

WESTERN AUSTRALIAN INDUSTRIAL MAGISTRATES COURT

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

CLAIMANT

AND

DIRECTOR-GENERAL OF HEALTH

FIRST RESPONDENT

NORTH METROPOLITAN HEALTH SERVICE BOARD

SECOND RESPONDENT

EAST METROPOLITAN HEALTH SERVICE BOARD

THRID RESPONDENT

CatchWords : INDUSTRIAL LAW (WA) – Application to dismiss part of a claim – Construction of industrial agreement – Alleged contravention of clause of *Department of Health Medical Practitioners (Metropolitan Health Services) AMA Industrial Agreement 2013* for non-payment of a Contract Completion Payment – Meaning of practitioner in clause 20(5) of the Agreement – Whether payment requires a medical practitioner to be registered under the *Health Practitioner Regulation National Law (WA) Act 2010* at the time of expiry of fixed term contract – Purpose for which the Contract Completion Payment is paid

Legislation : *Industrial Relations Act 1979* (WA)
Magistrates Court (Civil Proceedings) Act 2004 (WA)
Hospitals and Health Services Act 1927 (WA)
Industrial Magistrates Courts (General Jurisdiction) Regulations 2005 (WA)
Health Practitioner Regulation National Law (WA) Act 2010 (WA)
Minimum Conditions of Employment Act 1993 (WA)

Instrument	:	<i>Department of Health Medical Practitioners (Metropolitan Health Services) AMA Industrial Agreement 2013</i> <i>Medical Practitioners (Metropolitan Health Services) AMA Industrial Agreement 2002</i>
Case(s) referred to in reasons	:	<i>General Steel Industries Inc v Commissioner of Railways NSW</i> (1964) 112 CLR 125 <i>Dalgety Australia Ltd v Rubin</i> ; unreported; Full Crt WA Supreme Court 24 August 1984 Lib No 5485 <i>Amcor Ltd and Ors v Barnes and Ors</i> [2012] VSC 94 <i>Garbett v Midland Brick Company Pty Ltd</i> [2003] WASCA 36 <i>Gromark Packaging v Federated Miscellaneous Workers Union of Australia (WA Branch)</i> (1992) 46 IR 98 <i>Bunnett v Henderson's Federal Spring Works Pty Ltd</i> (1989) 31 AILR 356 <i>Sammut v AVM Holdings Pty Ltd [No2]</i> [2012] WASC 27 <i>Fedec -v- The Minister for Corrective Services</i> [2017] WAIRC 00828 <i>City of Wanneroo v Australian Municipal, Administrative, Clerical And Services Union</i> [2006] FCA 813 <i>Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Excelior Pty Ltd</i> [2013] FCA 638
Result	:	Application granted
Representation:		
Claimant	:	Mr T. Hoffman (agent)
Respondents	:	Mr R. Andretich (of counsel) as instructed by the State Solicitor's Office

REASONS FOR DECISION

- 1 On 17 July 2019, the North Metropolitan Health Service Board (NMHSB) lodged an application to dismiss part of a claim by Dr Olumuyiwa Sunday Sorunmu (the claimant) as it relates to the payment of a Contractual Completion Payment.
- 2 The NMHSB contends that at the time of the expiry of the claimant's last contract of employment the claimant was not a medical practitioner, as defined in the *Department of Health Medical Practitioners (Metropolitan Health Services) AMA Industrial Agreement 2013* (PSAAG 4 of 2013) (the Agreement), and consequently is not entitled to the payment (the Application).
- 3 The NMHSB relies upon an affidavit affirmed by Mark Golesworthy, Acting Director, Industrial Relations NMHSB, on 15 July 2019 in support of the Application. The claimant opposes the Application and lodged a signed statement by him dated 27 September 2019.

Background

- 4 On 16 May 2018, the claimant lodged a claim against the Director-General of Health claiming the Director-General of Health failed to comply with an award, agreement, instrument or order

pursuant to the *Industrial Relations Act 1979* (WA) (the IR Act). While not directly stated, I infer the claim was made pursuant to s 83 of the IR Act where the claim stated the Director-General of Health contravened or failed to comply with:

- (a) cl 20(5) of the Agreement in failing to pay him a Contract Completion Payment upon the expiration of his contract of employment on 30 June 2016; and
- (b) cl 37(b) of the Agreement in failing to pay him long service leave entitlements.

- 5 The claimant later applied, and was granted leave, to join the NMHSB and East Metropolitan Health Service Board (EMHSB) as respondents to the claim.
- 6 The claimant ultimately seeks the payment of an amount, approximately \$131,000.00, he says is owed to him because of the alleged contraventions or failures to comply with the Agreement.
- 7 The claimant was employed by the Western Australian Metropolitan Health Service as a medical practitioner in accordance with a series of consecutive fixed term contracts commencing on or around 22 May 2003 with the last fixed term contract expiring on 30 June 2016.
- 8 The claimant's last fixed term contract of employment from 2013 to 30 June 2016 was also subject to the terms of the Agreement.
- 9 On 20 November 2015, the claimant's registration with the Australian Health Practitioner Regulation Agency (AHPRA) expired and the claimant was unsuccessful in applying for registration in an area of limited need¹. While the claimant was unregistered with AHPRA he did not work and the NMHSB allowed the claimant to take accrued leave and then 'leave without pay' until the fixed term contract expired on 30 June 2016.
- 10 There is no dispute between the parties that the Agreement, and previous iterations of the Agreement, applied to the claimant's employment or that the claimant was properly categorised under the Agreement as a Senior Practitioner² (as opposed to a Doctor in Training or a practitioner with private practice rights).
- 11 The NMHSB appears to have assumed responsibility for the claimant's employment where the Agreement applies to all medical practitioners employed by the Minister of Health as the Board of the hospitals that formerly comprised the Metropolitan Health Service under s 7 of the *Hospitals and Health Services Act 1927* (WA). A fixed term contract from 22 May 2008 to 21 May 2013 relied upon by the claimant provides that NMHSB is the responsible employer with the claimant's work location specified as Inner City Mental Health³.
- 12 The EMHSB denies the claimant was ever employed by it.
- 13 Notwithstanding, from the claimant's perspective, the issue of who his employer was on 30 June 2016 may be unresolved, the outcome of the Application will likely apply to all named respondents.
- 14 While not expressed in the Application, I infer the Application is made pursuant to reg 7(1)(h) of the *Industrial Magistrates Courts (General Jurisdiction) Regulations 2005* (WA) (the IMC Regulations) where the Industrial Magistrates Court of Western Australia (IMC) has the power to make an order that an issue not be tried.
- 15 Schedule I to this decision outlines the jurisdiction of the IMC.
- 16 Schedule II to this decision outlines principles applicable to construction of an industrial agreement and statutes.
- 17 Schedule III to this decision contains relevant extracts of the Agreement.

Issues for Determination

18 The following issues require determination:

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

The NMHSB’s Contentions

19 The NMHSB contends that:

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

Claimant’s Contentions

20 The claimant contends that:

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

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

- provides no application of illegality of contract to the Application or his claim but merely poses a question concerning the mode of performance under the National Law. In any event, the claimant appears to accept that the fixed term contract was not illegal; and

- says the NMHSB is estopped from making the Application because of alleged representations of future conduct gives rise to a promissory estoppel. Conceptually the claimant appears to raise two points under the broad heading of estoppel, none of which seem to assist his case:
 - i. from March 2003, the Department of Health advised the claimant that he was permanently employed and relied upon this statement to apply for permanent residency in Australia and move from Victoria to take up a position in Western Australia. If the claimant now claims he is a permanent, rather than contracted, employee with NMHSB, then he is ineligible for a Contract Completion Payment where the payment only applies to practitioners on a fixed term contract; and
 - ii. the NMHSB understood that until the claimant completed his specialist training with the Royal Australian and New Zealand College of Psychiatrists (RANZCP), the only way he could remain on the ‘public register’ was to be offered future employment and maintain the RANZCP training. The claimant was not in a position to complete the requisite exams due to his eye condition and that he had good reason to delay taking the exams, but he would inevitably meet the requirements for registration (at some unspecified time in the future). Further, the NMHSB knew that he needed to renew his contracts of employment so as to maintain affiliation with the RANZCP. Whatever might be the claimant’s position with respect to some moral obligation the NMHSB may have with respect to any future contracts of employment, the claimant’s claim relates to alleged contraventions by the Director-General of Health and others. This simply does not invoke any moral or other legal obligation for consideration by the IMC.

Jurisdiction of the IMC

- 22 The IMC jurisdiction under s 83 of the IR Act is uncontroversial. That is, an application to the IMC for enforcement can only be made in respect of an instrument to which subsection (1) applies. These instruments are detailed in subsection (2) and include an award, an industrial agreement, an employer-employee agreement or an order made by the Western Australian Industrial Relations Commission (the Commission).
- 23 To invoke the IMC’s enforcement jurisdiction, the claimant must first identify which instrument he says he is seeking to enforce. In the claimant’s case, the claimant can only rely upon the Agreement there being no employer-employee agreement and no order made by the Commission.
- 24 Thereafter, once the instrument is identified, consistent with the words in subsection (1), the claimant must then also identify the provision he says has been contravened or not complied with by the Department of Health.
- 25 Relevant to the Application, the claimant’s claim refers to a failure to comply with cl 20(5) of the Agreement.
- 26 One of the orders sought by the claimant is the payment of an amount of money he says he was entitled to be paid under the Agreement, namely the Contract Completion Payment. Any such order can only be made by the IMC under s 83A(1) of the IR Act in proceedings under s 83 of the IR Act where the employee has not been paid an amount to which they are entitled under the relevant instrument.

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

- 27 While the Application is not strictly a strike out application, the NMHSB is, in effect, seeking to strike out, or alternatively dismiss without trial, that part of the claimant's claim relative to the Contract Completion Payment on the basis that the claimant was never, nor could he have been, entitled to the payment.
- 28 In either case a court should proceed with caution before coming to the conclusion that a party at an interlocutory stage should be prevented from proceeding with their claim⁴. While the court may determine a difficult question of law on such an application, it would normally be appropriate for difficult questions of law to be left for trial. In terms of facts, the question is whether it would be open to the party (on its case) to prove facts at trial which would constitute its claim. It is only in cases in which it can be seen from the outset that, however the facts are found, there is no basis for the legal conclusion contended by the party that a pleading should be struck out (or in this case that part of the claim be dismissed without trial)⁵.
- 29 One of the key facts of the claimant's claim is not in dispute, namely that the claimant was not registered with AHPRA on 30 June 2016. What is in the dispute, at least from the claimant's perspective, is what his status of being unregistered means in the context of a Contract Completion Payment.

The Agreement – cl 20(5)

- 30 The Agreement applies to all medical practitioners employed by the Director-General of Health (as a delegate of the Minister for Health) or any other delegated authority. That is, all applicable medical practitioners employed in the public health system in Western Australia.
- 31 Part 3 of the Agreement contains the terms of the contract of service for Senior Practitioners, including cl 20(5) of the Agreement. Relevantly, the appointment of Senior Practitioners is by five-year contracts of employment, unless by contrary written agreement, and there is no automatic right of reappointment upon expiry of a contract: cl 20(1)(a) and cl 20(4) of the Agreement.
- 32 Subject to cl 20(2) of the Agreement⁶, any contract of employment, including a fixed term contract, may be terminated by either party giving not less than three months' notice, although the employer can pay out the notice period or the employee can forfeit the commensurate salary or the parties can agree a lesser notice period: cl 20(7) and cl 20(8) of the Agreement.
- 33 Other than the possible payment of a Contract Completion Payment, no other termination, redundancy or severance pay is contemplated or shall be made unless provided for in the Agreement. Relevantly, the only other payment contemplated is contained in cl 20(7): cl 20(5) of the Agreement.
- 34 The Agreement also contemplates the existence of Senior Practitioners who have permanent tenure with the Director-General of Health (presumably where the practitioner has long standing employment prior to the Agreement and previous iterations of the Agreement).
- 35 Similar terms in cl 9 of Part 2 to the Agreement apply to Doctors in Training⁷. Notably, cl 9(3)(c) of the Agreement contains a similar Contract Completion Payment to cl 20(5) of the Agreement but applicable to Supervised Medical Officers⁸. Again, similar to Senior Practitioners, no other termination, redundancy or severance payment shall be made except as provided in the Agreement.

- 36 However, unlike for Senior Practitioners, a tenured Supervised Medical Officer who converts to a fixed term contract and at the end of the first fixed term contract is unsuccessful in seeking reappointment, the person is to be paid pro rata long service leave after five years of continuous service in addition to a Contract Completion Payment.
- 37 Termination payments relevant to Supervised Medical Officers is provided for in cl 9(4) of the Agreement (which provides for staged termination payments).
- 38 Clause 8 of the Agreement contains the following relevant definitions:
- “Medical Practitioner”* means a medical practitioner as defined under the Health Practitioner Regulation National Law (WA) Act 2010 as amended from time to time.
- “Practitioner”* means a medical practitioner employed under this Agreement.
- 39 The National Law defines *medical practitioner* as ‘*a person who is registered under this Law in the medical profession*’. The National Law and the Agreement do not define *registered*.
- 40 Clause 20(5) of the Agreement states:
- A practitioner who, upon expiry of a fixed term contract, is unsuccessful in seeking a new contract shall be paid a Contract Completion Payment equal to 10% of their final base salary, for each year of continuous service, or part thereof paid on a proportionate basis, calculated on completed months’ of service up to a maximum of 5 years. No other termination, redundancy or severance payment shall be made except as provided for in this Agreement.*

The National Law – registration

- 41 In or around July 2010, each State and Territory enacted Health Practitioner Regulation National Law regulating 16 health professions by nationally consistent legislation under the National Registration and Accreditation Scheme. The National Law is Western Australia’s statutory regime (consistent with similar legislation in each other State and Territory) and provides for a National Registration and Accreditation Scheme for health practitioners which is contained in the Schedule to the National Law.
- 42 One of the objectives of the National Law is to ‘*provide for the protection of the public by ensuring that only health practitioners who are suitably trained and qualified to practise in a competent and ethical manner are registered*’: s 3(2)(a) of Part 1 of the Schedule to the National Law.
- 43 The National Law contains the following relevant definitions:
- health practitioner*** means an individual who practises a health profession.
- health profession*** means the following professions, and includes a recognised specialty in any of the following professions – (relevantly) (e) medical.
- medical practitioner*** means a person who is registered under this Law in the medical profession.
- National Register*** means the Register kept by a National Board under s 222.
- registered health practitioner*** means an individual who –
- (a) is registered under this Law to practise a health profession, other than as a student;
or
 - (b) holds non-practicing registration under this Law in a health profession.

registration status, in relation to an applicant for registration, includes – (relevantly) (c) any decisions made by a registration authority, a tribunal, a court or another entity having functions relating to the regulation of health practitioners about the applicant’s practice of the profession, whether before or after the commencement of this Law.

- 44 Part 7 of the Schedule to the National Law provides for the registration of health practitioners. Broadly speaking there are several categories of registration each having specific criteria for eligibility or qualification in that category:
- General registration – s 52 and s 53;
 - Specialist registration – s 57 and s 58;
 - Provisional registration – s 62;
 - Limited registration – s 65, s 67, s 68, and s 69; and
 - Non-practising registration – s 73 and s 75.
- 45 Save for non-practising registration, the other categories of registration enable a health practitioner to lawfully practise in the relevant health profession in accordance with the terms of the category of registration, either on condition or not on condition.
- 46 A person is eligible for non-practising registration in a health profession if: (a) the person holds or held general registration; (b) holds or held specialist registration; or (c) held registration under prior corresponding legislation in either of those categories; and the person is suitable to hold non-practising registration: s 73 of the National Law. However, a registered health practitioner who holds non-practising registration must not practise in the profession: s 75 of the National Law.
- 47 An individual may apply for registration in the health profession and the application can be investigated by a National Board before a decision on the application is made: s 77, s 80 and s 82 of the National Law.
- 48 The registration period for each category of registration is 12 months where upon a *registered health practitioner* may apply to the National Board for renewal of the registration: s 107 of the National Law. Provided the health practitioner applies in compliance with s 107 of the National Law, the registration continues until the National Board issues a new certificate or refuses to renew the registration: s 108 of the National Law.
- 49 Each health profession is required to keep a public national and specialist register to include the names of all health practitioners currently registered in the profession and the names of all health practitioners whose registration has been cancelled by an adjudication body and the names of all person’s subject to a prohibition order: s 222 and s 223 of the National Law.
- 50 Section 225 of the National Law provides that each of the registers must include certain information, including the date of expiry of the practitioner’s registration.
- 51 Thus, the whole tenor of registration under the National Law is directed to ensuring that only those health practitioners, including medical practitioners, who are registered to practice in health professions are entitled to lawfully practice in those areas.
- 52 Eligibility for a category of registration is not the same as being registered under the National Law, where, eligibility and/or qualifications set out the criteria against which an application for registration is assessed. By way of example, a person will not be eligible for general registration unless they are, amongst other things, qualified for general registration: s 52 and s 53 of the

National Law. Thereafter, if an application for general registration is granted, it is for a period of 12 months: s 56 of the National Law.

- 53 Nothing in the National Law (save s 107) gives, or is intended to give, automatic qualification for registration merely because notionally a person may meet (on their view) the criteria set out in the National Law. The registration process depends on a person making an application in the relevant area of registration and being assessed against relevant criteria before their application is granted and then reapplying every 12 months thereafter.
- 54 It is only after an application for registration has been granted and the person reappplies within the requisite time that the person is a *registered health practitioner* under the National Law. The extent of their practice is dictated by: (1) the type of registration granted; (2) any conditions on the registration; (3) in relation to non-practicing registration, the person cannot practice as a health professional at all.

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

- 55 On 20 November 2015, the claimant's limited registration as a medical practitioner expired⁹. The expiration of the claimant's limited registration followed his application and approval for limited registration as a medical practitioner in an area of need on 20 November 2014, subject to conditions including annual renewal.
- 56 According to the claimant, between 18 December 2015 and 1 April 2016 he applied unsuccessfully on three occasions for renewal or reinstatement of his 'public registration by AHPRA'¹⁰.
- 57 On 27 May 2016, the claimant was advised by AHPRA that the Western Australian Registration Committee of the Medical Board of Australia proposed to refuse limited registration as a medical practitioner¹¹.
- 58 According to the claimant his response to AHPRA was that he was in discussions with the RANZCP Specialist International Medical Graduate Education pathway and had made an application to the RANZCP for continued training, which he says would have resulted in AHPRA restoring his name to the 'public register'¹².
- 59 The claimant says that by 28 September 2016 he had progressed the RANZCP application to the stage where he required a Certificate of Good Standing from AHPRA and accepted job offer in Australia or New Zealand in order to complete the application¹³.
- 60 On 19 October 2016, AHPRA provided the claimant with a Certificate of Registration Status noting the claimant was unregistered and his registration had expired on 20 November 2015¹⁴.
- 61 The claimant's argument is that because he was not 'struck off' any register and he was eligible for restoration to the 'public register' provided he met certain criteria, he remained registered for the purposes of the National Law and payment of the Contract Completion Payment. That is, until such time as he was 'properly removed' from the register, he was still registered or on the register.
- 62 I do not accept the claimant's characterisation of his registration status. The claimant's registration under s 65 of the National Law expired on 20 November 2015. On the claimant's evidence, the claimant did not apply for the renewal of his registration in compliance with s 107 of the National Law and, therefore, there was no ongoing registration pending renewal.
- 63 Thereafter, the claimant re-applied for limited registration but was unsuccessful in being granted limited registration or any other registration applicable under the National Law. Whether he was

eligible or retained an AHPRA profession number for possible future registration is not to the point.

- 64 Simply, on 20 November 2015 the claimant ceased being registered in any of the categories of registration in Part 7 of the National Law. That he may have been, and still might be, eligible for future registration did not alter the fact that from 20 November 2015 he was no longer registered as a *registered health practitioner* in the medical profession.
- 65 As the claimant was no longer registered as a *registered health practitioner* in the medical profession, he was not entitled to practice in that profession. This was the case from 20 November 2015 and remained the case up to and from 30 June 2016.
- 66 The Certificate of Registration Status from AHPRA dated 16 October 2016¹⁵ merely confirms the claimant is unregistered with his registration having expired on 20 November 2015 and that there are no outstanding disciplinary proceedings against him. This document in no way grants registration and the fact that a professional number is recorded on the document is a reference number for the claimant. One reasonably assumes that should the claimant wish to *apply* for registration in the future, this document may aid him in doing so.
- 67 Further, there is nothing that suggests that being unregistered under the National Law occurs when a person is ‘struck off’ and in the meantime they remain on a public register able to practice as a *registered health practitioner*.
- 68 There is likely to be any number of people who, for whatever reason (death, illness, retirement), do not renew their registration in a health profession. None of these reasons necessarily results in the person being ‘struck off’, but without the granting of their application for, or renewal of, registration they remain unregistered for the purposes of the National Law.

What is the purpose of the Contract Completion Payment?

- 69 NMHSB contends that the payment of a Contract Completion Payment in cl 20(5) of the Agreement is in contemplation of a medical practitioner being *able* to enter into a contract on expiry of a fixed term contract, but no future fixed term contract or work is available for the practitioner.
- 70 NMHSB further contends that the intention of cl 20(5) of the Agreement is not to provide a payment to someone who is ineligible to do the job. The payment is made to someone who is willing, able and eligible to do the job but cannot obtain future work in the public health service under the Agreement.
- 71 On the NMHSB contentions, a Contract Completion Payment would not be made to a practitioner who was imprisoned for an offence and was refused a future fixed term contract if they requested it. Similarly, a Contract Completion Payment would not be made if a practitioner was physically incapable (illness or accident) or retiring from the profession. However, the NMHSB also notes that the reasons why a practitioner may be unsuccessful are not the core of its submission, which hinges on the meaning of *practitioner* under the Agreement and that a practitioner must be registered at the time of the expiry of the fixed term contract.
- 72 The NMHSB contends that the purpose of cl 20(5) of the Agreement is to provide compensation to medical practitioners registered under the National Law who are genuinely seeking to be re-employed within the Department of Health at the end of a fixed term contract but who are unsuccessful in obtaining a new fixed term contract.

- 73 The claimant says in response that ineligibility (for whatever reason) is irrelevant to the payment of a Contract Completion Payment. The claimant contends that the payment recognises prior good service within the Department of Health and that a practitioner who is ineligible can still obtain the payment.
- 74 The claimant further contends that poor drafting, or a failure to identify situations where a practitioner may not be eligible under cl 20(5) of the Agreement, should not exclude the claimant from obtaining a Contract Completion Payment in the circumstances.
- 75 Save for the reference of termination payments in cl 20(7) and cl 9(4) of the Agreement, there is no other redundancy or severance payment contemplated in the Agreement.
- 76 The common law concept of redundancy or severance was discussed in *Ancor Ltd and Ors v Barnes and Ors* [2012] VSC 94, at [371] where Vickery J distilled the concept to five propositions, which in summary include (citations excluded):
- (a) the employee's job ceases to exist, for whatever reason, because the employer no longer desires to have it performed by anyone;
 - (b) this can occur when the role no longer exists or the original role no longer exists;
 - (c) redundancy is not limited to just these circumstances;
 - (d) a redundancy may also occur upon redistribution of job functions or where the employee has no duties to discharge; and
 - (e) redundancy will not arise where the termination of employment is carried out solely because of any personal act or default of the employee.
- 77 Similarly, in *Garbett v Midland Brick Company Pty Ltd* [2003] WASCA 36, Heenan J (with whom Park J agreed), at [74], discussed the concept of 'redundancy'¹⁶ as
- [t]he need to terminate a contract of employment...because of some change in the nature of the employer's business, or a shift of business location, or some restructure genuinely considered by the employer to be necessary for the improvement or refinement of its business operations or for some reason quite independent of the performance of the individual employee or employees.*
- 78 Further, *Garbett* at [76] and [87], His Honour also summarised circumstances in which a redundancy will occur, including: when a workforce is reduced because there is labour in excess of that reasonably required to perform the work which is the employer's business¹⁷; the employer no longer requires the work to be performed by anyone¹⁸; and where an employer has decided that the job will not be done by any person¹⁹.
- 79 Having regard to the context in which the payment is made, when regard is had to the whole of the Agreement, the payment of a Contract Completion Payment appears likely to compensate a practitioner in a manner similar to that contemplated by a redundancy or severance payment (noting the employment relationship is borne from a fixed term and not a permanent contract of employment).
- 80 When considered in this context, the intention or purpose of the payment of a Contract Completion Payment is arguably not to compensate a practitioner merely because a fixed term contract comes to an end without any intention on the practitioner's part to pursue further employment in the public health system. The payment is not a windfall, nor does it compensate a practitioner because they are unable, or not eligible, to engage in future employment in the public health system, nor does it operate to reward past service in the public health system.

- 81 In my view, the payment of a Contract Completion Payment is to compensate a practitioner who genuinely wants to continue to, and can, be employed in the public health service but the service is unable to provide future employment. This purpose is further supported by the words in cl 20(5) of the Agreement '[a] *practitioner who....is unsuccessful in seeking a new contract*' [my emphasis]. The words 'in seeking' strongly suggests that the practitioner is the party responsible for obtaining or attempting to obtain future employment.
- 82 This purpose is further supported where there is no automatic right of reappointment upon expiry of a fixed term contract but where a contract expires or is otherwise terminated, monies otherwise due are paid.

Is registration as a medical practitioner a condition to payment of the Contract Completion Payment?

- 83 If the purpose of the payment of a Contract Completion Payment is accepted, then there are two reasons why a practitioner is required to be registered at the time of seeking a new fixed term contract:
- (1) the definition of 'practitioner' in the Agreement when read with the National Law means '*a medical practitioner registered under the Health Practitioner Regulation National Law (WA) Act 2010*'. There is no ambiguity in the meaning and, thus, at the time of expiry of a fixed term contract the practitioner must be registered under the National Law; and
 - (2) this definition is consistent with the overall purpose of the Agreement, which is to outline the employment conditions of various medical practitioners in the public health system. An unregistered medical practitioner cannot lawfully practice in the medical profession and, therefore, is unable, and ineligible, to work in the public health system.
- 84 Whatever might have been the practitioner's situation in the past, at the time of seeking a new fixed term contract of employment with the Department of Health, if the practitioner is unable to work as a medical practitioner because they are unregistered under the National Law, the practitioner cannot do the very thing the Agreement contemplates them doing, which is working as a medical practitioner in the public health system. It cannot have been contemplated that cl 20(5) of the Agreement be intended to compensate unregistered practitioners for being unable or ineligible to do the very work the Agreement is directed to providing that they do.

The claimant's contracts of employment

- 85 As I understand the claimant's contention, he says that as there is no requirement in his contract of employment requiring him to be registered with AHPRA (or its previous regulatory bodies), he is not required to be registered as a medical practitioner to receive a Contract Completion Payment under cl 20(5) of the Agreement.
- 86 The claimant refers to two available written contracts of employment: (1) contract of employment dated 23 January 2003 and signed on 25 May 2003²⁰; and (2) contract of employment dated 20 May 2008²¹.
- 87 In respect of the five-year contract of employment dated 23 January 2003, on page two, the contract specifically states under the heading of 'Registration with the Medical Board of Western Australia':

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

- 88 This contract also refers to the terms of the *Medical Practitioners (Metropolitan Health Services) AMA Industrial Agreement 2002* applying to the claimant's appointment.
- 89 Therefore, in relation to five-year contract dated 23 January 2003, the claimant was required to be registered to take up the appointment.
- 90 In respect of the five-year contract of employment dated 20 May 2008, the appointment was governed by the 'AMA – Medical Practitioners Agreement'. This document does not contain an express reference to a requirement that the claimant be registered with the relevant regulatory body. However, this does not assist the claimant where:
- the claimant agrees the Agreement applies to his employment from 2013 to 2016 and the definition of *practitioner* requires the medical practitioner to be registered under the National Law;
 - the claimant claims the Director-General of Health and others, including the NMHSB, have contravened the Agreement and, accordingly, is seeking payment of a sum of money arising from the alleged contravention. The claim is not for denial of a contractual benefit, which is beyond the IMC's jurisdiction under s 83 of the IR Act; and
 - neither of the contract documents referred to by the claimant otherwise make provision for a Contract Completion Payment, which is only available under the terms of the Agreement.
- 91 Therefore, having regard to the claimant's claim and the Application, the contracts of employment referred to by the claimant do not assist in determining whether the claimant is entitled to a Contract Completion Payment pursuant to cl 20(5) of the Agreement.

Determination

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

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

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

Outcome

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

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

D SCADDAN

INDUSTRIAL MAGISTRATE

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

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

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

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

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

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

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

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

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

¹⁰ The claimant's statement at [28].

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

¹² The claimant's statement at [31].

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

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

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

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

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

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

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

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

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

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

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

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

[T]he rules of evidence are [not] to be ignored.... After all, they represent the attempt made, through many generations, to evolve a method of enquiry best calculated to prevent error and elicit truth. ...

The more flexible procedure provided for does not justify decisions made without a basis in evidence having probative force.

Schedule II: Relevant Principles of Construction

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

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

To the above list I would add:

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

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

3. APPLICATION

- (1) The parties to this Agreement are the “Minister for Health incorporated as the Board of the hospitals formerly comprised in the Metropolitan Health Service Board, under s7 of the Hospitals and Health Services Act 1927 (WA)” (“the employer”) and the “Australian Medical Association (Western Australia) Incorporated” (“the Association”).
- (2) This Agreement shall extend to and bind all medical practitioners employed by the employer except those employed as clinical academics pursuant to the Clinical Academics AMA Industrial Agreement 2011 or any industrial agreement that replaces the Clinical Academics AMA Industrial Agreement 2011.
- (3) The estimated number of practitioners bound by this Agreement upon registration is 4373.
- (4) While this Agreement is in operation, it shall override all provisions of the:
 - (a) WA Public Hospitals (Senior Medical Practitioners) Award 2011
 - (b) WA Public Hospitals (Doctors in Training) Award 2011
- (5) This Agreement cancels and replaces the Department of Health Medical Practitioners (Metropolitan Health Services) AMA Industrial Agreement 2011.
- (6)
 - (a) The Director General of Health is the delegate of the “Minister for Health incorporated as the Board of the hospitals formerly comprised in the Metropolitan Health Service Board, under s7 of the Hospitals and Health Services Act 1927 (WA)”. In this capacity the Director General acts as the “employer” for the purposes of this Agreement.
 - (b) If the Director General of Health onward delegates any capacity to act as the “employer” to a Chief Executive of a Health Service or to any other office holder the Director General of Health shall inform the Association in writing of the terms of the delegation. An office holder who acts in accordance with the terms of a delegation from the Director General of Health shall be deemed to have acted as the “employer” for the purposes of this Agreement.

4. NO FURTHER CLAIMS

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

8. DEFINITIONS

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

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

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

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

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

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

“Hospital”, subject to the context, includes Health Service.

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

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

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

“Practitioner” means a medical practitioner employed under this Agreement.

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

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

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

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

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

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

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

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

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

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

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

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

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

PART 2 - DOCTORS IN TRAINING**9. CONTRACT OF SERVICE**

(1)

- (a) Appointments shall be as agreed in writing between the employer and the practitioner and shall normally be for 12 months.
- (b) Practitioners participating in accredited training programmes may be offered appointments for the period the training programme would be expected to take.

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

- (a) Interns; or
- (b) practitioners appointed for a consecutive term; or
- (c) casual practitioners

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

(3)

- (a) Notwithstanding (1) above, all new appointments as Supervised Medical Officers shall be on 5 year fixed term contracts unless there is written agreement to the contrary between the employer and the practitioner.
- (b) There shall be no automatic right of reappointment upon expiry of a contract.
- (c) A Supervised Medical Officer who, upon expiry of a fixed term contract, is unsuccessful in seeking a new contract shall be paid a Contract Completion Payment equal to 10% of their final base salary, for each year of continuous service, or part thereof paid on a proportionate basis, calculated on completed months' of service up to a maximum of 5 years.

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

- (d) A Supervised Medical Officer with tenure shall not be required to convert to a fixed term contract but may agree to do so. If unsuccessful in seeking reappointment at the end of that fixed term contract for reasons other than misconduct, he/she shall be paid pro rata long service leave after 5 years of continuous service in addition to the amount specified in subclause 3 (c).
- (e) This subclause shall not apply to Supervised Medical Officers who are in:
 - (i) a recognised medical college approved training programme, or
 - (ii) service positions that are not recognised training programmes designed to offer experience and/or training.

- (4)
- (a) Any contract of employment including a fixed term contract may be terminated by either the employer or the practitioner giving the following notice:
 - (i) For contracts where the term is 12 months or less - 4 weeks' notice.
 - (ii) For contracts where the term is more than 12 months but equal to or less than 2 years - 6 weeks' notice.
 - (iii) For contracts of where the term is more than 2 years but equal to or less than 3 years - 8 weeks' notice.
 - (iv) For contracts where the term is more than 3 years - 12 weeks' notice.
 - (b) In lieu of giving of the required notice the employer may pay or the practitioner may forfeit, as the case may be, salary commensurate with the residual period of notice otherwise required. The employer and the practitioner may agree to a lesser period of notice.
 - (c) Practitioners who have completed their probationary period shall be subject to regular documented performance management and may only be terminated with notice by the Employer on the grounds of unsatisfactory service, misconduct or redundancy.
- (5) Notwithstanding the other provisions of this Clause, the employer may, without prior notice, summarily dismiss a practitioner for serious misconduct.
- (6) A practitioner who is dismissed may appeal to a Board of Reference if the application is made within one month of the operative date of the dismissal.
- (7) A practitioner whose contract of employment expires or is terminated shall be paid all monies due on the payday following the last day of employment.
- (8)
- (a) Practitioners may by agreement be seconded on the approval of, and after consultation between, the relevant employing authorities, to any Government recognised hospital or agency, provided that satisfactory recognised supervision and training arrangements are in place.
 - (b) Interns may be seconded in accordance with this subclause as appropriate to the practitioner's training.
- (9) Prior to the commencement of each year, practitioners shall be advised of the clinical rotations they shall be required to complete. The employer shall, subject to operational requirements, make every endeavour to accommodate a practitioner's clinical rotation preferences. These rotations shall only be changed after consultation with the practitioner.
- (10) Practitioners shall be provided with a job description stating the relevant duties and responsibilities of the position including the general percentage for clinical responsibilities, teaching, non clinical duties and supervision of any staff. "Non clinical duties" means duties not directly associated with the diagnosis or management of patients.

PART 3 - SENIOR PRACTITIONERS**20. CONTRACT OF SERVICE**

- (1)
 - (a) All appointments shall be on 5 year contracts unless there is written agreement to the contrary between the employer and practitioner.
 - (b) To meet short term exigencies, the employer may employ a practitioner on a short term contract of up to six months. In such cases the practitioner shall not be entitled to receive leave benefits (including leave for public holidays), but shall instead be paid a loading of 25% on the base salary. Penalty rates shall be calculated exclusive of the loading.
- (2)
 - (a) Each practitioner shall be appointed for a probationary period of six months. During the probationary period either the employer or the practitioner may give four weeks' notice of termination or resignation of employment or such lesser period as agreed. The probationary period shall not apply if the practitioner is appointed for a consecutive term.
 - (b) Following completion of the probationary period, practitioners shall be subject to regular performance management and may only be terminated with notice by the employer on the grounds of unsatisfactory service, misconduct or redundancy.
- (3) Practitioners shall be provided with a job description stating the relevant duties and responsibilities of the position. As a guide, 80% of a practitioner's duties shall be allocated to clinical duties (including teaching) and 20% of a practitioner's duties shall be allocated for non-clinical duties. "Non-clinical duties" means duties not directly associated with the diagnosis or management of a particular patient. They may include administration, attendance at departmental meetings, formal teaching sessions, audit or other quality assurance activities.
- (4) There shall be no automatic right of reappointment upon expiry of a contract.
- (5) A practitioner who, upon expiry of a fixed term contract, is unsuccessful in seeking a new contract shall be paid a Contract Completion Payment equal to 10% of their final base salary, for each year of continuous service, or part thereof paid on a proportionate basis, calculated on completed months' of service up to a maximum of 5 years. No other termination, redundancy or severance payment shall be made except as provided for in this Agreement.
- (6) A practitioner with permanent tenure shall not be required to convert to a fixed term contract but may agree to do so. Such an agreement must be in writing specifically agreeing to the change and include a declaration by the practitioner that he/she fully understands the implications of foregoing permanency.
- (7) Subject to subclause (2) any contract of employment including a fixed term contract may be terminated by either the employer or the practitioner giving not less than 3 months' notice.
- (8) In lieu of the giving of the required notice the employer may pay, or the practitioner may forfeit, as the case may be, salary commensurate with the residual period of notice otherwise required. The employer and the practitioner may agree to a lesser period of notice.

- (9) Notwithstanding the other provisions of this clause, the Employer may, without prior notice, dismiss a practitioner for serious misconduct.
- (10) A practitioner who is dismissed may appeal to a Board of Reference if the application is made within one month of the operative date of the dismissal.
- (11) A practitioner whose contract of employment expires or is terminated shall be paid all monies due on the payday following the last day of employment.
- (12) Head of Department Appointments
 - (a) A Senior Practitioner may, from time to time, be concurrently appointed as a Head of Department for a term not exceeding the term of the practitioner's appointment as a senior practitioner. There shall be no automatic right of reappointment as a Head of Department after the end of a term of appointment. If employment as a senior practitioner ends, employment as a Head of Department automatically ends. If employment as a Head of Department ends, employment as a senior practitioner does not automatically end.
 - (b) A Head of Department shall be remunerated by way of an annual Head of Department Allowance, payable pro rata fortnightly with salary, which continues to be paid during periods of ordinary paid leave but is not counted as part of base salary for the purposes of this Agreement.
 - (c) The duties of the Head of Department shall be as set out, from time to time, in a job description which shall include the criteria upon which the performance of the Head of Department shall be evaluated.
 - (d) The terms of appointment of a Head of Department shall delineate the average number of sessions per week in the case of sessional practitioners, or number of hours per week, in the case of full-time and part-time practitioners, allocated to the undertaking of the duties of Head of Department.
 - (e) An appointment as Head of Department may, at the discretion of either party, be terminated by either the employer or the Head of Department giving to the other 1 months' notice or in lieu of the giving of the notice, the payment or the forfeiture of payment, as the case may be, of the Head of Department Allowance for that period.

(f) Head of Department Annual Allowance Calculation

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

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

- (g) A practitioner who is directed by the employer to act as Head of Department and who performs the full duties and has the full responsibility of the role for more than ten consecutive working days, shall be paid the Head of Department Allowance whilst so acting.
- (h) For the purpose of sub clause (f), "No. of staff under direct supervision and control" shall mean:
- (i) senior practitioners reporting to, and directly performance managed by, the Head of Department;
 - (ii) doctors in training reporting to, and directly performance managed by, the Head of Department provided that where doctors in training rotate through the Department the count shall be the number of doctors in training at the time of calculating the allowance;
 - (iii) chief technical staff reporting to, and directly performance managed by, the Head of Department; and
 - (iv) other staff, reporting directly to, and performance managed by the Head of Department;
- (i) For the purpose of this sub clause, "Department" means a clinical specialty or sub-specialty organisation unit of a Hospital however titled.
- (j) Where a sub-specialty Unit or sub-department (however titled) of a Department is established and a Head of Unit (however titled) is appointed pursuant to this sub clause, a Head of Department Allowance shall be paid to the Head of Unit. Staff under the direct supervision and control of a Head of Unit who is paid an allowance are not counted for the purposes of calculating the allowance payable to the Head of Department to whom the Head of Unit is accountable.