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PUBLIC SERVICE ARBITRATOR—Awards/Agreements—Variation of—

2019 WAIRC 00750

WA HEALTH DENTAL TECHNICIANS (DENTAL HEALTH SERVICES) AWARD 2016

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA (INC)
	APPLICANT
	-v-
	NORTH METROPOLITAN HEALTH SERVICE
	RESPONDENT
CORAM	COMMISSIONER T EMMANUEL
DATE	THURSDAY, 10 OCTOBER 2019
FILE NO/S	P 11 OF 2019
CITATION NO.	2019 WAIRC 00750

Result	Award varied
Representation	
Applicant	Mr R Johnstone (of counsel)
Respondent	Ms J Poon (as agent)

Order

HAVING heard from Mr R Johnstone (of counsel) on behalf of the applicant and Ms J Poon (as agent) on behalf of the respondent, the Public Service Arbitrator, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), hereby orders –

THAT the WA Health Dental Technicians (Dental Health Services) Award 2016 (**Award**) be varied in accordance with the following schedule and that such variation shall have effect from the first pay period on or after today's date.

Further, the Public Service Arbitrator records the following basis for the variations:

1. The Key Minimum Classification in the Award is the classification contained in Schedule 2: Wages, being 'Dental Technician Year 1'.
2. For work related allowances, the percentage increase in:
   - Clause 20 and Schedule F – shift work;
   - Schedule D – standby;
   - Schedule D – on call; and
   - Schedule D – availability

is derived from:

- State Wage Order increase of 2.3% (2017);
- $18.00 divided by $889.50 multiplied by 100 equals 2.0236% (2018); and
- State Wage Order increase of 2.75% (2019)

which is in accordance with Principle 6 – Adjustment of Allowances and Service Increments of the Statement of Principles, specifically 6.4, which states:

> In circumstances where the Commission has determined that it is appropriate to adjust existing allowances relating to work or conditions which have not changed and service increments for a monetary safety net increase, the method of adjustment shall be that such allowances and service increments should be increased by a percentage derived as follows: divide the monetary safety net increase by the rate of pay for the key classification in the relevant award immediately prior to the application of the safety net increase to the award rate and multiply by 100.

3. For expense related allowances, the increase in:

(I)

- Clause 45(6) – cost of storage;
- Clause 45(1)(c) – removal allowance;
- Clause 45(1)(c) – household furniture;

is calculated by applying the percentage change in the current ABS 6401.0 CPI table 5 CPI: *Index Numbers; Furnishings, household equipment and services; Perth* for each year from 2016 to 2019. That is:

$$\text{2017 allowance} = \frac{\text{March 2017 CPI}}{\text{March 2016 CPI}} \text{ X 2016 allowance} \frac{\text{March 2017 CPI}}{\text{March 2016 CPI}} \text{ X 2016 allowance}$$

$$\text{2018 allowance} = \frac{\text{March 2018 CPI}}{\text{March 2017 CPI}} \text{ X 2017 allowance} \frac{\text{March 2018 CPI}}{\text{March 2017 CPI}} \text{ X 2017 allowance}$$

(rounded)

$$\text{2019 allowance} = \frac{\text{March 2019 CPI}}{\text{March 2018 CPI}} \text{ X 2018 allowance (rounded)} \frac{\text{March 2019 CPI}}{\text{March 2018 CPI}} \text{ X 2018 allowance (rounded)}$$

(II)

- Clause 45(1)(d) – pet allowance;

is calculated using the method set out at (I) above and data from ABS 6401.0 CPI table 5 *Index Numbers; Transport; Perth* for the period of March 2016 to March 2019.

(III)

- Schedule D – meal allowance – breakfast;
- Schedule D – meal allowance – lunch; and
- Schedule D – meal allowance – dinner

is calculated using the method set out at (I) above and data from ABS 6401.0 CPI table 5 *Index Numbers; Food and non-alcoholic beverages; Perth* for the period of March 2016 to March 2019.

4. The parties request the name of the award be amended by consent from 'WA Health Dental Technicians (Dental Health Services) Award 2016' to 'WA Health CSA Dental Technicians (Dental Health Services) Award 2016'.

(Sgd.) T EMMANUEL,
Commissioner,
[L.S.] Public Service Arbitrator.

SCHEDULE

1. Clause 1 – Title

A. Delete this clause and insert in lieu the following:

1. - TITLE

This Award shall be known as the WA Health CSA Dental Technicians (Dental Health Services) Award 2016 and shall supersede and replace the Hospital Employees' (Perth Dental Hospital) Award 1971.

2. Clause 20 – Shift work allowance

A. Delete subclause 20(2)(a)(i) and insert in lieu the following:

(2)(a)(i) An employee required to work a weekday afternoon or night shift, will in addition to the ordinary weekly wage rate of pay, be paid a fixed loading of $23.51 for each shift so worked.

3. Clause 45 – Removal allowance

A. Delete subclause 45(1)(c) and insert in lieu the following:

(c) An allowance of $565.00 for accelerated depreciation and extra wear and tear on furniture, effects and appliances for each occasion that an employee is required to transport their furniture, effects and appliances provided that the employer is satisfied that the value of household furniture, effects and appliances moved by the employee is at least $3,387.00.

B. Delete subclause 45(1)(d) and insert in lieu the following:

(d) Reimbursement of reasonable expenses in kennelling and transporting of domestic pet or pets up to a maximum amount of $198.00.

Pets are defined as dogs, cats, birds or other domestic animals kept by the employee or the employee's dependants for the purpose of household enjoyment.

Pets do not include domesticated livestock, native animals or equine animals.

C. Delete subclause 45(6) and insert in lieu the following:

(6) Where an employee is transferred to government owned or private rental accommodation, where furniture is provided, and as a consequence the employee is obliged to store furniture, the employee shall be reimbursed the actual cost of such storage up to a maximum allowance of $1,052.00 per annum. Actual cost is deemed to include the premium for adequate insurance coverage for the value of the furniture stored. An allowance under this subclause shall not be paid for a period in excess of four years without the approval of the employer.

4. Schedule D – Clause 21 – Overtime allowance

A. Delete Part 1 – Out of hours contact and insert in lieu the following:

PART 1 - OUT OF HOURS CONTACT	
Standby	$ 9.54 per hour
On Call	$ 4.77 per hour
Availability	$ 2.38 per hour

B. Delete Part 2 – Meals and insert in lieu the following:

PART 2 - MEALS	
Breakfast	$11.00 per meal
Lunch	$13.50 per meal
Evening Meal	$16.25 per meal

5. Schedule F – Shift work allowance

A. Delete Schedule F – Shift work allowance and insert in lieu the following:

SCHEDULE F - SHIFT WORK ALLOWANCE

An employee required to work a weekday afternoon or night shift of 7.6 hours worked, will in addition to the ordinary rate of salary, be paid an allowance of $23.51 is payable for each afternoon or night shift of 7.6 hours worked.

INDUSTRIAL MAGISTRATE—Claims before—

2019 WAIRC 00840

WESTERN AUSTRALIAN INDUSTRIAL MAGISTRATES COURT

CITATION	**:**	2019 WAIRC 00840
CORAM	**:**	INDUSTRIAL MAGISTRATE D. SCADDAN
HEARD	**:**	THURSDAY, 31 OCTOBER 2019
DELIVERED	**:**	THURSDAY, 28 NOVEMBER 2019
FILE NO.	**:**	M 76 OF 2018
BETWEEN	**:**	DR OLUMUYIWA SUNDAY SORUNMU

CLAIMANT

AND

DIRECTOR-GENERAL OF HEALTH

FIRST RESPONDENT

NORTH METROPOLITAN HEALTH SERVICE BOARD

SECOND RESPONDENT

EAST METROPOLITAN HEALTH SERVICE BOARD

THRID RESPONDENT

CatchWords	**:**	INDUSTRIAL LAW (WA) – Application to dismiss part of a claim – Construction of industrial agreement – Alleged contravention of clause of *Department of Health Medical Practitioners (Metropolitan Health Services) AMA Industrial Agreement 2013* for non-payment of a Contract Completion Payment – Meaning of practitioner in clause 20(5) of the Agreement – Whether payment requires a medical practitioner to be registered under the *Health Practitioner Regulation National Law (WA) Act 2010* at the time of expiry of fixed term contract – Purpose for which the Contract Completion Payment is paid
Legislation	**:**	*Industrial Relations Act 1979* (WA)
		Magistrates Court (Civil Proceedings) Act 2004 (WA)
		Hospitals and Health Services Act 1927 (WA)
		Industrial Magistrates Courts (General Jurisdiction) Regulations 2005 (WA)
		Health Practitioner Regulation National Law (WA) Act 2010 (WA)
		Minimum Conditions of Employment Act 1993 (WA)
Instrument	**:**	*Department of Health Medical Practitioners (Metropolitan Health Services) AMA Industrial Agreement 2013*
		Medical Practitioners (Metropolitan Health Services) AMA Industrial Agreement 2002
Case(s) referred to in reasons	**:**	***General Steel Industries Inc v Commissioner of Railways NSW***
		(1964) 112 CLR 125
		Dalgety Australia Ltd v Rubin; unreported; Full Crt WA Supreme Court 24 August 1984 Lib No 5485
		Amcor Ltd and Ors v Barnes and Ors [2012] VSC 94
		Garbett v Midland Brick Company Pty Ltd [2003] WASCA 36
		Gromark Packaging v Federated Miscellaneous Workers Union of Australia (WA Branch) (1992) 46 IR 98
		Bunnett v Henderson's Federal Spring Works Pty Ltd (1989) 31 AILR 356
		Sammut v AVM Holdings Pty Ltd [No2] [2012] WASC 27
		Fedec -v- The Minister for Corrective Services [2017] WAIRC 00828
		City of Wanneroo v Australian Municipal, Administrative, Clerical And Services Union [2006] FCA 813
		Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Excelior Pty Ltd [2013] FCA 638
Result	**:**	Application granted
Representation:		
Claimant	**:**	Mr T. Hoffman (agent)
Respondents	**:**	Mr R. Andretich (of counsel) as instructed by the State Solicitor's Office

REASONS FOR DECISION

1 On 17 July 2019, the North Metropolitan Health Service Board (NMHSB) lodged an application to dismiss part of a claim by Dr Olumuyiwa Sunday Sorunmu (the claimant) as it relates to the payment of a Contractual Completion Payment.

2 The NMHSB contends that at the time of the expiry of the claimant's last contract of employment the claimant was not a medical practitioner, as defined in the *Department of Health Medical Practitioners (Metropolitan Health Services) AMA Industrial Agreement 2013* (PSAAG 4 of 2013) (the Agreement), and consequently is not entitled to the payment (the Application).

3 The NMHSB relies upon an affidavit affirmed by Mark Golesworthy, Acting Director, Industrial Relations NMHSB, on 15 July 2019 in support of the Application. The claimant opposes the Application and lodged a signed statement by him dated 27 September 2019.

Background

4 On 16 May 2018, the claimant lodged a claim against the Director-General of Health claiming the Director-General of Health failed to comply with an award, agreement, instrument or order pursuant to the *Industrial Relations Act 1979* (WA) (the IR Act). While not directly stated, I infer the claim was made pursuant to s 83 of the IR Act where the claim stated the Director-General of Health contravened or failed to comply with:

(a) cl 20(5) of the Agreement in failing to pay him a Contract Completion Payment upon the expiration of his contract of employment on 30 June 2016; and

(b) cl 37(b) of the Agreement in failing to pay him long service leave entitlements.

5 The claimant later applied, and was granted leave, to join the NMHSB and East Metropolitan Health Service Board (EMHSB) as respondents to the claim.

6 The claimant ultimately seeks the payment of an amount, approximately $131,000.00, he says is owed to him because of the alleged contraventions or failures to comply with the Agreement.

7 The claimant was employed by the Western Australian Metropolitan Health Service as a medical practitioner in accordance with a series of consecutive fixed term contracts commencing on or around 22 May 2003 with the last fixed term contract expiring on 30 June 2016.

8 The claimant's last fixed term contract of employment from 2013 to 30 June 2016 was also subject to the terms of the Agreement.

9 On 20 November 2015, the claimant's registration with the Australian Health Practitioner Regulation Agency (AHPRA) expired and the claimant was unsuccessful in applying for registration in an area of limited need[1]. While the claimant was unregistered with AHPRA he did not work and the NMHSB allowed the claimant to take accrued leave and then 'leave without pay' until the fixed term contract expired on 30 June 2016.

10 There is no dispute between the parties that the Agreement, and previous iterations of the Agreement, applied to the claimant's employment or that the claimant was properly categorised under the Agreement as a Senior Practitioner[2] (as opposed to a Doctor in Training or a practitioner with private practice rights).

11 The NMHSB appears to have assumed responsibility for the claimant's employment where the Agreement applies to all medical practitioners employed by the Minister of Health as the Board of the hospitals that formerly comprised the Metropolitan Health Service under s 7 of the *Hospitals and Health Services Act 1927* (WA). A fixed term contract from 22 May 2008 to 21 May 2013 relied upon by the claimant provides that NMHSB is the responsible employer with the claimant's work location specified as Inner City Mental Health[3].

12 The EMHSB denies the claimant was ever employed by it.

13 Notwithstanding, from the claimant's perspective, the issue of who his employer was on 30 June 2016 may be unresolved, the outcome of the Application will likely apply to all named respondents.

14 While not expressed in the Application, I infer the Application is made pursuant to reg 7(1)(h) of the *Industrial Magistrates Courts (General Jurisdiction) Regulations 2005* (WA) (the IMC Regulations) where the Industrial Magistrates Court of Western Australia (IMC) has the power to make an order that an issue not be tried.

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

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

17 Schedule III to this decision contains relevant extracts of the Agreement.

Issues for Determination

18 The following issues require determination:

- the meaning of 'practitioner' in cl 20(5) of the Agreement;
- was the claimant registered as a medical practitioner within the meaning of the *Health Practitioner Regulation National Law (WA) Act 2010* (National Law) and consequently within the meaning of cl 20(5) of the Agreement;
- the purpose of a payment of a Contract Completion Payment in cl 20(5) of the Agreement; and
- whether the claimant was required to be registered at the time of the expiry of the fixed term contract of employment for the purposes of receiving a Contract Completion Payment.

The NMHSB's Contentions

19 The NMHSB contends that:

- the claimant was not registered with the AHPRA from February 2016 (in fact the claimant's registration expired on 20 November 2015);
- registration with AHPRA is an inherent requirement of the claimant's role as a medical practitioner and the claimant was required to be registered, and to maintain his registration, under the National Law as a condition of his employment;
- where the definition of practitioner under the Agreement requires a person to be registered under the National Law, when the claimant's fixed term contract of employment expired on 30 June 2016 he was not a medical practitioner and, therefore, was not entitled to a Contract Completion Payment; and
- the purpose of a Contract Completion Payment is not to provide a payment to someone who is ineligible to do the job.

Claimant's Contentions

20 The claimant contends that:

- there is no term or condition in any contract of employment requiring the claimant to be registered with AHPRA (or any of its previous regulatory bodies such as the Medical Board of Western Australia);
- the National Law does not define 'registered' or which register is applicable to the claimant and the claimant's removal from a register was an administrative error; and
- the claimant remains eligible for restoration to a register but, in any event, he remained registered as a medical practitioner where he retains a profession number, he is an applicant for registration and he remains eligible for restoration to the register, subject to satisfying certain conditions on AHPRA's Certificate of Registration Status.

21 In his submissions, the claimant also refers to issues of illegality of contract and estoppel. With respect to the claimant, these issues have limited, if any, application where the claimant:

- provides no application of illegality of contract to the Application or his claim but merely poses a question concerning the mode of performance under the National Law. In any event, the claimant appears to accept that the fixed term contract was not illegal; and
- says the NMHSB is estopped from making the Application because of alleged representations of future conduct gives rise to a promissory estoppel. Conceptually the claimant appears to raise two points under the broad heading of estoppel, none of which seem to assist his case:
  i. from March 2003, the Department of Health advised the claimant that he was permanently employed and relied upon this statement to apply for permanent residency in Australia and move from Victoria to take up a position in Western Australia. If the claimant now claims he is a permanent, rather than contracted, employee with NMHSB, then he is ineligible for a Contract Completion Payment where the payment only applies to practitioners on a fixed term contract; and
  ii. the NMHSB understood that until the claimant completed his specialist training with the Royal Australian and New Zealand College of Psychiatrists (RANZCP), the only way he could remain on the 'public register' was to be offered future employment and maintain the RANZCP training. The claimant was not in a position to complete the requisite exams due to his eye condition and that he had good reason to delay taking the exams, but he would inevitably meet the requirements for registration (at some unspecified time in the future). Further, the NMHSB knew that he needed to renew his contracts of employment so as to maintain affiliation with the RANZCP. Whatever might be the claimant's position with respect to some moral obligation the NMHSB may have with respect to any future contracts of employment, the claimant's claim relates to alleged contraventions by the Director-General of Health and others. This simply does not invoke any moral or other legal obligation for consideration by the IMC.

Jurisdiction of the IMC

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

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

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

25 Relevant to the Application, the claimant's claim refers to a failure to comply with cl 20(5) of the Agreement.

26 One of the orders sought by the claimant is the payment of an amount of money he says he was entitled to be paid under the Agreement, namely the Contract Completion Payment. Any such order can only be made by the IMC under s 83A(1) of the IR Act in proceedings under s 83 of the IR Act where the employee has not been paid an amount to which they are entitled under the relevant instrument.

Principles relevant to determining whether to dismiss a claim or part of a claim without a hearing

27 While the Application is not strictly a strike out application, the NMHSB is, in effect, seeking to strike out, or alternatively dismiss without trial, that part of the claimant's claim relative to the Contract Completion Payment on the basis that the claimant was never, nor could he have been, entitled to the payment.

28 In either case a court should proceed with caution before coming to the conclusion that a party at an interlocutory stage should be prevented from proceeding with their claim[4]. While the court may determine a difficult question of law on such an application, it would normally be appropriate for difficult questions of law to be left for trial. In terms of facts, the question is whether it would be open to the party (on its case) to prove facts at trial which would constitute its claim. It is only in cases in which it can be seen from the outset that, however the facts are found, there is no basis for the legal conclusion contended by the party that a pleading should be struck out (or in this case that part of the claim be dismissed without trial)[5].

29 One of the key facts of the claimant's claim is not in dispute, namely that the claimant was not registered with AHPRA on 30 June 2016. What is in the dispute, at least from the claimant's perspective, is what his status of being unregistered means in the context of a Contract Completion Payment.

The Agreement – cl 20(5)

30 The Agreement applies to all medical practitioners employed by the Director-General of Health (as a delegate of the Minister for Health) or any other delegated authority. That is, all applicable medical practitioners employed in the public health system in Western Australia.

31 Part 3 of the Agreement contains the terms of the contract of service for Senior Practitioners, including cl 20(5) of the Agreement. Relevantly, the appointment of Senior Practitioners is by five-year contracts of employment, unless by contrary written agreement, and there is no automatic right of reappointment upon expiry of a contract: cl 20(1)(a) and cl 20(4) of the Agreement.

32 Subject to cl 20(2) of the Agreement[6], any contract of employment, including a fixed term contract, may be terminated by either party giving not less than three months' notice, although the employer can pay out the notice period or the employee can forfeit the commensurate salary or the parties can agree a lesser notice period: cl 20(7) and cl 20(8) of the Agreement.

33 Other than the possible payment of a Contract Completion Payment, no other termination, redundancy or severance pay is contemplated or shall be made unless provided for in the Agreement. Relevantly, the only other payment contemplated is contained in cl 20(7): cl 20(5) of the Agreement.

34 The Agreement also contemplates the existence of Senior Practitioners who have permanent tenure with the Director-General of Health (presumably where the practitioner has long standing employment prior to the Agreement and previous iterations of the Agreement).

35 Similar terms in cl 9 of Part 2 to the Agreement apply to Doctors in Training[7]. Notably, cl 9(3)(c) of the Agreement contains a similar Contract Completion Payment to cl 20(5) of the Agreement but applicable to Supervised Medical Officers[8]. Again, similar to Senior Practitioners, no other termination, redundancy or severance payment shall be made except as provided in the Agreement.

36 However, unlike for Senior Practitioners, a tenured Supervised Medical Officer who converts to a fixed term contract and at the end of the first fixed term contract is unsuccessful in seeking reappointment, the person is to be paid pro rata long service leave after five years of continuous service in addition to a Contract Completion Payment.

37 Termination payments relevant to Supervised Medical Officers is provided for in cl 9(4) of the Agreement (which provides for staged termination payments).

38 Clause 8 of the Agreement contains the following relevant definitions:

> *"Medical Practitioner"* means a medical practitioner as defined under the Health Practitioner Regulation National Law (WA) Act 2010 as amended from time to time.
>
> *"Practitioner"* means a medical practitioner employed under this Agreement.

39 The National Law defines *medical practitioner* as '*a person who is registered under this Law in the medical profession*'. The National Law and the Agreement do not define *registered*.

40 Clause 20(5) of the Agreement states:

> *A practitioner who, upon expiry of a fixed term contract, is unsuccessful in seeking a new contract shall be paid a Contract Completion Payment equal to 10% of their final base salary, for each year of continuous service, or part thereof paid on a proportionate basis, calculated on completed months' of service up to a maximum of 5 years. No other termination, redundancy or severance payment shall be made except as provided for in this Agreement.*

The National Law – registration

41 In or around July 2010, each State and Territory enacted Health Practitioner Regulation National Law regulating 16 health professions by nationally consistent legislation under the National Registration and Accreditation Scheme. The National Law is Western Australia's statutory regime (consistent with similar legislation in each other State and Territory) and provides for a National Registration and Accreditation Scheme for health practitioners which is contained in the Schedule to the National Law.

42 One of the objectives of the National Law is to '*provide for the protection of the public by ensuring that only health practitioners who are suitably trained and qualified to practise in a competent and ethical manner are registered*': s 3(2)(a) of Part 1 of the Schedule to the National Law.

43 The National Law contains the following relevant definitions:

> ***health practitioner*** means an individual who practises a health profession.
>
> ***health profession*** means the following professions, and includes a recognised specialty in any of the following professions – (relevantly) (e) medical.
>
> ***medical practitioner*** means a person who is registered under this Law in the medical profession.
>
> ***National Register*** means the Register kept by a National Board under s 222.
>
> ***registered health practitioner*** means an individual who –
>
> (a) is registered under this Law to practise a health profession, other than as a student; or
>
> (b) holds non-practicing registration under this Law in a health profession.
>
> ***registration status***, in relation to an applicant for registration, includes – (relevantly) (c) any decisions made by a registration authority, a tribunal, a court or another entity having functions relating to the regulation of health practitioners about the applicant's practice of the profession, whether before or after the commencement of this Law.

44 Part 7 of the Schedule to the National Law provides for the registration of health practitioners. Broadly speaking there are several categories of registration each having specific criteria for eligibility or qualification in that category:

- General registration – s 52 and s 53;
- Specialist registration – s 57 and s 58;
- Provisional registration – s 62;
- Limited registration – s 65, s 67, s 68, and s 69; and
- Non-practising registration – s 73 and s 75.

45 Save for non-practising registration, the other categories of registration enable a health practitioner to lawfully practise in the relevant health profession in accordance with the terms of the category of registration, either on condition or not on condition.

46 A person is eligible for non-practising registration in a health profession if: (a) the person holds or held general registration; (b) holds or held specialist registration; or (c) held registration under prior corresponding legislation in either of those categories; and the person is suitable to hold non-practising registration: s 73 of the National Law. However, a registered health practitioner who holds non-practising registration must not practise in the profession: s 75 of the National Law.

47 An individual may apply for registration in the health profession and the application can be investigated by a National Board before a decision on the application is made: s 77, s 80 and s 82 of the National Law.

48 The registration period for each category of registration is 12 months where upon a *registered health practitioner* may apply to the National Board for renewal of the registration: s 107 of the National Law. Provided the health practitioner applies in compliance with s 107 of the National Law, the registration continues until the National Board issues a new certificate or refuses to renew the registration: s 108 of the National Law.

49 Each health profession is required to keep a public national and specialist register to include the names of all health practitioners currently registered in the profession and the names of all health practitioners whose registration has been cancelled by an adjudication body and the names of all person's subject to a prohibition order: s 222 and s 223 of the National Law.

50 Section 225 of the National Law provides that each of the registers must include certain information, including the date of expiry of the practitioner's registration.

51 Thus, the whole tenor of registration under the National Law is directed to ensuring that only those health practitioners, including medical practitioners, who are registered to practice in health professions are entitled to lawfully practice in those areas.

52 Eligibility for a category of registration is not the same as being registered under the National Law, where, eligibility and/or qualifications set out the criteria against which an application for registration is assessed. By way of example, a person will not be eligible for general registration unless they are, amongst other things, qualified for general registration: s 52 and s 53 of the National Law. Thereafter, if an application for general registration is granted, it is for a period of 12 months: s 56 of the National Law.

53 Nothing in the National Law (save s 107) gives, or is intended to give, automatic qualification for registration merely because notionally a person may meet (on their view) the criteria set out in the National Law. The registration process depends on a person making an application in the relevant area of registration and being assessed against relevant criteria before their application is granted and then reapplying every 12 months thereafter.

54 It is only after an application for registration has been granted and the person reapplies within the requisite time that the person is a *registered health practitioner* under the National Law. The extent of their practice is dictated by: (1) the type of registration granted; (2) any conditions on the registration; (3) in relation to non-practicing registration, the person cannot practice as a health professional at all.

Was the claimant registered at the time of the expiry of his contract of employment?

55 On 20 November 2015, the claimant's limited registration as a medical practitioner expired[9]. The expiration of the claimant's limited registration followed his application and approval for limited registration as a medical practitioner in an area of need on 20 November 2014, subject to conditions including annual renewal.

56 According to the claimant, between 18 December 2015 and 1 April 2016 he applied unsuccessfully on three occasions for renewal or reinstatement of his 'public registration by AHPRA'[10].

57 On 27 May 2016, the claimant was advised by AHPRA that the Western Australian Registration Committee of the Medical Board of Australia proposed to refuse limited registration as a medical practitioner[11].

58 According to the claimant his response to AHPRA was that he was in discussions with the RANZCP Specialist International Medical Graduate Education pathway and had made an application to the RANZCP for continued training, which he says would have resulted in AHPRA restoring his name to the 'public register'[12].

59 The claimant says that by 28 September 2016 he had progressed the RANZCP application to the stage where he required a Certificate of Good Standing from AHPRA and accepted job offer in Australia or New Zealand in order to complete the application[13].

60 On 19 October 2016, AHPRA provided the claimant with a Certificate of Registration Status noting the claimant was unregistered and his registration had expired on 20 November 2015[14].

61 The claimant's argument is that because he was not 'struck off' any register and he was eligible for restoration to the 'public register' provided he met certain criteria, he remained registered for the purposes of the National Law and payment of the Contract Completion Payment. That is, until such time as he was 'properly removed' from the register, he was still registered or on the register.

62 I do not accept the claimant's characterisation of his registration status. The claimant's registration under s 65 of the National Law expired on 20 November 2015. On the claimant's evidence, the claimant did not apply for the renewal of his registration in compliance with s 107 of the National Law and, therefore, there was no ongoing registration pending renewal.

63 Thereafter, the claimant re-applied for limited registration but was unsuccessful in being granted limited registration or any other registration applicable under the National Law. Whether he was eligible or retained an AHPRA profession number for possible future registration is not to the point.

64 Simply, on 20 November 2015 the claimant ceased being registered in any of the categories of registration in Part 7 of the National Law. That he may have been, and still might be, eligible for future registration did not alter the fact that from 20 November 2015 he was no longer registered as a *registered health practitioner* in the medical profession.

65 As the claimant was no longer registered as a *registered health practitioner* in the medical profession, he was not entitled to practice in that profession. This was the case from 20 November 2015 and remained the case up to and from 30 June 2016.

66 The Certificate of Registration Status from AHPRA dated 16 October 2016[15] merely confirms the claimant is unregistered with his registration having expired on 20 November 2015 and that there are no outstanding disciplinary proceedings against him. This document in no way grants registration and the fact that a professional number is recorded on the document is a reference number for the claimant. One reasonably assumes that should the claimant wish to *apply* for registration in the future, this document may aid him in doing so.

67 Further, there is nothing that suggests that being unregistered under the National Law occurs when a person is 'struck off' and in the meantime they remain on a public register able to practice as a *registered health practitioner*.

68 There is likely to be any number of people who, for whatever reason (death, illness, retirement), do not renew their registration in a health profession. None of these reasons necessarily results in the person being 'struck off', but without the granting of their application for, or renewal of, registration they remain unregistered for the purposes of the National Law.

What is the purpose of the Contract Completion Payment?

69 NMHSB contends that the payment of a Contract Completion Payment in cl 20(5) of the Agreement is in contemplation of a medical practitioner being *able* to enter into a contract on expiry of a fixed term contract, but no future fixed term contract or work is available for the practitioner.

70 NMHSB further contends that the intention of cl 20(5) of the Agreement is not to provide a payment to someone who is ineligible to do the job. The payment is made to someone who is willing, able and eligible to do the job but cannot obtain future work in the public health service under the Agreement.

71 On the NMHSB contentions, a Contract Completion Payment would not be made to a practitioner who was imprisoned for an offence and was refused a future fixed term contract if they requested it. Similarly, a Contract Completion Payment would not be made if a practitioner was physically incapable (illness or accident) or retiring from the profession. However, the NMHSB also notes that the reasons why a practitioner may be unsuccessful are not the core of its submission, which hinges on the meaning of *practitioner* under the Agreement and that a practitioner must be registered at the time of the expiry of the fixed term contract.

72 The NMHSB contends that the purpose of cl 20(5) of the Agreement is to provide compensation to medical practitioners registered under the National Law who are genuinely seeking to be re-employed within the Department of Health at the end of a fixed term contract but who are unsuccessful in obtaining a new fixed term contract.

73 The claimant says in response that ineligibility (for whatever reason) is irrelevant to the payment of a Contract Completion Payment. The claimant contends that the payment recognises prior good service within the Department of Health and that a practitioner who is ineligible can still obtain the payment.

74 The claimant further contends that poor drafting, or a failure to identify situations where a practitioner may not be eligible under cl 20(5) of the Agreement, should not exclude the claimant from obtaining a Contract Completion Payment in the circumstances.

75 Save for the reference of termination payments in cl 20(7) and cl 9(4) of the Agreement, there is no other redundancy or severance payment contemplated in the Agreement.

76 The common law concept of redundancy or severance was discussed in ***Amcor Ltd and Ors v Barnes and Ors*** [2012] VSC 94, at [371] where Vickery J distilled the concept to five propositions, which in summary include (citations excluded):

(a) the employee's job ceases to exist, for whatever reason, because the employer no longer desires to have it performed by anyone;

(b) this can occur when the role no longer exists or the original role no longer exists;

(c) redundancy is not limited to just these circumstances;

(d) a redundancy may also occur upon redistribution of job functions or where the employee has no duties to discharge; and

(e) redundancy will not arise where the termination of employment is carried out solely because of any personal act or default of the employee.

77 Similarly, in ***Garbett v Midland Brick Company Pty Ltd*** [2003] WASCA 36, Heenan J (with whom Park J agreed), at [74], discussed the concept of 'redundancy'[16] as

> [t]*he need to terminate a contract of employment…because of some change in the nature of the employer's business, or a shift of business location, or some restructure genuinely considered by the employer to be necessary for the improvement or refinement of its business operations or for some reason quite independent of the performance of the individual employee or employees*.

78 Further, ***Garbett*** at [76] and [87], His Honour also summarised circumstances in which a redundancy will occur, including: when a workforce is reduced because there is labour in excess of that reasonably required to perform the work which is the employer's business[17]; the employer no longer requires the work to be performed by anyone[18]; and where an employer has decided that the job will not be done by any person[19].

79 Having regard to the context in which the payment is made, when regard is had to the whole of the Agreement, the payment of a Contract Completion Payment appears likely to compensate a practitioner in a manner similar to that contemplated by a redundancy or severance payment (noting the employment relationship is borne from a fixed term and not a permanent contract of employment).

80 When considered in this context, the intention or purpose of the payment of a Contract Completion Payment is arguably not to compensate a practitioner merely because a fixed term contract comes to an end without any intention on the practitioner's part to pursue further employment in the public health system. The payment is not a windfall, nor does it compensate a practitioner because they are unable, or not eligible, to engage in future employment in the public health system, nor does it operate to reward past service in the public health system.

81 In my view, the payment of a Contract Completion Payment is to compensate a practitioner who genuinely wants to continue to, and can, be employed in the public health service but the service is unable to provide future employment. This purpose is further supported by the words in cl 20(5) of the Agreement '[a] *practitioner who….is unsuccessful <u>in seeking</u> a new contract*' [my emphasis]. The words 'in seeking' strongly suggests that the practitioner is the party responsible for obtaining or attempting to obtain future employment.

82 This purpose is further supported where there is no automatic right of reappointment upon expiry of a fixed term contract but where a contract expires or is otherwise terminated, monies otherwise due are paid.

<u>Is registration as a medical practitioner a condition to payment of the Contract Completion Payment?</u>

83 If the purpose of the payment of a Contract Completion Payment is accepted, then there are two reasons why a practitioner is required to be registered at the time of seeking a new fixed term contract:

(1) the definition of 'practitioner' in the Agreement when read with the National Law means '*a medical practitioner registered under the Health Practitioner Regulation National Law (WA) Act 2010'*. There is no ambiguity in the meaning and, thus, at the time of expiry of a fixed term contract the practitioner must be registered under the National Law; and

(2) this definition is consistent with the overall purpose of the Agreement, which is to outline the employment conditions of various medical practitioners in the public health system. An unregistered medical practitioner cannot lawfully practice in the medical profession and, therefore, is unable, and ineligible, to work in the public health system.

84 Whatever might have been the practitioner's situation in the past, at the time of seeking a new fixed term contract of employment with the Department of Health, if the practitioner is unable to work as a medical practitioner because they are unregistered under the National Law, the practitioner cannot do the very thing the Agreement contemplates them doing, which is working as a medical practitioner in the public health system. It cannot have been contemplated that cl 20(5) of the Agreement be intended to compensate unregistered practitioners for being unable or ineligible to do the very work the Agreement is directed to providing that they do.

<u>The claimant's contracts of employment</u>

85 As I understand the claimant's contention, he says that as there is no requirement in his contract of employment requiring him to be registered with AHPRA (or its previous regulatory bodies), he is not required to be registered as a medical practitioner to receive a Contract Completion Payment under cl 20(5) of the Agreement.

86 The claimant refers to two available written contracts of employment: (1) contract of employment dated 23 January 2003 and signed on 25 May 2003[20]; and (2) contract of employment dated 20 May 2008[21].

87 In respect of the five-year contract of employment dated 23 January 2003, on page two, the contract specifically states under the heading of 'Registration with the Medical Board of Western Australia':

> *It is a requirement of the appointment that the appointee is registered as a Medical Practitioner with the Medical Board of Western Australia, and that registration is maintained in respect of primary and specialist medical qualifications.*

88 This contract also refers to the terms of the *Medical Practitioners (Metropolitan Health Services) AMA Industrial Agreement 2002* applying to the claimant's appointment.

89 Therefore, in relation to five-year contract dated 23 January 2003, the claimant was required to be registered to take up the appointment.

90 In respect of the five-year contact of employment dated 20 May 2008, the appointment was governed by the 'AMA – Medical Practitioners Agreement'. This document does not contain an express reference to a requirement that the claimant be registered with the relevant regulatory body. However, this does not assist the claimant where:

- the claimant agrees the Agreement applies to his employment from 2013 to 2016 and the definition of *practitioner* requires the medical practitioner to be registered under the National Law;

- the claimant claims the Director-General of Health and others, including the NMHSB, have contravened the Agreement and, accordingly, is seeking payment of a sum of money arising from the alleged contravention. The claim is not for denial of a contractual benefit, which is beyond the IMC's jurisdiction under s 83 of the IR Act; and
- neither of the contract documents referred to by the claimant otherwise make provision for a Contract Completion Payment, which is only available under the terms of the Agreement.

91 Therefore, having regard to the claimant's claim and the Application, the contracts of employment referred to by the claimant do not assist in determining whether the claimant is entitled to a Contract Completion Payment pursuant to cl 20(5) of the Agreement.

Determination

92 Having come to the conclusion that:

- the claimant was not registered as a medical practitioner under the National Law when the fixed term contract expired on 30 June 2016;
- the definition of practitioner in the Agreement required the claimant to be registered as a medical practitioner under the National Law in order to work under the terms of the Agreement;
- the definition of practitioner in cl 20(5) of the Agreement required the claimant to be registered under the National Law at the time of seeking a new fixed term contract of employment; and
- the purpose of a payment of the Contract Completion Payment is to compensate practitioners who are willing and able to undertake future work in the public health service, but the Department of Health are unable to provide future contracts of employment.

I also conclude that as an unregistered practitioner at the time of the expiry of the last fixed term contract, the claimant is not eligible for a Contract Completion Payment and that there is no basis for the legal conclusion otherwise contended by the claimant that there has been a contravention of cl 20(5) of the Agreement by the NMHSB.

93 Therefore, the claimant's claim as it relates to the alleged contravention of cl 20(5) of the Agreement in failing to pay a Contract Completion Payment is dismissed.

Outcome

94 The NMHSB's Application is and be granted as follows:

(a) Pursuant to reg 7(1)(h) of the of the IMC Regulations, the claimant's claim for the payment of a Contract Completion Payment be dismissed.

D SCADDAN

INDUSTRIAL MAGISTRATE

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[1] Attachment 2014-11-20 and 2016-05-27 to the claimant's statement dated 27 September 2019.

[2] Under the Agreement, a Senior Practitioner means a medical practitioner who does not have a recognised specialist qualification but practices without clinical supervision exclusively in a specialist area recognised by the AMC or such other area recognised by the Director-General of Health as being a specialist area.

[3] Attachment 2008-05-20 to the claimant's statement dated 27 September 2019.

[4] ***General Steel Industries Inc v Commissioner of Railways NSW*** (1964) 112 CLR 125.

[5] ***Dalgety Australia Ltd v Rubin***; unreported; Full Crt WA Supreme Court 24 August 1984 Lib No 5485.

[6] In essence, termination with notice by the employer on grounds of unsatisfactory service, misconduct or redundancy.

[7] Defined in cl 8 of the Agreement to mean a practitioner who is appointed as an Intern, Resident Medical Officer, Registrar, Supervised Medical Officer, Trainee Medical Administrator, Trainee Public Health Physician, Trainee Psychiatrist or Senior Registrar. Notably, some of these position are further defined in cl 8.

[8] Defined in cl 8 of the Agreement to mean a registered non-specialist medical practitioner requiring clinical supervision by a Consultant/Specialist or Senior Medical Practitioner.

[9] Attachment 2016-10-20(C) to the claimant's statement dated 27 September 2019 (and referred to at [22] of the claimant's statement).

[10] The claimant's statement at [28].

[11] Attachment 206-05-27 to the claimant's statement.

[12] The claimant's statement at [31].

[13] The claimant's statement at [34] and attachment 2016-09-28.

[14] Attachment 2016-10-20(C) to the claimant's statement.

[15] Attachment 2016-10-20(C) to the claimant's statement.

[16] In the context of whether, in the alternative, the termination of an employee was 'harsh, oppressive or unfair'.

[17] ***Gromark Packaging v Federated Miscellaneous Workers Union of Australia (WA Branch)*** (1992) 46 IR 98.

[18] ***Bunnett v Henderson's Federal Spring Works Pty Ltd*** (1989) 31 AILR 356.

[19] Meaning of 'redundant' in s 40(1) the *Minimum Condition of Employment Act 1993* – noting the definition is more narrow.

[20] Attachment 2003-05-26 to the claimant's statement dated 26 September 2019.

[21] Attachment 2008-05-20 to the claimant's statement dated 26 September 2019.

Schedule I: Jurisdiction of the Industrial Magistrates Court of Western Australia (IMC)

[1] The IMC has the jurisdiction conferred by the IR Act and other legislation. Section 83 and s 83A of the IR Act confer jurisdiction on the court to make orders for the enforcement of a provision of an industrial agreement where a person has contravened or failed to comply with the agreement. If the contravention or failure to comply is proved, the IMC may issue a caution or impose a penalty and make any other order, including an interim order, necessary for the purpose of preventing any further contravention. The IMC must order the payment of any unpaid entitlements due under an industrial agreement.

[2] The powers, practice and procedure of the IMC are the same as a case under the *Magistrates Court (Civil Proceedings) Act 2004* (WA). The onus of proving a claim is on the claimant and the standard of proof required to discharge this onus is proof 'on the balance of probabilities'. The IMC is not bound by the rules of evidence and may inform itself on any matter and in any manner as it thinks fit. In ***Sammut v AVM Holdings Pty Ltd [No2]*** [2012] WASC 27 [40] - [47], Commissioner Sleight examined a similarly worded provision regulating cases in the State Administrative Tribunal of Western Australia, noting:

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

Schedule II: Relevant Principles of Construction

[1] This case involves construing an industrial agreement and statutes. Similar principles apply to both. The relevant principles to be applied when interpreting an industrial instrument are set out by the Full Bench of the Western Australian Industrial Relations Commission in ***Fedec -v- The Minister for Corrective Services*** [2017] WAIRC 00828 [21] - [23]. In summary (omitting citations), the Full Bench stated:

- 'The general principles that apply to the construction of contracts and other instruments also apply to the construction of an industrial agreement.'
- 'The primary duty of the court in construing an instrument is to endeavour to discover the intention of the parties as embodied in the words they have used in the instrument. It is the objectively ascertained intention of the parties, as it is expressed in the instrument, that matters; not the parties' subjective intentions. The meaning of the terms of an instrument is to be determined by what a reasonable person would have understood the terms to mean;'
- 'The objectively ascertained purpose and objective of the transaction that is the subject of a commercial instrument may be taken into account in construing that instrument. This may invite attention to the genesis of the transaction, its background and context. The apparent purpose or object of the relevant transaction can be inferred from the express and implied terms of the instrument, and from any admissible evidence of surrounding circumstances';
- 'An instrument should be construed so as to avoid it making commercial nonsense or giving rise to commercial inconvenience. However, it must be borne in mind that business common sense may be a topic on which minds may differ';
- 'An instrument should be construed as a whole. A construction that makes the various parts of an instrument harmonious is preferable. If possible, each part of an instrument should be construed so as to have some operation'; and
- 'Industrial agreements are usually not drafted with careful attention to form by persons who are experienced in drafting documents that have legal effect.'

To the above list I would add:

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

Schedule III: *Department of Health Medical Practitioners (Metropolitan Health Services) AMA Industrial Agreement 2013* (PSAAG 4 of 2013) (the Agreement) – relevant clauses

3. APPLICATION

(1) The parties to this Agreement are the "Minister for Health incorporated as the Board of the hospitals formerly comprised in the Metropolitan Health Service Board, under s7 of the Hospitals and Health Services Act 1927 (WA)" ("the employer") and the "Australian Medical Association (Western Australia) Incorporated" ("the Association").

(2) This Agreement shall extend to and bind all medical practitioners employed by the employer except those employed as clinical academics pursuant to the Clinical Academics AMA Industrial Agreement 2011 or any industrial agreement that replaces the Clinical Academics AMA Industrial Agreement 2011.

(3) The estimated number of practitioners bound by this Agreement upon registration is 4373.

(4) While this Agreement is in operation, it shall override all provisions of the:

(a) WA Public Hospitals (Senior Medical Practitioners) Award 2011

(b) WA Public Hospitals (Doctors in Training) Award 2011

(5) This Agreement cancels and replaces the Department of Health Medical Practitioners (Metropolitan Health Services) AMA Industrial Agreement 2011.

(6)

(a) The Director General of Health is the delegate of the "Minister for Health incorporated as the Board of the hospitals formerly comprised in the Metropolitan Health Service Board, under s7 of the Hospitals and Health Services Act 1927 (WA)". In this capacity the Director General acts as the "employer" for the purposes of this Agreement.

(b) If the Director General of Health onward delegates any capacity to act as the "employer" to a Chief Executive of a Health Service or to any other office holder the Director General of Health shall inform the Association in writing of the terms of the delegation. An office holder who acts in accordance with the terms of a delegation from the Director General of Health shall be deemed to have acted as the "employer" for the purposes of this Agreement.

4. NO FURTHER CLAIMS

The parties undertake that for the period of this Agreement they shall not, other than as agreed or as provided in this Agreement, pursue any extra claims with respect to salaries and conditions to apply within the period of this Agreement to practitioners who are bound by it.

8. DEFINITIONS

"Board of Reference" means a panel consisting of a person nominated by the Employer, a person nominated by the Association and an independent Chairperson nominated by the Western Australian Industrial Relations Commission.

"Consultant / Specialist" means a medical practitioner who holds the appropriate higher qualification of a University or College, recognised by the Australian Medical Council ("the AMC"), and includes a Fellow of the Australasian Chapter of Addiction Medicine, or, in exceptional circumstances to satisfy areas of unmet need, such other specialist qualification recognised by the Director General of Health and who, unless otherwise approved by the Director General of Health, is employed and practising in the specialty for which he/she is qualified.

"Director of Medical Services" means a medical practitioner who is the principal medical administrator of the hospital and / or health service.

"Doctor in Training" means a practitioner who is appointed as an Intern, Resident Medical Officer, Registrar, Supervised Medical Officer, Trainee Medical Administrator, Trainee Public Health Physician, Trainee Psychiatrist or Senior Registrar.

"General Practitioner" means a medical practitioner engaged in the provision of primary, continuing whole-patient care to individuals, families and their community not being a vocationally registered general practitioner.

"Health Service Medical Practitioner" means a non-specialist medical practitioner who is not in a recognised training program and who is authorised to perform duties without requiring clinical supervision by a consultant / specialist or senior medical practitioner. The classification includes a general practitioner (not vocationally registered).

"Hospital", subject to the context, includes Health Service.

"Intern" means a medical practitioner employed by a teaching hospital during the first year of relevant experience following graduation, prior to full registration by the Medical Board of Australia.

"Medical Administrator" means a practitioner who is appointed as a Director of Medical Services or to a like position the duties of which are primarily associated with the management of hospitals or health services.

"Medical Practitioner" means a medical practitioner as defined under the Health Practitioner Regulation National Law (WA) Act 2010 as amended from time to time.

"Practitioner" means a medical practitioner employed under this Agreement.

"Private Patient" means a patient of a public hospital who is not a public patient. A private patient elects to accept responsibility to pay for medical care and the provision of hospital services. Patients who are covered under Workers' Compensation or Motor Vehicle Insurance Trust legislation or policies are deemed to be private patients for the purpose of this Agreement.

"Public Patient" means a patient in respect of whom a hospital or health service provides comprehensive care, including all necessary medical, nursing and diagnostic services and, if they are available at the hospital or health service, dental and paramedical services, by means of its own staff or by other agreed arrangements.

"Registrar" means a registered medical practitioner employed as a Registrar. A Registrar may be employed with or without the Part 1 Examination of an appropriate specialist qualification recognised by the AMC.

"Resident Medical Officer" means a registered medical practitioner who is employed as a Resident Medical Officer in the second or subsequent years of relevant experience following graduation and who is not performing the duties of a Registrar.

"Senior Medical Practitioner" means a medical practitioner who does not have a recognised specialist qualification but practices without clinical supervision exclusively in a specialist area recognised by the AMC or such other area recognised by the Director General of Health as being a specialist area; and/or who clinically supervises other practitioners; and/or who has significant medical administration duties (50% as guide). Promotion to the position of Senior Medical Practitioner shall be by appointment only.

"Senior Registrar" means a registered medical practitioner who is either appointed as a Senior Registrar, or a registrar who has obtained an appropriate specialist qualification acceptable to the AMC or equivalent recognised by the Director General of Health.

"Supervised Medical Officer" means a registered non-specialist medical practitioner requiring clinical supervision by a Consultant / Specialist or Senior Medical Practitioner.

"Teaching Hospital" means a hospital declared to be a teaching hospital pursuant to the provisions of the University Medical School, Teaching Hospitals Act 1955 as amended.

"Tertiary Hospital" means Royal Perth Hospital, Sir Charles Gairdner Hospital, Fremantle Hospital, King Edward Memorial Hospital and Princess Margaret Hospital for Children.

"Trainee Medical Administrator" means a registered medical practitioner appointed to a recognised Medical Administration training position and enrolled in the Royal Australian College of Medical Administrators training program.

"Trainee Psychiatrist" means a Registrar or Senior Registrar appointed to a training position recognised by the Royal Australian and New Zealand College of Psychiatrists.

"Trainee Public Health Physician" means a registered medical practitioner appointed to the Department of Health's Public Health Medicine training program or an advanced trainee of the Australasian Faculty of Public Health Medicine appointed to a position within public health services.

"Vocationally Registered General Practitioner" means a medical practitioner registered under section 3F of the *Health Insurance Act 1973*.

PART 2 - DOCTORS IN TRAINING

9. CONTRACT OF SERVICE

(1)

(a) Appointments shall be as agreed in writing between the employer and the practitioner and shall normally be for 12 months.

(b) Practitioners participating in accredited training programmes may be offered appointments for the period the training programme would be expected to take.

(2) Practitioners shall be appointed subject to a probationary period of six months. During the period of probation either the practitioner or the employer may terminate the contract of employment by giving four weeks' notice or such lesser period as agreed. The probationary period shall not apply to:

(a) Interns; or

(b) practitioners appointed for a consecutive term; or

(c) casual practitioners

In the case of Interns, a performance review process shall commence no later than six months after engagement to assist the Intern to satisfactorily progress.

(3)

(a) Notwithstanding (1) above, all new appointments as Supervised Medical Officers shall be on 5 year fixed term contracts unless there is written agreement to the contrary between the employer and the practitioner.

(b) There shall be no automatic right of reappointment upon expiry of a contract.

(c) A Supervised Medical Officer who, upon expiry of a fixed term contract, is unsuccessful in seeking a new contract shall be paid a Contract Completion Payment equal to 10% of their final base salary, for each year of continuous service, or part thereof paid on a proportionate basis, calculated on completed months' of service up to a maximum of 5 years.

No other termination, redundancy or severance payment shall be made except as provided for in this Agreement.

(d) A Supervised Medical Officer with tenure shall not be required to convert to a fixed term contract but may agree to do so. If unsuccessful in seeking reappointment at the end of that fixed term contract for reasons other than misconduct, he/she shall be paid pro rata long service leave after 5 years of continuous service in addition to the amount specified in subclause 3 (c).

(e) This subclause shall not apply to Supervised Medical Officers who are in:

(i) a recognised medical college approved training programme, or

(ii) service positions that are not recognised training programmes designed to offer experience and/or training.

(4)

(a) Any contract of employment including a fixed term contract may be terminated by either the employer or the practitioner giving the following notice:

(i) For contracts where the term is 12 months or less - 4 weeks' notice.

(ii) For contracts where the term is more than 12 months but equal to or less than 2 years - 6 weeks' notice.

(iii) For contracts of where the term is more than 2 years but equal to or less than 3 years - 8 weeks' notice.

(iv) For contracts where the term is more than 3 years - 12 weeks' notice.

(b) In lieu of giving of the required notice the employer may pay or the practitioner may forfeit, as the case may be, salary commensurate with the residual period of notice otherwise required. The employer and the practitioner may agree to a lesser period of notice.

(c) Practitioners who have completed their probationary period shall be subject to regular documented performance management and may only be terminated with notice by the Employer on the grounds of unsatisfactory service, misconduct or redundancy.

(5) Notwithstanding the other provisions of this Clause, the employer may, without prior notice, summarily dismiss a practitioner for serious misconduct.

(6) A practitioner who is dismissed may appeal to a Board of Reference if the application is made within one month of the operative date of the dismissal.

(7) A practitioner whose contract of employment expires or is terminated shall be paid all monies due on the payday following the last day of employment.

(8)

(a) Practitioners may by agreement be seconded on the approval of, and after consultation between, the relevant employing authorities, to any Government recognised hospital or agency, provided that satisfactory recognised supervision and training arrangements are in place.

(b) Interns may be seconded in accordance with this subclause as appropriate to the practitioner's training.

(9) Prior to the commencement of each year, practitioners shall be advised of the clinical rotations they shall be required to complete. The employer shall, subject to operational requirements, make every endeavour to accommodate a practitioner's clinical rotation preferences. These rotations shall only be changed after consultation with the practitioner.

(10) Practitioners shall be provided with a job description stating the relevant duties and responsibilities of the position including the general percentage for clinical responsibilities, teaching, non clinical duties and supervision of any staff. "Non clinical duties" means duties not directly associated with the diagnosis or management of patients.

PART 3 - SENIOR PRACTITIONERS

20. CONTRACT OF SERVICE

(1)

(a) All appointments shall be on 5 year contracts unless there is written agreement to the contrary between the employer and practitioner.

(b) To meet short term exigencies, the employer may employ a practitioner on a short term contract of up to six months. In such cases the practitioner shall not be entitled to receive leave benefits (including leave for public holidays), but shall instead be paid a loading of 25% on the base salary. Penalty rates shall be calculated exclusive of the loading.

(2)

(a) Each practitioner shall be appointed for a probationary period of six months. During the probationary period either the employer or the practitioner may give four weeks' notice of termination or resignation of employment or such lesser period as agreed. The probationary period shall not apply if the practitioner is appointed for a consecutive term.

(b) Following completion of the probationary period, practitioners shall be subject to regular performance management and may only be terminated with notice by the employer on the grounds of unsatisfactory service, misconduct or redundancy.

(3) Practitioners shall be provided with a job description stating the relevant duties and responsibilities of the position. As a guide, 80% of a practitioner's duties shall be allocated to clinical duties (including teaching) and 20% of a practitioner's duties shall be allocated for non-clinical duties. "Non-clinical duties" means duties not directly associated with the diagnosis or management of a particular patient. They may include administration, attendance at departmental meetings, formal teaching sessions, audit or other quality assurance activities.

(4) There shall be no automatic right of reappointment upon expiry of a contract.

(5) A practitioner who, upon expiry of a fixed term contract, is unsuccessful in seeking a new contract shall be paid a Contract Completion Payment equal to 10% of their final base salary, for each year of continuous service, or part thereof paid on a proportionate basis, calculated on completed months' of service up to a maximum of 5 years. No other termination, redundancy or severance payment shall be made except as provided for in this Agreement.

(6) A practitioner with permanent tenure shall not be required to convert to a fixed term contract but may agree to do so. Such an agreement must be in writing specifically agreeing to the change and include a declaration by the practitioner that he/she fully understands the implications of foregoing permanency.

(7) Subject to subclause (2) any contract of employment including a fixed term contract may be terminated by either the employer or the practitioner giving not less than 3 months' notice.

(8) In lieu of the giving of the required notice the employer may pay, or the practitioner may forfeit, as the case may be, salary commensurate with the residual period of notice otherwise required. The employer and the practitioner may agree to a lesser period of notice.

(9) Notwithstanding the other provisions of this clause, the Employer may, without prior notice, dismiss a practitioner for serious misconduct.

(10) A practitioner who is dismissed may appeal to a Board of Reference if the application is made within one month of the operative date of the dismissal.

(11) A practitioner whose contract of employment expires or is terminated shall be paid all monies due on the payday following the last day of employment.

(12) Head of Department Appointments

(a) A Senior Practitioner may, from time to time, be concurrently appointed as a Head of Department for a term not exceeding the term of the practitioner's appointment as a senior practitioner. There shall be no automatic right of reappointment as a Head of Department after the end of a term of appointment. If employment as a senior practitioner ends, employment as a Head of Department automatically ends. If employment as a Head of Department ends, employment as a senior practitioner does not automatically end.

(b) A Head of Department shall be remunerated by way of an annual Head of Department Allowance, payable pro rata fortnightly with salary, which continues to be paid during periods of ordinary paid leave but is not counted as part of base salary for the purposes of this Agreement.

(c) The duties of the Head of Department shall be as set out, from time to time, in a job description which shall include the criteria upon which the performance of the Head of Department shall be evaluated.

(d) The terms of appointment of a Head of Department shall delineate the average number of sessions per week in the case of sessional practitioners, or number of hours per week, in the case of full-time and part-time practitioners, allocated to the undertaking of the duties of Head of Department.

(e) An appointment as Head of Department may, at the discretion of either party, be terminated by either the employer or the Head of Department giving to the other 1 months' notice or in lieu of the giving of the notice, the payment or the forfeiture of payment, as the case may be, of the Head of Department Allowance for that period.

(f) Head of Department Annual Allowance Calculation

Number of staff under direct supervision and control	1st pay period on or after 1-Oct-13	1st pay period on or after 1-Oct-14	1st pay period on or after 1-Oct-15
1-4	$8,234	$8,542	$8,841
5-9	$14,637	$15,186	$15,717
10-20	$26,981	$27,993	$28,973
Over 20	$43,448	$45,078	$46,655

or such other amount agreed in writing between the employer and the Head of Department.

(g) A practitioner who is directed by the employer to act as Head of Department and who performs the full duties and has the full responsibility of the role for more than ten consecutive working days, shall be paid the Head of Department Allowance whilst so acting.

(h) For the purpose of sub clause (f), "No. of staff under direct supervision and control" shall mean:

(i) senior practitioners reporting to, and directly performance managed by, the Head of Department;

(ii) doctors in training reporting to, and directly performance managed by, the Head of Department provided that where doctors in training rotate through the Department the count shall be the number of doctors in training at the time of calculating the allowance;

(iii) chief technical staff reporting to, and directly performance managed by, the Head of Department; and

(iv) other staff, reporting directly to, and performance managed by the Head of Department;

(i) For the purpose of this sub clause, "Department" means a clinical specialty or sub-specialty organisation unit of a Hospital however titled.

(j) Where a sub-specialty Unit or sub-department (however titled) of a Department is established and a Head of Unit (however titled) is appointed pursuant to this sub clause, a Head of Department Allowance shall be paid to the Head of Unit. Staff under the direct supervision and control of a Head of Unit who is paid an allowance are not counted for the purposes of calculating the allowance payable to the Head of Department to whom the Head of Unit is accountable.

UNFAIR DISMISSAL/CONTRACTUAL ENTITLEMENTS—

2019 WAIRC 00826

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2019 WAIRC 00826
CORAM	**:**	COMMISSIONER D J MATTHEWS
HEARD	**:**	WEDNESDAY, 11 SEPTEMBER 2019, FRIDAY, 25 OCTOBER 2019
DELIVERED	**:**	FRIDAY, 22 NOVEMBER 2019
FILE NO.	**:**	B 78 OF 2019
BETWEEN	**:**	BRADLEY COOPER
		Applicant
		AND
		OSM MARITIME GROUP
		Respondent

CatchWords	**:**	Industrial Law (WA) - Claim for denied contractual benefits - Relevant term of Industrial Agreement incorporated into contract of employment - Contractual term not breached by respondent - Not unreasonable for respondent to reject application actually made - Application dismissed
Legislation	**:**	
Result	**:**	Application dismissed
Representation:		
Counsel:		
Applicant	**:**	Mr G Walsh (as agent)
Respondent	**:**	Mr S White (as agent)

Reasons for Decision

1 The applicant says that the following, an excerpt from clause 13.9 of the Svitzer Australia Pty Ltd and Australian Maritime Officers Union Offshore Oil and Gas Enterprise Agreement 2010, applies to him as a matter of contract:

> "[If] an employee who has been employed by the Employer for a period of at least twelve months applies in writing to go ashore to study and sit for an AMSA Master or Mate Certificate of Competency they shall, subject to approval of the application by the Employer (with consent not being unreasonably withheld) be entitled to the period of leave and to the rates of pay specified hereunder."

2 The applicant says that clause 13.9 is part of his contract of employment with the respondent, that he satisfies the pre-condition of having been employed by "the Employer" for more than twelve months and that he has applied in writing to go ashore to study and sit for an AMSA Chief Mate Certificate of Competency.

3 The applicant says that, in those circumstances, he is "entitled" to the period of leave, and to the rate of pay specified in the balance of the subclause, unless "the Employer" withholds its consent and does so reasonably.

4 The applicant says that the respondent has withheld its consent but has done so "unreasonably".

5 The respondent does not dispute that it has withheld its consent, but says it has done so reasonably.

6 I note, by way of an aside only at this time, that "the Employer" is defined by the Svitzer Australia Pty Ltd and Australian Maritime Officers Union Offshore Oil and Gas Enterprise Agreement 2010 to be "SVITZER Australia Pty Ltd" and that the applicant's current employer, and the entity to which he applied, is "OSM Australia Pty Ltd". That is, the applicant is not, and was not at the relevant time, employed by "the Employer" under the Svitzer Australia Pty Ltd and Australian Maritime Officers Union Offshore Oil and Gas Enterprise Agreement 2010.

7 However, the contract of employment between the applicant and OSM Australia Pty Ltd specifically provides that "your continued service with Svitzer will be taken to be service with OSM Australia" and no argument is made by the respondent that it is fatal to the claim that the applicant was not employed by "the Employer" referred to in the Svitzer Australia Pty Ltd and Australian Maritime Officers Union Offshore Oil and Gas Enterprise Agreement 2010, or that the applicant had not given twelve months service to "the Employer", at the time he made the relevant application.

8 The application under clause 13.9 was made on 29 October 2018.

9 In what became Exhibit 6 in these proceedings the applicant wrote to "Casey Munyard, OSM Australia" in terms which included the following:

> "I'd like to formally apply to OSM Australia for an opportunity to progress in my seafaring career and undertake my Chief Mate's Certificate at Fremantle Maritime TAFE for the intake of February 2019."

10 The rest of the document makes it clear it is an application under clause 13.9.

11 The application was not approved.

12 Exhibit 4 contains an email from Renae Hesford, the respondent's Crewing Manager, which said that "we are unable to approve your request for study leave to commence in the February 2019 intake."

13 The following was given by Ms Hesford by way of reasons:

> "I am sure you are aware that there is quite a bit of uncertainty going into next year with Siem Offshore having three of their vessels without work. Although we are working as hard as we can to secure work at the moment and there could be work in the pipeline still, nothing has been confirmed as yet. It has also been a difficult year for OSM this year and at this stage, we have not been able to rollover and allocate any addition funds for study leave next year."

14 So the relevant background is as follows:

(1) the applicant had been employed by the respondent for more than twelve months when he made his application;

(2) his application was in writing;

(3) the application was to go ashore and sit for an AMSA Mate Certificate of Competency; and

(4) the application was not approved.

15 The matters I need to consider and decide are:

(1) whether clause 13.9 is a contractual entitlement;

(2) if so, whether the entitlement was not allowed by the respondent; and

(3) if so, what remedy the applicant is entitled to.

Was the subclause a contractual entitlement?

16 The respondent's case on this point is set out at [10] to [18] of its written closing submissions as follows:

> 10. The contract of employment between the Applicant and the Respondent refers to the Applicant's conditions of employment being "set out" within the Svitzer Agreement in conjunction with relevant legislation
>
> 11. The Svitzer Agreement does not apply to or cover the Respondent.
>
> 12. The contract of employment between the Applicant and the Respondent does not contain a clause relating to a study leave provision.
>
> 13. The Respondent submits that the mere mention of an enterprise agreement in a contract of employment is not sufficient to consider that enterprise agreement to be contractually binding.
>
> 14. In other words, as the Svitzer Agreement has been identified in the contract of employment as a point of reference for the conditions of employment, this does not mean that the conditions set out in the Svitzer Agreement govern the contractual obligations of the Respondent to the Applicant or vice versa.
>
> 15. The Respondent submits that for the Svitzer Agreement to have been considered as a contractual obligation on the parties, it needed to have been explicitly referred to and incorporated into the contract of employment (*Gramotnev v Queensland University of Technology* [2013] QSC 158).
>
> 16. As held in the Federal Court of Australia and the Western Australian Industrial Relations Commission (*Australian Workers' Union v BHP Iron-Ore Pty Ltd* [2001] FCA 3; *Fergusson v The Salvation Army (Western Australia) Property Trust as the Trustee for the Salvation Anny (WA) Social Work Trading as Salvos Stores* [2014] WAIRC 01042), the words "set out" do not explicitly incorporate the Svitzer Agreement into the contract of employment, rather they describe the instruments, being the Svitzer Agreement and other relevant legislative provisions, that are relevant to the Applicant's employment. Whilst the words "set out" used in the current matter are different to the words "as prescribed by" and "as per" referred to in the *Australian Workers Union v BHP Iron-Ore Pty Ltd* and *Fergusson v The Salvation Army* matters, the language used is highly comparable and, when read in conjunction with each other, results in the same outcome.
>
> 17. Even if the terms and conditions of an enterprise agreement were generally agreed by the parties to have been included in the contract, the question of whether a particular clause of the Svitzer Agreement is incorporated into the contract may not be answered in the affirmative. Given that the Svitzer Agreement contains non-contractual provisions between the employer and the employee, the Respondent submits that the provision that the Applicant's terms and conditions of employment are "set-out" in the Svitzer Agreement, when properly construed, does not have the effect of making all of the terms of the agreement contractually binding on the parties (*Gramotnev v Queensland University of Technology* [2015] QCA 127).

18. The Respondent submits that there is no contractual benefit of study leave owed to the Applicant as the Svitzer Agreement is not incorporated into the contract of employment and there is not a study leave provision present in the contract.

17 The contract of employment between the applicant and respondent relevantly says the following:

> "The terms and conditions of your employment are currently set out within the *Svitzer Australia Pty Ltd and Australian Maritime Officers Union Offshore Oil and Gas Enterprise Agreement 2010* (**Svitzer Agreement**) and applicable legislation, until a new OSM agreement which covers the scope of your position comes into operation, replacing the Svitzer Agreement."

18 The key passage is that the "terms and conditions of your employment are currently set out within the Svitzer Australia Pty Ltd and Australian Maritime Officers Union Offshore Oil and Gas Enterprise Agreement 2010."

19 The question is whether that language is the language of contractual incorporation.

20 This is a question that requires findings of fact to determine, from all of the found circumstances and context, what a reasonable person in the applicant's position would believe was intended by the relevant words in his contract of employment.

21 The reasonable person, of course, does not operate in a vacuum of knowledge.

22 He is presumed to be aware of relevant matters.

23 Other cases, and words used in other cases, are of limited relevance and assistance given that this is a fact-finding mission depending on all of the circumstances present in this case.

24 The circumstances here are such as to admit of only one conclusion.

25 That conclusion is that the Svitzer Australia Pty Ltd and Australian Maritime Officers Union Offshore Oil and Gas Enterprise Agreement 2010 was incorporated into the contract of employment between the applicant and the respondent.

26 I say this because, if the Svitzer Australia Pty Ltd and Australian Maritime Officers Union Offshore Oil and Gas Enterprise Agreement 2010 is not incorporated into the contract of employment, it does not otherwise apply to the applicant and the respondent and the employment relationship between them.

27 The agreement, on its terms, applies to "SVITZER Australia Pty Ltd" and its employees and not OSM Australia Pty Ltd and its employees.

28 The respondent was at pains at the hearing, and in its written submissions, to make the point that it is a completely separate entity from "SVITZER Australia Pty Ltd" and that there was no transfer of the business of "SVITZER Australia Pty Ltd" to it.

29 I do not understand how the respondent can then argue that the Svitzer Australia Pty Ltd and Australian Maritime Officers Union Offshore Oil and Gas Enterprise Agreement 2010 can apply to the applicant and it, and the employment relationship between them, without it being incorporated into the contract of employment between them. As I say, if it is not incorporated into the contract of employment, it would not otherwise apply to the parties at all.

30 Additionally, the language of "terms and conditions of your employment are currently set out within" is the language of contractual incorporation.

31 I note that the language also purports to incorporate "applicable legislation" in the contract of employment. There is no need for "applicable legislation" to be part of the contract. It applies in any event. This, however, merely points up the importance of interpreting the text in the light of all of the circumstances. Unlike the "applicable legislation" the Svitzer Australia Pty Ltd and Australian Maritime Officers Union Offshore Oil and Gas Enterprise Agreement 2010 would not apply other than if it was incorporated into the contract of employment. That is a crucial circumstance.

32 In my view, the passage quoted at [17] above says to the reasonable reader that if you want to know what the terms and conditions of your contract of employment are, it being clear that they are not all in the three page contract of employment document, you must go to the Svitzer Australia Pty Ltd and Australian Maritime Officers Union Offshore Oil and Gas Enterprise Agreement 2010.

33 In this case the language used in the contract of employment is the language of contractual incorporation. For the contract of employment to achieve its purpose of having the Svitzer Australia Pty Ltd and Australian Maritime Officers Union Offshore Oil and Gas Enterprise Agreement 2010 apply, it is necessary to treat the language, as it suggests we should, as language of incorporation. If I were to arrive at the alternative construction a key element of the contract of employment, the application of the Svitzer Australia Pty Ltd and Australian Maritime Officers Union Offshore Oil and Gas Enterprise Agreement 2010, would miscarry. The Svitzer Australia Pty Ltd and Australian Maritime Officers Union Offshore Oil and Gas Enterprise Agreement 2010 would not apply at all.

34 However, moving on to the submission made at [17] of the respondent's closing written submissions, what Jackson J said in *Dimitri Gramotnev v Queensland University of Technology* (2015) 251 IR 448 at [59] and [60] is undoubtedly correct. That is, even if the terms of an industrial agreement are the terms of a contract of employment this does not mean every provision of the industrial agreement is capable of operating, or ought be properly construed as operating, as a contractual promise.

35 I agree that in relation to most industrial agreements "a reasonable person in the position of the [parties to it], on reading the enterprise bargaining agreement, would be aware that not all of its provisions could operate as terms or conditions of the contract". (See [63] of *Dimitri Gramotnev v Queensland University of Technology* (2015) 251 IR 448.)

36 There can, however, in my view, be no argument that clause 13.9 is one of those clauses that is not a term or condition of the contract.

37 Clause 13.9 provides an employee with a clear entitlement. The approval of "the Employer" is required but that approval is qualified by the clear condition that is must not be unreasonably withheld.

38 The clause is one which is, to use the words of Jackson J at [60] of *Dimitri Gramotnev v Queensland University of Technology* [2015] QCA 127, "quite capable of operating as a contractual promise and obligation and apt to be construed as operating that way."

39 Here the respondent has promised the applicant, as part of the contract of employment by which he agreed to render it service, that it would grant him the entitlement provided for by clause 13.9, unless it had reasonable grounds to withhold its consent.

40 The only real question in this matter is whether the applicant has discharged the onus of proving, on the balance of probabilities, that the respondent's withholding of consent was unreasonable.

Was clause 13.9 breached?

41 I have already set out the reasons the respondent was given by Ms Hesford by email in November 2018.

42 Ms Hesford also gave evidence in these proceedings. Ms Hesford's evidence was that she was in favour of the applicant's application. Ms Hesford, in cross examination, said that the way in which permission was sought for the application to be approved was that a budget was sent to "Norway" for approval which included the cost of the applicant's training. In fact, the whole training budget was proposed to be dedicated to the applicant's training.

43 Ms Hesford said it "was put forward to Norway for consideration and approval for us to spend that this year and that was declined based on the financial situation of OSM Australia and no work" (ts 87).

44 I consider that Ms Hesford had an excellent understanding of the industry and of the financial performance of the respondent. I accept that her assertions that the request was knocked back due to financial considerations and a lack of confidence about a pick up in work to be informed ones.

45 Ms Hesford gave evidence, and I accept, that the respondent did suffer a significant loss in 2018 that would have it reasonably looking to save every dollar it could in 2019, and especially so given that I accept Ms Hesford's evidence that the market for the respondent's services in Australia was not robust as at late 2018 and was not predicted, on reasonable grounds, to be strong in 2019.

46 Although the amount of money needed to fund the applicant's training can be made to look small by comparison to other figures relating to the respondent, like its payroll, it was still a six-figure sum, and an entity looking to reasonably cut costs coming off a bad year, with no certainty of a pick-up in the next, was entitled to reasonably say "no" to a request for it to spend such a sum of money.

47 This is especially so where, as Ms Hesford said in unchallenged evidence, the respondent had no pressing need for the applicant to actually become a chief mate.

48 The applicant, nonetheless, says that there is an issue which, if taken into account, makes the respondent's withholding of its consent unreasonable.

49 The applicant gave evidence that in 2016 there was an agreement reached between him and his then employer, an employer which the current respondent, the applicant says, substituted in 2018, that, if he did certain things for his employer, it would fund paid study leave for a chief mate certificate.

50 The applicant gave evidence that when, in 2016, he was placed by his then employer as a second mate on a vessel, the Siem Topaz, he did duties for his employer additional to his second mate duties related to his employer's information technology, and that, in return, his employer, or at least one of its senior managers, promised "facilitation around, um putting me through and sponsoring my, um, chief mate certificate" (ts 30).

51 The applicant says that that senior manager came across to the employ of the respondent when it took over his former employer's local operations by way of substitution and it is not fair or reasonable for the respondent to renege on the deal.

52 I do not need to find whether there was such a deal or not, and I do not need to find whether, if there was such a deal, the respondent should be legally or morally bound by it given all of the circumstances.

53 I say this because, whether or not there was a deal, and whether or not the respondent would be legally or morally bound by it if there was such a deal, the fact is the applicant did not refer to the deal in his application under clause 13.9.

54 I do not see how it could possibly be unfair or unreasonable for the decision-maker to not take into account the claimed deal when no reference was made to it by the applicant in the application itself.

55 This might bring to a seemingly abrupt end a claim which has overcome several hurdles and which has been well-presented by the applicant's representative. It might also seem to the applicant to be an abrupt end given that I have no doubt that the applicant believes that he has a deal and that the respondent is being most unfair in not honouring it.

56 But I have to decide whether the failure to approve the application is unreasonable or not. In doing this, I have to have regard to the application itself and I have done that. Perhaps it is best if I set it out now in its entirety:

> "I'd like to extend my gratitude to OSM for having me on the team for nearly 10 years and providing me with a platform to grow and flourish as a multi-skilled seafarer that is not only bound to the constraints of the ocean life, but to that which have in the past been given opportunities to learn and adapt within the company in roles such as Crewing Manager and Operations, IT & Projects Advisor, where I was directly involved in the transition from Svitzer-OSM Australia. This experience brought about many positive challenges which not only helped me understand the importance of establishing a solid connection between shore and ship roles that aid in the ability of creating and maintaining a high level of service for OSM's respected clients.

> My ability to progress in my sea-going career into a Chief Mate position will directly help maintain the high quality of service that OSM can deliver to it's clients, where I'm able to utilise my shore-side experience coupled with my extensive seafaring experience to help build a safe, positive and harmonic environment on the vessel to which I'm engaged with.
>
> I'd like to formally apply to OSM Australia for an opportunity to progress in my seafaring career and undertake my Chief Mate's certificate at Fremantle Maritime Tafe for the intake of February 2019. I understand the costs involved as per the EBA and I also empathise with the company regarding the financial state of the industry, as during my time in the office the decline in the industry was strong and business was scarce. I believe that leading up to 2019 we are starting to see an uptrend in projects that are coming on line, and I believe that obtaining my next certificate in 2019 would greatly help OSM and it's clients in the lead up to a thriving Offshore Oil & Gas in the early stages of 2020.
>
> Having had obtained all my previous certificates at Fremantle Maritime Tafe, I do receive a discount in course fees, and Fremantle is also very close to my home so other than the 75% in wages, the intangible benefits that OSM gain from this investment considerably outweigh the costs of sponsoring me. As a long-standing employee with OSM Australia and position holder within Siem Offshore, I'm confident that with a combination of respect for OSM's policies, visions and high values with my extensive knowledge of Siem's operations and offshore systems, that I'll continue to be a valuable asset within the OSM team in helping to deliver a superior level of service to not only it's clients, but my superiors and fellow work colleagues.
>
> Bradley Cooper"

57 As can be seen, the application makes no reference to the "deal" as a matter to be taken into account in deciding whether to approve it or not.

58 The respondent was entitled to consider the application that was actually made, not some other application. The respondent was entitled to confine itself to the application that was actually made and was not obliged to conduct an investigation into wider circumstances than those referred to in the application.

59 The applicant has not discharged the onus upon him and his claim must fail.

2019 WAIRC 00827

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	BRADLEY COOPER
	APPLICANT
	-v-
	OSM MARITIME GROUP
	RESPONDENT
CORAM	COMMISSIONER D J MATTHEWS
DATE	FRIDAY, 22 NOVEMBER 2019
FILE NO/S	B 78 OF 2019
CITATION NO.	2019 WAIRC 00827

Result	Application dismissed
Representation	
Applicant	Mr G Walsh (as agent)
Respondent	Mr S White (as agent)

Order

HAVING heard from Mr G Walsh, as agent, for the applicant and Mr S White, as agent, for the respondent on Wednesday, 11 September 2019 and Friday, 25 October 2019;

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

(Sgd.) D J MATTHEWS,
Commissioner.

[L.S.]

2019 WAIRC 00805

CONTRACTUAL BENEFIT CLAIM

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2019 WAIRC 00805
CORAM	**:**	COMMISSIONER D J MATTHEWS
HEARD	**:**	THURSDAY, 3 OCTOBER 2019
DELIVERED	**:**	TUESDAY, 12 NOVEMBER 2019
FILE NO.	**:**	B 104 OF 2019
BETWEEN	**:**	MANON GANDIOLLE
		Applicant
		AND
		M4 MARKETING
		Respondent

CatchWords	**:**	Industrial law (WA) – Contractual benefit claim – Claimed entitlement to salary and annual leave – Applicant discharges evidential onus in relation to part of the claim only – Claim for denied contractual benefit upheld in part – Order issued – Name of respondent amended
Legislation	**:**	*Western Australian Industrial Relations Act 1979*
Result	**:**	Claim upheld in part
Representation:		
Applicant	**:**	In person
Respondent	**:**	In person

Reasons for Decision

1 Ms Gandiolle was employed by an entity which traded as M4 Marketing until 17 April 2019. On that date she received an email from a Mr Richard Trainer, the person she understood to be in charge, ending her employment.

2 At the hearing of the matter before me, Ms Gandiolle's case was that she was not paid after 2 April 2019.

3 It emerged that, in relation to the time up until 15 April 2019, Ms Gandiolle's claim was that she worked and was not paid. For the days 15 to 17 April 2019 Ms Gandiolle says she was entitled to sick leave payments.

4 Mr Trainer's case was that Ms Gandiolle had a payslip covering up to 10 April 2019 and was paid until that time in accordance with the payslip. Mr Trainer did not address the matter of payment for 11 and 12 April 2019. In relation to 15 to 17 April 2019 Mr Trainer said that Ms Gandiolle was not really sick and that the medical certificate she provided to him was not credible.

5 At ts 17, there was the following exchange between me and Mr Trainer about the first aspect of Ms Gandiolle's case, that is the aspect about payment up to and including 12 April 2019:

> **MATTHEWS C:** All right. Do you dispute that Ms Gandiolle wasn't paid from 2 April on? That is her case, that she wasn't paid after 2 April. Do you have anything to say to her about that?
>
> **TRAINER, MR:** No. In fact, the date she was paid, weekly in advance, so the date I would have her paid up to was in fact, the 11th.
>
> **MATTHEWS C:** So what Mr Trainer is saying is that you were paid in advance and when did you make the last payment to her?
>
> **TRAINER, MR:** Look, I haven't got that in front of me and I'd have to basically, go back through and get that from my partner. So it's a date – a date I don't have, I should have it but I don't have it.

6 There was a payslip which covered up until 10 April 2019.

7 Ms Gandiolle said that despite there being a payslip, she did not receive wages for the week 3 April 2019 to 10 April 2019.

8 There was this exchange between Ms Gandiolle and Mr Trainer when Ms Gandiolle was cross-examining Mr Trainer:

> **GANDIOLLE, MS:** Mr Trainer, so you said I received a payslip that should have been from 10 March to 10 April. I am not contesting that payslip, however, do you have proof of payment that payments were made, according to that payslip? --- I would presume from the payslip being provided and you hadn't come back, in that email to Emma, to say you haven't received the payment. You've basically, said thank you for the payslip, however, the date's incorrect and you put the date. But you certainly haven't mentioned that in that email and you – and I believe you would have if you hadn't been paid. You stated there you haven't received your payment. You haven't said that in this email. (Indistinct).

9 In relation to 11 and 12 April 2019, as I say, Mr Trainer did not give any evidence as to whether Ms Gandiolle was paid or not.

10 In relation to the period 15 to 17 April 2019, Mr Trainer asserted the following, at ts 30:

> I believe the doctor's certificate was a furphy. She in fact, just didn't want to come to work and work out her notice period and she – she hadn't come in and completed her obligations and worked out her notice period. So she wasn't then, entitled to her leave.

11 Both parties attended by telephone by their own choice. Ms Gandiolle was in Scotland. Mr Trainer was in Sydney.

12 For the period 3 to 10 April 2019, Ms Gandiolle has not convinced me to the required standard that she was not paid for that work. She gave evidence she was not paid. Mr Trainer says she was paid. I am simply unable to make, on what I have, any finding of fact with the requisite level of comfort.

13 I do not find myself persuaded on the evidence I have, basically Ms Gandiolle's word, that on the balance of probabilities she was not paid. I have to take into account that Mr Richard Trainer gave evidence that she was paid.

14 Ms Gandiolle asked Mr Trainer, in the passage reproduced above, if he could prove that he paid her. That is, of course, not the way things work. The onus remains at all times on Ms Gandiolle to prove, on the balance of probabilities, that she was not paid. It was not for Mr Trainer to prove that she was. Ms Gandiolle failed to discharge the onus upon her.

15 If the parties had been in attendance there might have been something about their demeanour, or presentation, that would have allowed me to prefer the evidence of one over the other and decide I was satisfied to the requisite standard that something happened or did not happen.

16 If Ms Gandiolle had produced some documentary evidence, say some bank records showing that a normal weekly payment had not occurred, that may have had an impact.

17 All I had was Ms Gandiolle on the telephone saying she was never paid and Mr Trainer saying she was. There was no good basis upon which I could possibly determine what did or did not happen.

18 I have no such doubt in relation to 11 and 12 April 2019 because Ms Gandiolle says she was not paid for those dates and Mr Trainer did not dispute it.

19 In relation to 15 to 17 April 2019, Ms Gandiolle is only entitled to be paid if she had an entitlement to paid sick leave for this period.

20 Ms Gandiolle has not proven to me to the requisite standard that she had such an entitlement. Ms Gandiolle was not able to establish on the balance of probabilities what her entitlement was nor how much of it she had used (or not used) as at 15 April 2019.

21 I reject Mr Trainer's assertion that the medical certificate was a 'furphy' but in the end whether it was or not I have been unable to determine Ms Gandiolle's sick leave entitlement.

22 I find that Ms Gandiolle is owed for two days' pay (11 and 12 April 2019) at a rate of $19.30 per hour. I calculate the amount owed to be $308.80.

23 It is necessary for me to decide who should pay this amount, that is, who was the correct employer. Ms Gandiolle brought the action against "M4 Marketing" which was just a trading name and not an entity capable of being sued. Mr Richard Trainer explained that he is the trustee of the unit trust named "M4 Unit Trust" which traded as M4 Marketing (see ts 2 and 3).

24 Accordingly, it is appropriate that Mr Richard Trainer as trustee for the M4 Unit Trust be named as the employer, and as the respondent, and I make that order.

2019 WAIRC 00812

CONTRACTUAL BENEFIT CLAIM

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MANON GANDIOLLE
	APPLICANT
	-v-
	M4 MARKETING
	RESPONDENT
CORAM	COMMISSIONER D J MATTHEWS
DATE	THURSDAY, 14 NOVEMBER 2019
FILE NO/S	B 104 OF 2019
CITATION NO.	2019 WAIRC 00812

Result	Order made
Representation	
Applicant	In person
Respondent	In person

Order

HAVING heard from the applicant, in person, and the respondent, in person, on Thursday, 3 October 2019, I, the undersigned, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby order that the name of the respondent be amended from 'M4 Marketing' to 'Richard Trainer as the Trustee for the M4 Unit Trust'.

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

2019 WAIRC 00813

CONTRACTUAL BENEFIT CLAIM

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES MANON GANDIOLLE

APPLICANT

-v-

RICHARD TRAINER AS THE TRUSTEE FOR THE M4 UNIT TRUST

RESPONDENT

CORAM COMMISSIONER D J MATTHEWS
DATE THURSDAY, 14 NOVEMBER 2019
FILE NO/S B 104 OF 2019
CITATION NO. 2019 WAIRC 00813

Result Application granted in part

Representation

Applicant In person

Respondent In person

Order

HAVING heard from the applicant, in person, and the respondent, in person, on Thursday, 3 October 2019, I, the undersigned, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby order that the respondent pay the applicant the sum of $308.80.

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

2019 WAIRC 00815

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2019 WAIRC 00815
CORAM	**:**	COMMISSIONER D J MATTHEWS
HEARD	**:**	WEDNESDAY, 30 OCTOBER 2019
DELIVERED	**:**	THURSDAY, 14 NOVEMBER 2019
FILE NO.	**:**	B 26 OF 2019
BETWEEN	**:**	JASON ANDREW KOVAL Applicant AND CHD PTY LTD Respondent

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CatchWords	**:**	Denied contractual benefits claim - Applicant summarily dismissed - Applicant entitled to reasonable notice - Application granted in part
Legislation	**:**	
Result	**:**	Application granted in part
Representation:		
Applicant	**:**	In person
Respondent	**:**	Ms C Debono (as agent)

Reasons for Decision

(Given extemporaneously at the conclusion of proceedings)

1 Mr Jason Koval commenced employment with the respondent in the position of restaurant manager on 14 January 2019 and he was dismissed from that employment on 28 January 2019 in a phone call with the general manager of The Local Shack Mandurah, Mr Bradley Wright.

2 Mr Koval was dismissed without notice and was not allowed to work any notice or given any payment in lieu of notice. Exhibit 1 in these proceedings is a contract of employment which provides that he was on probation for a period of six months and at clause 4 it provides as follows:

> Please note that a failure to meet the employer's standards may, depending on the circumstances, result in any of the following steps being taken:

3 It goes on to provide at subclause (c):

> "Your employment being terminated with or without notice depending on the circumstances."

4 Ms Debono, who appears for The Local Shack Mandurah, says the circumstances were such that it was a fair thing and within the contract that Mr Koval be dismissed without notice. Ms Debono says that if that is not the case, then clause 14, which provides for notice periods, applies to Mr Koval and clause 14 contains a table which says that if someone is dismissed when they have less than one year's service, they are entitled to four weeks of notice.

5 Mr Koval says, by way of his case, that clause 14 applies to him and that the circumstances were not such that he could be terminated without notice, that he could only be terminated with notice and that clause 14 makes provision for the notice period.

6 The evidence is that Mr Koval was dismissed because of what happened at the restaurant on the morning of Sunday, 27 January 2019 and also because of a failure on his part, so far as the respondent was concerned, to complete a set of computer manuals or modules which has been referred to in these proceedings as "OP Central", which essentially sets out policies, procedures and practices for The Local Shack chain and that ensures consistency across The Local Shack entities.

7 There are, according to Mr Wright, 12 manuals. Mr Koval says that he completed some of them, although, because of a bug in the system, that may not have been obvious to Mr Wright when he has checked.

8 Mr Wright said it is not possible for there to have been a bug in the system which would disguise, or camouflage, or not make it plain to him that Mr Koval had completed modules or manuals when he had done so and he rejects that Mr Koval had completed modules or manuals when he had done so and he rejects Mr Koval asserting that he had completed some of the manuals.

9 In relation to the events on 27 January 2019, Mr Koval says that he only had three staff on, that it was not enough staff, that the staff that were there, that is the front of the house staff numbering three, became overwhelmed by the custom at the restaurant and that wait times blew out. He says that his plan of attack, given his assessment that he did not have enough staff, was for him to fulfil the role of barista whilst the other two staff took and ferried orders. He says that times may have blown out to half an hour, or more than half an hour, he was not aware of that being the case on the day because he was so busy, but times did blow out.

10 Mr Wright is the person who investigated with Mr Koval the problems on Sunday, 27 January 2019. I do not think it matters whether the phone call between the two was on the Sunday or the Monday, but there was a conversation about what happened on 27 January 2019 in which Mr Wright investigated that matter.

11 Mr Wright put it to Mr Koval that wait times had blown out. Mr Koval did not deny it and, at the end of the day, accepted when a third person said that the wait times were as much as 30 minutes that that may have been the case. Obviously, from the respondent's point of view, wait times blowing out to that extent is completely unacceptable and led to negative social media comment.

12 I find that Mr Koval did not complete all of the manuals that he was required to under the "OP Central" system.

13 Whether or not there was some bug in the system, and I doubt that there was, there is just no evidence that Mr Koval either completed those manuals or, as Mr Wright I think fairly says, brought to the attention of his employer that he was unable to complete the manuals or unable to establish to the employer's satisfaction that he was able to or that he had done the manuals because of a glitch in the system.

14 I find that there was a failure on Mr Koval's part to complete the "OP Central" manuals.

15 I also find that there were problems on Sunday, 27 January 2019 that ought not to have arisen and that Mr Koval, probably through a mixture of embarrassment and so on, was not upfront about those straight away. At the same time and to his credit, he did not fight his corner unreasonably and as soon as it became clear that someone else was keeping an eye on the exact time and nominated what it was, he accepted it. So there were problems, but I do not think Mr Koval was a dishonest person or anything like that in relation to how he dealt with that with his employer.

16 The next question is, having found that there was that failure to complete the "OP Central" manuals and that there were problems on the Sunday which ought not have occurred on the watch of Mr Koval as the restaurant manager on that day, or the shift leader on that day as Mr Wright called him, what was the appropriate response from the employer? The employer says those things alone were enough to effectively summarily dismiss Mr Koval.

17 A summary dismissal is, and as is set out at clause 14(3) of the contract of employment, in effect, allowed where there is "dishonesty, fraud, theft, neglect of duty, disclosure of confidential information or other serious misconduct".

18 The behaviour that an employer finds against an employee must be so serious that dismissal without notice is appropriate. I just do not think that Mr Koval's conduct fell into that category.

19 However, I do not think that Mr Koval's employment could possibly have survived the probation period, given that he had not completed what was in the "OP Central" system and that he had proven ineffective on the Sunday. I do not think he was going to continue, that is fair.

20 By the same token, I do not think that he had engaged in such "dishonesty, fraud, theft, neglect of duty, disclosure of confidential information or other serious misconduct" as at that date to warrant his summary dismissal. That is, a dismissal without a proper investigation or any investigation, dismissal without payment of any entitlements and dismissal without the payment of notice.

21 Does that mean that clause 14 applies? I do not think so.

22 Ms Debono very fairly said that if the employment being terminated without notice was not the right thing that clause 14 ought apply. I do not agree with that, as fair as it was on Ms Debono's part to say it.

23 In my view, a fair reading of the contract is that clause 14 kicks in once a person has become a permanent employee or an ongoing employee under the contract. That is, once they have survived their probation period.

24 I do not think it is sensible that someone who, for instance, had worked one day on probation and then the employer decided that the person was no good and that the employment ought not continue, which is something that might be done under a probationary period, would be entitled to four weeks of notice.

25 I think that is too long. I think that clause 14 is for persons who have survived their probation period.

26 I think during the probationary period I am entitled to imply, as the law does, that a person must be given reasonable notice when they are being dismissed where notice is required.

27 I find that notice was required, that is, the circumstances were not so bad that Mr Koval could be terminated without notice, but I do not think he gets four weeks' notice. I would imply into clause 4 a reasonable notice provision and for someone who had been employed for two weeks, I would have thought a reasonable period of notice would be one week.

28 My decision in this matter is that Mr Koval is entitled to one week by way of a notice period and he has told me, and I do not think there is any argument about it, that one week of salary for him is $1,153.85.

29 I will make an order that the respondent, CHD Pty Ltd, pay to the applicant, Mr Jason Koval, the sum of $1,153.85 forthwith.

2019 WAIRC 00809

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	JASON ANDREW KOVAL
	APPLICANT
	-v-
	THE LOCAL SHACK MANDURAH
	RESPONDENT
CORAM	COMMISSIONER D J MATTHEWS
DATE	WEDNESDAY, 13 NOVEMBER 2019
FILE NO/S	B 26 OF 2019
CITATION NO.	2019 WAIRC 00809

Result	Order made
Representation	
Applicant	In person
Respondent	Ms C Debono (as agent)

Order

HAVING heard from the applicant in person and Ms C Debono, as agent, for the respondent on Wednesday, 30 October 2019, I, the undersigned, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby order that the name of the respondent in this matter be amended to 'CHD Pty Ltd'.

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

2019 WAIRC 00810

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	JASON ANDREW KOVAL
	APPLICANT
	-v-
	CHD PTY LTD
	RESPONDENT
CORAM	COMMISSIONER D J MATTHEWS
DATE	WEDNESDAY, 13 NOVEMBER 2019
FILE NO/S	B 26 OF 2019
CITATION NO.	2019 WAIRC 00810

Result	Application granted in part
Representation	
Applicant	In person
Respondent	Ms C Debono (as agent)

Order

HAVING heard from the applicant in person and Ms C Debono, as agent, for the respondent on Wednesday, 30 October 2019 I, the undersigned, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby order that the respondent pay to the applicant the sum of $1,153.85 forthwith.

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

SECTION 29(1)(b)—Notation of—

Parties		Number	Commissioner	Result
Aaron James Irvine	AHG Services (WA) Pty Ltd	B 116/2019	Commissioner D J Matthews	Discontinued
Alison Williams	Jackson Greeve	U 137/2019	Commissioner D J Matthews	Discontinued
Andre Francois FOURIE	City of Busselton	U 143/2019	Commissioner D J Matthews	Discontinued
Anne Marie Watson	Association for Services to Torture and Trauma Survivors	B 92/2019	Commissioner T B Walkington	Discontinued
Laurance Davey	Coral and Fish Barn	U 97/2019	Commissioner T B Walkington	Discontinued
Melissa Micallef	Resolute Security Services	U 86/2019	Commissioner T B Walkington	Discontinued
Michelle Beryl Hunter	Gooseberry Hill Primary School	U 140/2019	Commissioner T B Walkington	Discontinued
Vlado Butrakoski	Margaria Cleaning Services	B 91/2019	Commissioner T B Walkington	Discontinued

CONFERENCES—Matters arising out of—

2019 WAIRC 00817

DISPUTE RE UNION MEMBER'S EMPLOYMENT
WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2019 WAIRC 00817
CORAM	**:**	COMMISSIONER D J MATTHEWS
HEARD	**:**	MONDAY, 28 OCTOBER 2019
DELIVERED	**:**	THURSDAY, 14 NOVEMBER 2019
FILE NO.	**:**	PSAC 3 OF 2019
BETWEEN	**:**	THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED Applicant AND THE DIRECTOR GENERAL, THE DEPARTMENT OF JUSTICE Respondent

CatchWords	:	Industrial law (WA) – Dispute in relation to applicant's member's employment status – Applicant's member was a permanent public service officer – Did new contract affect status – In the alternative as a matter of fairness ought the applicant's member be considered to have permanent status – Applicant's member cannot be both indefinitely appointed and appointed for a fixed term – Fixed term contract extinguished permanent employment status – Nothing unfair about this in all of the circumstances – Application dismissed
Legislation	:	*Public Sector Management (Redeployment and Redundancy) Regulations 2014* r28, r30
		Public Sector Management Act 1994 s64(1)
Result	:	Application dismissed
Representation:		
Counsel:		
Applicant	:	Mr M Ritter SC (of counsel)
Respondent	:	Mr J Carroll (of counsel)

Reasons for Decision

1 The applicant says its member is a permanent public service officer. The respondent disputes this.

2 It is common that the applicant's member was a permanent public service officer at the Department of Education Services when, in August 2014, she was informed that her position was to be abolished.

3 It is also common that in May 2015 the applicant's member was notified that she had become a registered redeployee under the *Public Sector Management (Redeployment and Redundancy) Regulations 2014.*

4 Relevantly, regulation 28 of the *Public Sector Management (Redeployment and Redundancy) Regulations 2014* contains a definition of "redeployment period" which, when it was applied to the applicant's member, meant that her employment would terminate pursuant to regulation 30 *Public Sector Management (Redeployment and Redundancy) Regulations 2014* in early November 2015.

5 It is not in dispute that the applicant's member did not wish her employment within the public sector to end pursuant to any part of the *Public Sector Management (Redeployment and Redundancy) Regulations 2014*. She did not wish to take a severance under the *Public Sector Management (Redeployment and Redundancy) Regulations 2014* and she certainly did not wish to be terminated pursuant to regulation 30.

6 It is not in dispute that the applicant's member wanted to remain employed in the public sector and also fervently, and understandably in my view, wished to maintain her permanent status.

7 Permanency is something that is sought after and highly valued within the public sector.

8 It is common that as at November 2015, indeed from June 2015, the applicant's member was on secondment working within the Department of Corrective Services, which is now part of the Department of Justice.

9 It is common that on 11 November 2015 the applicant's member signed a contract of employment with the Department of Corrective Services.

10 The terms of the contract of employment and the circumstances surrounding the applicant's member's execution of it are the key matters in this case.

11 The respondent says the contract of employment signed by the applicant's member ended her permanency. The applicant rejects that contention and says that as a matter of law the contract of employment did not have that effect. In the alternative the applicant says that, as a matter of fairness, the contract of employment ought not be considered to have that effect.

12 The applicant seeks a declaration against the respondent, being the current chief executive officer of the Department of Justice, that its member was at all relevant times a permanent public service officer.

13 The applicant put on evidence from its member and also two employees of the Department of Corrective Services she had contact with in relation to her employment status being:

(1) Mr Darian Ferguson, the Director Human Resources at the Department of Corrective Services from July 2014; and

(2) Mr Patrick Leach, the Director Change and Capability at the Department of Corrective Services from late September 2015.

14 Mr Darian Ferguson, at [9] and [13] of his witness statement, gave evidence that he was told, he cannot recall by whom, that the applicant's member was to be offered a position within the Department of Corrective Services and that the appointment was intended to stop the regulation 30 *Public Sector Management (Redeployment and Redundancy) Regulations 2014* clock ticking down against her.

15 Mr Ferguson gave evidence, at [13] of his witness statement, that he understood the Department of Education Services "would not suspend the registration period or revoke the registration unless [the applicant's member] was transferred into the Department of Corrective Services".

16 At [14] of his witness statement Mr Ferguson gave evidence, however, that for various reasons it was not possible to have the applicant's member transfer into a position with the Department of Corrective Services.

17 He gave evidence that something else had to be done to get the applicant's member across and into the employment of the Department of Corrective Services and to stop the clock ticking.

18 At [16] of his witness statement he gave the following evidence about what was done and why it was done:

> Given the limitations affecting DCS and in order to overcome the issues with DES it was proposed that [the applicant's member] be employed as a Principal Policy Officer with a term of three years. This was a means to an end. [The applicant's member] accepted this and on this basis DES agreed to suspend or revoke registration which I seem to recall happened with one day left on the redeployment period.

19 At [22] of his witness statement Mr Ferguson gave evidence that:

> Although, I do not specifically recall the exact conversations with [the applicant's member], I know that I did reassure her on several occasions that she was still permanent and that the fixed term contract was used as a 'work around' to beat the redeployment process timeframe.

20 Mr Patrick Leach gave evidence, at [19] of his witness statement, that he was aware of the background as at November 2015 and he urged the Acting Chief Executive Officer of the Department of Corrective Services to offer the applicant's member a three-year fixed term contract so that the regulation 30 *Public Sector Management (Redeployment and Redundancy) Regulations 2014* clock did not tick down to zero and result in the termination of the applicant's member's employment in the public sector.

21 Mr Leach gave evidence, at [25] of his witness statement, that he was aware that the applicant's member was a permanent public service officer and he thought the offer of the fixed term contract was the best that could be done in all of the circumstances to continue her employment in the public service and that it was not intended to affect the applicant's member's status as a permanent public service officer.

22 Much later, on 18 May 2018, when it was brought to his attention that the applicant's member's status was in question, Mr Leach wrote, in an email to the Executive Director Corporate Services of the Department of Corrective Services, as follows:

> "My understanding of the process is as follows:
>
> - [The applicant's member] was a permanent officer at Education, and initially seconded into DCS, and then eventually transferred permanently.
> - She was a displaced officer at Education, and therefore became a displaced officer here, as there was no permanent position for her.
> - She voluntarily relinquished her Spec Calling for a level 8 classification and was salary maintained for 6 months.
> - She was then temporarily held against her current level 8 position via a fixed term contract, which is clunky, but may have been a system workaround.
>
> It appears during this process [the applicant's member's] system status as a permanent public servant was changed to a temporary employee. This doesn't seem to be the intent of any of the parties, and I've recently confirmed this with Darian. And I don't think we had any mandate for actually conducting that change.
>
> I think the resolution is simply to amend the system to reflect [the applicant's member's] original permanent public servant status, but will defer to any other information held in HR that I do not have access to."

23 The applicant's member gave evidence, at [25] and [26] of her witness statement, that before signing the fixed term contract she questioned with some officers of the Department of Corrective Services whether the fixed term contract would affect her status as a permanent public service officer and that Mr Darian Ferguson told her that the fixed term contract was "a 'work around' to get me appointed in the current environment and that I was already permanent and so [the paragraph which said that the contract did not confer on me permanent status] was not applicable."

24 The reference to "current environment" is a reference to the need to stop the regulation 30 clock in circumstances where a transfer could not be effected.

25 The respondent led no evidence.

26 The applicant argues its member was a permanent public service officer at the Department of Education Services and that nothing ever happened to change her status as a permanent public service officer. If she was employed by the Department of Corrective Services, and indisputably she was, she was employed as a permanent public service officer.

27 The applicant says the contract signed simply brought its member across to the Department of Corrective Services in the most convenient manner in all of the circumstances and was not intended to, and should not be interpreted to, affect her permanent status. The applicant says anything in the fixed term contract that says anything different, or which might be argued have a different effect, is "inapt".

28 The applicant submits, in the alternative, its member ought be declared to be a permanent public service officer with the Department of Justice as a matter of fairness.

29 On this score, the applicant submits that Mr Darian Ferguson and Mr Patrick Leach ought be held to their word insofar as they represented to its member that her status was unaffected by the fixed term contract she signed. The applicant says that taking those representations into account, and the state of mind they created in the applicant's member, it would be unfair to allow the respondent to deny that its member joined the respondent's employ as anything other than a permanent public service officer.

30 The respondent says that as a matter of law the applicant's member's permanency came to an end when the contract of employment was executed. He disputes that it would be unfair to so hold.

Consideration

31 The assertion that the fixed term contract did not, as a matter of law, affect the applicant's member's status as a permanent public service officer must fail.

32 In my view one need look no further than clause 1 of the contract, which is a term that the applicant's member's appointment to the position within the Department of Corrective Services "is in accordance with section 64(1)(b) *Public Sector Management Act 1994*."

33 Under section 64 *Public Sector Management Act 1994* appointments are either on a permanent or fixed term basis. The two kinds of appointment are mutually exclusive with the "or" between them being disjunctive in the normal manner. A person cannot be an appointee for an indefinite period and an appointee for a finite term at the same time.

34 As the contract expressly appointed the applicant's member under section 64(1)(b) *Public Sector Management Act 1994* it is completely inconsistent with, and must defeat, an assertion that her appointment was under, or continued under, section 64(1)(a) *Public Sector Management Act 1994*.

35 If the applicant's member had previously been employed under section 64(1)(a) *Public Sector Management Act 1994*, entry into a contract under which she was employed under section 64(1)(b) *Public Sector Management Act 1994* has, as a matter of law, the effect of ending employment under section 64(1)(a) *Public Sector Management Act 1994.* As I say, you cannot be both an appointee for an indefinite period and an appointee for a finite term.

36 The applicant, as I noted above, argued that clause 1 was "inapt", by which I understood it was being submitted that it was "ill fitted" to the situation of a permanent public service officer who everyone involved in the contract formation considered would, and should, continue as a public service officer.

37 As "inapt" or "ill fitted" as it may have been, a contract containing clause 1 was entered into and clause 1 is inconsistent with permanency.

38 There is no argument that clause 1 should be severed.

39 Rather, there is an argument that it may simply be ignored.

40 I do not see how, as a matter of law and without more, I may simply ignore a clearly expressed contractual term having a clear legal effect. I do not ignore it and I find that as a matter of law the contract ended the applicant's member's permanency and commenced her as an employee under section 64(1)(b) *Public Sector Management Act 1994* as a "term officer".

41 I have read and carefully considered [42] of *Black Box Pty Ltd v Terravision Pty Ltd* [2016] WASCA 219 and find nothing within it to give me pause for thought in relation to my conclusion on this point. In fact, as the case emphasises the primacy of the text, when that text is clear, I am emboldened in my conclusion that the construction argument of the applicant must fail.

42 The parties may not have intended the contract of employment to end the applicant's member's permanency but the "search is for the meaning of what the parties said in the instrument, not what the parties meant to say". Whatever their intentions may have been they have here been resoundingly superseded by, and have merged into, the contract. (See [42] of *Black Box Pty Ltd v Terravision Pty Ltd* [2016] WASCA 219)

43 Clause 1 could not be more clear and its effect could not be more obvious.

44 That leaves for consideration the question of fairness.

45 It is said by the applicant that it is unfair to allow the respondent to assert that the applicant's member was not a permanent public service officer, taking into account the following circumstances:

(1) The applicant's member was a permanent public service officer at the Department of Education Services;

(2) The applicant's member wanted to maintain her permanent status;

(3) Everyone involved in the contract of employment at the Department of Corrective Services (Ms Dharmananda, Mr Leach, Mr Ferguson and Mr Cinquina) wanted to maintain the applicant's member's permanent status;

(4) The only thing which might be said to affect the applicant's member's permanent status, the fixed term contract, was entered into for reasons wholly unrelated to the applicant's member's status;

(5) The fixed term contract was entered into as a "work around", or device, being the only way to stop the clock under regulation 30 *Public Sector Management (Redeployment and Redundancy) Regulations 2014* and was not intended to affect the applicant's member's employment status;

(6) It would be unfair for that device, entered into to assist the applicant's member, to work a result against her;

(7) The applicant's member was assured by Mr Darian Ferguson that entry into the contract would not affect her permanent status; and

(8) Mr Patrick Leach later assured the applicant's member that entry into the contract was not intended to, and should not have, affected her permanent status.

46 In short, the applicant asks whether it is fair for its member to suffer an effect of the contract which no one involved in the contract formation intended?

47 The applicant invites me to do what is fair and that is, it says, to recognise that the circumstances, including inhibitive public sector processes and practices, forced the parties into a document which none intended to have a certain consequence and to recognise that, given those circumstances and the impact of reliance on the consequence, it would be unfair to allow a party to now rely on that consequence.

48 On balance, I do not consider that it is unfair for the respondent to now assert that the applicant's member was employed by it on the terms provided for in her contract of employment.

49 Firstly, I say that Ms Dharmananda, Mr Leach, Mr Ferguson and Mr Cinquina having in mind that the contract was not intended to affect the applicant's member's permanency is neither here nor there in terms of the respondent now saying that the contract means what the contract says.

50 In terms of fairness, what is relevant is what the employee thought, or had in mind, and the role those officers, or others, had in the formation and consolidation of those thoughts.

51 In other words, it is what officers communicated to the employee that matter when I come to assess the fairness of the respondent later relying upon the written words of the contract of employment.

52 Of course, evidence about intention may inform an assessment of what was represented to the applicant's member, but what was said, and when it was said, is not really in dispute in this matter.

53 I am also of the view that only communications which pre-date entry into the contract the terms of which it is sought to depart from as a matter of fairness are relevant.

54 For instance, I am not much impressed or influenced by the evidence of Mr Patrick Leach that he had in mind, when the contract of employment was put before the applicant's member, that her permanency would not be affected and that he later told the applicant's member that the contract of employment was not intended to affect her permanency.

55 Unless Mr Patrick Leach actually said something to the applicant's member at or around the time she entered the contract about the issue in dispute, his thought processes and later assurances would not make the respondent now relying upon the terms of the contact of employment an unfair thing, absent some evidence from the applicant's member that the later representation caused her to act to her detriment.

56 On review of everything I have read and heard, the only relevant evidence in favour of the applicant's position in relation to fairness is that found at [26] of the applicant's member's witness statement where she recounts what Mr Ferguson and Mr Cinquina told her prior to entry into the contract, and Mr Ferguson's evidence confirming that he had such conversations.

57 At [26] the applicant's member says:

> After I received the contract from Mr Cinquina to sign, I noticed that at paragraph 9 of the contract stated that 'nothing in this letter shall confer upon you 'permanent officer' status in this position within the meaning of s64 (1)(a) of the Public Sector Management Act 1994'. I discussed the contract briefly with Mr Cinquina who told me that the contract was a generic contract used by the Shared HR Services. I then had a brief conversation with Mr Ferguson who confirmed it was a 'work around' to get me appointed in the current environment and that I was already permanent and so paragraph 9 was not applicable.

58 I accept the contents of [26] to be true and accurate.

59 At [22] of his witness statement, and at ts 18, Mr Ferguson, in general terms, confirms what the applicant's member says.

60 Mr Cinquina gave no evidence and we may assume he would not dispute what the applicant's member says. However what he said, according to the applicant's member, does not amount to much. He simply told her that the contract of employment was generic.

61 The representations of Mr Ferguson, and the effect they had on the applicant's member, are the most relevant but they are not enough to make the respondent now relying upon the terms of the contract of employment unfair.

62 My reasons for this are as follows:

(1) Clause 1 was the crucial clause and not clause 9. As the applicant's member notes at [27] of her witness statement, there is a construction of clause 9 which is not fatal to an assertion that she remained permanent. It was clause 1 that the applicant's member really needed to worry about. Mr Darian Ferguson's representation was not really on point;

(2) The applicant's member was a lawyer who was concerned about the effect of the contract upon her permanency. Objectively assessed, she should not have and, could not have, relied upon Mr Darian Ferguson's assurances about clause 9 as being conclusive on the issue she was concerned about. It is not, in my view, unfair for the respondent to say that Mr Darian Ferguson's assurances were not conclusive about anything in particular and I do not consider it unfair for him to take the position he does in spite of them; and

(3) A contemporaneous but wholly different representation from a different person may have made it unfair for the respondent to now rely upon the terms of the contract of employment, but such a representation is absent. For example, if Ms Dharmananda had told the applicant's member that she could ignore all the terms of the contract of employment going to tenure, including clause 1, before the applicant's member executed the contract of employment we might be entering, or even within, the ballpark. But there is no such evidence here.

63 In my view, there is nothing unfair in all of the circumstances for the respondent to assert the contract of employment means what it says.

64 I find the intentions of persons to be irrelevant to that question except insofar as they were communicated to the applicant's member contemporaneously to execution by her of the contract of employment.

65 I find Mr Patrick Leach's evidence to be basically irrelevant given he first spoke to the applicant's member about the relevant matter in May 2018.

66 Mr Darian Ferguson did say some things to the applicant's member at the relevant time but those statements were not so clear and convincing on relevant matters as to make it unfair for the respondent to now rely on the contract of employment.

67 The application will be dismissed.

2019 WAIRC 00816

DISPUTE RE UNION MEMBER'S EMPLOYMENT

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED
	APPLICANT
	-v-
	THE DIRECTOR GENERAL, THE DEPARTMENT OF JUSTICE
	RESPONDENT
CORAM	PUBLIC SERVICE ARBITRATOR
	COMMISSIONER D J MATTHEWS
DATE	THURSDAY, 14 NOVEMBER 2019
FILE NO	PSAC 3 OF 2019
CITATION NO.	2019 WAIRC 00816

Result	Application dismissed
Representation	
Applicant	Mr M Ritter SC (of counsel)
Respondent	Mr J Carroll (of counsel)

Order

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

NOW THEREFORE the Public Service Arbitrator, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby order that the application be, and is hereby, dismissed.

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

2019 WAIRC 00819

DISPUTE RE UNION MEMBER'S EMPLOYMENT

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED
	APPLICANT
	-v-
	THE DIRECTOR GENERAL, THE DEPARTMENT OF JUSTICE
	RESPONDENT
CORAM	PUBLIC SERVICE ARBITRATOR
	COMMISSIONER D J MATTHEWS
DATE	FRIDAY, 15 NOVEMBER 2019
FILE NO	PSAC 3 OF 2019
CITATION NO.	2019 WAIRC 00819

Result	Order corrected
Representation	
Applicant	Mr M Ritter SC (of counsel)
Respondent	Mr J Carroll (of counsel)

Correcting Order

HAVING heard from Mr M Ritter SC, of counsel, for the applicant and Mr J Carroll, of counsel, for the respondent on Monday, 28 October 2019; and

WHEREAS the Public Service Arbitrator issued an order on Thursday, 14 November 2019;

AND WHEREAS the respondent notified the Public Service Arbitrator by correspondence on Friday, 15 November 2019 of an error within the order issued Thursday, 14 November 2019;

NOW THEREFORE the Public Service Arbitrator, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby orders –

THAT the order of Thursday, 14 November 2019, 2019 WAIRC 00816, deposited in the office of the Registrar on Thursday, 14 November 2019 be, and is hereby, corrected by removing the words:

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

and inserting the words:

"HAVING heard from Mr M Ritter SC, of counsel, for the applicant and Mr J Carroll, of counsel, for the respondent on Monday, 28 October 2019;"

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

CONFERENCES—Notation of—

Parties		Commissioner	Conference Number	Dates	Matter	Result
Independent Education Union of Western Australia, Union of Employees	Catholic Education Office Western Australia	Scott CC	C 14/2019	21/08/2019	Dispute re non-payment of redundancy/severance	Discontinued
Independent Education Union of Western Australia, Union of Employees	The Roman Catholic Archbishop of Perth	Matthews C	C 10/2019	18/06/2019 13/09/2019	Dispute re union member's employment	Discontinued
The Independent Education Union, Union of Employees	The Roman Catholic Archbishop of Perth	Matthews C	C 30/2018	17/09/2018 10/12/2018	Dispute re union members employment	Discontinued
The State School Teachers' Union of W.A. (Inc.)	Director General, Department of Education	Matthews C	C 19/2019	14/10/2019	Dispute re alleged unfair disciplinary process	Discontinued
The State School Teachers' Union of W.A. (Inc.)	Governing Council of North Metropolitan TAFE	Matthews C	C 17/2019	N/A	Dispute re alleged unfair disciplinary action	Discontinued

Parties		Commissioner	Conference Number	Dates	Matter	Result
United Voice (WA Branch)	Department of Education (WA)	Matthews C	C 12/2019	N/A	Dispute re PASSTAB system and alleged breach of clause 68 of the Education Assistants' (Government) General Agreement 2019	Discontinued

PROCEDURAL DIRECTIONS AND ORDERS—

2019 WAIRC 00744

DISPUTE RE ALLEGED UNFAIR DISMISSAL OF UNION MEMBER'S

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES WESTERN AUSTRALIAN PRISON OFFICERS' UNION OF WORKERS

APPLICANT

-v-

MINISTER FOR CORRECTIVE SERVICES

RESPONDENT

CORAM SENIOR COMMISSIONER S J KENNER
DATE TUESDAY, 8 OCTOBER 2019
FILE NO/S C 34 OF 2018
CITATION NO. 2019 WAIRC 00744

Result Order issued
Representation
Applicant Mr D Stojanoski of counsel
Respondent Mr R Andretich of counsel

Order

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

THAT the notice of application in the herein matter be and is hereby amended in terms of the amended schedule to Form 1 Notice of application (general) filed on 2 October 2019.

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

2019 WAIRC 00821

APPEAL AGAINST THE DECISION OF THE FULL BENCH IN FBA 13 OF 2018

WESTERN AUSTRALIAN INDUSTRIAL APPEAL COURT

PARTIES DIXON

APPELLANT

-v-

DIRECTOR GENERAL, DEPARTMENT OF EDUCATION

RESPONDENT

CORAM BUSS J
DATE TUESDAY, 19 NOVEMBER 2019
FILE NO/S IAC 1 OF 2019
CITATION NO. 2019 WAIRC 00821

Result Programming Orders issued

Order

1. The appellant file 4 copies of submissions and a list of legal authorities and serve a copy on the respondent by 4 pm 11 December 2019.
2. The respondent file 4 copies of submissions and a list of legal authorities and serve a copy on the appellant by 4pm on 20 January 2020.
3. The appellant file 4 copies of the appeal book and serve a copy on the respondent by 4pm on 10 February 2020.

(Sgd.) S KEMP,
[L.S.] Clerk of Court.

2019 WAIRC 00823

APPEAL AGAINST THE DECISION OF THE FULL BENCH IN FBA 15 OF 2018

WESTERN AUSTRALIAN INDUSTRIAL APPEAL COURT

PARTIES DIRECTOR GENERAL, DEPARTMENT OF EDUCATION

APPELLANT

-v-

THE STATE SCHOOL TEACHERS' UNION OF WA (INCORPORATED)

RESPONDENT

CORAM BUSS J
DATE TUESDAY, 19 NOVEMBER 2019
FILE NO/S IAC 2 OF 2019
CITATION NO. 2019 WAIRC 00823

Result Programming Orders Issued

Order

1. The appellant file 4 copies of submissions and a list of legal authorities and serve a copy on the respondent by 4 pm 11 December 2019.
2. The respondent file 4 copies of submissions and a list of legal authorities and serve a copy on the appellant by 4pm on 20 January 2020.
3. The appellant file 4 copies of the appeal book and serve a copy on the respondent by 4pm on 10 February 2020.

(Sgd.) S KEMP,
[L.S.] Clerk of Court.

2019 WAIRC 00839

APPEAL AGAINST THE DECISION OF THE FULL BENCH IN FBA 15 OF 2018

WESTERN AUSTRALIAN INDUSTRIAL APPEAL COURT

PARTIES DIRECTOR GENERAL, DEPARTMENT OF EDUCATION

APPELLANT

-v-

THE STATE SCHOOL TEACHERS' UNION OF WA (INCORPORATED)

RESPONDENT

CORAM BUSS J
DATE FRIDAY, 29 NOVEMBER 2019
FILE NO/S IAC 2 OF 2019
CITATION NO. 2019 WAIRC 00839

Result	Amended Programming Orders Issued

Order

By consent, the Court orders:

1. Order 1 of the orders made by the Court on 19 November 2019 is varied so that the appellant is to file 4 copies of submissions and a list of legal authorities and serve a copy on the respondent by 4.00 pm on 24 January 2020.
2. Order 2 of the orders made by the Court on 19 November 2019 is varied so that the respondent is to file 4 copies of submissions and a list of legal authorities and serve a copy on the appellant by 4.00 pm on 14 February 2020.

(Sgd.) S KEMP,
[L.S.] Clerk of Court.

2019 WAIRC 00824

REVIEW OF IMPROVEMENT NOTICE

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	GHD PTY LIMITED
	APPLICANT
	-v-
	WORKSAFE WESTERN AUSTRALIA COMMISSIONER
	RESPONDENT
CORAM	COMMISSIONER T B WALKINGTON
DATE	WEDNESDAY, 20 NOVEMBER 2019
FILE NO.	OSHT 5 OF 2019
CITATION NO.	2019 WAIRC 00824

Result	Direction issued
Representation	**(by correspondence)**
Applicant	Mr Scott Puxty (of counsel)
Respondent	Ms Stephenie Vahala (of counsel)

Direction

HAVING heard from Mr S Puxty (of counsel) on behalf of the applicant and Ms S Vahala (of counsel) on behalf of the respondent, the Tribunal, pursuant to the powers conferred on it under the *Occupational Safety and Health Act 1984*, hereby directs –

1. THAT the parties give informal discovery by serving its list of documents on the other party by 30 October 2019;
2. THAT the parties provide inspection and provision of documents by 22 November 2019;
3. THAT the parties file an Agreed Statement of facts by 22 November 2019;
4. THAT evidence in chief to be adducted by signed witness statements which will stand as evidence in chief;
5. THAT the applicant file and serve upon the respondent any statement of evidence by 6 December 2019;
6. THAT the respondent file and serve upon the applicant any statement of evidence in reply by 20 December 2019;
7. THAT the parties file written submissions and list of authorities by 24 January 2020;
8. THAT the parties advise each other of witnesses required for cross examination by 24 January 2020;
9. THAT the matter is listed for hearing for one day on 6 February 2020; and
10. THAT the parties have liberty to apply on 48 hours' notice.

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

2019 WAIRC 00859

REVIEW OF IMPROVEMENT NOTICE

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	GHD PTY LIMITED
	APPLICANT
	-v-
	WORKSAFE WESTERN AUSTRALIA COMMISSIONER
	RESPONDENT
CORAM	COMMISSIONER T B WALKINGTON
DATE	WEDNESDAY, 11 DECEMBER 2019
FILE NO.	OSHT 5 OF 2019
CITATION NO.	2019 WAIRC 00859

Result	Direction issued
Representation	**(by correspondence)**
Applicant	Mr Scott Puxty (of counsel)
Respondent	Ms Stephenie Vahala (of counsel)

Direction

HAVING heard from Mr S Puxty (of counsel) on behalf of the applicant and Ms S Vahala (of counsel) on behalf of the respondent, the Tribunal, pursuant to the powers conferred on it under the *Occupational Safety and Health Act 1984*, hereby directs –

1. THAT the parties provide inspection and provision of documents by 17 January 2020;
2. THAT the parties file an Agreed Statement of facts by 17 January 2020;
3. THAT the applicant file and serve upon the respondent any statement of evidence by 31 January 2020;
4. THAT the respondent file and serve upon the applicant any statement of evidence in reply by 14 February 2020;
5. THAT the parties file written submissions and list of authorities by 28 February 2020;
6. THAT the parties advise each other of witnesses required for cross examination by 28 February 2020;
7. THAT the matter is listed for hearing for one day on a date to be set; and
8. THAT the parties have liberty to apply on 48 hours' notice.

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

2019 WAIRC 00836

ORDER PURSUANT TO S.66

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS, THE PLUMBERS AND GASFITTERS EMPLOYEES' UNION OF AUSTRALIA, WEST AUSTRALIAN BRANCH, INDUSTRIAL UNION OF WORKERS
	APPLICANT
	-v-
	BUILDING TRADES ASSOCIATION OF UNIONS OF WESTERN AUSTRALIA (ASSOCIATION OF WORKERS)
	RESPONDENT
CORAM	CHIEF COMMISSIONER P E SCOTT
DATE	THURSDAY, 28 NOVEMBER 2019
FILE NO/S	PRES 4 OF 2018
CITATION NO.	2019 WAIRC 00836

Result	Order made
Representation	
Applicant	no appearance
Respondent	Mr M Buchan

Order

On 11 June 2019, the parties sought an extension of time in which to meet the requirements of order 3(b) of the Order made on 20 December 2018 ([2018] WAIRC 00909) to enable the interim Committee of Management to continue to operate while the amendments to the rules of the BTA are finalised. The extension was granted, and an Order was made 17 June 2019 ([2019] WAIRC 00288).

On 28 November 2019, the respondent sought a further extension of time in which to meet the requirements of order 3(b) of the Order made on 20 December 2018 ([2018] WAIRC 00909) to enable the interim Committee of Management to continue to operate while the amendments to the rules of the BTA are finalised.

Having considered the circumstances, I am satisfied that such an extension ought to be granted.

NOW THEREFORE, the Chief Commissioner, pursuant to the powers conferred under s 66 of the *Industrial Relations Act 1979* hereby orders that -

> The operation of order 3(d) of the orders made on 20 December 2018 [2018] WAIRC 00909, as amended by the order made on 13 June 2019 [2019] WAIRC 00288, be extended to 27 January 2020.

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

2019 WAIRC 00589

DISPUTE RE UNION MEMBER'S EMPLOYMENT

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	HEALTH SERVICE UNION OF WESTERN AUSTRALIA (UNION OF WORKERS)
	APPLICANT
	-v-
	NORTH METROPOLITAN HEALTH SERVICE
	RESPONDENT
CORAM	PUBLIC SERVICE ARBITRATOR
	COMMISSIONER T EMMANUEL
DATE	FRIDAY, 26 JULY 2019
FILE NO	PSAC 15 OF 2019
CITATION NO.	2019 WAIRC 00589

Result	Order issued
Representation	
Applicant	Mr C Studsor (as agent)
Respondent	Mr M Golesworthy (as agent)

Order

WHEREAS this in an application for an urgent compulsory conference under s 44 of the *Industrial Relations Act 1979* (WA) filed on Thursday, 25 July 2019;

AND WHEREAS the applicant's member requested that the respondent convert her fixed term employment to permanent employment in August 2018, the respondent has yet to consider her request for conversion, and her current fixed term contract expires on Sunday, 28 July 2019;

AND WHEREAS at the compulsory conference on Friday, 26 July 2019, the respondent offered to extend the term of the applicant's member's fixed term contract for ten weeks, and gave an undertaking that the paperwork necessary to effect that extension will be provided to the applicant's member by close of business today;

AND WHEREAS the Arbitrator is of the opinion that the below orders will enable conciliation or arbitration to resolve the matter in question;

NOW THEREFORE, having heard from the parties at the conference, to enable conciliation or arbitration to resolve the matter in question, the Arbitrator, pursuant to the powers conferred on her under s 44(6)(ba) of the *Industrial Relations Act 1979* (WA), orders:

1. THAT the respondent consider whether to convert the applicant's member's employment to permanent employment;
2. THAT the respondent provide the Commission and applicant by 6 September 2019 its decision, and the reasons for its decision, about whether the applicant's member's employment will be converted to permanent employment; and
3. THAT, if the parties remain in dispute, the matter be listed for further conciliation after 9 September 2019.

(Sgd.) T EMMANUEL,
Commissioner,
[L.S.] Public Service Arbitrator.

2019 WAIRC 00722

DISPUTE RE UNION MEMBER'S EMPLOYMENT

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	HEALTH SERVICE UNION OF WESTERN AUSTRALIA (UNION OF WORKERS)
	APPLICANT
	-v-
	NORTH METROPOLITAN HEALTH SERVICE
	RESPONDENT
CORAM	PUBLIC SERVICE ARBITRATOR
	COMMISSIONER T EMMANUEL
DATE	FRIDAY, 27 SEPTEMBER 2019
FILE NO	PSAC 15 OF 2019
CITATION NO.	2019 WAIRC 00722

Result	Interim orders issued
Representation	
Applicant	Mr C Studsor (as agent)
Respondent	Mr M Golesworthy (as agent)

Interim Orders

WHEREAS this in an application for an urgent compulsory conference under s 44 of the *Industrial Relations Act 1979* (WA) filed on Thursday 25 July 2019;

AND WHEREAS the applicant's member requested that the respondent convert her fixed term employment to permanent employment in August 2018, and in around September 2019 the respondent indicated it will not convert her fixed term employment to permanent employment because it says it does not have ongoing funding for the role, but has not provided any evidence of that;

AND WHEREAS the applicant's member's current fixed term contract expires on Sunday 6 October 2019;

AND WHEREAS compulsory conferences have been held in this matter on 26 July, 11 September and 27 September 2019;

AND WHEREAS the Arbitrator is of the opinion that the below orders will enable conciliation or arbitration to resolve the matter in question;

NOW THEREFORE, having heard from the parties at the conference, to enable conciliation or arbitration to resolve the matter in question, the Arbitrator, pursuant to the powers conferred on her under s 44(6)(ba) of the *Industrial Relations Act 1979* (WA), orders:

1. THAT the respondent, by 12pm Wednesday 2 October 2019, consider the applicant's member against all substantively vacant positions at level in North Metropolitan Health Service that involve a similar skill set to Administrative Coordinator Level 6, and inform the applicant and Arbitrator of the outcome and justification of that consideration.
2. THAT the respondent, by 12pm Wednesday 2 October 2019, respond to the questions set out in the email from Mr Studsor to the Arbitrator's Associate dated 23 September 2019. This response is to be directed to the applicant and the Arbitrator.
3. THAT the respondent, by 12pm Wednesday 2 October 2019, provide to the applicant and the Arbitrator, all documents that relate to its assessment of the applicant's member's request for conversion to permanent employment.

4. THAT the respondent, by 12pm Wednesday 2 October 2019, provide to the applicant and the Arbitrator, evidence to support its contention that there is no ongoing funding for the applicant's member's role.
5. THAT, if the applicant's member applies for the vacant position of HR Consultant – Transition by close of business on Tuesday 1 October 2019, the respondent, by Wednesday 2 October 2019, consider whether she can be placed in that position on a temporary basis.

(Sgd.) T EMMANUEL,
Commissioner,
[L.S.] Public Service Arbitrator.

2019 WAIRC 00849

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	TUESDAY, 10 DECEMBER 2019
FILE NO.	U 110 OF 2019
CITATION NO.	2019 WAIRC 00849

Result	Direction issued
Representation	
Applicant	Mr Robert Mathew
Respondent	Ms Layla Langridge (of counsel)

Direction

HAVING heard from the applicant on his own behalf and Ms L Langridge (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 13 December 2019;
2. THAT inspection and provision of the documents to each other shall be completed by no later than 20 December 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 3 January 2020;
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 both parties file and serve outline of submissions one week prior to the hearing by 12 February 2020.
7. THAT the issue of Jurisdiction is listed for a two-day hearing on 19 February 2020 and 20 February 2020, and
8. THAT the parties have liberty to apply at short notice.

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

2019 WAIRC 00834

UNFAIR DISMISSAL APPLICATION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ELEESHA COOTE
	APPLICANT
	-v-
	SHIRE OF BROOKTON
	RESPONDENT
CORAM	COMMISSIONER T B WALKINGTON
DATE	TUESDAY, 26 NOVEMBER 2019
FILE NO.	U 126 OF 2019
CITATION NO.	2019 WAIRC 00834

Result	Direction issued
Representation	
Applicant	Ms Michelle McDiarmid (of counsel)
Respondent	Ms Celeste de Saint Jorre (of counsel)

Direction

HAVING heard from Ms M McDiarmid (of counsel) on behalf of the applicant and Ms C de Saint Jorre (of counsel) on behalf of the respondent, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby directs –

1. THAT the parties shall give informal discovery by serving its list of documents on each other by 10 December 2019;
2. THAT inspection of the documents shall be completed by 23 December 2019;
3. THAT the applicant file and serve signed witness statements upon which it intends to rely, no later than 5 January 2020;
4. THAT the respondent file and serve any signed witness statements upon which it intends to rely, no later than 30 January 2020;
5. THAT the applicant file and serve an outline of submissions and any list of authorities upon which they intend to rely, no later than fourteen clear days prior to the date of hearing;
6. THAT the respondent file and serve an outline of submissions and any list of authorities upon which they intend to rely, no later than seven clear days prior to the date of hearing;
7. THAT the matter be listed for a two-day hearing on a date to be set; and
8. 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
Department of Fire and Emergency Services CSA Agency Specific Agreement 2019 PSAAG 4/2019	12/11/2019	Department of Fire and Emergency Services, The Civil Service Association of Western Australia	(Not applicable)	Senior Commissioner S J Kenner	Agreement registered
Department of Justice - Registered Nurses (ANF) Industrial Agreement 2018 PSAAG 3/2019	11/27/2019	Director General, Department of Justice	Australian Nursing Federation Industrial Union of Workers Perth	Commissioner T Emmanuel	Agreement registered
Registered Nurses - Australian Nursing Federation - Disability Services Commission Industrial Agreement 2019 AG 13/2019	12/11/2019	Disability Services Commission	Australian Nurses Federation	Commissioner T Emmanuel	Agreement registered

OCCUPATIONAL SAFETY AND HEALTH TRIBUNAL—Notation of—

The following were matters before the Commission sitting as the Occupational Safety and Health Tribunal pursuant to s 51I of the *Occupational Safety and Health Act 1984* that settled prior to an order issuing.

Parties		Commissioner	Application Number	Dates	Matter	Result
Southern Cross Care (WA) Inc	Worksafe WA	Walkington C	OSHT 7/2019	13/11/2019	Review of Improvement Notice	Discontinued