APPEAL AGAINST A ORDER OF THE INDUSTRIAL MAGISTRATE IN MATTER NO. M 109 OF 2017
GIVEN ON 25 OCTOBER 2018
WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2020 WAIRC 00112
CORAM	**:**	CHIEF COMMISSIONER P E SCOTT COMMISSIONER D J MATTHEWS COMMISSIONER T B WALKINGTON
HEARD	**:**	WEDNESDAY, 20 MARCH 2019, TUESDAY, 30 APRIL 2019
DELIVERED	**:**	FRIDAY, 21 FEBRUARY 2020
FILE NO.	**:**	FBA 14 OF 2018
BETWEEN	**:**	COMMISSIONER OF POLICE Appellant AND BRIAN JOHN MCCORMACK Respondent

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ON APPEAL FROM:

Jurisdiction	**:**	**WESTERN AUSTRALIAN INDUSTRIAL MAGISTRATE'S COURT**
Coram	**:**	**INDUSTRIAL MAGISTRATE M FLYNN**
Citation	**:**	**2018 WAIRC 00809**
File No	**:**	**M 109 OF 2017**

CatchWords	:	Industrial law (WA) - Appeal against decision of the Industrial Magistrate in relation to construction of industrial agreement – Contravention of *Western Australia Police Industrial Agreement 2014* – Construction of cl 36 on non work-related medical and pharmaceutical expenses – Whether Industrial Magistrate erred in making an order pursuant to s 83(5) of the *Industrial Relations Act 1979* (WA) requiring Commissioner of Police to reconsider Reimbursement Claims – Order beyond power – Interpretation of ss 83(4) and (5) of the Act – CPAP machine hire and purchase cost not costs relating to the provision of a service – Contraventions of contract or legal principle compared with contraventions of industrial instrument – No express or implied requirement to provide reasons in writing for refusal of claims – Appeal upheld – Decision of Industrial Magistrate quashed – Complaint dismissed
Legislation	:	Industrial Relations Act 1979, s 83A, s 83
Result	:	Appeal upheld, Orders quashed

Representation:

Counsel:

Appellant	:	Mr J Carroll (of counsel)
Respondent	:	Mr A Crocker (of counsel)

Case(s) referred to in reasons:

Civil Service Association of Western Australia Inc v. Commissioner, Western Australian Police Department [2019] WAIRC 00142; (2019) 99 WAIG 358

Martin Fedec v The Minister for Corrective Services [2017] WAIRC 00828; (2017) 97 WAIG 273

Minister for Police & Anor v Western Australian Police Union of Workers (1995) 75 WAIG 1504

Pearce v Mr Christopher Dawson, Commissioner of Police [2018] WAIRC 00679; (2018) 98 WAIG 1047

Samad v District Court of New South Wales [2000] NSWCA 344

Silverbrook Research Pty Ltd v Lindley [2010] NSWCA 357

Terri Vincent v Department of Finance [2016] WAIRC 00035; (2016) 96 WAIG 132

Thomson Australia Holdings Pty Ltd v Trade Practices Commission and Others [1981] 148 CLR 150

Western Australian Police Union of Workers v Commissioner of Police [2003] WAIRC 7604; (2003) 83 WAIG 823

Reasons for Decision

Scott CC:

1 This is an appeal against the decision of the Industrial Magistrate's Court (IMC) in matter numbered M 109 of 2017, by which the Industrial Magistrate ordered that:

> 1. The respondent is directed to reconsider, in light of the reasons for judgment in this matter, the claimant's claim for reimbursement of the three non work-related medical expenses described in the Reasons as 'the Three Expenses'; and
>
> 2. The respondent is issued a caution for the proved contravention of cl 36 of the *Western Australia Police Industrial Agreement 2014.*

Background

2 Mr McCormack is a serving member of Western Australia Police. His conditions of service include the *Western Australia Police Industrial Agreement 2014* (Industrial Agreement). Clause 36 – NON WORK-RELATED MEDICAL AND PHARMACEUTICAL EXPENSES of the Industrial Agreement sets out that the Commissioner of Police (the Commissioner) may pay certain reasonable medical illness or injury related expenses. The clause sets the general terms of what expenses may be reimbursed, a list of exclusions and how an officer is to make a claim.

3 Mr McCormack made a claim for reimbursement of a number of expenses. They arose because, according to his evidence and a number of other documents including a letter from Dr Peter Bairstow to Dr Michael Prichard, a sleep specialist, Mr McCormack's family suggested Mr McCormack was experiencing obstructive sleep apnoea. Dr Prichard saw Mr McCormack and arranged for him to undergo an overnight sleep study at The Mount Private Hospital. The overnight sleep study appears to have been undertaken by a technician.

4 Dr Prichard is said to have reviewed the report generated by the sleep study. He diagnosed Mr McCormack with obstructive sleep apnoea. As a result, he arranged for Mr McCormack to hire a continuous positive airway pressure (CPAP) machine for a trial period. Mr McCormack trialled the machine at home. Mr McCormack returned to be reassessed by Dr Prichard who said Mr McCormack would benefit from purchasing such a machine, and he did so. Mr McCormack then claimed reimbursement of the amounts associated with consultations with Dr Prichard, the hospital stay, the hire of the CPAP machine, and then for its purchase. The amounts he claimed were those left over from claims on his private health insurance.

5 The Commissioner agreed, in the Agreed Statement of Facts, at paragraph 5, that he rejected the claim for the $250 overnight stay for the sleep study and the CPAP machine hire cost of $250. He agreed that he rejected the claim for reimbursement for the purchase cost balance of $1780. He also agreed that he rejected the claim for the CPAP machine purchase through a memorandum from Jim Anderson, Executive Manager of the WA Police Claims Management Unit.

6 The WA Police Union wrote to Mr Anderson with further evidence said to support the claim and saying that the hire of the CPAP machine was a 'service' under cl 36. Mr Anderson responded, disagreeing with the Union's interpretation of cl 36 and saying that the claim did not fall within the clause.

7 Mr McCormack then lodged a grievance relating to the rejection of his claim for the hospital accommodation of $250 and the hire of the CPAP machine of $250. Notably the grievance did not include the cost of the purchase of the CPAP machine. Ms Lavell, Director, Human Resources, for the Office of Assistant Commissioner, Workforce Portfolio, responded to the grievance, saying that in accordance with the Industrial Agreement, the Commissioner had appropriately used his discretion to reject the claim.

The claim to the Industrial Magistrate's Court

8 Mr McCormack made a claim to the IMC under the *Industrial Relations Act 1979* (the Act). He initially claimed that the Commissioner failed to provide adequate justification for denying payment of his claims for reimbursement of specified non work-related medical expenses to him. He claimed reimbursement of two amounts of $250 being for an overnight sleep study at The Mount Private Hospital and the hire of the CPAP machine. The remedies sought were:

> a) Payment of claims in the sum of $500; and
>
> b) An order for the payment of penalties in respect of the breaches of the Industrial Agreement.

9 An amended statement of claim sought 'reimbursement for the purchase of a CPAP machine and consultation costs of $1780'.

10 The remedies sought were the same as before except the cost of the purchase of the CPAP machine was added to paragraph (a) to bring the amount sought to $2,280.00.

11 So, the remedies sought were payment of the amounts said to be owed and penalties for the breach of the Industrial Agreement. During the course of the hearing, the parties argued about the meanings of the terms of cl 36; whether the items claimed fitted the meaning of the clause; whether the Commissioner had discretion to accept or reject the claims; whether he had exercised discretion and whether that discretion miscarried.

Reasons for decision at first instance

12 The learned Industrial Magistrate's Reasons for Decision identified the items and amounts claimed for reimbursement as 'the Three Expenses'. He noted that 'Clause 36 of the Agreement concerns 'non work-related medical expenses' and provides that (the Commissioner) may reimburse the reasonable medical expenses of an employee where those expenses fall within categories proscribed [sic] by the clause.' The learned Industrial Magistrate then set out a summary of the issues and his determination of them. He covered three issues:

> 1. Whether the Three Expenses fall within the categories prescribed by cl 36, and whether the expenses are the result of a 'service' or follow a 'referral

given by a medical practitioner'. He noted that for the reasons he set out, 'it was open to the Commissioner to conclude that the Three Expenses fall within cl 36 of the Agreement'.

2. Whether the Commissioner was 'required' to grant the reimbursement claim. He concluded that cl 36 conferred a discretion on the Commissioner.

3. Whether, in refusing the reimbursement claims, the Commissioner had properly exercised the discretion conferred by cl 36. He found that the Commissioner had failed to exercise the discretion in the manner required by cl 36. He then proposed to make an order for the Commissioner to reconsider the reimbursement claim.

13 His Honour noted the jurisdiction, the practice and procedure of the IMC including that the onus of proving the claim is on the claimant. He then returned to consider the issues in detail. He examined the circumstances and the terms of the Industrial Agreement. His Honour dealt with the disputed meaning of 'referral' and 'service' used in cl 36. He concluded that '[i]t would be incorrect of the Commissioner to construe cl 36(1) of the Agreement such that it was not open to find that the Reimbursement Claims related to expenses under a *referral* by Dr Prichard'.

14 His Honour also found that '[i]t would be incorrect of the Commissioner to construe cl 36(1) of the Agreement such that it was not open to find that the Machine Hire Expense and the Machine Purchase claims related to an *'X-ray or other service'*.

15 His Honour then dealt with the issue of whether the Commissioner was entitled to exercise a discretion to refuse the claims. In doing so, his Honour examined and compared the terms of clauses 35 and 36.

16 The next issue dealt with by his Honour was whether the Commissioner had exercised his discretion as conferred by cl 36. He noted that the Commissioner was entitled to refuse a claim upon the considerations set out in cl 36. He then examined the evidence of the stated findings of the Commissioner in response to the claim by reference to the communications contained in a number of pieces of correspondence. They included correspondence of 8 January 2016; Dr Prichard's letter of 13 January 2016; the email response of 19 January 2016 and Ms Lavell's letter of 3 May 2016.

17 His Honour formed conclusions about the meanings of terms within the clause which lead his Honour to conclude that Mr McCormack's claims related to the terms of those claims which the Commissioner may consider. His Honour noted a number of authorities which dealt with similar cases relating to discretionary decisions (including under a previous scheme), including ***Pearce v Mr Christopher Dawson, Commissioner of Police*** [2018] WAIRC 00679; (2018) 98 WAIG 1047 per Scaddan IM; ***Western Australian Police Union of Workers v Commissioner of Police*** [2003] WAIRC 7604; (2003) 83 WAIG 283 per Scott C; ***The Minister for Police & Anor v Western Australian Police Union of Workers*** (1995) 75 WAIG 1504 per Franklyn J (with whom Rowland J agreed) and Kennedy J.

18 His Honour also examined authorities about the way a decision maker is required to exercise discretion. These included ***Silverbrook Research Pty Ltd v Lindley*** [2010] NSWCA 357 per Allsop P (Beazley JA agreeing) where the issue of a discretionary bonus under a contract between the parties was considered. This was to the effect that the discretion is not to be exercised capriciously or arbitrarily or unreasonably. His Honour went on to note seven circumstances under which the Commissioner might generally refuse a claim, and that 'the claimant will not succeed on his allegation of a contravention of cl 36(1) of the Agreement unless he proves that, in reaching one (or more) of those seven findings, the Commissioner was: dishonest, capricious, arbitrary, unreasoned, manifestly unreasonably [sic], or not acting in conformity with the purposes of the Agreement'. His Honour then noted that it was necessary to examine the stated findings of the Commissioner in response to the claims. He concluded that the claimant was left in a position of uncertainty as to the findings of the Commissioner. This included whether the expenses were not 'medical' expenses, or did not concern a 'service' or whether the Commissioner had exercised the discretion.

19 He concluded that:

> The Commissioner's failure to communicate to the claimant the finding (or findings) that resulted in the claim being refused was a significant omission … a contractual obligation to exercise a discretion has consequences for an employer. The claimant has satisfied me that, in failing to make findings that enable the claimant to satisfy himself that cl 36(1) of the Agreement had been correctly applied to his claim for the Hospital Expense, the Commissioner had not acted in conformity with the purposes of the Agreement, and, accordingly, has contravened the clause [54].

20 He found 'that the expenses of 'accommodation' are capable of being expenses of a 'service' within the ordinary meaning of the word 'service'. I note for completeness that the Hospital Expenses was for the amount of $250.

21 His Honour went on to say that references in the letter of 3 May 2016 'to reviewing the previous applications of the Commissioner's discretion does not satisfactorily address the possibility that any exercise of the discretion was based upon an erroneous legal interpretation of the word 'service', indicate that the Commissioner had not acted in conformity with the purposes of the Agreement and, accordingly, has contravened the clause'.

22 His Honour concluded that cl 36 'casts an obligation on the Commissioner to make findings and, ultimately, to exercise a discretion with respect to payment to an employee. There is no warrant in the text of the clause or in the IR Act for the Court to assume those obligations or to exercise the discretion'.

23 Therefore, he concluded that it was appropriate to make an order pursuant to s 83(5) of the IR Act requiring the Commissioner to reconsider the Reimbursement Claims. He then heard from the parties as to the precise terms of the orders and with respect to penalties. Having heard from the parties, which included proposed orders drafted and agreed between them, his Honour made the orders, set out in the first paragraph of these Reasons.

Grounds of appeal

24 The grounds of appeal as originally filed are:

> 1. The Industrial Magistrate erred in law by finding that the hire or purchase of a continuous positive airway pressure (CPAP) machine by an employee covered by the *Western Australian Police Industrial Agreement 2014* **(Agreement)** amounts to the receipt of an 'other service' by that employee within the meaning of clause 26(1)(b) of the Agreement.
>
> 2. The Industrial Magistrate erred in law in finding that clause 36(1) of the Agreement requires the appellant to make findings such that enables an employee to be satisfied that clause 36(1) of the Agreement had been correctly applied.

25 The orders sought were:

> 1. The appeal be allowed.
>
> 2. Orders 1 and 2 made by the Industrial Magistrate on 25 October 2018 be quashed.
>
> 3. Claim M 109 of 2017 be dismissed.

Applications to amend

26 At the hearing of the appeal on 20 March 2019, the Full Bench raised with the parties what power the IMC has to make the orders it had given the provisions of s 83(4) and (5) of the Act.

27 The appellant subsequently sought to amend his grounds of appeal by amending ground 1 to also deal with the proper construction of the word "referral" in cl 36(1)(b) and by adding ground 3 that:

> The Industrial Magistrate erred in law in making Order 1 because he has no power to do so.
>
> **Particulars**
>
> A. The only possible power for making an order in the nature of Order 1 is s 83(5) of the *Industrial Relations Act 1979* (WA) (**Act**).
>
> B. A pre-condition to making an order under s 83(5) of the Act is the imposition of a penalty by the Industrial Magistrate.
>
> C. The Industrial Magistrate did not impose a penalty.

28 The respondent opposes the application to amend by adding the proposed ground 3. He says that the jurisdictional error, which is now apparent, arose because of the manner in which the parties drafted the Minutes of Order for the consideration of the Industrial Magistrate after the Reasons were published. He says that the impugned Order is capable of being amended to give effect to the intention of the parties at the time, in a manner which is within jurisdiction. On that basis, the respondent says that the Full Bench should amend Order 1 to say that the Industrial Agreement has been contravened in that the Commissioner has denied the claimant's claim for reimbursement of the three non-work related medical expenses described in the Reasons as 'the Three Expenses' by erroneously concluding that the expenses did not come within cl 36 of the Industrial Agreement. He says that such an amendment is consistent with

the conclusion reached by the learned Industrial Magistrate. It would be couched in a jurisdictionally valid form and would reflect the finding that a contravention had been proved and it would reflect the issuing of a caution. He says that if Order 1 were so amended the concern about jurisdiction would dissipate and the amended order would reflect what both parties endeavoured to achieve when preparing the draft Minutes of Order.

29 The respondent also says that it is necessary for the Full Bench to consider the construction of cl 36, rather than simply uphold the appeal on the basis of ground 1. He says that without the amendment he proposes, Order 1 would be of no assistance and undesirable to the parties in processing any other claims which are presently awaiting the outcome of this appeal. He says the practical effect of such a resolution would be the need to find another 'test case' and start again in the IMC. He says it would not be desirable that the construction of cl 36 be occasioned by a debate as to what may, or may not, be the binding *ratio* from the doctrine of this Full Bench. He submits that amending the current Order 1 would alleviate the risk that the appeal could be disposed of in a manner which gives no guidance in relation to the genuine dispute between the parties concerning the issues currently articulated in grounds 1 and 2 of the appeal.

Conclusion regarding the applications to add proposed ground 3 and to amend ground 1

30 The first order made by the learned Industrial Magistrate in directing the Commissioner to reconsider the claims for reimbursement is clearly based on his conclusion that the Commissioner had contravened cl 36 in the manner in which he communicated the exercise of his discretion, because his reason for refusal of the Three Expenses was not clear to the claimant. His Honour had already made findings about the meanings to be attributed to the terms in the Agreement. Those findings were that it was open to the Commissioner to grant the claims for reimbursement, but he did not go so far as to find that he ought to have done so because the decision was discretionary. His Honour found that the Act did not provide for the Court to assume the Commissioner's obligations or to exercise the discretion. He then concluded that he would 'order pursuant to s 83(5) of the Act to the effect that the Commissioner be required to re-consider the Reimbursements Claims in light of these reasons'.

31 Section 83 – Enforcing awards etc. of the Act sets out the IMC's jurisdiction and powers in dealing with applications to enforce instruments including industrial agreements.

32 The IMC's powers to make orders are set out in subsections (4) and (5) in the following terms:

> (4) On the hearing of an application under subsection (1) the industrial magistrate's court may, by order –
>
> (a) if the contravention or failure to comply is proved –
>
> (i) issue a caution; or
>
> (ii) impose such penalty as the industrial magistrate's court thinks just but not exceeding $2 000 in the case of an employer, organisation or association and $500 in any other case;

or

(b) dismiss the application.

(5) If a contravention or failure to comply with a provision of an instrument to which this section applies is proved against a person as mentioned in subsection (4) the industrial magistrate's court may, in addition to imposing a penalty under that subsection, make an order against the person for the purpose of preventing any further contravention or failure to comply with the provision.

33 Order 1 was said by his Honour to have been pursuant to s 83(5), that being an order preventing any further contravention where a contravention has been found. It is not clear to me how the order made would achieve that purpose.

34 The powers of the IMC, where a contravention is proved, are:

1. to issue a caution or a penalty (s 83(4)(i) and (ii));
2. in addition to a penalty, make an order for the purpose of preventing any further contravention (s 83(5)) (emphasis added).

35 The IMC may also order the employer to make good any under payment (s 83A).

36 There is no power to remit the matter for reconsideration as provided in Order 1. Further, such order, if it were for the purpose of preventing any further contravention, can only be made in addition to a penalty. No penalty was imposed under s 83(4)(a)(ii).

37 With respect, the way in which the matter was argued and determined led to a finding that in effect, the Commissioner breached the Agreement by failing to make findings that enabled the claimant to satisfy himself that the Agreement had been correctly applied. However, in my respectful view, the issue was simple and was simply expressed in the originating claim. While it alleged that the Commissioner had failed to provide clear or adequate justification for denying the claims and failed to properly assess and exercise discretion, the orders sought were the payment of the amounts and penalties. Therefore, either the amounts were due or they were not.

38 In my respectful view, having found that 'the claimant will not succeed on his allegation of a contravention of cl 36(1) of the Agreement unless he proves that, in reaching one (or more) of those seven findings, the Commissioner was: dishonest, capricious … etc', the next step in the process ought to have been to consider whether the claimant had discharged that onus. Instead, his Honour concluded that 'the claimant was left in a position of uncertainty as to the findings of the Commissioner'. His Honour's answer to that problem was to send the matter back to the Commissioner on the basis that this lack of certainty provided by the Commissioner's communication to the claimant constituted a contravention of the clause.

39 To enter into a debate about the exercise of discretion and adequate reasons is to confuse the issues of enforcement of the Agreement and the employer's decision-making process. The Commissioner, before the IMC, acknowledged the refusal of the claim and provided justification for doing so. The courses open to the IMC were the finding that the amounts were

proven to be due or not. If they were due, then because they were not paid, an order that they be paid would issue, and then a caution or a penalty. If a penalty was ordered, his Honour could then have made an order to prevent a further contravention.

Remedies sought by the parties

40 The appellant seeks that the appeal be upheld, Orders 1 and 2 be quashed and the original claim be dismissed.

41 The respondent seeks that the Full Bench amend Order 1 in the terms set out above, said to reflect the intentions of the parties at the time, in a manner which is within jurisdiction. The Full Bench would then proceed to deal with the issues which arise from the decision at first instance.

42 As I have already noted, this situation has arisen at least in large part due to the way the parties have proceeded. The approach taken was some combination of judicial review and enforcement, which are not compatible in this case. Further, they proposed orders which are beyond power. In ***Thomson Australia Holdings Pty Ltd v Trade Practices Commission and Others*** [1981] 148 CLR 150 at [163] – [164], the High Court noted that the parties cannot confer power upon the court to make orders which the court lacks power to make or are not in conformity with legal principles (per Gibbs CJ, Stephen, Mason and Wilson JJ).

43 On one hand, the orders are clearly beyond power and their quashing is justified. On the other hand, the parties are in dispute about a matter which appears to be likely to arise again.

44 I would grant the application to amend the grounds of appeal to add ground 3. For the reasons given, I would uphold ground 3. However, for the purpose of bringing finality to the matters, rather than merely rescind or quash the decision of the IMC and remit the matter, in my view it is appropriate to deal with grounds 1 and 2 of the appeal.

Ground 1

45 I have set out earlier the findings of the learned Industrial Magistrate. I also note that his Honour recorded that the onus is on the claimant.

46 In respect of amended ground 1, in determining the meaning of 'other service' and 'referral', his Honour correctly made comparisons between cl 35, which deals with work-related injury or illness, and cl 36, which deals with non work-related injury or illness. This, with respect, is an appropriate approach to the construction of an industrial agreement, by construing the instrument as a whole: ***Martin Fedec v The Minister for Corrective Services*** [2017] WAIRC 00828; (2017) 97 WAIG 273.

47 Clause 35 – Work Related Medical and Hospital Expenses of the Agreement provides:

> Subject to the provisions contained within subclause (7)(b) of Clause 33. – Entitlement to Leave and Allowances Through Illness or Injury of this Agreement, the Employer shall pay the reasonable medical, dental, medical aides, hospital and travelling expenses incurred by an employee as a result of illness or injury arising out of or in the course of the employee's duties or suffered by the employee in the course of travel to or from a place of duty.

48 The relevant parts of cl 36 – Non Work-Related Medical and Pharmaceutical Expenses are subclauses (1) and (2) as follows:

> Medical and Pharmaceutical Expenses
>
> (1) Subject to the provisions contained within subclause (7)(b) of Clause 33. – Entitlement to Leave and Allowances through Illness or Injury of this Agreement, the Employer may pay the reasonable medical illness or injury related expenses (less the amount of any Medicare benefits and private health insurance or other benefit fund, paid or payable) of an employee who receives:
>
> (a) any consultation, treatment or other service by a medical practitioner; or
>
> (b) any X-ray or other service not provided by a medical practitioner but provided under a referral given by a medical practitioner.
>
> (2) An employee is entitled to reimbursement by the Employer of the cost of a medicine supplied by a pharmacist on the prescription of a medical practitioner if the medicine was at the time of issue of the prescription specified in the Schedule of Pharmaceutical Benefits.

49 Clause 35 is expressed in terms which create a requirement on the Commissioner by the word 'shall'. (However, I note in passing the expenses that he shall reimburse contain the element of 'reasonableness'). The list of types of expenses covered is broad. They are medical, dental, medical aides, hospital and travelling expenses.

50 On the other hand, cl 36 contains two separate groups of expenses, one which is expressly discretionary, by the use of the word 'may' in subclause (1). These are the reasonable medical illness or injury related expenses of an employee who receives:

> (a) any consultation, treatment or other service by a medical practitioner; or
>
> (b) any X-ray or other service which is:
>
> (i) not provided by a medical practitioner; but
>
> (ii) is provided under a referral given by a medical practitioner.

51 Subclause (2) provides an 'entitlement' to reimbursement of expenses of pharmaceutical medications prescribed by a medical practitioner. So subclause (1) is discretionary and subclause (2) is mandatory.

52 'Other service' is used twice in cl 36(1). The first occasion is as part of 'any consultation, treatment or other service by a medical practitioner'. Therefore, it is part of the process such as consultation and treatment, normally provided by a medical practitioner.

53 The second reference is to 'any X-ray or other service not provided by a medical practitioner but provided under a referral by a medical practitioner'. An X-ray is usually sought by a medical practitioner for the purposes of diagnosis or information gathering. The service is provided under a referral given by a medical practitioner to a service provider. In the case of an X-ray, the medical practitioner will 'refer' a patient to an X-ray service provider such as a radiologist to perform or supervise and report on the X-ray. It is my understanding that whilst

the radiologist is ultimately responsible, an X-ray is obtained by the services of a radiographer who is not a medical practitioner. The service provider then reports back to the medical practitioner. The service is the undertaking and the provision of the X-ray image. The X-ray machine is not the service or service provider. Another example of service may be a physiotherapist, not being a medical practitioner, providing a treatment by way of a service fitting the description contained in the clause.

54 I am inclined to the view that the sleep study undertaken at Dr Prichard's instigation may have constituted a service, provided that it was not a service provided by a medical practitioner. The evidence about the person who provided the sleep study and that person's relationship with Dr Prichard was the subject of some conjecture in the evidence but there was no finding made about it. The sleep technician is the person who provided the sleep study service.

55 This sleep study and possibly the assessment of the results of the trial of the CPAP machine usage may have constituted a service. The actual hire of the machine and its subsequent purchase do not, with respect, fall within the meaning of a service. They are more akin to medical aides which are expressly covered in cl 35, dealing with work-related injury or illness expenses. However, they are not covered either expressly or, in my view, by inference, in the non work-related injury or expenses provisions. Clause 35(1) deals with the services (consultation, treatment or other service by a medical practitioner and X-ray, and, other service) not medical aides.

56 I question whether the purchase of an exercise bike or any other piece of equipment or apparatus constitutes the provision of a service. I think it would not. It is not consistent, in the context of the circumstances and the clause, with a service such as an X-ray.

57 As to the issue of 'referral', the learned Industrial Magistrate found that the ordinary meaning of 'referral' in the medical context is the introduction of a patient by a medical practitioner to another medical practitioner for treatment. From the context in which the term is used in cl 36(1)(b), the referral can include one by a medical practitioner to someone who is not a medical practitioner but who provides a service. I would add to the definition, set out by his Honour of being for the purpose of treatment, for the purpose of diagnosis.

58 His Honour went on to record that '[a]ny communication by Dr Prichard to the claimant for the purpose of treatment of a medical illness or injury, and resulting in the claimant receiving 'an X-ray or other service' is capable of being a referral'. His Honour noted that '*[o]nly* the '*reasonable*' medical illness or injury-related expenses' are payable. His Honour said '[i]t would be incorrect of the Commissioner to construe cl 36(1) of the Agreement such that it was not open to find that the Reimbursement Claims related to expenses under a '*referral*' by Dr Prichard'.

59 I take this double negative to mean that it was open to the Commissioner to find that the claim related to any expenses incurred because Dr Prichard had suggested or recommended it.

60 It is clear to me that a referral may be that which was made from Dr Bairstow to Dr Prichard. That is, it was an introduction of a patient from one medical practitioner to another under

cl 36(1)(a). It may be that the communication by Dr Prichard to the sleep technician or any other person to provide a service also constituted a referral under cl 36(1)(b).

61 In this context, I find that the learned Industrial Magistrate erred in concluding that '[i]t would be incorrect of the Commissioner to construe cl 36(1) of the agreement such that it was not open to find that the Machine Hire Expense and the Machine Purchase claims related to an '*X-ray or other service*'. In other words, it was in error to find that it was open to the Commissioner to construe cl 36(1) to find that the machine hire and purchase expenses claims relate to an X-ray or other service.

62 I find that the learned Industrial Magistrate erred in concluding that the hire and purchase of the CPAP machine constituted a reimbursable expense resulting from a service and therefore, do not fall within cl 36(1). I would uphold ground 1.

Ground 2

63 This ground deals with the third finding of the IMC that the Commissioner failed in the exercise of his discretion because his reasoning for refusal of the claims was not clear to the claimant and constituted a contravention of the Industrial Agreement. The appellant says that neither party sought such a conclusion.

64 The Commissioner says that there was no requirement to give written reasons.

65 His Honour dealt with the issue of whether the Commissioner had exercised his discretion appropriately by, in essence, finding that there was a contractual obligation to exercise the discretion in a way that enabled the claimant to understand his reasoning. He then found that this failure contravened the clause of the Industrial Agreement.

66 Clause 36(1) provides only that the employer 'may' pay certain types of claims. Subclause (2), as I have noted, provides no discretion. Subclause (3) sets out exclusions. Subclause (4) provides for an accumulation of expenses. Subclause (5) sets out obligations on the employee to provide information and documents. No part of the clause sets out how the Commissioner is to exercise the discretion set out in subclause (1). It provides no requirement for reasons in writing or for an explanation expressed in terms clear to an employee.

67 If any obligation arises to provide clear reasons, it comes from contract or from legal principles. A breach of contract or of such principles may be pursued under another regime. However, it does not arise as a contravention of the Industrial Agreement.

68 I would uphold this ground of appeal.

Disposition of appeal

69 Having found that the orders were beyond power; that the learned Industrial Magistrate erred in finding that it was open to the Commissioner to construe cl 36(1) to find that the machine hire and purchase costs relate to a service, and was a reimbursable expense, and by finding that there was a contravention of the Industrial Agreement, the appropriate conclusion is to uphold the appeal, to quash the decision, and dismiss the complaint.

MATTHEWS C:

70 The industrial magistrate's court made orders in this matter as follows:

> 1. The [Commissioner of Police] is directed to reconsider, in light of the reasons for judgment in this matter, the claimant's claim for reimbursement of the three non-work related medical expenses described in the reasons as 'the Three Expenses'; and
>
> 2. The [Commissioner of Police] is issued a caution for the proved contravention of cl 36 of the Western Australia Police Industrial Agreement 2014.

71 The "Three Expenses" were the "hospital expense", the "machine hire expense" and the "machine purchase expense."

72 The Commissioner of Police seeks that both orders be quashed, although the Commissioner of Police now accepts the "hospital expense" is payable under clause 36 of the Western Australia Police Industrial Agreement 2014, and has paid it, and this appeal in no way relates to it.

73 The original grounds of appeal are set out at [24] of the Chief Commissioner's Reasons for Decision. With reference to those grounds of appeal, the Commissioner of Police argued before the Full Bench that he did not breach clause 36 of the Western Australia Police Industrial Agreement 2014 in relation to the "machine hire expense" claim and the "machine purchase expense" claim because:

> (a) those claims could not possibly come within clause 36; and
>
> (b) clause 36 does not require the making and publication of such findings as are necessary to satisfy a claimant under clause 36 that the claim has been dealt with properly, this being a conclusion which the respondent says His Honour reached.

74 Additionally, the Commissioner of Police sought to argue, by proposed appeal ground 3, that order 1 was attended by jurisdictional error in that it was an invocation of section 83(5) *Industrial Relations A*ct *1979* when a necessary pre-condition for the invocation of that subsection, the imposition of a penalty under section 83(4)(a)(ii) *Industrial Relations Act 1979*, was not present.

75 The Commissioner of Police says that an order under section 83(5) *Industrial Relations A*ct *1979* can only be made "in addition to" the imposition of a penalty and thus can only be made if a penalty has been imposed. The Commissioner of Police says the orders set out at [69] herein make it clear that no "penalty" was imposed.

76 A short discussion of the background to the present appeal is necessary.

77 The Amended Statement of Claim filed in the industrial magistrate's court alleged that the Commissioner of Police had "failed to provide adequate justification for denying payment of [his] claims" and that the Commissioner of Police had "failed to properly assess and exercise [his] discretion under clause 36."

78 However, by way of remedy, the respondent did not, as the contents of the Amended Statement of Claim quoted above might suggest he would, seek that the Commissioner of Police "properly assess and exercise his discretion". Rather, he sought payments under clause 36 and the imposition of penalties in respect of breaches of the Western Australia Police Industrial Agreement 2014.

79 This was, in my respectful view, an unfortunate approach and one which invited confusion and was the genesis of the confusing outcome of this matter in the industrial magistrate's court.

80 A claim of breach to the industrial magistrate's court and the remedy sought from the industrial magistrate's court should align. If payments are to be sought by way of a remedy then a failure to make those payments should be alleged to be the breach.

81 Instead, and confusingly, a failure to exercise a discretion under clause 36 was alleged as the breach.

82 The Commissioner of Police's defence to the claim included, at paragraph 7 of his Amended Response to the Statement of Claim, the following:

> The [Commissioner of Police] says:
>
> (a) the [claimant's claims] did not fall within the scope of clause 36 of the 2014 Agreement and the [Commissioner of Police] was therefore justified in rejecting both claims; and
>
> (b) the [Commissioner of Police] has not yet exercised the discretion conferred by clause 36 nor was the [Commissioner of Police] required to exercise, or to consider exercising, his discretion.

83 I do not see how a claim can be "rejected", as 7(a) of the Amended Response alleged, if no discretion had been exercised, as 7(b) of the Amended Response alleged. However nothing turns on this, other than it being further evidence of the confusing approach which has bedevilled this matter.

84 Against the pleaded background, the hearing before the industrial magistrate's court traversed the following matters, many of which did nothing to get anyone nearer the answers to the questions the parties were interested in:

(1) whether the claims could fall within the scope of clause 36;

(2) whether the Commissioner of Police had a discretion under clause 36;

(3) if so, whether the Commissioner of Police had exercised that discretion;

(4) if not, whether the Commissioner of Police should now exercise that discretion; and

(5) whether reasons needed to be published for the Commissioner of Police's decision.

85 In relation to the above matters His Honour, in my view, found:

(1) it was possible that the claims fell within the scope of clause 36, or, more accurately, it was not correct to say they could not possibly fall within the scope of clause 36;

(2) the Commissioner of Police did have a discretion under clause 36;

(3) it was not possible to conclude the Commissioner of Police had exercised that discretion; and

(4) the Commissioner of Police should exercise that discretion.

86 In relation to the finding set out at (1) in [85] herein, I refer to [32] of His Honour's reasons for decision where His Honour found that it "would be incorrect" to construe clause 36 in such a way that it was "not open" to find the claims, which includes the two claims which remain in dispute, were within its scope.

87 In relation to the finding set out at (2) in [85] herein, I refer to [33] to [42] of His Honour's reasons for decision.

88 In relation to the finding set out at (3) in [85] herein, I refer to [55] to [57] of His Honour's reasons for decision. In those paragraphs, in my view, His Honour found that he could not safely conclude that the Commissioner of Police had exercised his discretion. The tenor of the paragraphs is that the Commissioner of Police made his decision fettered inappropriately by a certain construction of clause 36, being a construction His Honour did not agree with. At [57] His Honour expressly rejects an argument that one document before him evidenced that the Commissioner of Police had properly exercised his discretion.

89 At the hearing of the appeal consideration was given to [50] to [54] of His Honour's reasons for decision in relation to what His Honour had found but, upon reflection and further consideration, it is clear that those paragraphs deal with the now resolved "hospital expense" claim and not the two claims that remain alive before us. The paragraphs are not relevant to the disposition of the appeal.

90 In relation to the finding set out at (4) in [85] herein, I rely upon [59] of His Honour's reasons for decision and the orders made by His Honour.

91 Against that background, His Honour made the orders set out at [69] herein. I hasten to add that the orders were put before him in an agreed minute said by the parties to reflect His Honour's written judgment.

92 Order 1, at first blush, appears a convenient, and uncontroversial, way for His Honour to achieve what he wanted to achieve in relation to the matter, as it was argued before him.

93 However, on closer analysis, it is objectionable. This is because it attempts to take action under section 83(5) *Industrial Relations Act 1979,* in that it seeks to prevent any further contravention of clause 36 of the type identified by His Honour in relation to the respondent, when no penalty has been imposed.

94 Section 83(5) *Industrial Relations Act 1979* plainly states that an order under that subsection may be made "in addition to imposing a penalty under subsection (4)". The subsection can only be read as saying that a penalty must be imposed before an order under section 83(5) may be made.

95 Section 83(4)(a) *Industrial Relations Act 1979* makes it equally plain that a "caution" is not a "penalty". Section 83(4)(a)(i) *Industrial Relations Act 1979* refers to a "caution" and section 83(4)(a)(ii) *Industrial Relations Act 1979* refers to a "penalty". A caution is plainly not a penalty.

96 Parliament evidently considered only matters serious enough to warrant the imposition of a penalty should be amenable to injunctions under section 83(5) *Industrial Relations Act 1979.*

97 As order 1 is an invocation of the power in section 83(5) *Industrial Relations Act 1979* without the necessary pre-condition of a penalty having been imposed, it was made without jurisdiction.

98 The respondent says, however, that this should not be the end of the matter. The respondent says there is a sensible way around the problem with order 1 and argues that the Full Bench should adopt it.

99 The respondent says the jurisdictional error may be cured by the Full Bench exercising the power under section 84(4)(a) *Industrial Relations Act 1979* to "amend" His Honour's first order so that it reads as follows:

> The Industrial Agreement has been contravened in that the [Commissioner of Police] has denied the claimant's claim for reimbursement of the three non work related medical expenses described in the reasons as 'the Three Expenses' by erroneously concluding these expenses did not come within clause 36 of the Industrial Agreement.

100 The respondent argued before the Full Bench that His Honour found that the Commissioner of Police had breached clause 36 by rejecting his claims for the payment of money. That is, the respondent says that His Honour's decision was not ultimately about a failure on the part of the Commissioner of Police to exercise his discretion but was, rather, about his failure to pay the claims made under clause 36.

101 This is a belated attempt to get the matter back on the track it ought to have been on from day one. However, the attempt must fail.

102 Although I agree that the matter before His Honour should have been about the failure of the Commissioner of Police to pay the claims, and whether that was a breach of clause 36, it was not. I have made this clear by the analysis of the pleadings and His Honour's reasons for decision.

103 The respondent's interpretation of His Honour's reasons for decision is neither open nor fair.

104 His Honour did not, at any point, say that the claims should have been paid and that the Commissioner of Police was in breach of clause 36 by not paying them. He was not required to decide that issue because of the way the matter was pleaded.

105 His Honour said that it was possible that the claims could fall within clause 36. His Honour found that if the Commissioner of Police fettered his discretion by holding that they could not possibly fall within clause 36, he ought not to have so fettered his discretion. His Honour found that because it seemed possible, on all of the documentation before His Honour, that the Commissioner of Police had so fettered his discretion, the Commissioner of Police should take another look at the claims.

106 Insofar as a breach of clause 36 was found, and it is clear that such a breach was found, His Honour concluded the Commissioner of Police had contravened clause 36 by failing to exercise a discretion in making his decision and not that the Commissioner of Police had made the wrong decision in relation to the claims.

107 In this regard, I point to [58] of His Honour's reasons for decision where His Honour wrote that clause 36 "casts an obligation on the Commissioner [of Police] … to exercise a discretion."

108 Given that the Amended Statement of Claim alleged such a breach, it is hardly surprising that, in deciding the matter in the claimant's favour, this is what His Honour found.

109 I do not agree with the respondent that a fair reading of His Honour's reasons for decision gives a basis for the Full Bench to amend His Honour's order to have it read as the respondent proposes.

110 I am by no means satisfied that His Honour would have made such an order if he had turned his mind to the making of it in the terms the respondent seeks.

111 It is my view that His Honour's substantive finding was that the Commissioner of Police had not exercised his discretion and not that the Commissioner of Police had erred in rejecting the claims. If His Honour was of the view that the Commissioner of Police had breached clause 36 in rejecting the claims, His Honour would have said so.

112 Even if the respondent's argument is correct, section 84(4)(a) *Industrial Relations Act 1979* cannot be used in the way the respondent suggests. The power under section 84(4)(a) *Industrial Relations Act 1979* is one relating to the disposition of an appeal and is not there to defeat or otherwise affect the grounds of the appeal before the Full Bench.

113 As a matter of law and, if I had such, as a matter of discretion, I would reject the respondent's argument that His Honour's orders may be safely varied in such a way as would make them within jurisdiction.

114 Accordingly, I consider it proper that the application to amend the Notice of Appeal be granted, so that proposed appeal ground 3 become appeal ground 3, and I would uphold ground of appeal 3 and accordingly quash order 1.

115 Ground of appeal 3, however, does not deal with order 2 and on its face there is no reason why order 2 may not stand alone once order 1 is quashed, given that order 1 does not actually spell out the "proved contravention" for which the caution was imposed.

116 For this reason, I consider that ground of appeal 1 and ground of appeal 2, which attack order 2, must be dealt with.

117 Ground of appeal 2 may, in my view, be quickly disposed of. It does not address a contravention the industrial magistrate's court found to be proved.

118 I do not consider that His Honour held that clause 36 requires the Commissioner of Police to "make findings such that enables an employee to be satisfied that clause 36 had been correctly applied", to quote from ground of appeal 2.

119 The Commissioner of Police says that conclusion was reached by His Honour at [53] of his reasons for decision where His Honour wrote:

> The claimant has satisfied me that, in failing to make findings that enabled the claimant to satisfy himself that cl 36(1) of the Agreement had been correctly applied his claim for the Hospital Expense, the Commissioner had not acted in conformity with the purposes of the Agreement and, accordingly, has contravened the clause.

120 These findings relate solely and exclusively to the "hospital expense".

121 The "hospital expense" is not the subject of this appeal.

122 I do not understand how any reasoning relating to the "hospital expense" is properly before the Full Bench given there is no appeal in relation to this aspect of the matter.

123 I do not think it can be said with any confidence that His Honour came to similar conclusions in relation to the two matters before the Full Bench on appeal, being the claims in relation to the "machine hire expense" and "machine purchase expense".

124 His Honour does not expressly say that the Commissioner of Police contravened clause 36 in relation to the "machine hire expense" claim or the "machine purchase expense" claim by a failure to "make findings that enabled the claimant to satisfy himself that clause 36(1) of the agreement had been correctly applied". This conclusion appears only in a passage of the reasons for decision dealing with the "hospital expense" claim.

125 I am not persuaded that His Honour had, in relation to the "machine hire expense" and "machine purchase expense" claims, a concern that the claimant did not know why these claims had been rejected. It is not obvious from [55] to [57] of His Honour's reasons for decision, which dealt with those claims, that His Honour had such a concern.

126 At [58] His Honour did write:

> Clause 36 of the Agreement casts an obligation on the Commissioner to make findings and, ultimately, to exercise a discretion with respect to a payment to an employee. There is no warrant in the text of the clause or in the IR Act for the court to assume those obligations or to exercise the discretion.

127 I can understand the interpretation that the Commissioner of Police puts upon the paragraph, especially given His Honour's findings in relation to the "hospital expense" claim but I am, nonetheless, far from convinced that it is correct to interpret this passage as His Honour saying that the publication of reasons or findings is necessary for compliance with clause 36.

128 I read this passage as being a reference to the need for the Commissioner of Police, so far as His Honour was concerned, to exercise a discretion. Obviously, if His Honour felt there was a need for the exercise of a discretion there would, concomitantly, be a need for the Commissioner of Police to "make findings". But that is not the same as a requirement to present those findings to a claimant or to present them to a claimant in such form as to make sure a claimant understands them.

129 Of course, evidence of a decision-making process, and provision of that evidence to interested parties, is a good idea and may assist to reduce disputation, but I do not consider His Honour found a failure to do so to be a breach of clause 36 in relation to the matters which remain alive before the Full Bench.

130 Accordingly, I would dismiss ground of appeal 2 as it seeks to agitate a matter that I do not consider is before the Full Bench. That is, I consider that ground of appeal 2 attacks a finding that was not actually made.

131 That leaves ground of appeal 1. In relation to this ground the Commissioner of Police seeks to amend the ground and there is no objection so, accordingly, I will deal with amended ground of appeal 1, which is as follows:

> 1. The Industrial Magistrate erred in law by finding that the hire or purchase of a continuous positive airway pressure (CPAP) machine by the respondent could amount to the receipt of an "X-ray or other service … provided under a referral given by a medical practitioner" by the respondent within the meaning of clause 36(1)(b) of the *Western Australian Police Industrial Agreement 2014* (**Agreement**).
>
> **Particulars**
>
> (a) Clause 36(1)(a) of the Agreement provides by discretion an entitlement to reimbursement of any "service" provided by a medical practitioner.
>
> (b) Clause 36(1)(b) of the Agreement provides by discretion an entitlement to reimbursement of any "service" not provided by a medical practitioner.
>
> (c) An example of a "service" not provided by a medical practitioner is expressly given by clause 36(1)(b), namely an X-ray.
>
> (d) An X-ray is a "service" provided by a person who is not medical practitioner, namely a radiologist.
>
> (e) The express mention of X-ray as a type of service to which clause 36(1)(b) applies limits the classes of "service" to services of a similar nature to that of X-ray, being a diagnostic service provided by a qualified professional.
>
> (f) Clause 36(1)(b) requires that such a service be "provided under a referral given by a medical practitioner".
>
> (g) A "referral" requires the introduction of a patient by one medical practitioner to another expert, specialist, or consultant, for consultation, diagnosis, or treatment.

(h) In hiring and purchasing the CPAP machine, the respondent did not receive an "other service … provided under a referral".

132 A fair background to the consideration of amended ground of appeal 1 is as follows:

(1) although the document which, most likely, contained the decisions on the relevant claims was not actually before the industrial magistrate's court, and did not go into evidence at the hearing at first instance, and was not before the Full Bench, it is clear enough that the Commissioner of Police rejected the "machine hire expense" claim and the "machine purchase expense" claim;

(2) it is also clear enough that the Commissioner of Police rejected those claims because the Commissioner of Police did not consider the claims could properly be within clause 36 of the Western Australia Police Industrial Agreement 2014;

(3) it has been a matter of dispute, throughout these proceedings, whether the claims can properly be within clause 36 of the Western Australia Police Industrial Agreement 2014;

(4) the Commissioner of Police argued at the appeal before the Full Bench that the claims could not come within clause 36 of the Western Australia Police Industrial Agreement 2014 for the reasons he advanced in support of amended ground of appeal 1, being that the expenses did not relate to "services" and that the expenses were not incurred as a result of a "referral";

(5) the respondent argued that the expenses did relate to "services" and were incurred as a result of a "referral".

133 In my view, it clearly matters, in the proper determination of amended ground of appeal 1, whether the claims related to "services provided under a referral."

134 If the claims were for "services provided under a referral" then, in my view, amended ground of appeal 1 must fail and order 2 made by His Honour must stand.

135 I say this because, in my view, if those assertions are correct, the Commissioner of Police has not demonstrated that His Honour was in error in finding, as His Honour did, that:

(1) the exercise of a discretion is required by clause 36 of the Western Australia Police Industrial Agreement 2014;

(2) the Commissioner of Police did not exercise a discretion in relation to the "machine hire expense" claim and the "machine purchase expense" claim; and

(3) the Commissioner of Police thereby contravened clause 36 of the Western Australia Police Industrial Agreement 2014.

136 However, if the claims cannot possibly come within clause 36 of the Western Australia Police Industrial Agreement 2014, then no need to exercise a discretion under the clause can possibly have arisen and the failure to exercise a discretion in this case cannot be a contravention of the clause.

137 That is, if a necessary "jurisdictional" fact is not present for the clause to come into play, there can be no contravention in not doing what the clause requires.

138 I consider that amended ground of appeal 1 does attack a contravention that the industrial magistrate's court found to have been proved.

139 I consider that, to decide amended ground of appeal 1, it is necessary to interpret clause 36 of the Western Australia Police Industrial Agreement 2014.

140 The relevant principles for the interpretation of industrial instruments have been regularly set out by decisions of the Western Australian Industrial Relations Commission. A good recent summary may be found in ***Civil Service Association of Western Australia Inc v. Commissioner, Western Australian Police Department*** [2019] WAIRC 00142; (2019) 99 WAIG 358 per Kenner SC at [10].

141 My primary task is to endeavour to discover the intention of the parties as embodied in the words they have used in the Western Australia Police Industrial Agreement 2014.

142 That intention is to be objectively ascertained and the meaning of terms is to be determined by what a reasonable person would have understood the terms to mean.

143 That reasonable person will have knowledge of the genesis of the transaction as well as its background and context. The reasonable person does not operate in a vacuum and is taken to know the content of the whole instrument, the surrounding circumstances and the purpose and object of the transaction.

144 Generosity of construction is the correct approach, but this does not mean violence may be done to the language.

145 In this case, it has been argued that there are two key terms requiring interpretation being "service" and "referral".

146 However, I consider that the correct approach, and one which honours the importance of context, is to interpret the whole of the passage "any X-ray or other service not provided by a medical practitioner but provided under a referral given by a medical practitioner."

147 If the whole of the passage is read, I consider that its meaning is clear.

148 In my view, a reasonable person reading the passage would think it is referring to services in relation to which a patient ordinarily obtains a note from a doctor before accessing.

149 A reasonable person would know that sometimes you go to a doctor with a problem and the doctor is not able to say exactly, or with certainty, what is wrong.

150 A reasonable person would know that doctors often consider it a good idea to get further information from another source and may decide to send their patient off to get an X-ray or an

ultrasound or an MRI or a blood test or to access some other service by which diagnostic information may be gathered.

151 A reasonable person would know that when this occurs the doctor gives the patient a "referral", being a document which the patient presents to the entity that is going to do whatever is required to get the doctor the information the doctor wants about the patient.

152 The reasonable person would know that the Western Australia Police Industrial Agreement 2014 allows payment to be made to police officers for "non-work related medical … expenses", to quote from the heading of clause 36, and might very well accept that the reasons for this unusual situation are as the respondent argued before the industrial magistrate's court, which are set out at [38] of His Honour's decision.

153 However, I cannot find any warrant for a wider reading of the passage "any X-ray or other service not provided by a medical practitioner but provided under a referral given by a medical practitioner" than that set out above.

154 In my view, a reasonable person would know exactly what the passage is referring to. It is referring to services that, before a person accesses them, they receive a referral document from a doctor.

155 The use of the CPAP machine, whether by hire or after purchase, was not a service provided under a referral given by a medical practitioner. It was something the respondent did because a doctor recommended it, but this cannot, on any reasonable reading of the clause, with the reasonable reader knowing what they should, equate to a service provided on a referral from a doctor.

156 The respondent himself admitted that he wasn't given a "written referral" in relation to the use of the machine (see 142AB). The respondent by his evidence, of course, cannot decide the correct construction of the clause but it appears to me, although it is illustrative and not decisive, that the exchange which produced that evidence proceeded on the basis that everyone knows what a referral is and the respondent had no choice but to admit that he did not have one. The reasonable person would have been able to easily follow and understand the exchange and would have, in my view, come to a conclusion along the lines, "Of course the respondent did not use the machine under a referral given by a medical practitioner and he was correct to admit as much."

157 In my view, the position is so clear in relation to the correct construction of clause 36, and the conclusion that use of the CPAP machine, whether on hire or after purchase, was not a service provided under a referral given by a medical practitioner, that the discretion under clause 36 was not enlivened by the claims for payment relating to them.

158 Accordingly, in my view, it cannot be said that the Commissioner of Police contravened clause 36 by not exercising his discretion under the clause. The claims were not within the clause and the need to exercise a discretion simply did not arise.

159 In my view amended ground of appeal 1 is made out and order 2 must be quashed.

160 In the result, in my view, ground of appeal 3 succeeds and leads to the quashing of order 1 and amended ground of appeal 1 succeeds leading to the quashing of order 2. Ground of appeal 2 fails.

161 The appeal should be upheld. In my view the matter is entirely resolved by the orders and there is nothing to remit to the industrial magistrate's court.

WALKINGTON, C:

162 I agree that the appeal is upheld and there is nothing to remit.