APPEAL AGAINST A DECISION OF THE INDUSTRIAL MAGISTRATE IN MATTER NO. M 76/2018 GIVEN ON 28 NOVEMBER 2019
WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

FULL BENCH

CITATION	**:**	2020 WAIRC 00178
CORAM	**:**	SENIOR COMMISSIONER S J KENNER COMMISSIONER T EMMANUEL COMMISSIONER D J MATTHEWS
HEARD	**:**	WEDNESDAY, 26 FEBRUARY 2020
DELIVERED	**:**	TUESDAY, 17 MARCH 2020
FILE NO.	**:**	FBA 2 OF 2020
BETWEEN	**:**	DR OLUMUYIWA SORUNMU Appellant AND DIRECTOR-GENERAL OF HEALTH First Respondent NORTH METROPOLITAN HEALTH SERVICE BOARD Second Respondent

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ON APPEAL FROM:

Jurisdiction	**:**	**Industrial Magistrate's Court**
Coram	**:**	**Industrial Magistrate D Scaddan**
Citation	**:**	**2019 WAIRC 00840**
File No	**:**	**M 76 of 2018**

Catchwords	**:**	Industrial Law (WA) – Appeal against decision of Industrial Magistrate to dismiss appellant's claim at first instance – Seeking Contract Completion Payment under cl 20(5) of the *Department of Health Medical Practitioners (Metropolitan Health Services) AMA Industrial Agreement 2013* - Delay in filing Notice of Appeal - Extension of time sought to file Notice of Appeal – Notice of Appeal did not identify grounds – Appeal book not filed – Extension of time granted – Appeal book to be filed within seven days
Legislation	**:**	*Industrial Relations Act 1979* (WA) ss s 27(1)(n); 84(3) *Industrial Relations Commission Regulations 2005* regs 102(1), (2), (3), (10) *Health Practitioners Regulation National Law (WA) Act 2010* *Industrial Magistrates Court (General Jurisdiction) Regulations 2005* reg 7(1)(h)
Result	**:**	Extension of time granted

Representation:

Counsel:

Appellant	**:**	In person
Respondent	**:**	Mr R Andretich (of counsel)

Solicitors:

Respondent	**:**	State Solicitors Office of Western Australia

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Case(s) referred to in reasons:

Arpad Security Agency Pty Ltd v Federated Miscellaneous Workers' Union of Australia, Hospital, Service and Miscellaneous, WA Branch (1989) 69 WAIG 1287

Simonsen v Legge [2010] WASCA 238

Reasons for Decision

KENNER SC:

Background

1 On 28 November 2019 the Industrial Magistrates Court dismissed the appellant's claim that the respondent had failed to comply with cl 20(5) of the Department of Health Medical Practitioners (Metropolitan Health Services) AMA Industrial Agreement 2013 in relation to a contract completion payment.

2 It was common ground before the court that the appellant was employed by the respondent as a medical practitioner on a series of fixed term contracts of employment from May 2003. The appellant's final fixed term contract of employment came to an end on 30 June 2016. It was also common ground that the appellant's registration as a medical practitioner with the Australian Health Practitioners Regulation Agency expired on 20 November 2015. The appellant was not successful in applying for registration in a limited area of need. From the time of the appellant's registration expiry to the cessation of his contract of employment on 30 June 2016, the appellant did not work for the respondent and he took both annual leave and later unpaid leave.

3 In the proceedings at first instance the respondent brought an application under reg 7(1)(h) of the Industrial Magistrates Court (General Jurisdiction) Regulations 2005, effectively seeking an order that the appellant's claim be dismissed. The learned Industrial Magistrate granted the respondent's application and dismissed the appellant's claim. The learned Industrial Magistrate considered the terms of cl 20(5) of the Agreement and concluded that on its proper construction, in accordance with the definitions set out in cl 8 of the Agreement a "medical practitioner" (as defined) must, in order to meet the requirements of cl 20(5) of the Agreement, be registered under the *Health Practitioners Regulation National Law (WA) Act 2010*. This was because a medical practitioner could not "seek" a new contract of employment on the expiry of a fixed term contract with the respondent, if the practitioner was not able to work as a medical practitioner by reason of not being registered under the *Health Practitioners Act*. By their nature, the proceedings before the court did not involve a full hearing of the issues in dispute.

4 Accordingly, as the reasoning went, given at the time of the cessation of the appellant's fixed term contract on 30 June 2016 the appellant was not so registered, he was not ready, willing and able to seek a new contract of employment with the respondent and therefore the appellant did not qualify for a Contract Completion Payment under cl 20(5) of the Agreement.

5 On 22 December 2019, three days outside of the time limit of 21 days under s 84(3) of the Act, the appellant lodged a Notice of Appeal against the decision of the court, dismissing his substantive claim. The Notice of Appeal was defective. It was not accepted for filing by the Registry until 9 January 2020, some 18 days outside of the 21 day time limit. Such an appeal "shall be instituted within 21 days from the date of the decision against which the appeal is brought": s 84(3) Act. By reg 102(1) of the *Industrial Relations Commission Regulations 2005*, which applies with any necessary modifications, to appeals from decisions of the Industrial Magistrates Court, an appeal to the Full Bench "may be commenced by filing a notice of appeal in the approved form". By the combined effect of s 84(3) of the Act and reg 102(1) of the Regulations, an appeal to a Full Bench from a decision of the Industrial Magistrates Court is "instituted" when it is filed in the Registry. In this case, this was on 9 January 2020.

6 As the Notice of Appeal was filed outside of the time limit prescribed by s 84(3) of the Act, for the Full Bench to entertain the appeal, the appellant must persuade the Full Bench that it should extend the prescribed 21 day time limit, under s 27(1)(n) of the Act, and the Full Bench has the power to do so: *Arpad Security Agency Pty Ltd v Federated Miscellaneous Workers' Union of Australia, Hospital, Service and Miscellaneous, WA Branch* (1989) 69 WAIG 1287.

7 Additionally, the appellant has also failed to file appeal books, as required by reg 102(10) of the Regulations, in accordance with the requirements set out in reg 102(11A).

8 On 24 January 2020, the appellant filed a Form 1A - Multipurpose Form in which he sought an "extension of time". It is not entirely clear from the form itself what it is that the appellant seeks an extension of time for, although I note from Registry records that the appellant was given substantial assistance in the preparation of appeal books on 23 and 24 January 2020. The last day for the filing of the appeal books was 23 January 2020. I note from Registry records that on 23 January 2020 the appellant was given a copy of a Form 1A and a further copy again on 24 January 2020 and was informed by Registry staff that if he wished to seek an extension of time to file the appeal books, he would need to lodge the Form 1A, which the appellant then did. In the section of the form for reasons setting out the reasons for the request, the appellant referred to medical reasons and him undergoing eye treatment; blurred vision and required assistance to complete forms as he could not afford a lawyer. In the hearing on the present issue of an extension of time, the appellant informed the Full Bench that the Form 1A was filed in order to seek an extension of time for both the Notice of Appeal and to file the appeal books.

Extension of time to file the appeal

9 The principles applicable to extensions of time to appeal were set out by the Court of Appeal (WA) in *Simonsen v Legge* [2010] WASCA 238. At par 8 of the judgment, Pullin, Newnes and Murphy JJA said:

> 8. The relevant matters to consider when a party seeks to extend the time for filing its notice of appeal include the following:
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> (a) on the expiry of the time for appealing, the respondent has a vested right to retain the judgment unless the application for an extension of time is granted: *Gallo v Dawson* [1990] HCA 30; (1990) 64 ALJR 458, 459;
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> (b) the grant of an extension of time under the rule is not automatic; the object of the rule permitting extensions of time is to ensure that the rules which fix time for the doing of acts do not become instruments of injustice; and the discretion to extend time is given for the sole purpose of enabling the court to do justice between the parties: *Gallo v Dawson* (459);
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> (c) nevertheless, the rules of court must, prima facie, be obeyed, and in order to justify a court in extending the time, there must be some material upon which the court can exercise its discretion: *Gallo v Dawson* (459);
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> (d) there are, generally, at least four major factors to be considered, although they are not necessarily exhaustive in each case:
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> (i) the length of the delay;
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> (ii) the reasons for the delay;
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> (iii) the prospects of the applicant succeeding in the appeal; and
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> (iv) the extent of any prejudice to the respondent: *Esther Investments Pty Ltd v Markalinga Pty Ltd* (1989) 2 WAR 196, 198; *In de Braekt v Powell* [2007] WASCA 55 [11]; (2007) 33 WAR 389;
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> (e) other factors may include whether the delay was intentional, or contumelious, or merely the result of a bona fide mistake or blunder, and whether the delay is that of the litigant or of its lawyers with which the litigant should not be saddled: *City of Canning v Avon Capital Estates (Australia) Ltd* [2009] WASCA 120 [33];
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> (f) the length and reasons for the delay must be addressed by the applicant and the cogency of the explanation increases as the period

> of the extension sought increases: *Girando v Girando* (1997) 18 WAR 450, 454;
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> (g) in relation to the third matter referred to in subpar (d) above, the time for appealing will not be extended unless the proposed appeal has some prospect of success; the converse of that proposition is not that time must be extended if an appeal has any prospect of success, but rather, the fact that an appeal has some prospect of success is a factor which is to be taken into account, together with all other relevant factors: *City of Canning v Avon Capital Estates (Australia) Ltd* [17]; and
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> (h) similarly, it is not the law that, whenever an applicant demonstrates an arguable case, or even a strongly arguable case, in the absence of significant prejudice suffered by the respondent, an extension of time should be granted: *City of Canning v Avon Capital Estates (Australia) Ltd [16]*.

10 I adopt and apply this approach for the purposes of the present matter. In particular, the four factors to consider as set out at par 8(d) of the Court's judgment. Given that the respondent has a vested right to retain the decision at first instance, it is for the appellant to persuade the Full Bench that it should extend the time for filing the appeal.

11 As to the length of the delay, in this case the delay in filing the Notice of Appeal is some 18 days, which although not excessive, is not insignificant.

12 As to the reasons for the delay, the appellant says he experienced technical difficulties in filing the Notice of Appeal online, he says that the online version was completed within time, but he had to attend the Registry to file a Notice of Appeal in person.

13 The next issue to consider is the prospects of success of the appeal. This requires the Full Bench to reach a view that the appeal has some prospect of success, but as the Court of Appeal observed in *Simonsen* at par 8(g), this does not mean if this view is reached, time to appeal must be extended. It is a factor to be considered, along with the other matters.

14 An important factor in this respect is the grounds of appeal. It is the grounds of appeal that mark out the issues for determination by the Full Bench. As mentioned by the Court in *Simonsen* at par 9, albeit in the context of the requirements of the Court of Appeal Rules, the task of an appeal court is to identify error in the decision at first instance. Proper grounds of appeal guide the process of error identification.

15 The requirement for proper grounds of appeal in this jurisdiction is set out in regs 102(2) and (3) of the Regulations, which require an appellant to set out clearly and concisely the grounds of appeal and what alternative decision is sought. This

needs to be done with some particularity. In this case, the Notice of Appeal in relation to what would otherwise be grounds of appeal says:

> Errors in law and facts were made in reaching this decision . the code of good faith as specified by the western Australian industrial relationst act(*sic)* of 1979 clause 42 C and essential facts of the situation with respect to my qualifications and experience, were ignored in reaching the decision.
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> The two issues brought before the industrial magistrate court were the contract completion payment and accrued long service leave, both of which are provions (*sic)* under the AMA industrial agreement of 2013 clause 20, however, the smaller amount was paid in part and the other payment refused. Under the industrial agreement, both parties are subject to all not part of the agreement.
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> Finally, my experience and qualifications, were adequate for registration but the empoyer (*sic)* decline to provide the administrative support that is mandatory under the contract signed with me. If employers are allowed to get away with this behaviour, it can be used to deny employees their legal entitlements.

16 These are not grounds of appeal. There is no attempt to identify any such alleged "errors in law and facts" asserted in the Notice. No attempt has been made to state how it was that the Industrial Magistrates Court made errors, for example in the interpretation of the Agreement or the requirements imposed by the *Health Practitioners Act* or any other matter. There is no indication how, if at all, the Industrial Magistrates Court mistook the facts as asserted in the appeal grounds. Simply put, from the Notice of Appeal, the Full Bench has no real idea what the appellant's complaint is about, concerning the learned Industrial Magistrate's decision.

17 However, at the hearing of the extension of time to appeal, the appellant was given an opportunity to explain what errors were alleged to have been made by the court, despite the grounds of appeal not elucidating the issues. Firstly, the appellant submitted to the Full Bench that he was treated unfairly and the respondent did not show good faith because the respondent would not give him a letter that he needed that contained an offer of a further contract for at least 12 months, that AHPRA required to progress his registration under the *Health Practitioners Act*. Without it the process could not be concluded. Secondly, the appellant contended that his contract did not end in June 2016 but earlier in February 2016, when he was unable to continue working as his registration had not been renewed, and he was forced to take leave from this time until 30 June 2016. As a result of this, the appellant said that under cl 20(10) and (11) of the Agreement, he was entitled to the Contract Completion Payment on his effective dismissal. Furthermore, this constituted the end of his contract, given the circumstances.

18 The relevant provisions of the Agreement are annexed as Schedule III to her Honour's reasons. Additionally, the relevant sections of the *Health Practitioners Act* are referred to also in her Honour's reasons. I am mindful that a key consideration in her Honour's decision was the proper construction of cl 20(5) of the Agreement, about which reasonable minds may differ. Constructional choices need to be made in cases of the present kind. It would be pre-emptive to dispose of the appeal, without the further opportunity for argument, especially as the proceedings at first instance were effectively summarily determined without a full trial on the merits. It may also be the case that with the opportunity to formulate argument on the appeal proper, the appellant may be able to persuade the Full Bench to reach an alternative view on the construction of cl 20(5), despite the apparent attraction of the conclusions reached by her Honour at first instance.

19 Having regard to the relatively short period of the delay in filing the Notice of Appeal, the reasons for the delay and that there may be an argument as to the proper construction of cl 20(5) of the Agreement, and in the absence of any identified prejudice to the respondent, other than having to respond to the appeal in due course, I am minded to grant an extension in this case. Given that the appellant has still not filed the appeal books, he will be required to do so within seven days. Orders now issue.

EMMANUEL C:

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

MATTHEWS C:

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