



# DECISION

*Fair Work Act 2009*  
s.394—Unfair dismissal

**Scott Kenneth Micke**

v

**University of Western Australia**  
(U2022/11192)

DEPUTY PRESIDENT BEAUMONT

PERTH, 24 FEBRUARY 2023

*Application for an unfair dismissal remedy – objection that minimum employment period not served – jurisdictional objection upheld - minimum employment period not completed.*

[1] Mr Micke (the **Applicant**), a former ‘Casual Academic’ of the University of Western Australia (the **Respondent**), made an application to the Fair Work Commission for a remedy in respect of his dismissal. The Respondent raised a jurisdictional objection to the application on the basis that the Applicant had not met the minimum employment period and therefore is not protected from unfair dismissal.

[2] To be protected from unfair dismissal, the Applicant’s period of continuous service at the time of the notice of his dismissal must have been at least six months (minimum employment period). If it was not, then his application must fail.

[3] There are two grounds that the Respondent relies upon in support of its objection. The first, during the period of 21 October 2021 and 1 November 2022, the Applicant was suspended from work. The Respondent says the suspension severed the continuity of the Applicant’s service (to the extent any service prior to this time could be characterised as continuous – another contentious issue). It further argues that the non-performance of work during the period of suspension cannot be sensibly characterised as an ‘excluded period’ of the kind that would preserve continuity of service.<sup>1</sup>

[4] The Respondent relies upon its second ground to the extent that the Commission decides that the suspension was in fact an ‘excluded period’. The enquiry then turns to whether, immediately prior to the commencement of the excluded period, the Applicant met the minimum employment period. The Respondent’s arguments in this regard are two-fold:

- a) the Applicant’s service as a casual employee prior to his suspension was not of the kind that counts toward an employee’s period of employment for the purposes of s 384(2) of the Act; and
- b) in any event, any period of continuous service the Applicant may have been able to identify prior to his suspension was severed during the break between the Applicant’s last engagement of Semester 1, 2021 (being in May 2021) and the date

the Applicant was offered work assisting with Labs for Semester 2, 2021 (such notification being by email dated 26 July 2021).

[5] For the following reasons, I am satisfied that the Applicant has not completed the required minimum employment period and therefore the jurisdictional objection of the Respondent is upheld.

### **Background**

[6] The Applicant states that he began working for the Respondent on 1 July 2019<sup>2</sup> and was notified of his dismissal on 1 November 2022.<sup>3</sup> His dismissal took effect on that same day.

[7] The Applicant identified that he was a casual employee, worked variable hours and that his job title was 'Casual Teaching'.<sup>4</sup>

[8] Included in the Applicant's evidence was a copy of his employment contract.<sup>5</sup> Dated 6 August 2019, it was titled 'Casual Academic Employment Agreement' (**Teaching Contract**). It provided for '[I]rregular Hours for up to 12 Months with 25% Casual Loading (Timesheets)' and noted that the 'Appointment Period' was from 1 July 2019 to 28 February 2020'. The Teaching Contract set out the following:

You have affirmed the following:

...

Notice: I understand that as the number of students enrolled in the unit may fluctuate, it is possible that my appointment may be subject to variation or cancellation any time during the semester. This contract may be terminated by one day's notice on either side given in writing on any day or by the payment in lieu of that day.

[9] Ms Elsa Isebe, Employee Relations Advisor, gave evidence on behalf of the Respondent. In her witness statement, Ms Isebe described the general process for recruiting and employing casual employees prior to Semester 2, 2021.

[10] Ms Isebe explained that in the School of Molecular Science (the **School**), Unit Coordinators would submit requests for the number of employees they anticipated they would need for their units to accommodate the forecasted or estimated student demand. This was then submitted to a School Operations Team, who liaised with the Head of School to obtain the Head of School's approval.<sup>6</sup> Once approval from the Head of School was received, the School Operations Team assisted the Unit Coordinator in undertaking the administrative tasks required to implement the proposed plan, such as organising contracts of employment.<sup>7</sup>

[11] The School undertakes research and education in the fields of chemistry, chemical biology, biochemistry, molecular biology, molecular genetics, omics, nanotechnology, molecular materials, computation, synthetic biology and systems biology.<sup>8</sup>

[12] Dr Spagnoli is one of the Unit Coordinators (on some occasions there are multiple coordinators) of the following units: (a) Chemistry – Properties and Energetics, (b) Chemistry – Structure and Reactivity; and (c) Chemistry – Introductory Chemistry, (together, the **Units**).<sup>9</sup> He has been responsible for coordinating the delivery of chemistry and biochemistry laboratories (**Lab** or **Labs**).<sup>10</sup>

[13] Relevantly, Dr Spagnoli facilitated and coordinated how the Labs for the units would run on each occasion that the Applicant was engaged as a Lab Demonstrator (**Demonstrator**).<sup>11</sup>

[14] Ms Isebe said that the role of a Demonstrator is to conduct experiments for students and/or assist students with conducting their own experiments.<sup>12</sup>

[15] At the beginning of each semester, Dr Spagnoli would plan what weeks in the semester the Labs would occur based on the unit requirements (i.e. which weeks required an experiment as a learning exercise).<sup>13</sup>

[16] Usually, Dr Spagnoli required approximately 30 Demonstrators per semester for the Units. However, the number of casual employees actually engaged as Demonstrators varied depending on, amongst other matters, budgetary considerations and the availability of permanent staff.<sup>14</sup>

[17] Relevantly, the School Operations Team would liaise with Professor Ludwig (previous Head of the School) to secure her approval for the proposed number of hours of casual engagement for the forthcoming semester.<sup>15</sup>

[18] Typically, in order to engage Demonstrators, Dr Spagnoli would request that the School Operations Team send out a call for expressions of interest (**EOI**) for casual Demonstrators.<sup>16</sup> He would do this a few weeks prior to the commencement time of each semester.<sup>17</sup> The School Operations Team would typically choose one of the following two EOI distribution lists to send the EOI to:

- a) the first being a list of chemistry students completing their PhD and Masters – of approximately 150 students; and
- b) the ‘Bayliss Building’ List – comprised of both students, academics, lecturers, tutors and teachers in the School’s network – which is approximately 400-500 individuals.<sup>18</sup>

[19] Until the time the EOI were called for, prospective employees would not know whether there would be casual work available as Demonstrators within the School.<sup>19</sup>

[20] After receiving responses to the EOI, and confirmation from the Head of School as to the approved number of casual hours, Dr Spagnoli would allocate Labs to successful applicants.<sup>20</sup>

[21] Ms Isebe ventured that the engagement of casual employees was always subject to the School’s evolving financial position and student enrolment; there was never any guarantee that the number of Labs offered was set in stone.<sup>21</sup>

[22] By way of example, on 12 August 2020 (around under three weeks into Semester 2, 2020 and after offers of Labs had been sent to the selected individuals), Dr Spagnoli sent the Demonstrators he had engaged for a unit that semester (including the Applicant) an email in which he stated:

...I do not like writing this email. However, due to budget cuts we have had to make some changes to the number of sessions that you will demonstrate... the fairest way was to allow you

to have the demonstrating that you currently have... Therefore you will be demonstrating in 5 sessions this semester.<sup>22</sup>

[23] Ms Isebe stated that the School Operations Team would usually adhere to the following process:

- a) if an individual was being offered work and engaged as a Demonstrator on a casual basis for the first time, a contract of employment will be issued;
- b) if an individual had previously had a contract of employment, the School Operations Team would usually send out an 'engagement email' confirming that the terms and conditions of their contract of employment would remain as per their initial contract.<sup>23</sup>

[24] By email dated 26 February 2021, the School Operations Coordinator emailed the Applicant the engagement email informing him of the following:

Dear Scott

We confirm your casual teaching appointment within the School of Molecular Sciences.

The terms and conditions of your casual employment are set out within your casual teaching contract of employment with the University.

You may be engaged to deliver teaching activities as required for the following Unit/s in Semester 1 of 2021:

Role	Unit Code	Unit Name	Supervisor
Other Required			
Academic Activity	CHEM1002	Chemistry - Structure and Reactivity	Dino Spagnoli
Standard Marking	CHEM1002	Chemistry - Structure and Reactivity	Dino Spagnoli

To ensure you receive the correct rate of pay, please maintain your UWA student status and completed qualifications in ESS.

[25] On 28 June 2021, Dr Spagnoli emailed the School Operations Team asking if they could send an EOI email on his behalf calling for Demonstrators to assist with the Units in Semester 2, 2021 (which commenced 26 July 2021). Responses were due back to Dr Spagnoli by 16 July 2021.<sup>24</sup> The email read in part:

Dear Team SMS,

Can the email below please be forwarded to all PhD, Masters and Honours students in our school?

=====

1st year laboratories will be taking place in semester 2 2021. I am looking for expressions of interest for demonstrators of laboratories in all four chemistry units.

Please see details below for all 1st year labs available for demonstrating in Sem 2 2021.

Please read the instructions carefully and reply back to me directly

(dino.spagnoli@uwa.edu.au) by Friday 16th July with the following information:

Preferred Unit:

Number of sessions you can do a week:

Preference (which session you would like to do):

Please note that if you sign up for demonstrating then you will be expected to be available for the whole of semester in your unit. Moreover, if you are an Honours, Masters or PhD student then you must check with your supervisor that they are happy with the number of labs you wish to do. You get paid for the three hours of demonstrating a lab...<sup>25</sup>

[26] On 22 July 2021, Dr Spagnoli emailed Ms Jacqueline McNally, School Operations Team Leader, a list of ten casual employees to be engaged as Demonstrators (the Applicant included), stating they would be needed '3 hours for 5 weeks'.<sup>26</sup> Dr Spagnoli noted to Ms McNally:

Dear Jacqueline,

I would like to employ the following people for CHEM1003 demonstrating. They will be needed for 3 hours for 5 weeks...

Scott Micke <scott.micke@uwa.edu.au>

Please let me know if there are any issues...<sup>27</sup>

[27] On 22 July 2021, Ms McNally informed Dr Spagnoli that Professor Ludwig had raised concerns about engaging the ten casual employees requested by Dr Spagnoli due to budget cuts. Professor Ludwig and Dr Spagnoli also corresponded about the effect of the changes to budget as follows:

- a) Dr Spagnoli had anticipated engaging two casual employees to act as Demonstrators for each Lab, as had been the practice for previous semesters;
- b) Professor Ludwig advised Dr Spagnoli that for Semester 2, 2021, preference had to be given to the School's permanent employees (i.e. Academics) such that the first Demonstrator engaged for any Lab had to be a permanent employee. A casual employee could then only be engaged in the event a second Demonstrator was required. Moreover, a second Demonstrator would only be allocated if a Lab had over 25 students;
- c) Professor Ludwig informed Dr Spagnoli that 'it is different than in previous years and semesters because we have not faced the financial issues we are facing now. All staff need to realise this'.<sup>28</sup>

[28] The effect of Professor Ludwig's direction was that the number of hours of work available to casual employees was significantly reduced.<sup>29</sup>

[29] Rather than telling the selected individuals that there would be no work available for them, Dr Spagnoli, as was his discretion, decided that rather than offer work to fewer individuals, he would instead engage the same number of individuals but offer them each fewer Labs.<sup>30</sup>

[30] On 26 July 2021, Dr Spagnoli then emailed the 10 individuals that he had selected from the EOI responses, apologised for the delay in responding to them, and advised that due to changes in budget, and contrary to what had been foreshadowed when the EOI had been called for, he 'cannot offer [them] a lab every week'. He then included a link to a shared Google Drive spreadsheet in which the selected individuals could insert their own name to indicate which Lab they were available to demonstrate. Further, Dr Spagnoli indicated that he could

only allow them to choose three to four Labs (amounting to between nine to twelve hours), as that would allow for an even number of Labs for each person.<sup>31</sup>

**[31]** Set out below are the days and hours worked by the Applicant over the course of 2019 to 2021.

Unit Laboratory/Class name	Day Date Time
Semester 2 2019	
CHEM1001 Pre laboratory meeting 1	Monday 29/7/19 10am-11am
CHEM1001 Solubility of Ca(OH) <sub>2</sub>	Tuesday 6/8/19 10am-1pm
CHEM1001 Marking	Tuesday 6/8/19 1pm-2pm
CHEM1001 Pre laboratory meeting 2	Monday 12/8/19 10am-10:30am
CHEM1001 Chemical Equilibrium	Tuesday 20/8/19 10am-1pm
CHEM1001 Marking	Tuesday 6/8/19 1pm-2pm
CHEM1001 Pre laboratory meeting 3	Monday 26/8/19 10am-10:30am
CHEM1001 Thermochemistry	Tuesday 3/9/19 10am-1pm
CHEM1001 Marking	Tuesday 6/8/19 1pm-2pm
CHEM1001 Pre laboratory meeting 4	Monday 9/9/19 10am-10:30am
CHEM1001 Kinetics	Tuesday 17/9/19 10am-1pm
CHEM1001 Marking	Tuesday 6/8/19 1pm-2pm
CHEM1001 Pre laboratory meeting 5	Monday 23/9/19 10am-10:30am
CHEM1001 Electrochemistry	Tuesday 8/10/19 10am-1pm
CHEM1001 Pre laboratory meeting 6	Monday 14/10/19 10am-10:30am
CHEM1001 Acid, Bases and Buffers	Tuesday 22/10/19 10am-1pm
Semester 1 2020	
CHEM1001 Solubility of Ca(OH) <sub>2</sub>	Tuesday 10/3/20 10am-1pm
CHEM1001 Thermochemistry	Tuesday 17/3/20 10am-1pm
CHEM1001 Competing Equilibrium	Tuesday 31/3/20 10am-1pm
CHEM1001 Kinetics	Tuesday 21/4/20 10am-1pm
CHEM1001 Acid, Bases and Buffers	Tuesday 5/5/20 10am-1pm
CHEM1001 Electrochemistry	Tuesday 12/5/20 10am-1pm
Semester 2 2020	
CHEM1003 Pre laboratory meeting 1	Monday 10/8/20 10am-11am
CHEM1003 Introduction to the Chemistry Laboratory	Tuesday 11/8/20 10am-1pm
CHEM1003 Pre laboratory meeting 2	Tuesday 18/8/20 12pm-12:30pm
CHEM1003 Intermolecular Forces	Tuesday 25/8/20 10am-1pm
CHEM1003 Pre laboratory meeting 3	Tuesday 8/9/20 10am-10:30am
CHEM1003 Chemical Equilibrium	Tuesday 15/9/20 10am-1pm
CHEM1003 Pre laboratory meeting 4	Monday 21/9/20 1pm-1:30pm
CHEM1003 Volumetric Analysis	Tuesday 22/9/20 10am-1pm
CHEM1003 Pre laboratory meeting 5	Monday 5/10/20 10:30am-11am
CHEM1003 Oxidation and Reduction	Tuesday 13/10/20 10am-1pm
CHEM1003 Pre laboratory meeting 6	Monday 19/10/20 11am-11:30am
CHEM1003 Molecular Models	Tuesday 20/10/20 10am-1pm
Semester 1 2021	
CHEM1002 Acids and Bases Separation	Thursday 4/3/21 2pm-5pm
CHEM1002 Acids and Bases Separation	Friday 5/3/21 10am-1pm
CHEM1002 Pre laboratory meeting 2	Thursday 8/4/21 3pm-3:30pm

CHEM1002 Aromatic Chemistry	Thursday 15/4/21 2pm-5pm
CHEM1002 Aromatic Chemistry	Friday 16/4/21 10am-1pm
CHEM1002 Pre laboratory meeting 3	Thursday 22/4/21 3pm-3:30pm
CHEM1002 Addition to carbonyl	Thursday 29/4/21 2pm-5pm
CHEM1002 Addition to carbonyl	Friday 30/4/21 10am-1pm
CHEM1002 Pre laboratory meeting 4	Thursday 13/5/21 9am-9:30am
CHEM1002 Acids and Esters part 1	Thursday 13/5/21 2pm-5pm
CHEM1002 Acids and Esters part 1	Friday 14/5/21 10am-1pm
CHEM1002 Acids and Esters part 2	Thursday 20/5/21 2pm-5pm
CHEM1002 Acids and Esters part 2	Friday 21/5/21 10am-1pm
Semester 2 2021	
CHEM1003 Pre laboratory meeting 3	Tuesday 7/9/21 12pm-12:30pm
CHEM1003 Intermolecular Forces	Tuesday 14/9/21 10am-1pm
CHEM1003 Chemical Equilibrium	Tuesday 21/9/21 2pm-5pm
CHEM1003 Acids and Bases	Tuesday 12/10/21 2pm-5pm
CHEM1003 Redox	Tuesday 19/10/21 2pm-5pm

[32] The Applicant states that on 19 October 2021, an unknown member of Human Resources ended his appointment in the Respondent's personnel and payroll system.<sup>32</sup>

[33] By email dated 20 October 2021, the Integrity and Standards Unit at the Respondent informed the Applicant that he had allegedly engaged in conduct that contravened the Code of Conduct. The email advised that the Applicant's rights and privileges at the Respondent were temporarily suspended, pending the outcome of disciplinary proceedings under the Regulations for student conduct and discipline.<sup>33</sup> The email continued:

#### **Temporary Suspension**

A brief was provided to the Vice-Chancellor and I can confirm that a temporary suspension has been approved. This decision is made under Regulation 28 in the Regulations for student conduct and discipline. To ensure the protection of other members of the University and University assets, your rights and privileges as specified in Regulation 3.(1)(c) have been suspended. The effect of this decision is that, until the disciplinary process is complete, you are not permitted to:

- Attend lectures, seminars, tutorials and other classes;
- Use laboratories or other University facilities or any parts of them;
- Attend an examination or test or any part of them;
- Receive results of any unit, examination or test or any part of them; or
- Attend the University or any part of it.<sup>34</sup>

[34] By email dated 1 November 2021, the Integrity and Standards Unit wrote to the Applicant, advising him, amongst other matters, that the Respondent was in the process of reviewing all available material to decide about the continuation of the suspension, and that for his information, his scholarship had been suspended until a decision in the matter had been made.<sup>35</sup>

[35] Correspondence from the Integrity and Standards Unit dated 14 December 2021 advised the Applicant that a 'Student Conduct and Discipline investigation had commenced regarding these incidents'.<sup>36</sup> These incidents were described as 'serious incidents which occurred in October 2021 at the Bayliss and Harry Perkins buildings'.<sup>37</sup>

[36] By letter of 4 March 2022, the Respondent's Human Resources Director informed the Applicant that Human Resources was aware of allegations concerning the Applicant's conduct on 17 and 18 October 2021, which warranted investigation by the Respondent. The letter continued:

...You should be aware that the allegations (as set out below) are serious and may result in disciplinary action against you, up to and including termination of your casual employment as Research Assistant with the University.<sup>38</sup>

As you are both an employee and student of the University, the process from Human Resources will run concurrently with the investigation into the allegations conducted by...Integrity and Standards Unit...<sup>39</sup>

[37] By letter dated 13 June 2022, the Deputy Vice-Chancellor (Education) informed the Applicant that in respect of the student conduct and discipline investigation, two of the allegations against him had been substantiated and three had not.<sup>40</sup> The Deputy Vice-Chancellor thereafter notified the Applicant, in that same correspondence, that he was excluded from enrolment in all courses or units offered by the Respondent for a period of 12 months and on the recommencement of his studies he was required to complete the unit Academic Conduct and Research Integrity.<sup>41</sup>

[38] The Applicant informed the Respondent that he wished to lodge an appeal against the adverse findings on 12 July 2022.<sup>42</sup> Attached to the Applicant's email was a document setting out the bases for the appeal.<sup>43</sup> In that document, the Applicant set out that on 17 October 2021, he was present in the Harry Perkins Institute of Medical Research conducting employment related tasks – however, it appears that the Applicant was referring to employment with the Harry Perkins Institute of Medical Research.<sup>44</sup>

[39] On 30 August 2022, the Applicant was issued with a Student Notice regarding the Board of Discipline (**Notice**). The Notice advised that a hearing of the appeal was to take place on 14 September 2022.<sup>45</sup>

[40] Later correspondence from the Pro Vice-Chancellor Academic (Interim) to the Applicant indicates that the appeal hearing did not take place as foreshadowed in the Notice due to the extenuating personal circumstances of the Applicant.<sup>46</sup>

[41] The Applicant stated that on 4 October 2022, he was invited by Ms Yasmin Coutinho, Employee Relations Advisor, to attend a meeting to discuss 'Fiona Keay's determination'.<sup>47</sup>

[42] On 1 November 2022, the Applicant received by email a letter terminating his employment with the Respondent.<sup>48</sup>

[43] By email dated 4 November 2022, Ms Warren, Associate Director (Workplace Relations), informed the Applicant of the following:

...I refer to your email dated 2 November 2022 and the letter of allegations dated 4 March 2022 (Letter) regarding alleged misconduct that occurred on 17 and 18 October 2021.



In the Letter, it was explained that as you were an employee and a student of the University, the alleged misconduct would be subject to both the Human Resources Investigation process (HR Process) and the Integrity Standards Unit's investigation process (ISU Process) (together Investigations). It was further explained that the two Investigations would run concurrently.

The investigations are two standalone processes governed by different instruments. Specifically:

- The HR Process was to consider the alleged misconduct in your capacity as an employee of the University and to determine whether the alleged misconduct, if substantiated, would constitute:
  - a breach of the University's Code of Ethics;
  - a breach of the University's Code of Conduct (Code); and
  - serious misconduct as defined under Regulation 1.07 of the *Fair Work Regulations 2009* (Cth) (Regulations)
- The ISU Process was to investigate the allegations made against you, as a student, to determine whether there were any breaches of the:
  - University of Western Australia By-Laws: Part 5 - Conduct of Persons on the Lands;
  - Code (which applied to both staff and students of the University); and
  - University Charter of Student Rights.

Your request to the Board of Discipline was to review the decision arising from the ISU Process. This was then referred to the University Secretariat. The outcome of the Board of Discipline review does not impact the HR Process. There is no avenue for you to appeal this decision within the University.

For clarity, we understand that while the Secretariat has accepted your request to appeal the decision made as part of the ISU Process, the Secretariat has yet to make findings regarding the procedural fairness of the ISU Process or other matter (if any) raised.<sup>49</sup>

## Legislative framework

[44] Section 390(1)(a) provides that the Commission must, relevantly, be satisfied that a person was 'protected from unfair dismissal' at the time of being dismissed before it may make an order for an unfair dismissal remedy in the person's favour. Section 382(a) provides that the first of the two requirements that must be satisfied in order for a person to be 'protected from unfair dismissal' is that the person is an employee who has completed a 'period of employment' with the relevant employer of at least the 'minimum employment period'. Section 383(a) provides, in respect of an employer which is not a small business employer, that the 'minimum employment period' is 6 months ending at the earlier of the time when the person is given notice of the dismissal or immediately before the dismissal (the period is 12 months for a small business employer).

[45] Section 384 of the Act is concerned with how an employee's period of employment is calculated for the purpose of determining if the employee has satisfied the minimum employment period. The relevant part reads:

(1) **[Meaning of period of employment]**

An employee's *period of employment* with an employer at a particular time is the period of continuous service the employee has completed with the employer at that time as an employee.

(emphasis added)

[46] The starting point is that a *period of employment* is also referred to as a *period of continuous service*.

[47] Section 22 defines the terms 'service' and 'continuous service', the relevant subsections follow:

*General meaning*

(1) A period of **service** by a national system employee with his or her national system employer is a period during which the employee is employed by the employer, but does not include any period (an **excluded period**) that does not count as service because of subsection (2).

(2) **[Exceptions to meaning of service]**

The following periods do not count as service:

- (a) any period of unauthorised absence;
- (b) any period of unpaid leave or unpaid authorised absence, other than:
  - (i) a period of absence under Division 8 of Part 2-2 (which deals with community service leave); or
  - (ii) a period of stand down under Part 3-5, under an enterprise agreement that applies to the employee, or under the employee's contract of employment; or
  - (iii) a period of leave or absence of a kind prescribed by the regulations;
- (c) any other period of a kind prescribed by the regulations.

(3) **[Excluded period does not break continuous service]**

An excluded period does not break a national system employee's continuous service with his or her national system employer, but does not count towards the length of the employee's continuous service...

[48] A *period of continuous service* can be made up of a series of *periods of service*.<sup>50</sup> An employee may have a series of contiguous *periods of service* with an employer that may count towards a single *period of employment (period of continuous service)* with that employer.<sup>51</sup>

[49] In the case of a casual employee, a period of service will not count towards the casual employee's period of employment unless:

- a) the employment as a casual employee was as a regular casual employee; and
- b) during the period of service as a casual employee, the employee had a reasonable expectation of continuing employment by the employer on a regular and systematic basis.<sup>52</sup>

## Consideration

[50] In *Chandler v Bed Bath N' Table Pty Ltd (Chandler)*,<sup>53</sup> the Full Bench identified what it considered to be the correct approach to the application of s 384(2)(a) of the Act. That approach was clearly drawn from the reasoning in *Yaraka Holdings Pty Ltd v Giljevic (Yaraka Holdings)*<sup>54</sup> (see paragraph [11] of *Chandler*):

In *Yaraka Holdings Pty Ltd v Giljevic*, the Court of Appeal of the ACT gave consideration to the proper construction of s 11 of the *Workers Compensation Act 1951* (ACT), which for relevant purposes deemed as workers for the purpose of that Act casual workers if their “*engagement, under the contract or similar contracts, has been on a regular and systematic basis*” taking into account a range of matters including the contractual terms, the working relationship and all associated circumstances, the period or periods of engagement, the frequency of work, the number of hours worked, the type of work, and the normal arrangements for someone engaged to perform that type of work. Crispin P and Gray J observed that the concept of employment on a regular and systematic basis was drawn from the *Workplace Relations Act 1996* (Cth), and went on to say:

[65] It should be noted that it is the “engagement” that must be regular and systematic; not the hours worked pursuant to such engagement. Furthermore, the section applies to successive contracts and non-continuous periods of engagement. It is true that subs (3) provides that, in working out whether an engagement has been on a regular and systematic basis, a court must consider, inter alia, the frequency of work, the number of hours worked under the contract or similar contracts and the type of work. However, these statutory criteria relate to the decisive issue of whether the relevant engagement has been on a regular and systematic basis. The section contains nothing to suggest that the work performed pursuant to the engagements must be regular and systematic as well as frequent.

...

[67] Connolly J was right to conclude that the absence of any contractual requirements for the respondent to work at set times or of any assumption that he be present on a daily weekly or monthly basis unless told otherwise did not preclude a finding that his engagements had been regular and systematic.

[68] The term “regular” should be construed liberally. It may be accepted, as the Magistrate did, that it is intended to imply some form of repetitive pattern rather than being used as a synonym for “frequent” or “often”. However, equally, it is not used in the section as a synonym for words such as “uniform” or “constant”. Considered in the light of the criteria in s11 (3)(a)-(g), we are satisfied that the pattern of engagement over the years from 1995 to 2002 satisfied this description.

[69] *Mr Rares argued that the course of engagement over these years had not been shown to have been systematic because it had not been predictable that the respondent, would be engaged to work at particular times, on particular jobs or at particular sites. Again, that is not the test. The concept of engagement on a systematic basis does not require the worker to be able to foresee or predict when his or her services may be required. It is sufficient that the pattern of engagement occurs as a consequence of an ongoing reliance upon the worker’s services as an incident of the business by which he or she is engaged.*

**[51]** In *Chandler*, the Full Bench confirmed:

[13] The reasoning in *Yaraka Holdings* has been applied to the concept of casual employment on a regular and systematic basis in the FW Act. In *WorkPac Pty Ltd v Skene*, the Federal Court Full Court favoured (without needing to finally adopt) the view that the construction in *Yaraka Holdings* should be applied to the definition of “*long term casual employee*” in s 12 of the FW Act (which includes a requirement that the employee has been employed “*on a regular and systematic basis for a sequence of periods of employment during a period of at least 12 months*”). The Commission in its own decisions has consistently applied *Yaraka Holdings* to s 284(2)(a), including in the Full Bench decisions in *Pang Enterprises Pty Ltd ATF Pang Family*

*Trust v Sawtell and Bronze Hospitality Pty Ltd v Janell Hansson* as well as in numerous first instance decisions.

(citations omitted)

[52] To recap, in *Yaraka*, the Court noted that it is the engagement of a casual employee that must be regular and systematic, not the hours worked pursuant to such engagement.<sup>55</sup> It also held that the term ‘regularly’ should be construed liberally, and that ‘systematic’ does not mean predictable.<sup>56</sup> However, as was observed in the Full Bench decision in *Bronze Hospitality Pty Ltd v Hansson*,<sup>57</sup> the Court in *Yaraka* did not say or suggest that the hours of work are analytically unimportant, and clearly, the days on which a person works and the hours worked on those days are relevant to the consideration of whether casual employment is regular and systematic, and whether the person has a reasonable expectation of ongoing employment.<sup>58</sup>

[53] In the Federal Court judgment of *Bronze Hospitality Pty Ltd v Hansson (No 2) (Bronze Hospitality No.2)*, Jackson J expressed:

Section 384(2)(a)(i) calls for an evaluation of whether the employment as a casual employee was on a regular and systematic basis. So it is the relationship of employment that must be characterised, one way or the other. It is true that the basis of the relationship can change over time, so it is necessary to determine when it became employment on a regular and systematic basis. But if, looking back after the end of the relationship (as is of course inevitable in an unfair dismissal case) the evidence as a whole supports a characterisation of its basis as regular and systematic from the beginning, it does not matter that looking forward from the beginning, one would not have yet seen all that evidence. The basis of the employment was, in fact, regular and systematic from the start, even if sufficient evidence of that fact did not accumulate until later.<sup>59</sup>

[54] Returning to the notion of ‘expectation’ and the proper construction of s 384(2)(a) of the Act, Jackson J stated:

...If the employee's expectation was based, not on anything the employer said, but solely on her own observation of the regularity of her work shifts, it would be wrong to look back and say that, as it turned out, there was a reasonable expectation from the very beginning. An expectation could not be reasonable until the time at which the pattern necessary to make it so has emerged.

But I do not accept that as a matter of construction of s 384(2)(a)(ii), a week and a half of regular employment cannot establish that pattern. The ordinary meaning of the words of s 384(2)(a)(ii) requires that the employee has subjectively formed an expectation of continuing employment by the employer on a regular and systematic basis. If that expectation has been formed, it is necessary to assess whether it is a reasonable one. It is true that the word ‘reasonable’ is generally used in the law to import an objective standard: *Adams v Bracknell Forest Borough Council* [2004] UKHL 29; [2005] 1 AC 76 at [33] (Lord Hoffmann). But the FWA does not limit the matters that may be taken into account in determining whether the expectation is reasonable. Certainly, the shorter the period of employment, generally the harder it will be for the employee to establish that he or she reasonably relied on a pattern of work, if that is the basis of his or her reasonable expectation. But the reasonableness of the expectation *depends on all the circumstances*, and there is no minimum period in the legislation that makes a week and half insufficient in every case.<sup>60</sup>

[55] In *Bronze Hospitality No.2*, the Federal Court proposed that what is agreed to at the commencement of employment is also relevant to the question of whether an employee has

objectively reasonable grounds for an expectation of continuing employment on a regular and systematic basis.<sup>61</sup>

### **The Applicant's employment prior to the suspension**

[56] To determine whether the legal relationship is one of casual employment, the High Court has ruled that the determination of the character of the legal relationship between the parties is undertaken only by reference to the legal rights and obligations which constitute that relationship.<sup>62</sup> In this case, neither party cavils with the proposition that the Applicant was an employee employed on a casual basis. The express terms of the Applicant's Teaching Contract state as much.

[57] From the materials filed, there appears to have been one written contract between the Applicant and the Respondent – the Teaching Contract. Dated 6 August 2019, it provided for employment on irregular hours for up to 12 months. That contract cautioned the Applicant that the number of students enrolled in the unit may fluctuate, and it was therefore possible that the appointment may be subject to variation or cancellation any time during the semester.<sup>63</sup>

[58] Ms Isebe gave a comprehensive written account of the process for engaging Demonstrators. This included an explanation of the approval process that Unit Coordinators were required to adhere to in respect of employing Demonstrators for the facilitation of Labs.

[59] Ms Isebe's evidence corresponds with the business records of the Respondent. It is evident that before each semester and having obtained the relevant approvals, the Unit Coordinator would ask the School's Operations Team to send out a call for EOI for casual Demonstrators for the Labs.<sup>64</sup> The School's Operation Team would send the EOI to two distribution lists. Whilst there was conflict between the parties in respect to the number of potential candidates on the distribution lists, it remained that an EOI request was issued via these distribution lists, before a casual employee was employed as a Demonstrator for a particular semester.

[60] In respect to the 'distribution lists', the potential candidates' calibre relative to the positions on offer was questioned by the Applicant. However, importantly, what was evident was that the 'distribution list' markedly differed to what one may find where an employee is working for a labour hire company and is kept on an 'employment register' and thereafter assigned jobs with a client of the company. From the evidence led, the distribution lists included in excess of 50-100 candidates, and according to the Applicant, as noted, not all candidates possessed the required skill set or expertise. It would seem that the inclusion of one's name on the distribution lists did not indicate that the Respondent and the person so named were in an employment relationship, or that inclusion on the distribution list gave rise to an expectation of employment.

[61] Ms Isebe stated that until the time the EOI were called for, prospective employees would not know whether there would be casual work available as a Demonstrator within the School.<sup>65</sup> There was no suggestion made that this was not the case.

[62] Furthermore, while a candidate may have been informed of the Labs they were conducting during a semester, Ms Isebe gave evidence that the engagement of casual employees

was always subject to the School's evolving financial position and student enrolment. Ms Isebe's evidence is supported by a business record. I refer in this respect to Dr Spagnoli's email dated 12 August 2020,<sup>66</sup> and the Teaching Contract which, as noted, expressed that as the number of students enrolled in the unit may fluctuate, it is possible that one's appointment may be subject to variation or cancellation any time during the semester.<sup>67</sup>

**[63]** Whilst only one written Teaching Contract was tendered into evidence, the context of this case warrants consideration. Ms Isebe's uncontested evidence was that the Operations Team would usually provide an employment contract to a candidate on the first occasion they worked as a Demonstrator, and thereafter the Operations Team would usually send out an engagement email which confirmed that the terms and conditions of the candidate's contract of employment would remain as per their initial contract.<sup>68</sup> This is evident in the email from the School Operations Coordinator, Ms McNally, to the Applicant dated 26 February 2021.

**[64]** As noted, Ms McNally emailed the Applicant on 26 February 2021 and confirmed his casual teaching appointment with the School, stating that the terms and conditions of his casual employment were set out within the Teaching Contract.<sup>69</sup> Ms McNally continued:

To ensure you receive the correct rate of pay, please maintain your UWA student status and completed qualifications in ESS.  
Information about casual timesheets, including FAQs, training videos and the payroll calendar can be accessed via the staff intranet. Should you require further support please contact the Human Force Support Team.  
For school specific boarding support, please contact your Academic Services Team within your Faculty Service Delivery Centre.  
Should you have any queries regarding teaching expectations, please contact your Supervisor.<sup>70</sup>

**[65]** Ms McNally's email of 26 February 2021 specifically clarified that the Applicant *may* be engaged to deliver teaching activities for specified units in Semester 1, 2021.

**[66]** The evidence shows that Dr Spagnoli thereafter adopted the usual recruitment process for casual employees in the second half of 2021. It was not the case that the Applicant's employment simply continued. EOIs appear to have been sent out in late-June to early July 2021. Whilst Dr Spagnoli had decided on the number of casual employees the School required and the hours they would work each week, evidently, Professor Ludwig, conscious of budget cuts, informed Dr Spagnoli on 22 July 2021 that preference was to be afforded to permanent employees to undertake the Labs.<sup>71</sup> Consequently, the casual employees that Dr Spagnoli had selected from the EOI were advised that he could not offer them Labs every week.<sup>72</sup>

**[67]** The following findings appear uncontroversial:

- a) the Applicant had been employed by the Respondent as a Demonstrator working on a casual basis;
- b) on each occasion that the Applicant worked for the Respondent he did so after responding to an EOI sent to a distribution list – a list which included the Applicant's name;
- c) after his initial engagement commencing in mid-August 2019 (the Teaching Contract stipulated a 12-month period), subsequent engagements and work periods with the Respondent were confirmed through an 'engagement email'. The

- engagement email dated 26 February 2021 stated that the terms and conditions of the casual teaching employment were set out within the ‘casual teaching contract of employment’;
- d) the Teaching Contract cautioned that the number of students enrolled in the unit may fluctuate, and it was therefore possible that the appointment (teaching appointment) may be subject to variation or cancellation any time during the semester;<sup>73</sup>
  - e) on 12 August 2020, Dr Spagnoli advised Demonstrators that due to budget cuts, the number of sessions they would demonstrate would be reduced by one (the molecular models Lab);
  - f) by email dated 26 February 2021, the Applicant was employed for Semester 1 of that year and informed that he ‘may’ be engaged to deliver teaching activities;
  - g) by email dated 26 July 2021, Dr Spagnoli explained (to the 10-11 candidates) that due to changes in the budget he could not offer a Lab every week and they were to select a session in the spreadsheet (limited to three to four sessions); and
  - h) the Applicant worked as a Demonstrator in Semester 2, 2019, and Semesters 1 and 2 in 2020 and 2021.

**[68]** Consideration of each calendar year from mid-2019 to the later part of 2021 shows there were two distinct periods when the Applicant worked for the Respondent. These periods aligned with the operational demands arising from a semester of teaching. I appreciate that there was some disagreement between the parties about whether the mainstay of teaching occurred within Semester 1 and Semester 2, or otherwise outside of a semester.

**[69]** In respect of the dates and times of each Lab within a semester, I am satisfied that the Applicant was notified in advance (three to five weeks before Labs commenced) of the dates and times he was required to work.<sup>74</sup> Further, the evidence leads to a finding that within a semester, the Applicant would routinely work designated days at designated times (perhaps apart from marking). It is therefore open to conclude that during a semester, the Applicant’s employment as a casual employee appeared to be on a regular and systematic basis. This is notwithstanding that for some weeks in the semester the Applicant was not allocated any work and in August 2021, the number of the Applicant’s Labs was reduced by one.

**[70]** That it was regular within a semester is demonstrated by both the Applicant’s summary provided at page 175 of the Digital Hearing Book and Annexure EI-11 to the witness statement of Ms Isebe. Those records show that for approximately two-and-a-half months within a semester, the Applicant worked multiple times conducting Labs, marking and occasionally in pre-laboratory meetings – the pattern of that work already described. It was systematic because, as the uncontested evidence shows, the Applicant worked in accordance with a timetable that was established by Dr Spagnoli.

**[71]** Subsections 382(a)(i) and (ii) require an assessment as to whether the employee was a ‘regular casual employee’, principles of which have already been traversed and applied to the facts in this case, and whether the employee had a ‘*reasonable* expectation’ of continuing employment by the employer on a regular and systematic basis. The Teaching Contract cautioned that the Applicant’s appointment may be subject to variation or cancellation at any time during a semester, and when one gazes retrospectively it can be seen that in August 2020, the Applicant’s number of sessions (Labs) were reduced,<sup>75</sup> and in the latter part of 2021, Dr Spagnoli was forced to inform candidates that the number of Labs on offer to each

Demonstrator had been reduced due to budgetary constraints. In short, I have concluded that there was not a reasonable expectation.

[72] However, the aforementioned factors do not warrant further consideration as they are not of assistance in this case. Between the semesters from mid-2019 to the latter part of 2021, there were irrefutable breaks in the Applicant's employment. The Applicant's last day of work in Semester 2, 2019 was 22 October 2019. Thereafter, he did not work again for the Respondent until 10 March 2020, some four to five months after his last Lab and that work was subsequent to the Applicant going through the EOI process first. The breaks continued as follows:

- a) Semester 1, 2020 concluded on 12 May 2020 and the Applicant recommenced work in Semester 2 2020 on 10 August 2020;
- b) Semester 2, 2020 concluded on 20 October 2020 and the Applicant recommenced work in Semester 1, 2021 on 4 March 2021; and
- c) Semester 1, 2021 concluded on 21 May 2021 and the Applicant recommenced work on 7 September 2021.

[73] The abovementioned periods in which the Applicant was employed did not, in my view, culminate into what can be considered contiguous periods of service that counted toward a single period of employment. It would be wrong to assume that it is only the length of the period of absences between semesters that has led to this conclusion.

[74] First, it is apparent that the periods between semesters are not periods of unauthorised absence, unpaid leave or unpaid authorised absence. If such periods were 'excluded periods' for the purpose of s 22(2) of the Act, meaning that the absences fell within one of the three categories, then by s 22(3) the periods between semesters would not break the Applicant's continuous service with the Respondent albeit the time would not count towards the length of the Applicant's period of employment.

[75] Second, the Applicant spoke to the teaching structure at the tertiary level noting that the use of semesters was not unusual in higher academic institutions and that academics would usually not teach during semester breaks albeit they remained employed. However, the situation of a Demonstrator employed on a casual basis arguably differs to those academics who are employed on a fixed term contract, permanent contract or otherwise tenured. What must be examined in this case are the circumstances pertinent to the employment relationship between the Applicant and the Respondent.

[76] Third, except for the 'Suspension Letter' which I will address shortly, the evidence before me does not suggest that the Applicant was employed by the Respondent other than at the times when he worked during the semester as a Demonstrator. Ms Isebe provided an exacting description of the recruitment process for the Demonstrators employed on a casual basis – a process that was undertaken prior to the Applicant being employed on each occasion. The Applicant only gained employment on each occasion because he responded to the Unit Coordinators' EOI. Whilst included on a distribution list or on both distribution lists, those lists were not, in my view, indicative of ongoing employment. Had the Applicant not engaged in the recruitment process on each occasion – that is responded to the EOI, he would not have been employed.



[77] One Teaching Contract was tendered into evidence, Ms Isebe acknowledged that subsequent employment periods with the Respondent were underpinned by the engagement email, which expressly referred to the initial Teaching Contract. Direct evidence supported Ms Isebe's evidence on this point. It is evident from the engagement email that whilst the terms and conditions were drawn from the Teaching Contract, the engagement email confirmed and confined the appointment to a set employment period, which aligned with the schedule of Labs assigned for each semester as outlined at paragraph [31] of this decision. Those set employment periods did not constitute a period of continuous employment.

### **Suspension and the period of continuous service**

[78] It is evident from the evidence of Ms Isebe that the Applicant was issued with a letter of suspension pending an investigation into allegations of misconduct on 21 October 2021 (**Suspension Letter**).<sup>76</sup> The letter informed the Applicant, amongst other matters:

#### **Suspension from work**

This letter is to advise that I have been made aware of serious allegations regarding your conduct towards UWA staff members, which warrant investigation. If substantiated, the allegations may constitute serious misconduct as defined under Regulation 1.07 of the *Fair Work Regulations 2009* (Cth) and a breach of the University of Western Australia's (**University**) Code of Ethics and Code of Conduct (**Code**).

Given the nature and seriousness of the allegations, and to enable a prompt and fair investigation to occur, I am directing you to not attend work, while this matter is being investigated.

This direction is effective immediately and will remain in place for the duration of this matter, unless advised otherwise by me. During this period, you will be excluded from the University's workplace and facilities, unless authorised by Human Resources.

Your suspension does not mean that the University has prejudged the allegations against you. The University will investigate the allegations fairly. Particulars of the allegations will be provided to you in due course and you will be given an opportunity to respond to and explain your version of events. You will also be given the opportunity to have a support person in attendance at any meeting with you regarding the investigation.

You should be aware that the allegations are serious and a finding of misconduct or serious misconduct may result in disciplinary action, including termination of employment.<sup>77</sup>

[79] The Suspension Letter referred to a direction 'not to attend work, while this matter is being investigated... This direction is effective immediately and will remain in place for the duration of this matter ... During this period, you will be excluded from the University's workplace and facilities unless authorised by Human Resources.'

[80] The Suspension Letter was issued to the Applicant two days after his last Lab in 2021. On first blush, the Suspension Letter might suggest that the Applicant remained an employee of the Respondent post the conclusion of Semester 2, 2021 and could potentially be further extrapolated to surmise that the Applicant remained an employee post the conclusion of each of the teaching periods or semesters from mid-2019 to the latter part of 2021.

**[81]** However, the context in which the Suspension Letter was issued requires further examination.

**[82]** The Applicant purports that on 19 October 2021, an unknown member of Human Resources ended his appointment in the Respondent's personnel and payroll system.<sup>78</sup> By email dated 20 October 2021, the Integrity and Standards Unit at the Respondent informed the Applicant that he had allegedly engaged in conduct that contravened the Code of Conduct.

**[83]** I have traversed the contents of the email dated 20 October 2021. Broadly speaking, the Applicant was temporarily suspended from the Respondent pending an investigation into his student conduct.<sup>79</sup> By email dated 1 November 2021, the Integrity and Standards Unit wrote to the Applicant, advising him that the Respondent was in the process of reviewing all available material to decide about the continuation of the suspension, and that for his information, his scholarship had been suspended until a decision in the matter had been made.<sup>80</sup>

**[84]** Correspondence from the Integrity and Standards Unit dated 14 December 2021 advised the Applicant that a 'Student Conduct and Discipline investigation had commenced regarding these incidents'.<sup>81</sup> These incidents were described as 'serious incidents which occurred in October 2021 at the Bayliss and Harry Perkins buildings'.<sup>82</sup>

**[85]** By letter of 4 March 2022, the Respondent's Human Resources Director informed the Applicant that Human Resources was aware of allegations concerning the Applicant's conduct on 17 and 18 October 2021, which warranted investigation by the Respondent. The letter continued:

...You should be aware that the allegations (as set out below) are serious and may result in disciplinary action against you, up to and including termination of your casual employment as Research Assistant with the University.<sup>83</sup>

As you are both an employee and student of the University, the process from Human Resources will run concurrently with the investigation into the allegations conducted by...Integrity and Standards Unit...<sup>84</sup>

**[86]** Clearly, by 4 March 2022, the Applicant was not employed to facilitate Labs. However, the Applicant's alleged misconduct occurred at a time whilst employed to provide Labs – on 17 and 18 October 2021. At that time, he remained in the employ of the Respondent. Understandably, the Respondent ran parallel investigations into the Applicant's misconduct from both the perspective of student and casual employee. This was clearly explained in the letter of 4 March 2022. Whilst the letter of 4 March 2022 referred to the Applicant as an 'employee' and a 'student', I am not persuaded that the contents of the Suspension Letter give rise to an inference or otherwise suggest that between previous semesters (or prior semester breaks) the Applicant remained an employee of the Respondent. In my view, the contents of the Suspension Letter are confined to the parameters in which the Applicant was facing allegations of misconduct, which the Respondent was addressing.

**[87]** Plainly, when the Respondent issued the Suspension Letter, it considered it was authorised to direct the Applicant not to attend work while the investigation into the Applicant's purported misconduct was on foot. Presumably, the Respondent considered the direction issued was lawful and reasonable such that the Applicant was obliged to follow it. Therefore, the

Applicant's absence from the workplace arose from the direction issued and was mandated by the same.

[88] To clarify, in my view, the Suspension Letter, in addition to the evidence provided by both parties, is not suggestive that the Respondent imparted words or engaged in actions indicative that the Applicant's employment had ended when the Suspension Letter was issued. That did not occur until the issuance of the letter of 1 November 2022, in which the Respondent notified the Applicant that his employment was terminated effective immediately, in addition to advising of the outcome of the investigation into his alleged misconduct.<sup>85</sup>

[89] The question therefore is whether the Applicant was on a period of unpaid leave or an unpaid authorised absence in accordance with s 22(2)(b) of the Act, whilst 'suspended'. If he was, the period of absence will constitute an excluded period. Section 22(3) is explicit that an excluded period does not count towards the length of the employee's period of continuous service.

[90] It is apparent that the terms 'leave' and 'authorised absence' are directed to different circumstances, otherwise only one type of absence would be specified in s 22(2) of the Act.<sup>86</sup> Regarding the word 'leave', I do not consider the Applicant's absence as a period of 'leave'. 'Leave' suggests an absence in circumstances where the employee has met the requirements of a workplace instrument, statute or common law employment contract that entitles the employee to be absent from the workplace on a period of leave.<sup>87</sup>

[91] It is difficult to conceive that the period of suspension, that is, a period in which the Applicant was not paid and had been instructed not to attend the workplace, was anything other than an 'unpaid authorised absence', as referred to in s 22(2) of the Act.

[92] The Respondent presses that the Applicant's failure to perform work during the period of suspension cannot be sensible characterised as an 'excluded period' of the kind that would preserve continuity of service.<sup>88</sup> It says, as a consequence, when the Applicant was notified of his dismissal, he had not met the minimum employment period, because the Applicant's service ceased to be continuous with effect from his suspension.

[93] However, I find that the Applicant's employment commenced in or around the latter part of July 2021 or August 2021,<sup>89</sup> when he was appointed as a Demonstrator to conduct Labs for the second semester of that year. The Applicant's employment was terminated on 1 November 2022. From the time the Applicant's employment commenced (noting that his first Lab for Semester 2, 2021 was worked on 7 September 2021) until 21 October 2021, the Applicant had, in my opinion, engaged in a period of continuous service. Whilst during this period the employment was regular and systematic, I do not find that during such period the Applicant had a reasonable expectation of continuing employment. Post 21 October 2021, the Applicant remained employed by the Respondent whilst the investigation into his alleged misconduct was on foot, but the period did not count as service and therefore did not count towards the Applicant's continuous service with the Respondent. On this basis, I find that the Applicant had not completed a 'period of employment' of at least the 'minimum employment period'.

## Conclusion

**[94]** Based upon the above reasons, I have concluded that the Applicant is not protected from unfair dismissal because he has not completed a period of employment with the Respondent of at least the minimum employment period. The Applicant's unfair dismissal application is therefore dismissed and an Order<sup>90</sup> to that effect issues concurrently.



DEPUTY PRESIDENT

*Appearances:*

*Mr S Micke, Applicant*  
*Mr J Mclean of Counsel for the Respondent*

*Hearing details:*

2023.  
Perth (by video):  
8 February.

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<sup>1</sup> *Fair Work Act 2009* (Cth) s 22(2).

<sup>2</sup> Form F2 – Unfair Dismissal Application [1.1] (**Form F2**).

<sup>3</sup> *Ibid* [1.4], [1.5].

<sup>4</sup> Digital Hearing Book, 142 (**DHB**).

<sup>5</sup> *Ibid* 164.

<sup>6</sup> Witness Statement of Elsa Isebe, [9] (**Isebe Statement**).

<sup>7</sup> *Ibid*.

<sup>8</sup> *Ibid* [11].

<sup>9</sup> *Ibid* [12].

<sup>10</sup> *Ibid* [13].

<sup>11</sup> *Ibid* [14].

<sup>12</sup> *Ibid* [15].

- <sup>13</sup> Ibid [16].
- <sup>14</sup> Ibid [17].
- <sup>15</sup> Ibid.
- <sup>16</sup> Ibid [18].
- <sup>17</sup> Ibid.
- <sup>18</sup> Ibid.
- <sup>19</sup> Ibid.
- <sup>20</sup> Ibid [20].
- <sup>21</sup> Ibid [23].
- <sup>22</sup> Ibid.
- <sup>23</sup> Ibid [24].
- <sup>24</sup> Ibid [25].
- <sup>25</sup> Ibid annexure EI-2.
- <sup>26</sup> Ibid [26].
- <sup>27</sup> Ibid annexure EI-3.
- <sup>28</sup> Ibid [27].
- <sup>29</sup> Ibid [28].
- <sup>30</sup> Ibid annexure EI-5.
- <sup>31</sup> Ibid [30], annexure EI-5.
- <sup>32</sup> Form F2 (n 2) [3.2]; DHB (n 4) 159; Witness Statement of Scott Kenneth Micke (**Micke Statement**) [3].
- <sup>33</sup> DHB (n 4) 6.
- <sup>34</sup> Ibid 7.
- <sup>35</sup> Ibid 6.
- <sup>36</sup> Ibid 10.
- <sup>37</sup> Ibid.
- <sup>38</sup> Ibid 16.
- <sup>39</sup> Ibid.
- <sup>40</sup> Ibid 46.
- <sup>41</sup> Ibid 49.
- <sup>42</sup> Ibid 53.
- <sup>43</sup> Ibid.
- <sup>44</sup> Ibid 63.
- <sup>45</sup> Ibid 77.
- <sup>46</sup> Ibid 81.
- <sup>47</sup> Micke Statement (n 32) [9]; *ibid* 159.
- <sup>48</sup> Micke Statement (n 32) [10]; DHB (n 4) 159.
- <sup>49</sup> DHB (n 4) 93.
- <sup>50</sup> *Shortland v Smiths Snackfood Co Ltd* (2010) 198 IR 237, 240–1 [12].
- <sup>51</sup> Ibid.
- <sup>52</sup> *Fair Work Act* 2009 (Cth) ss 384(2)(a)(i)–(ii).
- <sup>53</sup> (2020) 295 IR 1.
- <sup>54</sup> (2006) 149 IR 339.
- <sup>55</sup> Ibid 355 [65].
- <sup>56</sup> Ibid 355–6 [68]–[69].

<sup>57</sup> [\[2019\] FWCFB 1099](#), [24].

<sup>58</sup> Ibid.

<sup>59</sup> (2019) 290 IR 344, 352 [37].

<sup>60</sup> Ibid 352–3 [39]–[40] (emphasis added).

<sup>61</sup> Ibid 353 [42].

<sup>62</sup> *WorkPac Pty Ltd v Rossato* (2021) 271 CLR 456, 477 [57].

<sup>63</sup> DHB (n 4) 164.

<sup>64</sup> Isebe Statement (n 6) [18].

<sup>65</sup> Ibid.

<sup>66</sup> Ibid [23].

<sup>67</sup> DHB (n 4) 164.

<sup>68</sup> Isebe Statement (n 6) [24].

<sup>69</sup> Ibid annexure EI-7.

<sup>70</sup> Ibid.

<sup>71</sup> Ibid [27].

<sup>72</sup> Ibid [30].

<sup>73</sup> DHB (n 4) 164.

<sup>74</sup> Ibid 168.

<sup>75</sup> Isebe Statement (n 6) [23].

<sup>76</sup> Ibid annexure EI-13.

<sup>77</sup> Ibid.

<sup>78</sup> Form F2 (n 2) [3.2]; DHB (n 4) 159; Micke Statement (n 32) [3].

<sup>79</sup> DHB (n 4) 6.

<sup>80</sup> Ibid.

<sup>81</sup> Ibid 10.

<sup>82</sup> Ibid.

<sup>83</sup> Ibid 16.

<sup>84</sup> Ibid 16.

<sup>85</sup> Isebe Statement (n 6) EI-14.

<sup>86</sup> *Badenhorst v Teys Bros (Naracoorte) Pty Ltd* [\[2011\] FWA 5622](#), [20].

<sup>87</sup> Ibid.

<sup>88</sup> *Fair Work Act 2009* (Cth) s 22(2).

<sup>89</sup> Isebe Statement (n 6) annexure EI-3.

<sup>90</sup> [PR749916](#).