there is reference to both residential employee allowances and commute employee allowances. They are in separate sections of the Agreement. For a residential employee, depending on the employee's role and roster, various allowances are prescribed including site allowance, shift allowance, function allowance and role allowance. In the case of the role allowance, the clause is the same in the first part, as it is in the Schedule. However, the second and third parts in the Agreement are quite different. The "Call Out" provision is very different to the Schedule and provides that if an employee is "Called Out" on 12 or more occasions per annum "they will be entitled to receive an allowance of \$3,540 per annum". In the case of commute employees, such as Mr Ahearn, reference is made in the Agreement to two allowances; a commute allowance and a function allowance only.

96 There are several observations to make in connection with Mr Ahearn's role allowance claim. Firstly, and importantly, Mr Ahearn's contract of employment documents are silent in relation to a role allowance, save for the inclusion of the sum of \$3,610 as a part of his Fixed Remuneration. Secondly, because of this, there is no provision for any payment to Mr Ahearn of any additional sum, or "higher amount", in any situation. That is, there is nothing in Mr Ahearn's contract of employment that invites the reader of the contract to look to another document, to ascertain the parameters of any "higher amount", in respect of the role allowance as is the case for Messrs Perrin and Holden. The contract of employment appears to be complete on its face. Thirdly, whilst in cl 3.2 of Mr Ahearn's letter of offer, there is reference to the respondent's "applicable policies" for payment of allowances, there is nothing that follows in the letter of offer to invite the reader to consult the relevant policy, in order to make any provision of either the letter of offer or the Agreement operative, complete and enforceable in accordance with its evident intention. This contrasts with the role allowance provision in the Schedule read with cl 3.2.13 of the Allowance Policy, as discussed above. In short, I see no basis to infer the incorporation into the contract of cl 3.2.13 of the Allowance Policy, as is the case in the Schedule, applicable to Messrs Perrin and Holden.

97 Moreover, the terms of the Agreement as a contractual document, draw a clear distinction between the entitlements of residential and commute employees. In the case of the latter, which includes Mr Ahearn, there is no entitlement to a role allowance. It plainly only applies to residential employees under the Agreement. However, even if, as the respondent notes, the terms of Mr Ahearn's contract of employment should be construed as extending the terms of a role allowance in the Agreement to him, which in my view it cannot be, then, as I have mentioned earlier, the amount payable as a contractual entitlement is a fixed sum of \$3,540 per annum. There is no provision for the payment of any "higher amount" and Mr Ahearn is already paid higher than this sum, as a part of his Fixed Remuneration, in any event. Additionally, to infer, or even to imply the terms of cl 3.2.13 of the Allowances Policy in this case, would be inconsistent with the express terms of Mr Ahearn's contract of employment, as I have endeavoured to explain it above, even if one was to extend the terms of cl 5.7.3 of the Agreement to Mr Ahearn.

98 As in the case of Messrs Perrin and Holden, there is no basis to sustain the contention that Allowance Policy in toto, has been incorporated into Mr Ahearn's contract of employment. It is neither objectively to be inferred nor necessary to do so, having regard to the express terms of Mr Ahearn's contract of employment. Accordingly, Mr Ahearn is not entitled to a role allowance, in respect of any "higher rate", beyond that presently paid to him as a part of his Fixed Remuneration. As with the payment of ad hoc night shift allowances to Messrs Perrin and Holden, the fact that Mr Ahearn was paid additional amounts for disruptions, over and above what his contract of employment provides for, does not convert what may be regarded as an extra, discretionary payment, into an enforceable entitlement under his contract, amenable to an order of the Commission.

Night shift allowance

99 Largely for the same reasons applicable to Messrs Perrin and Holden, there is no basis to find a contractual entitlement payable to Mr Ahearn for ad hoc night shifts. In addition, the only shift allowance payment provision is in cl 5.7.2(a) of the Agreement, set out above. When read with Annexure 2 to the Agreement, this is expressly applicable to residential employees and no such provision is made for commute employees. Furthermore, it is payable in relation to the working on a shift roster and to take account of all disabilities in connection with working afternoon and night shift. As with Messrs Perrin and Holden, Mr Ahearn does not work in accordance with such arrangements. Also, as for the Schedule, the Agreement contains language in both cl 5.8.1 Commute Allowance and cl 6.1.2 Work Outside Normal Hours, referring to the "disabilities and roster requirements" of the role and for "work outside of the employee's normal hours to meet the requirements of the role", as being covered by an employee's salary.

100 Accordingly, I am not persuaded that Mr Ahearn has established a contractual entitlement to the payment of a night shift allowance for working ad hoc night shifts.

Roster change

101 I reach the same conclusion on this issue also. The relevant provisions in Mr Ahearn's contract of employment are cl's 6.1.3 and 6.1.4. Clause 6.1.3 deals with "Rosters", in much the same terms as the corresponding provision in the Schedule. For the reasons which I have expressed in relation to Messrs Perrin and Holden, I do not consider that working ad hoc night shifts is a "roster change" for these purposes. There is no question that in his letter of offer, Mr Ahearn was appointed to a position in Cranes and Transport as a commute employee working a 14 day on and seven day off roster. Mr Ahearn's subsequent roster change in the 23 May 2012 letter, placed him on the same eight day on, six day off roster pattern as Messrs Perrin and Holden.

102 As opposed to Messrs Perrin and Holden, the shift work provision of Mr Ahearn's letter of appointment is set out separately at cl 6.1.4. A difficulty here is, however, as submitted by the respondent, that even if cl 6.1.4 did apply to ad hoc night shifts, as a contractual entitlement, then the compensation prescribed is a "Call Out" which only extends to residential employees. Accordingly, no contractual entitlement has been established by Mr Ahearn in relation to this claim.

103 In relation to Mr Ahearn, I finally comment on a letter handed up at the end of the applicants' case, exhibit A9. This letter, dated 31 January 2011, was from Mr Cockrell, a manager with Cranes and Transport. It referred to Mr Ahearn having worked 34 disruptions in 2010 and accordingly, he would be paid an extra amount of \$1805.00 in his pay for this. The applicants' pointed to Mr Cockrell's reference to Mr Ahearn being "entitled" to an additional Role Service Allowance payment in this period. This letter however, consistent with the legal principles I have referred to in par 84 above, cannot be relied on by Mr Ahearn to support his case to payment of an additional amount for the role allowance. It is the terms of Mr Ahearn's contract of employment as entered into, that I must consider and not any subsequent conduct or what Mr Cockrell may have said in his letter.

Conclusions

104 In relation to Messrs Perrin and Holden, the Commission has concluded that both applicants have a contractual entitlement to a role allowance and that the cessation of payments to them after 1 October 2015 constitutes a denied contractual benefit. Given the course agreed by the parties, they are directed to confer on the relevant quantum within 21 days and inform my Associate accordingly. In the event the parties cannot reach agreement, the Commission will determine quantum.

2019 WAIRC 00279

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION	
	DAVID PERRIN	FIRST APPLICANT
	COLIN HOLDEN	SECOND APPLICANT
	DARREN AHEARN	THIRD APPLICANT
	-v-	
	PILBARA IRON COMPANY (SERVICES) PTY LTD	RESPONDENT
CORAM	SENIOR COMMISSIONER S J KENNER	
DATE	THURSDAY, 6 JUNE 2019	
FILE NO.	B 70 OF 2018, B 71 OF 2018 AND B 73 OF 2018	
CITATION NO.	2019 WAIRC 00279	

Result	Directions issued
Representation	
Applicants	Mr A Bukarica of counsel
Respondent	Mr A Longland of counsel

Direction

HAVING heard Mr A Bukarica of counsel on behalf of the applicants and Mr A Longland 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 applicants deliver to the respondent in matters B70 and B71 of 2018:
 - (a) A proposed draft order finalising the proceedings.
 - (b) A short statement of proposed agreed facts consisting of no more than 2 pages in length.
 - (c) A written outline of submissions addressing the proposed draft orders.
 No later than 4pm on 21 June 2019.
- (2) THAT the respondent in matters B70 and B71 of 2018 deliver to the applicants:
 - (a) A proposed draft order finalising the proceedings.
 - (b) A written response to the statement of agreed facts stating each fact that they are willing to agree and the reason why they are not willing to agree each other fact of no more than 2 pages in length.
 - (c) A written outline of submissions addressing the proposed draft orders.
 No later than 4pm on 5 July 2019.
- (3) THAT upon delivery of the respondent's written response, the parties shall confer as soon as reasonably possible to consider the terms in which any agreed facts might be expressed.
- (4) THAT the applicants file and serve a statement of agreed facts between the parties no later than 4pm on 19 July 2019.
- (5) In the event that the parties are unable to agree on a statement of agreed facts that are necessary for the Commission to determine a form of orders by 19 July 2019, leave is granted to the parties to:
 - (a) File witness statements or other evidence which are confined to any disputed facts relevant to the proposed orders; and
 - (b) A short supplementary written outline of submissions, which are confined to the relevant disputed issues.
 No later than 4pm on 26 July 2019.
- (6) THAT unless advised by either party in writing by no later than 2 August 2019, that a witness is required for cross-examination, the proposed orders will be determined by the Commission on the papers without a further oral hearing.
- (7) THAT if the matters are not able to be determined on the papers, matters B70 and B71 of 2018 be listed for hearing in relation to final orders for one day or less in Perth on a date to be fixed by the Commission.
- (8) THAT with leave of the Commission, the evidence of witnesses may be taken via video-link.
- (9) THAT the parties have liberty to apply on short notice.

(Sgd.) S J KENNER,
Senior Commissioner.

[L.S.]

2019 WAIRC 00751

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION : 2019 WAIRC 00751
CORAM : SENIOR COMMISSIONER S J KENNER
HEARD : ON THE PAPERS – WRITTEN SUBMISSIONS FILED
 19 JULY 2019
DELIVERED : FRIDAY, 11 OCTOBER 2019
FILE NO. : B 70 OF 2018, B 71 OF 2018, B 73 OF 2018
BETWEEN : DAVID PERRIN;
 COLIN HOLDEN;
 DARREN AHEARN
 Applicants
 AND
 PILBARA IRON COMPANY (SERVICES) PTY LTD
 Respondent

Catchwords	:	<i>Industrial Relations Law (WA) - Contractual benefits claim for Role Service Allowance Payment previously upheld - Parties unable to agree on quantum - Interpretation of "call out" and "disruption" in contracts of employment - - Allowance Policy to be read with contracts of employment - Applicants entitled to "disruption" payment when called out to work a shift other than regular rostered shift and required to travel to another site and stay overnight - Applicants paid maximum additional Role Service Allowance payments - applications dismissed</i>
Legislation	:	<i>Industrial Relations Act 1979 (WA)</i>
Result	:	Applications dismissed
Representation:		
Counsel:		
Applicant	:	Mr A Bukarica of counsel and with him Mr S Crawford of counsel
Respondent	:	Mr A Longland of counsel and with him Mr G Giorgi of counsel
Solicitors:		
Applicant	:	Construction Forestry Maritime Mining & Energy Union
Respondent	:	Herbert Smith Freehills

Case(s) referred to in reasons:

David Perrin & Ors v Pilbara Iron Company (Services) Pty Ltd [2019] WAIRC 00137

Reasons for Decision

- On 20 March 2019 the Commission published its reasons for decision in relation to the contractual benefits claims brought by the applicants: *David Perrin & Ors v Pilbara Iron Company (Services) Pty Ltd* [2019] WAIRC 00137. The decision dealt with the threshold question of whether the applicants had contractual entitlements to the benefits the subject of their claims. In my reasons, I found that the contractual benefits claims brought by the third applicant Mr Ahearn, were not made out. In relation to the first and second applicants, Messrs Perrin and Holden, I found that their claims in relation to nightshift allowance and payment for a roster change, were also not made out. However, I upheld their claims in relation to a Role Service Allowance payment. The parties were requested to confer as to quantum. They were unable to reach agreement. They submitted that they were unable to agree on how a "disruption" and a "call out" should be construed, in order to determine the amount, if any, owed to Messrs Perrin and Holden.
- This matter was initially listed for hearing for determination. However, subsequently, the parties agreed, with the concurrence of the Commission, that the matter could largely, if not completely, be dealt with on the papers. In this respect, directions were made by the Commission on 6 June 2019 for the filing and service of proposed orders to finalise the proceedings, a short further statement of agreed facts and written outlines of submissions. Whilst it was contemplated that if the parties could not reach agreement on a further short statement of agreed facts, supplementary witness statements could be filed by late July, with notice to any witnesses of proposed cross-examination by early August 2019, ultimately, those steps were unnecessary.

Supplementary statement of agreed facts

- As noted, the parties have agreed a further limited statement of facts. Those agreed facts go to the Role Service Allowance payments received by Messrs Perrin and Holden over the period 2015 to 2018. The statement is in the following terms:
 - These agreed facts supplement the Statement of Agreed Facts (**SOAF**) (Exhibit A8) filed by the Applicants and Respondent in the above matters and signed on 9 October 2018. The terms used in this document have the same meaning as that used in the SOAF.
 - In respect of the period from 2015 to 2018, Mr Perrin has received Role Service Allowance payments as set out in **Table 1.1** below. The table groups the payments as follows:
 - "Express Contractual Entitlement" refers to the amount which appears on page 17 of SOAF (Attachment 1);
 - "Initial Amount Paid" refers to the amount paid to Mr Perrin in equal instalments throughout the course of the relevant year;
 - "Additional Role Allowance Paid (at end of year)" refers to the additional lump sum amounts paid to Mr Perrin at the end of each relevant year; and
 - "Additional Role Allowance Paid (reconciliation 2018)" refers to the additional lump sum amounts paid to Mr Perrin in 2018 in respect of the years 2015-2018.

Table 1.1

Year	Express Contractual Entitlement	Initial Amount Paid	Additional Role Allowance Paid (at end of year)	Additional Role Allowance Paid (reconciliation 2018)	Total Role Allowance paid for year
2015	\$3,937	\$3,937	\$5,904	0	\$9,841
2016	\$3,937	\$3,937	0	\$1,968	\$5,905
2017	\$3,937	\$3,937	\$1,968	\$1,968	\$7,873
2018	\$3,937	\$3,937	\$5,904	\$0	\$9,841
Total 2015-2018	\$15,748				\$33,460

3. In respect of the period from 2015 to 2018, Mr Holden has received Role Service Allowance payments as set out in **Table 1.2** below. Again, the table groups the payments as follows:
- “Express Contractual Entitlement” refers to the amount which appears on page 27 of the SOAF (Attachment 2);
 - “Initial Amount Paid” refers to the amount paid to Mr Perrin in equal instalments throughout the course of the relevant year;
 - “Additional Role Allowance Paid (at end of year)” refers to the additional lump sum amounts paid to Mr Holden at the end of each relevant year; and
 - “Additional Role Allowance Paid (reconciliation 2018)” refers to the additional lump sum amounts paid to Mr Holden in 2018 in respect of the years 2015 – 2018.

Table 1.2

Year	Express Contractual Entitlement	Initial Amount Paid	Additional Role Allowance Paid (at end of year)	Additional Role Allowance Paid (reconciliation 2018)	Total Role Allowance paid for year
2015	\$3,937	\$3,937	\$5,904	\$0	\$9,841
2016	\$3,937	\$3,937	\$5,904	\$0	\$9,841
2017	\$3,937	\$3,937	\$3,936	\$1,968	\$9,841
2018	\$3,937	\$3,937	\$5,904	\$0	\$9,841
Total 2015-2018	\$15,748				\$39,364

- The effect of the above payments is that Mr Holden has been paid the maximum potential Role Service Allowance for each of the years 2015, 2016, 2017 and 2018. It is not contended by any party that any additional money is owing to Mr Holden.
- The effect of the above payments is that Mr Perrin has been paid the maximum potential Role Service Allowance for the years 2015 and 2018. Again, it is not contended by any party that any additional money is owing to Mr Perrin in respect of those years.
- During 2016, Mr Perrin was directed to:
 - work outside of his normal rostered hours on night shift on 13 occasions;
 - stay at an away camp on 35 occasions; and
 - travel to work locations away from his usual work location at Tom Price on numerous additional occasions, without being required to either:
 - stay at an away camp; or
 - work a night shift.
- The respondent has not kept records which would allow the number of additional occasions referred to in paragraph 6(iii) to be ascertained.
- During 2017, Mr Perrin was directed to:
 - work outside of his normal rostered hours on night shift on 11 occasions;
 - stay at an away camp on 74 occasions; and
 - travel to work locations away from his usual work location at Tom Price on numerous additional occasions, without being required to either:
 - stay at an away camp; or
 - work a night shift.
- The respondent has not kept records which would allow the number of additional occasions referred to in paragraph 8(iii) to be ascertained.

Contentions of the parties

- 4 The applicant submitted that call outs or disruptions are accrued cumulatively and an entitlement will be triggered whenever the applicants are directed by the respondent to work a shift, including a night shift, which is other than their regular day work shift; when they are required to work away and stay overnight from their “home camp” or when they are required to work at a location other than their home camp or regular place of work, irrespective of whether they are required to stay overnight at another location. As referred to in my earlier reasons, it was common ground that the present home camp is the Greater Brockman Mine.
- 5 The submission of the applicants was that their claims in this respect are supported by the Commission’s decision, where at par 82 of my reasons I said:
- It is to be accepted that fly in fly out employees are already compensated generally for working away from their homes. That is what the commute allowance covers. However, this is not what a “disruption” is, as defined in cl 3.2.13. Messrs Perrin and Holden’s “normal or usual rostered working arrangement” is set out in the headings to the Schedules. They are commute employees located at Tom Price (subsequently Greater Brockman) and work on an eight on, six off roster. Their contracted normal rostered working arrangement is not to travel all over the Pilbara at short notice, sometimes working nights as well. That is not what their contracts of employment say. The notion of a “Call Out” must be understood in the context of the terms of the contract of employment and cl 3.2.13. This is consistent with the surrounding circumstances and context of the transaction, whereby the apparent reason that Cranes and Transport employees, being in somewhat of an unusual situation, would be provided this additional benefit.
- 6 The upshot of this submission was that a call out or disruption, having regard to the terms of the applicants’ contracts and cl 3.2.13 of the Allowances Policy, applies to a situation where employees are required to work outside of their normal or usual rostered working arrangement. In the case of the applicants, this means their contracted working roster arrangements of eight days on, six days off, with an average of 48 hours per week, at the home camp location of the Greater Brockman Mine. The applicants submitted that the normal rostered working arrangements were not to “travel all over the Pilbara at short notice”, sometimes working nights as well, in reliance upon my reasons above. Furthermore, the Role Allowance contemplated compensation for being required to work at various locations at short notice and the provision of “regular service or support outside normal rostered hours”. Whilst Mr Perrin submitted that he has not kept records of all his work at different locations in the Pilbara, and nor has the respondent it seems, based on the maximum entitlement and the amounts received by him for 2016 and 2017, he claimed to be entitled to the sum of \$5,904. Given that Mr Holden received the maximum Role Service Allowance payment for 2015, 2016 and 2017, no additional amount is claimed by him.
- 7 The respondent, in its written submissions, contended that to determine the question of quantum, the Commission will be required to determine the proper construction of the term call outs, as it is used in Messrs Perrin and Holden’s contracts of employment. After setting out the parties’ respective positions, the respondent went on to submit that in its view, on a proper construction of Messrs Perrin and Holden’s contracts of employment, a call out is limited only to the situation where either applicant works a night shift or any shift other than their regular day work shift. In its submissions, the respondent sought to confine the meaning of being called out to the express contractual provision in the Role Allowance clause in the Schedules to the employment contracts, where reference is made to the payment of a Role Allowance “where you are required to provide regular service or support outside your normal rostered hours”. The respondent referred to the Commission’s observations at par 82 of its reasons, relied upon by the applicants in their written submissions. The respondent contended that the reference to “travelling all over the Pilbara...etc” were essentially observation, and unnecessary for the ultimate disposition of the proceedings. Furthermore, the respondent contended that to the extent that the Allowances Policy referred to “normal roster arrangements”, a provision upon which the Commission placed some significance, this expression is inconsistent with the terms of the contracts and is therefore irrelevant.

Consideration

- 8 This latter submission is at odds with the findings the Commission has already made as to the proper construction of the contracts and the Allowances Policy at pars 79 to 83 of its reasons. The Commission concluded that a call out (or disruption) as it is also known, “is intended to apply where employees are required to work outside of their normal or usual rostered working arrangements”: par 81. Accordingly, as I set out in my reasons at pars 79 to 83, the notion of a call out or a disruption is not limited to what is provided in the Schedule to the contracts of employment of Messrs Perrin and Holden, that being limited to work outside rostered hours of work. This fails to have regard to cl 3.2.13 of the Allowance Policy, which I have found is incorporated into the contracts of employment. They must be read together. The latter informs the former and incorporates it. As I also mentioned in my reasons, the introductory part of the Allowances Policy, providing that “Allowances.... are paid in accordance with applicable policies”, reinforced the role of the policy.
- 9 The position is, as I have already found, a call out must be understood in the context of the terms of the Schedule in the contracts of employment of Messrs Perrin and Holden when read with the imported terms of cl 3.2.13 of the Allowances Policy. That is, as I said at par 81 of my earlier reasons, referred to above, a disruption is described as a requirement to be called out to work outside of an employee’s *normal roster arrangements* (my emphasis) on 12 or more occasions per annum. This is not just limited to work outside normal working hours. If that were the construction, then cl 3.2.13 of the Allowances Policy, in which the respondent itself specifies what a disruption is, would be otiose and have no work to do. The drafter of the policy did not simply repeat the language used in the Schedule. An “arrangement” in the relevant sense, means “3. A structure or combination of things for a purpose...6. Disposition of measures for a particular purpose” (Shorter Oxford English Dictionary). The concept of “normal rostered arrangements” is broader than the notion of “normal rostered hours” but would embrace it. Contractually, the “normal roster arrangement” for Messrs Perrin and Holden, is to work eight days on, six days off, with an average of 48 hours per week, based now at Greater Brockman. However, it is to be accepted that as part of their day to day roles in Cranes and Transport, due to the nature of the work, Messrs Perrin and Holden have been and are regularly required to work at other locations in the Pilbara, often at short notice. The observations I made at par 82 of my earlier reasons, highlighted by the respondent at par 13 of their written submissions, are to be understood in this way.

- 10 Accordingly, the question becomes what were and are Messrs Perrin and Holden's "normal or usual rostered working arrangements", having regard to the normal duties to be performed by employees in the Cranes and Transport department? The respondent contended, in my view correctly, consistent with par 9 above, that the evidence before the Commission was that the members of the Cranes and Transport team are required, as a part of their normal duties, to transport equipment around various locations in the Pilbara, for the purposes of performing maintenance, capital improvement works and other tasks. This was not disputed by the applicants. Accordingly, when the work of Messrs Perrin and Holden as a whole is understood in this context, a call out or a disruption, should be regarded as arising in circumstances where Messrs Perrin and Holden are required to work night shifts or at locations other than their home camp, which involve an overnight stay at an "away camp". This does not apply in circumstances where Messrs Perrin and Holden may be required to attend, during the course of an ordinary working day, to normal duties performed by Cranes and Transport personnel, at other locations, but returning to their home camp, that being Greater Brockman, at the end of their working shift. This approach is also generally consistent with the arrangements that have been applied, on the evidence, to residential employees, whereby such employees required to work away from their home camp and to stay overnight, will receive a disruption for each day so worked (see Commission's reasons at par 83 and SOAF Attachment 16).
- 11 Whether call outs or disruptions should be considered cumulative, was not a matter raised or argued in the substantive proceedings. In my opinion, the applicants' submissions in this respect should not be supported. It is not the case that in the ordinary course, an employee should receive a cumulative penalty payment when they attend to what could be regarded as more than one call out or disruption in the course of a shift. The respondent's submissions in this respect are preferred.

Conclusion

- 12 On this basis, I refer to and accept the respondent's submissions at par 34 of its outline as to Mr Perrin's entitlement to Role Service Allowance, calculated on the above basis, for the years 2015 to 2018 inclusive, read with the further statement of agreed facts. Taken in its totality, Mr Perrin appears to have been paid the additional Role Service Allowance payments that he would be entitled to, over these periods. Accordingly, final orders will now be made.

2019 WAIRC 00752

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION	
PARTIES	DAVID PERRIN; COLIN HOLDEN; DARREN AHEARN	APPLICANTS
	-v-	
	PILBARA IRON COMPANY (SERVICES) PTY LTD	RESPONDENT
CORAM	SENIOR COMMISSIONER S J KENNER	
DATE	FRIDAY, 11 OCTOBER 2019	
FILE NO/S	B 70 OF 2018, B 71 OF 2018, B 73 OF 2018	
CITATION NO.	2019 WAIRC 00752	

Result	Applications dismissed
Representation	
Applicant	Mr A Bukarica of counsel
Respondent	Mr A Longland of counsel

Order

HAVING heard Mr A Bukarica of counsel on behalf of the applicant and Mr A Longland 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 each of the claims made on behalf of Mr Ahearn alleging a denial of contractual benefits by the respondent since 1 October 2015 be and are hereby dismissed.
- (2) THAT claims of Messrs Perrin and Holden alleging that since 1 October 2015 the respondent has denied contractual benefits in the form of night shift payments and compensation for failure to provide notice of roster changes be and are hereby dismissed.
- (3) THAT given the payments made by the respondent to Messrs Perrin and Holden, the claims alleging that since 1 October 2015 they have been denied contractual benefits in the form of additional Role Service Allowance payments for "disruptions" be and are hereby dismissed.

(Sgd.) S J KENNER,
Senior Commissioner.

[L.S.]

2015 WAIRC 00233

PARTIES WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
SHANE PAUL SHENTON **APPLICANT**

-v-
MR PAUL FRANCIS HANING & MRS ANNA HANING
T/AS: WHITFORDS TREE SERVICES, ARBOR PLUS AND G.A.K.K TRANSPORT **RESPONDENT**

CORAM COMMISSIONER S J KENNER
DATE FRIDAY, 13 MARCH 2015
FILE NO/S B 165 OF 2014
CITATION NO. 2015 WAIRC 00233

Result Orders issued
Representation
Applicant In person
Respondent Mr P Haning

Consent Order

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

- (1) THAT the respondent pay to the applicant the sum of \$44,100 in instalments of \$200 per week commencing 28 days from the date of this order.
- (2) THAT the payments by the respondent in par (1) above may be supplemented by further amounts that may be available subject to the cash flow of the respondent's business.
- (3) THAT the parties have liberty to apply on short notice.

[L.S.]

(Sgd.) S J KENNER,
Commissioner.

2019 WAIRC 00759

PARTIES WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
SHANE PAUL SHENTON **APPLICANT**

-v-
MR PAUL FRANCIS HANING & MRS ANNA HANING
T/AS: WHITFORDS TREE SERVICES, ARBOR PLUS AND G.A.K.K TRANSPORT **RESPONDENT**

CORAM SENIOR COMMISSIONER S J KENNER
DATE MONDAY, 28 OCTOBER 2019
FILE NO/S B 165 OF 2014
CITATION NO. 2019 WAIRC 00759

Result Order issued
Representation
Applicant In person
Respondent Mr P Haning

Order

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

THAT the application be and is hereby discontinued by leave.

[L.S.]

(Sgd.) S J KENNER,
Senior Commissioner.

SECTION 29(1)(b)—Notation of—

Parties		Number	Commissioner	Result
Adrian Blackwell	Toll Transport Pty Ltd	B 34/2018	Commissioner D J Matthews	Discontinued
Angela Rimmer	Catherine and Kevin Italiano Harvey Courier	U 142/2018	Commissioner D J Matthews	Discontinued
Christina Glass	Candlewood Medical Centre	U 61/2019	Commissioner T Emmanuel	Discontinued
Fraser Whitelaw	Western Workforce Pty Ltd	B 111/2019	Commissioner D J Matthews	Discontinued
Henry Sawe	Autism Association of WA	U 89/2019	Commissioner T Emmanuel	Discontinued
Jacqueline Cook	Shire of Trayning	U 120/2019	Commissioner D J Matthews	Discontinued
Jacqueline Lee Graham	Shire of Victoria Plains	U 70/2019	Commissioner D J Matthews	Discontinued
Jarryd Sellen	Deep Clean Australia	U 85/2019	Commissioner T Emmanuel	Discontinued
John Machado	Jigalong Community Incorporated (ABN 73 028 407 150)	U 154/2018	Commissioner T B Walkington	Discontinued
Kim McRae	Greyhound Australia	B 29/2019	Commissioner D J Matthews	Discontinued
Linda Rose	AVN Northam Pty Ltd as the trustee for The Knipe Trading Trust	B 56/2019	Commissioner T Emmanuel	Discontinued
Mark Nelson	Venues West	B 134/2018	Commissioner D J Matthews	Discontinued
Rozita Samandari	East Metropolitan Health Service	U 96/2019	Commissioner T Emmanuel	Discontinued
Sonja Butrakoska	Margaria Cleaning Group	U 90/2019	Commissioner T B Walkington	Discontinued
Stephen Robert Fuller	PA & AJ NEGUS	U 109/2019	Commissioner T B Walkington	Discontinued

CONFERENCES—Notation of—

Parties		Commissioner	Conference Number	Dates	Matter	Result
State School Teachers' Union of W.A. (Inc.)	North Metropolitan TAFE	Matthews C	C 16/2019	09/09/2019 23/09/2019	Dispute re alleged unfair disciplinary process	Discontinued
The Australian Nursing Federation, Industrial Union of Workers Perth	WA Country Health Service	Emmanuel C	C 3/2019	08/04/2019	Dispute re union members employment	Discontinued
The Civil Service Association of Western Australia Incorporated	Director General Department of Local Government, Sport and Cultural Industries	Emmanuel C	PSAC 26/2018	25/09/2018	Dispute re union member's employment details	Discontinued
The Civil Service Association of Western Australia Incorporated	Director General, Department of Education	Emmanuel C	PSAC 16/2019	14/08/2019	Dispute re union members' long service leave entitlements	Discontinued
The Independent Education Union of Western Australia, Union of Employees	Ms Melissa Powell Principal Swan Valley Anglican School	Matthews C	C 2/2019	06/03/2019	Dispute re classification of union member	Discontinued
The State School Teachers' Union of W.A. (Incorporated)	The Director General, Department of Education	Matthews C	C 18/2018	07/06/2018 06/07/2018 03/08/2018	Dispute re alleged unfair termination of union member	Discontinued

Parties		Commissioner	Conference Number	Dates	Matter	Result
United Voice	North Metropolitan Health Service, Department of Health	Emmanuel C	C 29/2018	12/09/2018	Dispute re proposed change affecting union members'	Discontinued

PROCEDURAL DIRECTIONS AND ORDERS—

2019 WAIRC 00761

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

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

ADIB ABDENNABI

APPELLANT

-v-

THE COMMISSIONER OF POLICE, WA POLICE

RESPONDENT

CORAM

CHIEF COMMISSIONER P E SCOTT
SENIOR COMMISSIONER S J KENNER
COMMISSIONER D J MATTHEWS

DATE

TUESDAY, 29 OCTOBER 2019

FILE NO/S

APPL 42 OF 2016

CITATION NO.

2019 WAIRC 00761

Result	Order issued
Representation	(by correspondence)
Appellant	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 appellant has leave to tender paragraphs 1 and 64 to 138 of his statement dated 7 June 2019 as new evidence, pursuant to s 33R(3)(a) of the *Police Act 1892* (by consent) and such new evidence is to be filed and served by 1 November 2019.
2. The respondent is to file and serve any reformulated reasons and new evidence, should he so elect, pursuant to s 33R(8) of the *Police Act 1892*, by 29 November 2019.
3. The appellant has leave to file and serve an amended Form 31 Notice of Appeal, should he so elect, by 6 December 2019.
4. The operation of regulation 92 of the *Industrial Relations Commission Regulations 2005* is reinstated, and regulation 92(1) is to be complied with by 20 December 2019.
5. For the purpose of Order 4 and regulation 92(1) of the *Industrial Relations Commission Regulations 2005*, any new evidence that has already been filed in the Commission by the appellant or the respondent is taken to have already been filed in the Commission.
6. The matter is adjourned to a hearing on a date to be determined by the Commission, not before 24 January 2020.
7. The appellant is to file and serve an Outline of Submissions and List of Authorities 14 days prior to the hearing.
8. The respondent is to file and serve an Outline of Submissions and List of Authorities 7 days prior to the hearing.

(Sgd.) P E SCOTT,
Chief Commissioner,

[L.S.]

For and On behalf of the Western Australian Industrial Relations Commission.

2019 WAIRC 00778

PARTIES WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
ADAM RODD FEILDING
APPLICANT

-v-
HAMIWOOD ENTERPRISES PTY LTD
RESPONDENT

CORAM COMMISSIONER T B WALKINGTON
DATE THURSDAY, 31 OCTOBER 2019
FILE NO. B 81 OF 2019
CITATION NO. 2019 WAIRC 00778

Result Direction Issued
Representation
Applicant Mr P Williams (of counsel)
Respondent Mr L Lang and Mr M Vegar

Direction

HAVING heard from Mr P Williams (of counsel) on behalf of the applicant and Mr L Lang and Mr M Vegar 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 Direction dated 4 October 2019 [2019] WAIRC 00741 items (3), (4), (5) and (6), be set aside;
2. THAT informal discovery be extended until 23 January 2020;
3. THAT the Commission will reconvene a further Directions hearing once the informal discovery process has been completed; and
4. THAT the parties have liberty to apply by two business days.

[L.S.]

(Sgd.) T B WALKINGTON,
Commissioner.

2019 WAIRC 00721

APPEAL AGAINST THE DECISION TO TAKE DISCIPLINARY ACTION ON 5 NOVEMBER 2018

PARTIES WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
JENNIFER ANNE TILLY
APPELLANT

-v-
HEALTH SUPPORT SERVICES (HSS)
RESPONDENT

CORAM PUBLIC SERVICE APPEAL BOARD
COMMISSIONER T EMMANUEL - CHAIR
MR G SUTHERLAND - BOARD MEMBER
MR M AULFREY - BOARD MEMBER

DATE THURSDAY, 26 SEPTEMBER 2019
FILE NO. PSAB 30 OF 2018
CITATION NO. 2019 WAIRC 00721

Result Directions issued
Representation
Appellant Mr T Kucera (of counsel)
Respondent Mr P Watson (as agent)

Direction

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

1. THAT the parties file a statement of agreed facts and bundle of agreed documents by 7 October 2019.
2. THAT the appellant file her outlines of evidence and documents by 21 October 2019.
3. THAT the respondent file its outlines of evidence and documents by 4 November 2019.
4. THAT the appellant file her written outline of submissions by 18 November 2019.
5. THAT the respondent file its written outline of submissions by 2 December 2019.
6. THAT discovery be informal.
7. THAT this matter be listed for a three-day hearing not less than seven days after the respondent's written outline of submissions is filed.
8. THAT the parties have liberty to apply.

[L.S.]

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

2019 WAIRC 00747

APPEAL AGAINST THE DECISION TO TAKE DISCIPLINARY ACTION ON 5 NOVEMBER 2018

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

JENNIFER ANNE TILLY

APPELLANT

-v-

HEALTH SUPPORT SERVICES (HSS)

RESPONDENT**CORAM**

PUBLIC SERVICE APPEAL BOARD
COMMISSIONER T EMMANUEL - CHAIR
MR G SUTHERLAND - BOARD MEMBER
MR M AULFREY - BOARD MEMBER

DATE

WEDNESDAY, 9 OCTOBER 2019

FILE NO.

PSAB 30 OF 2018

CITATION NO.

2019 WAIRC 00747

Result

Directions issued

Representation**Appellant**

Mr T Kucera (of counsel)

Respondent

Mr P Watson (as agent)

Direction

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

1. THAT the parties file a statement of agreed facts and bundle of agreed documents by 18 October 2019.
2. THAT the appellant file her outlines of evidence and documents by 1 November 2019.
3. THAT the respondent file its outlines of evidence and documents by 15 November 2019.
4. THAT the appellant file her outline of submissions by 29 November 2019.
5. THAT the respondent file its outline of submissions by 13 December 2019.
6. THAT discovery be informal.
7. THAT this matter be listed for a three-day hearing not less than seven days after the respondent's outline of submissions is filed.
8. THAT the parties have liberty to apply.

[L.S.]

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

2019 WAIRC 00777

UNFAIR DISMISSAL APPLICATION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

ROBERT MATHEW

APPLICANT

-v-

THE LEGACY CLUB OF WESTERN AUSTRALIA INCORPORATED

RESPONDENT**CORAM**

COMMISSIONER T B WALKINGTON

DATE

WEDNESDAY, 30 OCTOBER 2019

FILE NO.

U 110 OF 2019

CITATION NO.

2019 WAIRC 00777

Result	Direction issued
Representation	
Applicant	Mr Robert Mathew
Respondent	Mr Nish Sooriyapava (of counsel)

Direction

HAVING heard from the applicant on his own behalf and Mr Nish Sooriyapava (of counsel) on behalf of the respondent, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby directs –

1. THAT each party shall give an informal discovery by serving its list of documents on each other by no later than 20 November 2019;
2. THAT inspection and provision of the documents to each other shall be completed by no later than 27 November 2019;
3. That the applicant file and serve any witness statements upon which it intends to rely with respect to the issue of jurisdiction by 11 December 2019;
4. THAT the respondent file and serve any witness statements upon which it intends to rely with respect to the issue of jurisdiction by 29 January 2020;
5. THAT the parties give notice to one another of witnesses they intend to call to give evidence on the issue of jurisdiction by 5 February 2020;
6. THAT the issue of Jurisdiction will be set down for a two day of hearing on a date to be set; and
7. THAT the parties have liberty to apply at short notice.

(Sgd.) T B WALKINGTON,
Commissioner.

[L.S.]

INDUSTRIAL AGREEMENTS—Notation of—

Agreement Name/Number	Date of Registration	Parties		Commissioner	Result
Australian Workers' Union (Western Australian Public Sector) General Agreement 2019 - The AG 12/2019	11/12/2019	Director General, Department of Primary Industries and Regional Development, Director General, Department of Biodiversity, Conservation and Attractions, Director General, Department of Education	The Australian Workers' Union, West Australian Branch, Industrial Union of Workers	Commissioner T Emmanuel	Agreement registered
Public Sector CSA Agreement 2019 PSAAG 2/2019	11/04/2019	Chemistry Centre (WA) and others, the Civil Service Association of WA Incorporated, Department of Mines, Industry Regulation and Safety	(NOT APPLICABLE)	Senior Commissioner S J Kenner	Agreement registered

PUBLIC SERVICE APPEAL BOARD—

2019 WAIRC 00792

APPEAL AGAINST THE DECISION TO TERMINATE EMPLOYMENT ON 11 FEBRUARY 2019

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	:	2019 WAIRC 00792
CORAM	:	PUBLIC SERVICE APPEAL BOARD COMMISSIONER T EMMANUEL - CHAIR MS R SINTON - BOARD MEMBER MR D HILL - BOARD MEMBER
HEARD	:	TUESDAY, 22 OCTOBER 2019, WEDNESDAY, 23 OCTOBER 2019, THURSDAY, 24 OCTOBER 2019
DELIVERED	:	TUESDAY, 5 NOVEMBER 2019
FILE NO.	:	PSAB 3 OF 2019
BETWEEN	:	LYNETTE ANN CALVERT Appellant AND PATHWEST LABORATORY MEDICINE WA Respondent

CatchWords	:	Public Service Appeal Board – Appeal accepted out of time – Orders for discovery not granted – Allegations substantiated – Dismissal was unfair in the circumstances – Reinstatement not practicable – Appeal dismissed
Legislation	:	<i>Industrial Relations Act 1979</i> (WA) s 27(1)(a)(iv), s 27(1)(o) and s 80I <i>Industrial Relations Commission Regulations 2005</i> (WA) regulation 107(2)
Result	:	Appeal dismissed
Representation:		
Appellant	:	In person
Respondent	:	Mr J Carroll (of counsel)

Cases referred to in reasons:

Australian Liquor, Hospitality and Miscellaneous Workers Union, Miscellaneous Workers Division, Western Australian Branch v Burswood Resort (Management) Ltd (1995) 75 WAIG 1801

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

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

The Undercliffe Nursing Home v The Federated Miscellaneous Workers' Union of Australia, Hospital, Service and Miscellaneous, W.A. Branch (1985) 65 WAIG 385

Reasons for Decision

- 1 These are the unanimous reasons of the Public Service Appeal Board (**Board**).
- 2 Ms Lynette Calvert was employed as a Medical Scientist by PathWest Laboratory Medicine WA (**PathWest**). In January 2018 she was given a third and final warning after PathWest found that she engaged in a breach of discipline. A few months later, arising out of three incidents that took place in March and April 2018, PathWest brought another disciplinary proceeding against Ms Calvert. That was finalised on 20 December 2018, with PathWest finding that the majority of the allegations were substantiated and that Ms Calvert had again breached the WA Health Code of Conduct. PathWest took disciplinary action against Ms Calvert in the form of a reprimand.
- 3 On 20 December 2018, PathWest informed Ms Calvert:

Please note that the Disciplinary Action of a reprimand constitutes a fourth reprimand. As you have been previously advised, if PathWest had grounds to reprimand you within 12 months of the final warning issued to you on 10 January 2018, PathWest has the right to dismiss you with notice.

Accordingly, PathWest Workforce has referred the matter to the Chief Executive for consideration.
- 4 On 23 January 2019, Ms Calvert received a further letter from PathWest which confirmed that, after considering Ms Calvert's written response, the Chief Executive had decided to dismiss her with notice.
- 5 Ms Calvert appealed to the Board on 11 February 2019. She said she was seeking a 'compensation payout for unfair dismissal', 'transfer to another position outside of Manjimup' and other outcomes relating to internal grievance processes and behaviour management at PathWest.

- 6 Though it is not clear from her notice of appeal, Ms Calvert clarified she appeals two decisions to the Board. First, she appeals PathWest's findings and its decision to give her a fourth reprimand on 20 December 2018. Second, she appeals PathWest's decision to dismiss her made on 23 January 2019.
- 7 Ms Calvert says she feels she has 'been unfairly dismissed as the bullying behaviours at the PathWest laboratory were not dealt with adequately and were allowed to escalate to mobbing led by the manager.'
- 8 PathWest says its findings made on 20 December 2018 in relation to alleged breaches of discipline can be substantiated, the disciplinary action of a reprimand was appropriate and it was not unfair to dismiss Ms Calvert after she received a fourth reprimand within 12 months of receiving a third and final warning.

Preliminary matters

- 9 Before dealing with the substantive appeal, the Board must consider three preliminary matters.
- 10 The first is an interlocutory application made by PathWest during the hearing to dismiss Ms Calvert's appeal. The second is whether to accept Ms Calvert's appeal of the findings and fourth reprimand out of time. The third is whether to grant Ms Calvert's two discovery applications.

Application to dismiss the appeal

- 11 On the first day of the substantive hearing, after Ms Calvert had finished her examination-in-chief, PathWest made an interlocutory application under s 27(1)(a)(iv) of the *Industrial Relations Act 1979 (WA) (IR Act)* to dismiss Ms Calvert's appeal. PathWest said the appeal must be dismissed because even if the appeal were upheld, there would be no remedy available to the Board. PathWest submitted Ms Calvert had made it clear that she did not want to return to work at Manjimup, therefore reinstatement was not possible. Further, PathWest argued that the Board could not transfer Ms Calvert because that would go further than 'adjusting' PathWest's decision to dismiss her. It would instead be substituting a new decision. In those circumstances, PathWest said it would not be in the public interest to hear this matter.
- 12 In response, Ms Calvert said she would be willing to return to Manjimup if she had to, but would much prefer a transfer to another laboratory. She said: 'And actually after three years of being in the country it's actually supposed to be a priority, if you put in an expression of interest to transfer. I was happy to go anywhere. I was happy to go onto relief staff. I was happy to go anywhere. And I've got multiple emails that's in the records of me asking for transfer and it was ignored.' Ms Calvert said her appeal should not be dismissed.
- 13 In order to rule on PathWest's interlocutory application, the Board would have needed to hear evidence from witnesses who had yet to give evidence and then adjourn to consider whether it could order that Ms Calvert be re-employed and transferred to another location.
- 14 The Board must do all such things necessary for the expeditious and just hearing and determination of matters before it. Given the number and location of witnesses and the limited availability of the parties, witnesses and Board members had already caused delays to the hearing of the matter, the Board did not consider it should adjourn the hearing in order to consider PathWest's interlocutory application to dismiss the appeal. Accordingly, the Board reserved its decision on this point.
- 15 The Board considers that the substance of PathWest's interlocutory application to dismiss Ms Calvert's appeal is dealt with in these reasons.

Out of time

- 16 The first part of Ms Calvert's appeal relates to PathWest's findings and its decision to give her a fourth reprimand on 20 December 2018.
- 17 Regulation 107(2) of the *Industrial Relations Commission Regulations 2005 (WA)* provides the time limit for filing an appeal to the Board. It states:
- An appeal may be commenced within 21 days after the date of the decision, finding, determination or recommendation in respect of which the appeal is made or where that decision, finding, determination or recommendation is published in the *Government Gazette* within one month of the date of that publication.
- 18 Ms Calvert had until 10 January 2019 to appeal the findings made and disciplinary action taken on 20 December 2018. This part of her appeal is therefore 32 days out of time.
- 19 The Board must decide whether it should accept this part of her appeal out of time.

Relevant principles

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

Length of the delay

- 22 On 11 February 2019, Ms Calvert appealed PathWest's findings and its decision to give her a fourth reprimand made on 20 December 2018.
- 23 The delay is 32 days. It is a reasonably long delay relative to a 21-day time limit.

Reason for the delay

- 24 Ms Calvert says she filed her appeal of PathWest's findings and its decision to give her a fourth reprimand late because she 'had a lot going on at the time' and thought she could deal with the matter as part of PSAB 25 of 2018, which was a separate

appeal she had before the Board. She says she was very stressed and it was hard to know what to do. Ms Calvert believes she has post traumatic stress disorder and says it clouds her thinking.

- 25 PathWest says the fourth reprimand was imposed one day before the notice of intention to terminate employment was sent. As a result, an employee could reasonably misunderstand that there are two separate appeal processes. Further, given Ms Calvert's mind would have been turned to responding to the notice of intention to terminate employment, there could be acceptable reasons for delay.

Consideration

- 26 At the time that Ms Calvert received PathWest's findings and its decision to give her a fourth reprimand, she was part way through proceedings before this same Board in relation to appealing the third and final warning she received from PathWest (**Previous Appeal**).

- 27 Shortly after the Previous Appeal was filed, the Board's Associate wrote to Ms Calvert on 15 November 2018 and directed her to the Commission's website page which contained information about appeals to the Board. It says:

Is there a time limit for matters to be referred to the Board?

Yes. An appeal must be commenced within 21 days after the date of the decision, finding, determination or recommendation. If the decision, finding, determination or recommendation is published in the Government Gazette, an appeal may be commenced within one month of the date of that publication (see regulation 107(2) *Industrial Relations Commission Regulations 2005*).

- 28 At the directions hearing in the Previous Appeal, held on 11 December 2018, the Board provided a copy of *Nicholas v Department of Education & Training* to Ms Calvert. The Board explained to her that this authority sets out the factors the Board would consider when deciding whether or not to extend the period for filing an appeal.
- 29 On 24 January 2019, Ms Calvert telephoned the Board's Associate and asked about getting 'advice for her case'. The Board's Associate explained she was not able to give advice, including legal advice, but suggested that Ms Calvert contact a community legal centre if she would like legal advice. Ms Calvert said she did not want legal advice and asked the Board's Associate whether she should file an unfair dismissal claim. The Board's Associate again said she could not give legal advice, but explained step by step how Ms Calvert could access the Commission's guides and procedures online, including the guides for unfair dismissal and appeals to the Board.
- 30 On the notice of appeal Ms Calvert filed in both her Previous Appeal on 15 October 2018 and in this matter, PSAB 3 of 2019, the time limit for filing appeals to the Board is clearly marked. The form says:

Note: An appeal may be filed within 21 days after the date of the decision, finding, determination or recommendation in respect of which the appeal is made or where that decision, finding, determination or recommendation is published in the *Government Gazette* within one month of the date of publication.

The Board may accept a late appeal. It usually takes into account the length of the delay, any action taken by you to dispute the decision other than lodging this claim, whether there is merit in this claim, any prejudice to the respondent caused by the delay and other relevant matters.

- 31 The Board considers that when Ms Calvert received PathWest's findings and decision to give her a fourth reprimand, Ms Calvert was aware of the time frame for appealing such a decision. She was also aware of which form she would need to complete to make her appeal and where to find the Commission's information about appealing to the Board.
- 32 However, given that the notice of intention to dismiss was sent to Ms Calvert the day after she received the fourth reprimand, the Board accepts that Ms Calvert was focussed on responding to her proposed dismissal. Further, the Board accepts that in the circumstances of this matter, Ms Calvert was confused about whether the two appeal processes were separate or could both be dealt with by appealing her dismissal. The Board finds Ms Calvert has an acceptable reason for the delay.

Whether Ms Calvert has an arguable case

- 33 The essence of Ms Calvert's case is that the allegations were concocted by her colleagues and human resources, the investigation was poor, PathWest breached public sector standards and did not provide procedural fairness, and the penalty was disproportionate.
- 34 PathWest made no submissions about whether Ms Calvert has an arguable case.

Consideration

- 35 It would not be unfair to dismiss an appeal that was filed out of time if it could not succeed.
- 36 At this preliminary stage, the Board's assessment of the merits is 'fairly rough and ready': *Jackamarra v Krakouer* [1998] HCA 27; (1998) 195 CLR 516 [9] (Brennan CJ & McHugh J). The Board does not consider that Ms Calvert's claim could not succeed. Her case is arguable.

Whether there would be any prejudice to PathWest

- 37 Ms Calvert says there would be no prejudice to PathWest if her appeal is accepted out of time.
- 38 PathWest says it would not be prejudiced because it understood that Ms Calvert intended to challenge the conduct and the penalty underlying the reprimand.

Consideration

- 39 The Board accepts PathWest's submission that it would not be prejudiced if Ms Calvert's appeal is accepted out of time.

Conclusion

- 40 The Board has considered the length of the delay, Ms Calvert's acceptable reasons for the delay, that the case is arguable and that PathWest would not be prejudiced.
- 41 On balance, and in circumstances where PathWest does not oppose the Board granting an extension of time, the Board considers that it should accept Ms Calvert's appeal as it relates to the findings made and disciplinary action taken on 20 December 2018 out of time.
- 42 This means that the Board must consider whether to quash the findings made on 20 December 2018, whether the reprimand was a proportionate penalty and whether it should adjust the decision to dismiss Ms Calvert on 23 January 2019.

Discovery

- 43 Ms Calvert sent a number of discovery applications to the Registry. Two discovery applications were accepted for filing: one on 29 July 2019 and another on 16 August 2019 (**Discovery Applications**).
- 44 The Discovery Applications are very broad and almost identical. Each is 13 pages long and contains requests for a large number of non-specific documents that arise out of disciplinary investigations and grievance processes from the past seven years.
- 45 Ms Calvert says she requires these documents because 'PathWest will need to prove from the beginning that they did not breach procedural fairness, duty of care and that they were not negligent, in order to prove that the dismissal was not unfair.'
- 46 PathWest says the only findings and disciplinary process that can be impeached in these proceedings is the process leading to the reprimand on 20 December 2018. It says that 'the materials underlying those findings has been discovered.'
- 47 The Board must decide whether the documents Ms Calvert requests are necessary to resolve the matters in dispute.

What documents does Ms Calvert want?

- 48 In her Discovery Applications, Ms Calvert asks the Board for copies of the following:
- full and unredacted versions of all disciplinary and grievance complaints and investigation reports made in the PathWest laboratory that involve Ms Calvert and Ms Karen Hyde from 2013 to 2019;
 - all verbal and emailed complaints that were made to managers and human resources in relation to those disciplinary and grievance complaints between Ms Calvert and Ms Hyde, as well as how decisions were arrived at in all investigation reports;
 - all communications between Ms Marion Cutforth and Ms Nyree Fisher about all of the investigation processes;
 - all unredacted communication between Mr Peter Beringer and PathWest managers including Ms Cutforth, Ms Fisher, Ms Francis Brogden and Mr Martin Taylor;
 - all letters containing allegations against Ms Calvert in relation to all complaints;
 - all unredacted, internal communications between Ms Calvert and human resources, including detail about how decisions were arrived at in 'those reports', as well as who made the decision;
 - all transcripts, notes and reports for the 'intake sessions' on 9 and 10 May 2018 conducted by Access Wellbeing Services/CentreCare by Ms Kirsty Staples;
 - all transcripts, notes and reports for the mediation run by Ms Staples in 2016;
 - all transcripts, notes and reports for the Manjimup Team Building Day;
 - 'RSSCAR1172 Friday 11/5/18 last day of work – Failure to Follow Protocol';
 - records of any training Ms Fisher has completed in relation to people management skills;
 - '1 21802 Stresswise RiskAx';
 - all documents in relation to 'PW17D02' including 'the letter from the nurse manager Jacqueline Heggie...and anyone else who reported the allegation to HR, including any input from my manager Nyree Fisher';
 - all documents in relation to the 'bullying incident' on 24 October 2017 and how it was managed;
 - all audio of the 'lawyers [sic] investigation interviews with staff from PW17D24'; and
 - who initially reported the incident to human resources.

Relevant principles

- 49 Discovery is confined to what is in issue on the pleadings. The Board can only make an order for discovery under s 27(1)(o) of the IR Act if it is just to do so and necessary for the fair disposal of the case. 'Just' means 'right and fair, having reasonable and adequate grounds to support it, well-founded and conformable to a standard of what is proper and right': *Australian Liquor, Hospitality and Miscellaneous Workers Union, Miscellaneous Workers Division, Western Australian Branch v Burswood Resort (Management) Ltd* (1995) 75 WAIG 1801, 1805.
- 50 As set out above at [42], Ms Calvert's appeal is limited to the findings made and reprimand imposed on 20 December 2018 and the decision to dismiss made on 23 January 2019. The questions for the Board are whether the findings can be substantiated, whether the reprimand was appropriate disciplinary action to take, and whether in dismissing Ms Calvert because she received a fourth reprimand within 12 months of receiving a third and final warning, PathWest's lawful right to dismiss was exercised so harshly or oppressively against Ms Calvert as to amount to an abuse of that right: *The Undercliffe Nursing Home v The*

Federated Miscellaneous Workers' Union of Australia, Hospital, Service and Miscellaneous, W.A. Branch (1985) 65 WAIG 385, at 386 (Undercliffe).

Are the documents necessary to resolve the matters in dispute?

- 51 The Board understands Ms Calvert to be saying that she requests the documents set out above at [48] because they will allow her to demonstrate that PathWest did not treat her in a way that was procedurally fair or compliant with disciplinary and grievance policies.
- 52 PathWest says it is apparent from the nature of the documents that are sought that Ms Calvert seeks to conduct 'a roving inquiry into the manner in which the respondent has dealt with complaints and grievances over the past seven years. However, that is not the role of this Board.'
- 53 PathWest says it has already provided Ms Calvert with the documents relevant to this appeal. None of the other material, for example in relation to managers receiving management training or the 'Team Building Day', is discoverable. It says the Discovery Applications should be dismissed.

Conclusion

- 54 Having heard from the parties, the Board is not persuaded that the documents Ms Calvert seeks to discover are necessary to resolve the matters in dispute.
- 55 Broadly, PathWest says it made the decision to dismiss Ms Calvert because of the number of reprimands she had been given. The third and final warning has not been successfully appealed so it stands. Almost all of the documents that Ms Calvert seeks appear to relate to issues that were the subject of those earlier reprimands or grievance processes unrelated to her dismissal.
- 56 The Board understands that Ms Calvert says these documents are necessary because they will demonstrate how PathWest treated her in a procedurally unfair way.
- 57 The Board's task is to hear and determine de novo Ms Calvert's appeal against the findings and reprimand dated 20 December 2018 and the decision to dismiss dated 23 January 2019. The Board is satisfied that PathWest has already made all relevant documents including the investigation report, letters of allegation and reasons for its decision available to Ms Calvert.
- 58 Based on what Ms Calvert has put to the Board, we consider that the remaining documents Ms Calvert seeks to discover do not sufficiently relate to the subject of this appeal. It is not necessary to order discovery of these documents for the fair disposal of the case and it would not be just to do so.
- 59 For these reasons, the Discovery Applications are dismissed.

What must the Board decide?

- 60 Ms Calvert's appeal is limited to appealing PathWest's findings and reprimand dated 20 December 2018 and its decision to dismiss her on 23 January 2019. The Board must decide whether it should adjust those matters.

Background

- 61 The first part of Ms Calvert's appeal relates to allegations that she breached the WA Health Code of Conduct in three interactions with her colleagues that took place on two days. These allegations were put to her by letter dated 14 May 2018. They were:
1. On 14 March 2018 at the Manjimup Laboratory Ms Calvert interacted in an inappropriate and confrontational manner with her line manager Ms Nyree Fisher and colleague Ms Marcie Grant by:
 - a. demanding Ms Fisher follow up about a blood transfusion;
 - b. denigrating the work of a colleague, Ms Andrea Miolin;
 - c. standing over Ms Fisher and gesticulating with thrusting hand movements, whilst holding papers in her hand; and
 - d. later that day, aggressively stating to Ms Fisher, Ms Grant and Ms Hyde words to the effect of 'what is this, bleach?' when she sat down in a chair.
 2. On the afternoon of 12 April 2018 at the Manjimup Laboratory Ms Calvert interacted with a colleague Ms Karen Hyde in an inappropriate manner by:
 - a. demanding that Ms Hyde vacate a computer immediately, stating loudly words to the effect of 'Karen, you need to get off that computer and use another. I need it now'; and
 - b. repeating that demand in a confrontational manner using words to the effect of 'it would be best if you didn't use this computer at all.'
- 62 The allegations relating to 14 March 2018 were substantiated insofar as they related to Ms Fisher and Ms Hyde. The allegations relating to 12 April 2018 were substantiated. Ms Calvert was given a written reprimand, which was within 12 months of the final warning she received on 10 January 2018. PathWest says it was for this reason Ms Calvert was dismissed.
- 63 Ms Calvert denies the allegations. She says PathWest breached procedural fairness in relation to her many complaints and grievances about her colleagues. She says her complaints and grievances were not properly investigated or responded to. She believes she was bullied by her colleagues and was unfairly dismissed.

Witnesses

Ms Calvert

- 64 Ms Calvert was an inconsistent and unreliable witness. There were many material inconsistencies in her testimony. For example, when asked whether she could return to work in the Manjimup laboratory, Ms Calvert first said: 'How could I go back there?' and: 'It is a nightmare of a place to work, the communication is appalling, the bullying is appalling. I have never experienced a workplace like it. It's horrendous.' Later, Ms Calvert said that she could return to work there. Ms Calvert tendered a medical report in support of her evidence that she has post traumatic stress disorder. Later she said that medical report was biased. Later still, when it suited her case, Ms Calvert said she trusted that medical report.
- 65 Ms Calvert was evasive when the answer to a question did not support her case. She was hostile and sarcastic to counsel for PathWest during cross-examination and she frequently refused to answer questions put to her. The Board had to direct Ms Calvert more than eight times to answer questions during her testimony. Ms Calvert's evidence about her workers' compensation case was improbable. For example, during cross-examination, counsel for PathWest put the certificate of outcome for the WorkCover conciliation conference to Ms Calvert. It states: 'The applicant claims weekly payments of compensation for total incapacity from 18 May 2018 and ongoing'. He asked Ms Calvert: 'Is it a fair characterisation of your [workers' compensation claim] to say that the basis of your claim is that you allege that due to conduct in the workplace or conduct of the employer you have been left with a total incapacity for work?'. Ms Calvert responded: 'No way'. Later, counsel asked: 'And you would agree that you're claiming workers' compensation from my client?' to which Ms Calvert responded: 'Well, I don't know'.
- 66 Finally, Ms Calvert frequently referred to her recollection of material events as 'very poor' and 'fuzzy' but then went on to dispute the recollection of others. She also refused to make concessions that clearly should have been made, such as that PathWest had concerns about her behaviour.
- 67 For these reasons, the Board has serious concerns about Ms Calvert's evidence and considers her an unreliable witness. To the extent that the evidence of PathWest's witnesses conflicts with Ms Calvert's evidence, the Board prefers the evidence of those witnesses.

Ms Hannaford

- 68 Ms Danielle Hannaford, a Technical Assistant in the Manjimup laboratory at the relevant time, gave evidence for Ms Calvert. Ms Hannaford saw and heard little of the incidents relevant to these proceedings. During her testimony she became uncooperative. She was hostile in response to questions that did not suit Ms Calvert's case, for example in relation to whether there was another computer Ms Calvert could have used. Ms Hannaford was evasive at times, for example when she was asked questions about whether she had given a copy of her own grievance to Ms Calvert. Ms Hannaford was evasive and argumentative when asked questions about whether she had told her manager that Ms Calvert had bullied and harassed her. When she eventually answered that question, she first denied that she had told her manager that Ms Calvert had bullied her, but it was plain from an email Ms Hannaford had sent at that time that she had told her manager that Ms Calvert had bullied and harassed her. The Board had to direct Ms Hannaford more than five times to answer questions while giving evidence. For these reasons the Board prefers the evidence of other witnesses to that of Ms Hannaford to the extent of any inconsistency.

Mr Grove

- 69 Mr Daniel Grove is PathWest's Human Resources Consultant and was the case manager for two of the disciplinary processes involving Ms Calvert. He gave evidence about the disciplinary and termination processes, as well as PathWest's management structure. His evidence was consistent and credible. It was not disturbed in cross-examination. The Board accepts Mr Grove's evidence.

Ms Fisher

- 70 Ms Nyree Fisher is the Medical Scientist in charge at the Manjimup laboratory. Ms Fisher was a cooperative witness. Her evidence was considered and consistent. She carefully answered all the questions that were put to her and made concessions when they were due. Ms Fisher's evidence was not disturbed in cross-examination. Ms Fisher was a credible, reliable witness and the Board accepts her evidence.

Ms Hyde

- 71 Ms Karen Hyde is a Technical Assistant at PathWest's Manjimup laboratory. Her recollection about some matters was poor. On those matters, the Board treats Ms Hyde's evidence with caution. At times Ms Hyde exaggerated her evidence, expanding upon some matters in a way that was inconsistent with earlier evidence. However, at its heart Ms Hyde's evidence about material matters was consistent with the evidence of Ms Fisher, Ms Grant and Ms Hannaford.

Ms Grant

- 72 Ms Marcelle Grant is a Technical Assistant at PathWest's Manjimup laboratory. She was cooperative and forthcoming when giving evidence. Her evidence was consistent, measured and free from exaggeration. Her evidence rang true to the Board and was not disturbed in cross-examination. Ms Grant impressed the Board as a credible, reliable witness. The Board accepts her evidence.

The unit of blood incident

- 73 Ms Calvert, Ms Fisher and Ms Grant gave evidence about this incident that occurred on 14 March 2018.
- 74 Ms Calvert gave evidence that she has a poor recollection of this incident because it happened nine weeks before the allegations were put to her. She said it was 'a distant memory' and that what she could tell the Board about it 'is only from what [she] remembered through listening to the interviews'. In spite of this poor recollection, her evidence was that she asked Ms Fisher to follow up about a unit of blood. She was not demanding. Ms Calvert repeatedly said Ms Fisher was hostile, dismissive and not helpful. Ms Calvert agreed that she persisted and said that was necessary because the issue was urgent. She said she did not demand anything in an aggressive way. Her evidence was that being demanding is not something she

would do. In cross-examination Ms Calvert would not accept that she criticised Ms Miolin's work, although she agreed she complained about Ms Miolin's lack of communication. Ms Calvert's evidence was that she did say to Ms Fisher that Ms Miolin does not communicate well, but that it was a positive comment to try to improve the workplace communication. Ms Calvert says other staff could not have overheard the incident because the workplace is noisy.

- 75 Ms Fisher gave evidence that Ms Calvert demanded, rather than asked, that she follow up about the issue. She said Ms Calvert spoke to her in an aggressive tone and manner, although she was not yelling, and waved paperwork at her. Ms Fisher's evidence was that Ms Calvert would not allow her to speak, would not seem to accept that she was busy and said things to her like 'you fix this, you do this'. Ms Fisher denied speaking to Ms Calvert in a dismissive or hostile way. Ms Fisher said Ms Calvert came back 10 minutes later to insist Ms Fisher deal with the issue.
- 76 The effect of Ms Fisher's evidence was that Ms Calvert denigrated Ms Miolin's work by pointing out various things she had failed to do. Ms Fisher said: 'You said she didn't leave a note, she doesn't do this, she doesn't do that, ah, basically that she was incompetent was the impression that you were giving. You thought that she was incompetent was what I felt that you were trying or the impression you were giving me... that she always left a mess, um, things like that.'
- 77 Ms Grant gave evidence that she could hear this interaction between Ms Calvert and Ms Fisher, although she was trying not to eavesdrop. Her evidence was consistent with Ms Fisher's evidence. Broadly Ms Grant said that Ms Calvert spoke to Ms Fisher in an argumentative, demanding and sharp tone, while Ms Fisher's tone was even, reasonable and deflecting. Ms Grant said Ms Calvert was holding papers and indicating to them, telling Ms Fisher what to do about the issue.

The wet chair incident

- 78 Ms Calvert, Ms Fisher, Ms Hyde and Ms Hannaford gave evidence about the wet chair incident on 14 March 2018.
- 79 Ms Calvert gave evidence that she also has a poor recollection of this incident. She said: 'I don't know. I can't remember. I just remember something vaguely about a chair that was wet and I said, "The chair's wet. Is this bleach?" and someone said, "No, it's water." She described it as a 'nothing event' and a 'non-event'. Ms Calvert denied she had a raised voice or an accusatory tone.
- 80 Ms Fisher gave evidence that while she and Ms Hyde were washing their hands at the sink, Ms Calvert leant over a chair and said: 'What is this? Bleach?' in a very rude tone and without any context. When asked by counsel to speak in the tone Ms Calvert had used, Ms Fisher did so in a tone that was abrupt and accusing. The effect of Ms Fisher's evidence in cross-examination was that Ms Calvert did not generally raise her voice at work but she did during this incident.
- 81 Ms Hyde gave what counsel for PathWest generously described as a 'colourful' account of this incident. Her evidence was that Ms Calvert 'started carrying on about the chair being all wet and "I hope bleach wasn't used on it" and she was just going off really.' When asked what she meant by 'going off', Ms Hyde said 'Okay. Like, "who would use bleach" and "how did I know" and "did she use bleach on this chair" and "where is she" and "I want to know".' She said Ms Calvert's tone was very rude, loud and abrupt. Ms Hyde was adamant in cross-examination that Ms Calvert's voice was raised.
- 82 Ms Hannaford was not in the room during the incident but her evidence was that she could hear voices. She is not sure whose voices she heard. She said the tone of the conversation was normal and she did not hear any raised voices.

The computer incident

- 83 Ms Calvert and Ms Hyde gave evidence about the computer incident that occurred on 12 April 2018. Ms Hannaford gave evidence about what happened straight after the incident.
- 84 Ms Calvert's evidence is that she said she needed to use a particular computer that Ms Hyde was using. She asked Ms Hyde: 'Will you be long? What are you doing?' and said 'it might be better if you don't use this computer at this time of day.' Ms Calvert gave evidence that other staff always accepted moving so that Ms Calvert could use the computer when she wanted to. Ms Calvert described the incident as another 'non-event'.
- 85 In her evidence, Ms Calvert said she thought she asked Ms Hyde: 'Oh, will you be long?'. She denied standing behind Ms Hyde with her arms crossed. She said her voice was not raised and her manner was not demanding.
- 86 Ms Hannaford did not witness the incident but gave evidence that after the incident she heard Ms Hyde saying: 'I have just been ordered off the microcomputer, not asked, ordered'. She said Ms Hyde said that loudly and aggressively and then said to Ms Grant about Ms Calvert: 'Why is she such a bitch? Why is she always such a bitch?'
- 87 Ms Hyde gave evidence that she was working on a particular computer when Ms Calvert came up behind her and said: 'Karen, you need to get off that computer. I need it. You don't need to be using it. You can use any other computer in the lab.' Ms Calvert said: 'I need that one to enter my micro and she was quite terse and quite, um, rude and like 'you need to get off of that computer now' like attitude.' Ms Hyde said Ms Calvert's voice was raised and her manner was rude. She was telling Ms Hyde what to do, rather than asking her. Ms Hyde's evidence was that Ms Calvert said 'get off that computer. I need it now and don't you use this one ever again because you know I need it at this time of the day. There's two other computers. Use one of those.'
- 88 Ms Hyde said she replied: 'Look, Lyn, what's the problem? I'll be five minutes. I've got to answer this query.' Ms Calvert said: 'I need the computer now. Get off it.' Ms Hyde then finished what she was doing, shut the computer down and told her manager what had just happened. Ms Hyde's evidence was that Ms Calvert stood by the desk tapping her fingers waiting for her to finish. Ms Hyde's evidence is that she could not recall saying 'Why is she such a bitch, why is she always such a bitch?' about Ms Calvert.

89 Like Ms Hannaford, Ms Grant did not witness the incident but gave evidence that after the incident she observed that Ms Hyde was very upset. She heard Ms Hyde say that Ms Calvert had asked her to get off the computer. When pressed in cross-examination, Ms Grant agreed that Ms Hyde was venting and had said: ‘Why is she such a bitch? Why is she always such a bitch?’

Ms Calvert’s conduct in the workplace generally

90 Evidence was given about Ms Calvert’s conduct in the workplace more generally.

91 Ms Calvert’s evidence was ‘I think my behaviour was always totally appropriate at work in the situation.’

92 A consistent theme emerged from the evidence of Ms Fisher, Ms Grant and Ms Hyde. The essence of their evidence was that Ms Calvert was very critical of others and would constantly complain and nit-pick. On a daily basis she would leave rude sticky notes that pointed out others’ mistakes for all to see, even though her manager had asked her not to. Ms Calvert cross-examined Ms Fisher:

CALVERT, MS: Well, you’ve said that you agree that there was not a total ban on sticky notes?---That’s correct.

So – but to me it sounded like – you made it sound like I used sticky notes as a form of bullying. Do you agree that – - -?---Yes.

Is that what you think? Why would you think that?---Because your notes, sticky notes, were very aggressive in terms you would have one word or a question mark, um, they were left out in the middle of the bench where everybody could see it so the person who made the mistake and everybody else in the lab saw it and they felt intimidated on occasion, um, and upset because you know they’d made the mistake that had been brought to the attention of everybody, um, yes.

EMMANUEL C: How do you know that?---Because they asked – told me about it and they complained to me which is why we tried to reduce the use of sticky notes without totally banning them altogether because they do have a place, sticky notes, I agree. When you leave them for yourself that’s useful for, you know, a couple of days or whatever but, um – yeah. So yes – no, there wasn’t a total ban but we tried to reduce it and use verbal communication because people were feeling very, um, upset by them, the ones that Lyn would leave.

93 Further, Ms Hyde said Ms Calvert would be rude if things did not go her way. Ms Grant said Ms Calvert created conflict. Ms Fisher said Ms Calvert would harass others if they did not do what she wanted done in the way she wanted it done. She said Ms Calvert was the most difficult person she had ever managed.

94 Ms Fisher said at times when she tries to speak with Ms Calvert informally to resolve a matter, Ms Calvert ‘basically, become[s] aggressive. [She] start[s] to harass me and then if I disagree with [her], [she] continue[s] to harass me.’

95 Ms Calvert denied she was a bully at work and that she left rude messages on sticky notes. Her evidence was that she left sticky notes as appropriate. She agreed they pointed out the mistakes of others and could be seen by everyone.

96 The Board accepts the evidence given by Ms Fisher, Ms Grant and Ms Hyde about Ms Calvert’s behaviours generally in the workplace. As Ms Calvert rightly acknowledged at the end of the third hearing day, she demonstrated the behaviours that are the subject of the allegations throughout the hearing. She was consistently demanding, insistent and discourteous. She repeatedly refused to follow the Board’s directions.

97 The Board finds that Ms Calvert consistently demonstrated workplace behaviours that amount to a breach of the WA Health Code of Conduct.

The disciplinary and termination process

98 Mr Grove gave evidence about PathWest’s process for investigating the allegations that Ms Calvert breached the WA Health Code of Conduct. It is apparent from the documents tendered by PathWest that Ms Calvert was given detailed allegations in writing, and she was given at least four opportunities to be heard throughout the process of investigating the allegations and determining what action PathWest would take. PathWest decided that the evidence substantiated in part the first breaches of the WA Health Code of Conduct on 14 March 2018, and substantiated the second breach of the WA Health Code of Conduct on 12 April 2018. It says that it was reasonable to give Ms Calvert a warning for that behaviour. Further, PathWest says because of the number and timing of warnings that Ms Calvert had already received, it exercised its lawful right to dismiss her in a way that was not harsh, oppressive or unfair.

Should the findings and fourth reprimand stand?

99 Throughout the hearing, Ms Calvert focussed on what she says is a history of bullying behaviours that she experienced at PathWest, as well as grievances and disciplinary investigations that are not the subject of this appeal, rather than the matters before the Board. Notwithstanding that, the Board understands that Ms Calvert denies the allegations against her.

100 PathWest argues that the evidence shows that its findings and the fourth reprimand should stand.

101 The Board finds that Ms Calvert spoke to Ms Fisher about the unit of blood in a demanding manner. When Ms Fisher did not immediately do what Ms Calvert wanted her to, Ms Calvert became increasingly insistent, demanding and rude. She gesticulated and waved paperwork around. Ms Calvert made negative comments about Ms Miolin’s work. The Board is satisfied that Ms Fisher behaved in an appropriate, professional manner throughout the interaction. The Board finds that allegation about the unit of blood is made out.

102 The Board accepts that Ms Calvert’s tone was aggressive and her voice was raised when she asked whether bleach had been used on the chair. The allegation about the wet chair is made out.

- 103 The Board accepts the evidence of Ms Grant and Ms Hannaford about Ms Hyde's reaction to the computer incident. That evidence is consistent with the essence of Ms Hyde's evidence about the computer incident. Notwithstanding Ms Hyde's exaggeration, the Board finds that Ms Calvert was insistent and rude in her interaction with Ms Hyde and repeatedly demanded that Ms Hyde get off the computer so that Ms Calvert could use it.
- 104 Ms Calvert's conduct was not consistent with the WA Health Code of Conduct. She did not treat her colleagues with courtesy and respect, in a way that promotes harmonious and productive working relationships. Ms Calvert's conduct amounts to breaches of discipline. For these reason, the Board is not persuaded it should interfere with the findings dated 20 December 2018.
- 105 The Board considers the appropriate disciplinary action for these breaches of discipline is a reprimand in the form of a warning.
- 106 For these reasons, the part of Ms Calvert's appeal that relates to the findings and fourth reprimand is dismissed.

Was the dismissal unfair?

- 107 Ms Calvert says her dismissal was unfair because she denies the behaviour that was the subject of the allegations that led to the fourth reprimand. She says her dismissal was harsh because the allegations are not serious enough to warrant dismissal and also because of its effect on her financial future. She says she is not eligible for welfare payments because she has savings and at the moment she cannot work.
- 108 PathWest says the dismissal was fair in the circumstances. Under cl 9.14(e) of the WA Health System – HSUWA – PACTS Industrial Agreement 2018 (**Industrial Agreement**), once Ms Calvert received the fourth reprimand, PathWest could have:
- dismissed Ms Calvert with notice;
 - regressed one or more salary increments in the range of Ms Calvert's classification;
 - demoted Ms Calvert to a classification not more than two levels lower than her classification; or
 - stood Ms Calvert down without pay for a specified period not exceeding four weeks.
- 109 PathWest says it had the right to dismiss Ms Calvert. Given Ms Calvert had been given a third and final warning for similar conduct less than 12 months earlier, dismissal was a proportionate response in the circumstances.

Consideration

- 110 Given the nature of the findings that led to the fourth warning, the Board considers that dismissal was not warranted in the circumstances. In the Board's view, PathWest should have considered the possibility of transferring Ms Calvert to another location within PathWest. PathWest should have responded to the fourth reprimand by regressing Ms Calvert's salary increment in accordance with cl 9.14(e) of the Industrial Agreement, and then managed Ms Calvert appropriately. It then should have been made clear to Ms Calvert that her behaviour towards her colleagues was unacceptable and that continuing to behave in that way would result in her dismissal. In effect, Ms Calvert should have been given one final chance and her conduct in the workplace managed appropriately.
- 111 The Board considers that in the circumstances PathWest exercised its lawful right to dismiss Ms Calvert in a way that amounted to an abuse of that right: *Undercliffe*. The Board would have made an order adjusting PathWest's decision such that the employment relationship is restored. However, for the reasons outlined from [112] - [128], the Board considers it should not adjust PathWest's decision to dismiss Ms Calvert.

Could Ms Calvert return to work in the Manjimup laboratory?

- 112 Unprompted during her testimony, Ms Calvert described Manjimup laboratory as 'a nightmare of a place to work, the communication is appalling, the bullying is appalling. I have never experienced a workplace like it. It's horrendous. And what's followed has been even worse.'
- 113 She gave evidence:
- EMMANUEL C:** All right, so we understand that you would not be asking the Board to adjust the decision such that you'd be sent back to Manjimup, is that right?---No.
- Okay. Well, it's important that we confirm these things, Ms Calvert?---How could I go back there?
- Okay?---I couldn't. It's - - -
- All right?---People are not going to change their - their ways of behaviour. It's going to take a long time. [A colleague] has got some serious trauma from childhood and she's got to really think about her behaviours. I gave her a lot of time to adjust and learn. But when they attack you the day after a team building day and - and it just continues on and HR continue to ignore it all, I don't see much hope. (name omitted)
- 114 In her closing submissions, Ms Calvert said 'I do consider that the Manjimup workplace did just degenerate into this highly toxic workplace'.

- 115 In evidence, Ms Calvert said she would be happy to go back to work at Manjimup 'but HR have to do their bit and follow through on their promises'. On another occasion, Ms Calvert said '[Manjimup] wouldn't be my first place of work, it'd probably be my last choice, but I would go back there because I actually strongly believe that these problems in the PathWest workplaces need to be addressed'. She seemed to be motivated by being an agent for change and repeatedly connected her return with problems being addressed. She said she wants human resources to create a safe working environment, train managers and address bystander behaviour.

116 In cross-examination, Ms Calvert described the workplace in Manjimup as a toxic environment that had caused her stress and anxiety. She said she had been bullied by every employee in the laboratory except Ms Hannaford. Ms Calvert considers the allegations against her are spurious and vindictive. She considers her manager colluded with her colleagues and human resources to concoct them. Yet, when it was put to her that there must be a lack of trust in those people, Ms Calvert would not concede that. At most she conceded there was a 'certain lack of trust' but said trust can be rebuilt and she is a forgiving person.

117 Ms Calvert agreed she considered her line manager and the person who is responsible for all medical scientists at PathWest had let her down and that her trust in them is at a low ebb.

118 When asked what would happen if Ms Calvert returned to work at the Manjimup laboratory, Ms Fisher, Ms Hyde and Ms Grant all said they would leave their employment.

Could Ms Calvert return to work for PathWest at another location?

119 Ms Calvert asks the Board to adjust PathWest's decision to dismiss her so that she is returned to work at PathWest at a different location.

120 PathWest argues that it would not be practicable for Ms Calvert to work for PathWest at any location, because the relationship of trust and confidence has broken down. Further, the medical report dated 1 April 2019 that Ms Calvert tendered makes it clear that she is not fit to work for six to 12 months anywhere and says she cannot work at PathWest because the relationship has broken down.

121 Ms Calvert agreed in cross-examination that she had concerns about the Acting Operations Manager of Regional Services and Acting General Manager of Regional Services. She said the human resources failures were colossal and she had been let down and betrayed by management. Ms Calvert agreed she had said that the Chief Executive had made disparaging remarks about her and that a human resources consultant had duplicitous behaviour. She also agreed that she had called Ms Cutforth 'extremely damaging and very duplicitous.' Her evidence was 'everyone's wronged me'. She agreed she was angry about the disciplinary process and said several times that PathWest was not a safe organisation.

122 PathWest argues that Ms Calvert has a workers' compensation claim that will be arbitrated in less than two months. The certificate arising out of conciliation makes it clear that her claim against PathWest is for a total incapacity for work due to PathWest's conduct. In those circumstances, it says Ms Calvert could not be returned to work at PathWest. When counsel for PathWest put that to Ms Calvert, she was evasive and refused to answer his questions. Finally she maintained that she did not know what her workers' compensation case was about or what she would be arguing at hearing.

Consideration

123 The Board finds that it would not be practicable to reinstate Ms Calvert to her position in the Manjimup laboratory. This is because it is clear from the evidence that Ms Calvert considers the Manjimup laboratory to be a toxic environment and she does not trust any of the employees who work there. The Board accepts that if Ms Calvert returned to that workplace at least three other employees, including her manager, would resign.

124 PathWest says the only way the Board could adjust its decision is by overturning the dismissal and reinstating Ms Calvert to her position in the Manjimup laboratory. Anything else would 'amount to an adjustment, removing the dismissal and then imposing a new decision.' Counsel for PathWest said that would be a two-step process rather than merely adjusting the decision.

125 The effect of PathWest's alternative submission is that even if the Board could adjust the dismissal by ordering Ms Calvert be re-employed at a location other than Manjimup, the evidence shows that Ms Calvert has lost trust in PathWest to such an extent that it is not practicable for any employment relationship to exist.

126 In the Board's view, because of the particular facts of this matter, it is not necessary to decide whether the Board has the power to adjust the decision to dismiss by ordering an employee be re-employed at a different location.

127 Even if the Board has the power to adjust PathWest's decision to dismiss such that Ms Calvert is re-employed at a different location, the Board is not persuaded it should do so. This is because the Board finds that the employment relationship between Ms Calvert and PathWest has deteriorated to such an extent that even a transfer to another location would be unworkable. The employment relationship should not be restored.

128 It is clear from the evidence that Ms Calvert's dissatisfaction with PathWest goes well beyond the Manjimup laboratory and extends to the organisation as a whole. She does not trust her laboratory colleagues, staff in human resources, the Operations Manager of Regional Services, the Acting General Manager of Regional Services nor the Chief Executive. Further, given the medical report and Ms Calvert's claim for total incapacity in her workers' compensation claim, the Board has concerns about Ms Calvert's current fitness to work for any employer, let alone for PathWest.

Conclusion

129 Ms Calvert has not persuaded the Board that it should adjust PathWest's decision to give her a fourth warning or to dismiss her. Accordingly, her appeal must be dismissed.

2019 WAIRC 00789

APPEAL AGAINST THE DECISION TO TERMINATE EMPLOYMENT ON 11 FEBRUARY 2019

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

LYNETTE ANN CALVERT

APPELLANT

-v-

PATHWEST LABORATORY MEDICINE WA

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

MONDAY, 4 NOVEMBER 2019

FILE NO

PSAB 3 OF 2019

CITATION NO.

2019 WAIRC 00789

Result	Appeal dismissed
Representation	
Appellant	In person
Respondent	Mr J Carroll (of counsel)

Order

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

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

(Sgd.) T EMMANUEL,
Commissioner,

On behalf of the Public Service Appeal Board.

[L.S.]

PUBLIC SERVICE APPEAL BOARD—Notation of—

The following were matters before the Commission under the Public Service Appeal Board.

Application Number	Parties		Commissioner	Matter	Dates	Result
PSAB 14/2019	David Graves	Director General, Department of Local Government, Sport and Cultural Industries	Matthews C	Appeal against the decision to take disciplinary action on 17 July 2019	N/A	Discontinued