DISPUTE RE ALLEGED BREACH OF CONTRACT

IN THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
SITTING AS
THE ROAD FREIGHT TRANSPORT INDUSTRY TRIBUNAL

CITATION	**:**	2019 WAIRC 00724
CORAM	**:**	SENIOR COMMISSIONER S J KENNER
HEARD	**:**	WEDNESDAY, 10 JULY 2019
DELIVERED	**:**	WEDNESDAY, 2 OCTOBER 2019
FILE NO.	**:**	RFT 1 OF 2019
BETWEEN	**:**	D & K HOLDEN PTY LTD Applicant AND HOLCIM (AUSTRALIA) PTY LTD Respondent

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Catchwords	**:**	*Industrial Law (WA) – Owner-driver contract – Referral of dispute regarding alleged breach of contract – Whether the respondent unlawfully terminated the contract – Whether the applicant committed serious and wilful misconduct – Whether the respondent made misrepresentations to the applicant to induce entering into the contract – Principles applied – Contract lawfully terminated for serious and wilful misconduct – No misrepresentations made – Application dismissed*
Legislation	**:**	*Industrial Relations Act 1979* (WA) *Owner-Driver (Contracts and Disputes) Act 2007* (WA) ss 4, 4(2), 5, 38, 47(4)

Result	**:**	Application dismissed

Representation:

Counsel:

Applicant	**:**	Mr J Burton of counsel
Respondent	**:**	Mr M Baroni of counsel and with him Ms C Vincent of counsel

Solicitors:

Applicant	**:**	Spyker Legal
Respondent	**:**	Australian Business Lawyers and Advisors

Case(s) referred to in reasons:

ADA Cartage Pty Ltd v Holcim (Australia) Pty Ltd [2010] VCAT 1771

Alcatel Australia Ltd v Scarcella (1998) 44 NSWLR 349.

Amcor Limited v CFMEU (2005) 222 CLR 241

Buitendag v Ravensthorpe Nickel Operations Pty Ltd [2012] WASC 425

Ferguson v TNT Australia Pty Ltd [2014] WAIRC 00020; (2014) 94 WAIG 110

Jones v Dunkel (1959) 101 CLR 298

Laws v London Chronicle (Indicator Newspapers) Ltd [1959] 1 WLR 698

North v Television Corporation Ltd (1976) 11 ALR 599

Walton and Anor v BHP Billiton Iron Ore Pty Ltd [2019] WAIRC 00089; (2019) 99 WAIG 299

Case(s) also cited:

Codelfa Construction Pty Ltd v State Rail Authority of NSW (1982) CLR 337

David Miller Re David Miller v University of New South Wales [2001] AIRC 1055

DP World Sydney Limited v Lambley [2012] FWAFB 4810

Electricity Generation Corporation t/as Verve Energy v Woodside Energy Ltd [2014] HCA 7

Genio v Woolworths Limit [2012] FWA 6678

Hemi v BMD Constructions Pty Ltd [2013] FC 8664

Jeff Weekley v Essential Energy [2018] FWC 1448

McDaid v Future Engineering and Communication Pty Ltd [2016] FWC 343

Parmalat Food Products Pty Ltd v Wililo [2011] FWAFB 1166

Shacam Transport Pty Ltd v Damien Cole Pty Ltd [2014] WAIRC 00394; (2014) 94 WAIG 627

Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd [2004] HCA 52

Whittaker v EDI Rail-Bombardier Transportation (Maintenance) Pty Ltd T/A EDI [2013] FWC 7908

Reasons for Decision

Background

1 The applicant and respondent entered into a contracting arrangement in or around late 2001, which involved the applicant delivering and pouring concrete at various sites for clients of the respondent, as directed by the respondent. This initially took place in Queensland and continued in Perth in 2003, when the applicant's owner and Director, Mr Holden, moved to Perth with his family. From 2003, the applicant continued to contract to Holcim delivering concrete to the respondent's clients in the Perth metropolitan area.

2 In October 2010, the applicant purchased a 2010 model FM Series Hino 26 tonne GVM concrete truck for $140,000.00, to perform the concrete delivery work for the respondent. The new truck was fitted with a frame, motor and concrete mixing bowl (Running Gear), which were owned by the respondent. The truck also contained the respondent's signage. The applicant continued to contract to the respondent in line with the arrangement previously followed, part of which was that the respondent paid the applicant monthly, based on the number of concrete deliveries performed by the applicant in the previous month.

Purchase of the Running Gear

3 Mr Holden gave evidence on behalf of the applicant, that in December 2016, at the respondent's request, he met with Mr Malcolm, Regional Logistics Manager – Western Australia, and Mr Antonioli, Transport Coordinator – Western Australia, of the respondent. Mr Holden said he was informed by Mr Malcolm that the applicant's current contract with the respondent was about to expire and the applicant would be offered a five-year contract extension if the applicant purchased the Running Gear for $20,000.00 plus GST. This was said to be based on $4,000.00 for each year of the contract extension. Mr Holden gave evidence that Mr Malcolm advised him that his pay rate would change because the applicant would need to pay extra maintenance costs for the Running Gear. Mr Holden said he immediately questioned the price the respondent was seeking for the Running Gear, which seemed high given that the Running Gear was already six years old. Mr Malcolm then advised Mr Holden that the applicant could take or leave the offer and that an answer was required as soon as possible. The applicant conferred with other drivers who contracted to Holcim, who said that their price for Running Gear averaged at $4,000.00 per year of their contract extension. Mr Holden's evidence was that he requested Mr Malcolm lower the price on a handful of occasions, however Mr Malcolm declined. Sometime in

early 2017, Mr Holden informed Mr Malcolm that the applicant agreed to pay $20,000.00 plus GST, as although he thought this was expensive, he considered he would secure five more years of work with the respondent that would see him through to retirement, so the argument went.

4 Mr Antonioli and Mr Malcolm gave evidence on behalf of the respondent. Mr Antonioli said he attended the meeting in December 2016 with Mr King, who is currently employed as the respondent's Fleet Manager for South East Queensland, however Mr Malcolm was not present. Mr Malcolm's evidence was that he was not the Regional Logistics Manager – Western Australia until February 2017, and that his role prior to this time did not involve interacting with contractors such as the applicant. Mr Malcolm recalled having a conversation with Mr Holden in or around February 2017, where he confirmed that the five-year contract extension was based on the applicant accepting the purchase price of the Running Gear for $20,000.00 plus GST. Mr Malcolm said he informed Mr Holden that the agitator bowl, which formed part of the Running Gear, might need replacing sometime in 2018. Mr Malcolm gave evidence that at no point did Mr Holden express any unwillingness or resistance on behalf of the applicant, to purchase the Running Gear.

5 On 20 April 2017, Mr Malcom emailed the applicant a document titled Agreement for Sale of Concrete Agitator/s specified in Schedule 1 (the Plant) (the Agreement for Sale). The applicant read the document, signed it and returned it to the respondent. Shortly after, the applicant transferred the sum of $22,000.00 to the respondent. The arrangement between the applicant and respondent continued as it had done prior to entering into the Agreement for Sale, however the applicant owned the Running Gear.

Cartage Agreement

6 On 22 May 2017, the applicant signed a document titled Holcim Western Australia Concrete Cartage Agreement - 2016 6 Wheeler Truck and Mixer. The Cartage Agreement was tendered as part of exhibit A2. Mr Holden gave evidence that Mr Malcolm provided him with this document on 22 May 2017, which he read, signed and returned to the respondent. Attached to the Cartage Agreement at Schedule 7 is a certificate of independent financial advice stating that the applicant's accountant advised the applicant of the financial obligations and risks involved in entering into the Cartage Agreement. Mr Malcolm's evidence was that the Cartage Agreement could not have been provided to the applicant on 22 May 2017 as the certificate of independent financial advice, which refers to the Cartage Agreement, was signed by the applicant's accountant on 2 March 2017.

7 Mr Malcolm gave further evidence that he went through items of the Cartage Agreement with the applicant in detail. He said this included but was not limited to pointing out Schedule 2A titled "Mixer True Cost Formula and Utilisation Cartage Rates", the finance annual contribution of $5,959, the annual profit component of $3,722, the annual R&M allowance of $4,827 and the annual bowl replacement allowance of $1,290.

Replacement of mixing bowl

8 The applicant submitted that in or around October 2017, the respondent inspected the applicant's concrete mixing bowl and informed the applicant that the bowl was required to be replaced. This was part of the respondent's annual thickness testing to ensure each truck complies with safety requirements. According to Mr Malcolm, the annual test for the applicant's truck took place on 27 December 2017 and identified that a new mixing bowl would be required by 30 September 2018. Attached to Mr Malcolm's witness statement is a copy of the test results dated 27 December 2017. It was not disputed that in or around September 2018, the applicant purchased and fitted a new concrete mixing bowl to the truck for the sum of $14,000.00 plus GST.

Incident on Hanssen worksite

9 On 8 December 2018 at approximately 4.30am, Mr Holden drove the applicant's truck to a Hanssen construction site located off Canning Highway in Applecross, to deliver and pour concrete as instructed by the respondent. A "mud map" was provided to the applicant prior to this date, which is a map that drivers use to ascertain a description of a site, instructions for the pour, and the site location, including entry and exits points. The map advises where to wait and where concrete trucks can and must not be parked. Mr Holden gave evidence that this pour was one of the biggest and busiest the applicant had been involved with, with over 70 concrete trucks and five concrete plants required for completion.

10 After completing the pour, at approximately 5.15am, Mr Holden drove his truck towards Kintail Road, which ran parallel to Canning Highway, and towards the exit shown on the "mud map". When leaving the worksite, Mr Holden was required to navigate various obstacles commonly associated with worksites. On his left hand-side were two trucks parked one behind the other, both were adjacent to what appears to be scaffolding, ladders and other equipment that are placed next to a fence. The trucks were parked in a parallel parking arrangement, with some distance between the two. The driver's door on the truck in front,

furthest from Mr Holden and closest to the exit point, was open. This truck was truck 8257.

11 On the right-hand side of Mr Holden there was a transportable building, a walkway and a pile of plant and equipment. These items were not blocked off or separated from the main driveway. They were on a separate gravelled area immediately next to the site road. IVMS or "dashcam" footage, as it was referred to in evidence, from the stationary truck parked behind the other stationary truck, truck 8239, shows one view of the area and was tendered as part of exhibit A2. There were two drivers present, Mr Khiple of Singh Logistics Australia Pty Ltd, who was known as "Sookie", and a driver that Mr Holden knew as "Alex". They were standing adjacent to the two stationary trucks, in between the trucks and the items to the right-hand side of Mr Holden's truck, effectively in the opening that Mr Holden was required to drive through to exit the site.

12 Mr Holden's evidence in his witness statement was that the gap he was required to manoeuvre his truck through was narrow, measuring roughly 3-4 metres wide. His truck was approximately 2.5 to 3 metres wide. As such, the applicant submitted that Mr Holden was unable to safely manoeuvre his truck through this gap as the driver's door on truck 8257 was "wide open", leaving insufficient distance between the truck and the items to the right-hand side of Mr Holden's truck. Contrary to this, the respondent submitted that the gap, even with the truck 8257's door open (which the respondent says was partially but not wide open), was large enough for Mr Holden to drive his truck through and that in fact, this is what he did, as Mr Khiple did not close the truck 8257's door before Mr Holden drove through. The only obstacle in the way, according to the respondent, was Mr Khiple.

13 The applicant submitted that Mr Holden stopped his truck and motioned to Mr Khiple to close truck 8257's door. At this point both Mr Khiple and Alex turned to look at the open truck door. Mr Holden maintained, both in his statement given on the day of the incident and at subsequent meetings with the respondent's management on 10 and 17 December 2018, that he did so politely. Mr Khiple then stepped in front of Mr Holden's truck and made a gesture to Mr Holden that appears to be raising his middle fingers. It was the respondent's position that it is unlikely Mr Khiple did this unprovoked. The more probable version of events was that Mr Holden provoked Mr Khiple in some way by, for example, yelling or gesturing from his stationary truck. This accords with Mr Khiple's recollection of events, where in an interview with Mr Malcolm and Mr Antonioli on 10 December 2018, he said that Mr Holden gave him "the finger" and abused him from his truck. It should be noted however that Mr Khiple was not called to testify in the proceedings and therefore, such statements were hearsay and not of great evidentiary value. It should be noted at this point,

that the IVMS on Mr Holden's truck was not working at the time of the incident. Therefore, the Tribunal did not have the benefit of footage from Mr Holden's truck.

14 After this, the applicant submitted, Mr Holden manoeuvred his truck toward the Kintail Road exit and in doing so, the left-hand side of his truck contacted Mr Khiple. Mr Holden gave evidence that immediately after Mr Khiple raised his middle fingers at Mr Holden, he straightened the steering wheel of his truck so that he manoeuvred clear around the items on his right-hand side. At this time, Mr Khiple was said to be in a "notorious" blind spot for truck drivers, and Mr Holden said he could not see him from where he was seated inside the truck cab. Consequently, he thought Mr Khiple was out of the way of the truck. Mr Holden then moved his steering wheel to the right, to avoid the open driver's door on the parked truck and drove towards the Kintail Road exit.

15 After the truck contacted Mr Khiple, Mr Khiple attempted to open the passenger door of Mr Holden's truck. Just after, Mr Holden heard a smashing sound from his rear window. Mr Khiple picked up a rock or brick and had thrown it through the rear window of Mr Holden's truck. Mr Holden stopped his truck and got out to see what had happened. He saw Mr Khiple and Alex walking towards him. An altercation then took place, which involved pointing motions and yelling, until Mr Holden and Mr Khiple were separated by another driver.

16 It was the respondent's contention that from the footage taken from truck 8239, after Mr Khiple raised his middle fingers at him, whilst standing in clear view in front of Mr Holden's truck, Mr Holden then turned the wheels of his truck to the left towards Mr Khiple and drove forward striking Mr Khiple as he moved to his right to get out of the way.

17 On the same day, the applicant reported the incident to the respondent by sending a text message to Mr Antonioli. The text message said that an incident had occurred and dashcam footage would need to be obtained from Mr Holden's truck as well as the two other trucks present at the incident site. On 9 December 2018, the day after the incident, Mr Holden emailed Mr Antonioli a statement of his account of the incident. It was the applicant's position that it cooperated with the investigation and acted in accordance with the Cartage Agreement.

Investigation of the incident

18 On 10 December 2018, Mr Holden attended a meeting with Mr Malcolm and Mr Antonioli at the respondent's Welshpool office. Mr Holden gave evidence that he was not informed whether he was being investigated for any offence and was not told if any allegations had been made against him. At the conclusion of

the meeting, Mr Malcolm told Mr Holden that he would be suspended while the investigation took place.

19 On 17 December 2018, Mr Holden attended a further meeting, this time with Mr Malcom and Mr Moss, the respondent's Acting General Manager – Western Australia. Mr Holden brought another driver along, Mr Garston, as a support person. At this meeting Mr Holden was shown the IVMS footage of the incident. Mr Holden gave evidence that the video was shown so quickly that he could not provide a proper response to what he had seen. Mr Holden said at no point during the meeting was he told that he was facing a serious allegation and possible termination of his contract. Mr Moss' evidence in his witness statement was that Mr Holden must have understood the seriousness of the incident as after viewing the footage, Mr Holden said "that's attempted manslaughter isn't it?" in reference to the truck colliding with Mr Khiple. The applicant's position is that this comment referred to the brick or rock being thrown through Mr Holden's rear window.

20 Mr Moss formed the view that Mr Holden became so angry that he intentionally drove his truck at Mr Khiple, and irrespective of whether or not Mr Holden was still looking at Mr Khiple when manoeuvring around the items on his right-hand side, he made a conscious decision to drive his truck forwards knowing that a pedestrian was in the "line of fire". Mr Antonioli and Mr Malcolm also formed the view that Mr Holden was aware that Mr Khiple remained in front of the truck. Mr Malcolm gave evidence that at the conclusion of the interview, he advised Mr Holden that a written response would be provided to him, which could include the possibility of termination of the Cartage Agreement.

Termination of the Cartage Agreement

21 On 19 December 2018, the applicant received a letter from the respondent stating that the Cartage Agreement was terminated immediately and without compensation. The letter, formal parts omitted, read as follows:

> On Saturday 8 December 2018 you were involved in an incident in contradiction of Holcim's Safety & Health Policy, the Cartage Agreement and statutory legislation. Video footage recorded the altercation with another contractor, leading to you driving your Vehicle and [sic] physical hitting another contractor, following which an exchange of physical and verbal threats occurred.
>
> An investigation has been conducted into the above incident. You were provided with a full opportunity to present your recollection of the incident, including an opportunity to review the video footage. Responses throughout the investigation have been carefully considered. It has been determined that you have engaged in serious and wilful misconduct in breach of the Cartage Agreement.

Your behaviour is completely unacceptable and in our opinion a form of common assault. Holcim will not tolerate noncompliance with Safety and Environmental guidelines and policies by any person working on our sites.

In accordance with clause 9.1(i) of the Cartage Agreement, Holcim hereby gives you notice of termination of the Cartage Agreement. Termination will be effective on and from the close of business of this letter (such that the last date of the Cartage Agreement will remain in force will be the date of this letter).

The writer will be in contact with you to agree a transition out plan to ensure minimal disruption is caused to Holcim's operations. You will be required to remove all branding from your vehicle. You will also be required to present your vehicle to remove Holcim's property, including but not limited to the in-vehicle monitoring system, GPS and radio.

For good order, we would appreciate if you would acknowledge receipt of this letter by returning a signed copy of the enclosed duplicate to the writer.

We take this opportunity to thank you for the services and support your organisation has provided since commencement of the Cartage Agreement.

22 Clause 9.1 of the Cartage Agreement reads as follows:

9.1 Termination by Holcim Without Compensation

Holcim may terminate the cartage agreement of an Owner granted by this Agreement immediately and without compensation to the Owner:

(a) where the Owner is in breach of any of its obligations under this Agreement and fails to remedy that breach within fourteen (14) days of a written notice from Holcim to the Owner, identifying the breach and requiring remedy of it;

(b) if the Owner suffers an Insolvency Event;

(c) if the Owner fails to comply with the conditions contained in **clause** 2;

(d) if the Owner is in persistent breach of its obligations under this Agreement;

(e) in the event of persistent serious performance failures notified to the Owner by Holcim;

(f) in the event of serious or persistent safety or environmental breach by the Owner or its Driver(s) and notified to the Owner by Holcim;

(g) if the Owner's Concrete Truck is used for the transportation of materials other than products specified by Holcim, without the prior written consent of Holcim;

(h) if the Owner or any employee or Subcontractor of the Owner or any Subcontractor's employee is in serious breach of the Fairness and Respect policy in **Schedule 5**;

(i) in the event of a fundamental breach by the Owner, or its Driver, of this Agreement, including, but not limited to:

i. serious and wilful misconduct (including, theft, violence or violent threats and fraud);

ii. falsification of documents;

iii. disclosure of confidential information;

iv. dishonesty or negligence;

v. conviction of, or charge with any criminal offence;

vi. being unfit for performance under this Agreement due to use or presence of intoxicating drugs or alcohol;

(j) if the Owner or the Driver engage in conduct that may, in the reasonable opinion of Holcim, cause injury to Holcim's business or reputation;

(k) if there is a purported assignment by the Owner of its rights or obligations without the prior written consent of Holcim, including where the assignment of rights or obligations is deemed to occur in accordance with **clause** 47.3;

23 In its submissions, the respondent relied on cl 9.1(f), (h), (i) i and (j). The applicant submitted that as the respondent was responsible for drafting the Cartage Agreement, it is limited to terminating the Agreement only in accordance with the express situations set out in cl 9.1(i) i, which are when a driver engages in theft, violence or violent threats and fraud. The applicant contended that Mr Holden's conduct did not constitute violence or a violent threat that would justify summary dismissal, or a breach of the Cartage Agreement that justifies termination.

24 The applicant's position is that contact between the applicant's truck and Mr Khiple was due to Mr Khiple being in Mr Holden's blind spot and not due to wilful or deliberate conduct. As such, the termination letter dated 19 December 2018 is invalid by reason that the applicant has not breached cl 9.1 of the Cartage Agreement. The applicant submitted that this constituted a breach of contract and unlawful termination by the respondent.

Procedural fairness

25 The applicant also submitted it was not afforded procedural fairness in the investigation process. The respondent failed to provide the applicant with a written notice of the precise allegations against it, failed to provide minutes of the investigation meetings held on 10 and 17 December 2018, and failed to provide the applicant with the video footage of the incident prior to these meetings. The respondent's position is that the Tribunal does not have jurisdiction to deal with matters of procedural fairness. However, in addressing the applicant's submissions on this point, the respondent says that in any event, the applicant was afforded procedural fairness during the investigation and termination process by

being given a right to respond to the allegations against it and being provided a comprehensive explanation of the reasons for the termination.

26 In support of this position, the respondent highlighted the written response provided by the applicant in an email dated 9 December 2018, the meetings which took place on 10 and 17 December 2018 where the applicant was provided with an opportunity to view the IVMS footage and explain its version of events including why the Cartage Agreement should not be terminated, and that the respondent considered all views regarding the incident prior to the imposition of a disciplinary sanction. The respondent says the applicant experienced no detriment in not receiving written notice of the allegations.

Representations made by the respondent

27 A further claim made by the applicant was that it was induced to enter into the Cartage Agreement by the false and misleading representation made by the respondent that the Cartage Agreement would continue for a five-year term if the applicant purchased the Running Gear. The respondent's position was that the applicant's argument is wrong in law. The effect of the success of such an argument would result in a situation where the respondent could never terminate the Cartage Agreement within its terms, despite the Cartage Agreement providing for circumstances of termination. The respondent submitted that at no time did it assert that the Cartage Agreement was not able to be terminated pursuant to its terms, independent legal advice was encouraged and terms of the Cartage Agreement, in particular cl 9 – Termination of Agreement, which includes cl 9.1 – Termination by Holcim Without Compensation, demonstrate that the Cartage Agreement is able to be terminated prior to the expiry of the five-year period.

Remedy sought

28 The applicant claims that the respondent has contravened the Cartage Agreement. It has suffered total loss and damage of $147,957.80. This comprised $38,210.40 lost income; $75,000.00 of additional payments it is entitled to receive under cl 9.2 of the Cartage Agreement; and $34,747.40 for payments made to purchase the Running Gear and a new agitator bowl, in reliance on representations made by the respondent to the applicant, that the applicant would receive a five-year contract extension if the applicant purchased the Running Gear. Orders for compensation in this amount are sought by the applicant. The respondent wholly opposed the applicant's claims.

Legal principles

29 By s 38 of the OD Act the Tribunal can hear and determine disputes referred to it under Part 9 of the OD Act and enquire into and deal with any other matter in relation to the negotiation of owner-driver contracts that may be referred under this Part. The powers of the Tribunal in determining a matter or a dispute referred to it are set out in s 47. Section 47(4) provides that:

> (4) In making a determination mentioned in subsection (1), the Tribunal may do one or more of the following –
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> (a) order the payment of a sum of money –
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> (i) found by the Tribunal to be owing by one party to another party; or
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> (ii) by way of damages (including exemplary damages and damages in the nature of interest); or
>
> (iii) by way of restitution;
>
> (b) order the refund of any money paid under an owner-driver contract;
>
> (c) make an order in the nature of an order for specific performance of an owner-driver contract;
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> (d) declare that a debt is, or is not, owing;
>
> (e) order a party to do, or to refrain from doing, something;
>
> (f) make any order it considers fair, including declaring void any unjust term of an owner-driver contract.

30 In accordance with s 47(5) of the OD Act, the Tribunal cannot insert a term into, or subject to subsection (4)(f), otherwise vary, an owner-driver contract.

Owner-driver contract

31 For the purposes of the applicant's claim the Tribunal must be satisfied that the subject matter of the proceedings relates to an owner-driver contract and that the applicant was an owner-driver. I am satisfied for the purposes of s 4 of the OD Act that the applicant is a body corporate which carries on the business of the transport of goods in one or more heavy vehicles, with a GVM of more than 4.5 tonnes. I am also satisfied on the evidence that Mr Holden was, at the material time, an officer of the applicant whose principal occupation was the operation of the applicant's heavy vehicle. Accordingly, I am satisfied that the applicant was an owner-driver for the purposes of s 4(2) of the OD Act.

32 Furthermore, I am satisfied that the Cartage Agreement entered into between the applicant and the respondent in May 2017, for the applicant to provide cartage

services to the respondent to transport its concrete products, was an owner-driver contract for the purposes of s 5 of the OD Act.

Interpretation of contracts

33 This case in part involves the interpretation of the relevant provisions of the Cartage Agreement. As to the approach to adopt in this task, recently, in *Walton and Anor v BHP Billiton Iron Ore Pty Ltd* [2019] WAIRC 00089; (2019) 99 WAIG 299, I had occasion to refer to the principles to apply to the interpretation of contracts and at par 24 I said:

> 24 As to the approach to the interpretation of contracts generally, in *King v Griffin Coal Mining Company Pty Ltd* (2017) 97 WAIG 527 I said at pars 11-13 as follows:
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> > 11 Some rules have been developed in the cases as to the approach to adopt in construing the terms of a contract. A recent summary of the relevant principles to be applied was set out by the Court of Appeal (WA) in *Black Box Control Pty Ltd* v *Terravision Pty Ltd* [2016] WASCA 219. In this case, Newnes and Murphy JJA and Beech J observed at par 42:
> >
> > **Construction of contracts: general principles**
> >
> > 42 The principles relevant to the proper construction of instruments are well known, and were not in dispute in this case. In summary:
> >
> > (1) The process of construction is objective. The meaning of the terms of an instrument is to be determined by what a reasonable person would have understood the terms to mean.[50]
> > (2) The construction of a contract involves determination of the meaning of the words of the contract by reference to its text, context and purpose.[51]
> > (3) The commercial purpose or objects sought to be secured by the contract will often be apparent from a consideration of the provisions of the contract read as a whole.[52] Extrinsic evidence may nevertheless assist in identifying the commercial purpose or objects of the contract where that task is facilitated by an understanding of the genesis of the transaction, its background, the context and the market in which the parties are operating.[53]
> > (4) Extrinsic evidence may also assist in determining the proper construction where there is a constructional choice, although it is not necessary in this case to determine the question of whether matters external to a contract can be resorted to in order to identify the existence of the constructional choice.[54]
> > (5) If an expression in a contract is unambiguous and susceptible of only one meaning, evidence of surrounding circumstances cannot be adduced to contradict its plain meaning.[55]
> > (6) To the extent that a contract, document or statutory provision is referred to, expressly or impliedly, in an instrument, that contract, document or statutory provision can be considered in construing the instrument, without any need for ambiguity or uncertainty of meaning.[56]
> > (7) There are important limits on the extent to which evidence of surrounding circumstances (when admissible) can influence the proper construction of an instrument. Reliance on surrounding circumstances must be tempered by loyalty to the text of the instrument. Reference to background facts is not a licence to ignore or rewrite the text.[57] The search is for the meaning of what the parties said in the instrument, not what the parties meant to say.[58]
> >
> > (8) There are also limits on the kind of evidence which is admissible as background to the construction of a contract, and the purposes for which it is admissible. Insofar as such evidence establishes objective background facts known to the parties or the genesis,

purpose or objective of the relevant transaction, it is admissible. Insofar as it consists of statements and actions of the parties reflecting their actual intentions and expectations it is inadmissible. Such statements reveal the terms of the contract which the parties intended or hoped to make, and which are superseded by, or merged into, the contract.[59]

(9) An instrument should be construed so as to avoid it making commercial nonsense or giving rise to commercial inconvenience.[60] However, it must be borne in mind that business common sense may be a topic on which minds may differ.[61]

(10) An instrument should be construed as a whole. A construction that makes the various parts of an instrument harmonious is preferable.[62] If possible, each part of an instrument should be construed so as to have some operation.[63]

(11) Definitions do not have substantive effect. A definition is not to be construed in isolation from the operative provision(s) in which the defined term is used. Rather, the operative provision is ordinarily to be read by inserting the definition into it.[64]

12 One question addressed in this matter was the most recent debate in the cases in relation to the need for ambiguity or differences in meaning, in order for a court to have regard to extrinsic evidence. This arises from the principles discussed in *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales* (1982) 149 CLR 337. In this case, Mason J, in what is described as the "true rule" said at par 22:

> 22 The true rule is that evidence of surrounding circumstances is admissible to assist in the interpretation of the contract if the language is ambiguous or susceptible of more than one meaning. But it is not admissible to contradict the language of the contract when it has a plain meaning.

13 As to the application of the "true rule", in *Hancock Prospecting Pty Ltd v Wright Prospecting Pty Ltd* (2012) 45 WAR 29 McLure P observed as follows at pars 74-80:

> **The scope of the "true rule" of construction**
>
> 74 Both parties rely on extrinsic material in support of their submissions as to the proper construction of the 1984 and 1989 Agreements. Accordingly, it is necessary to enlarge on the scope of the "true rule" in *Codelfa.*
>
> 75 The role of the court in construing a written contract is to give effect to the common intention of the parties. The common intention of the parties is to be ascertained objectively. That is, the meaning of the terms of a contract in writing is to be determined by what a reasonable person would have understood them to mean: *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165. The subjective intention or actual understanding of the parties as to their contractual rights and liabilities are irrelevant in the construction exercise.
>
> 76 The practical limitation flowing from the Codelfa true rule is that surrounding circumstances cannot be relied on to give rise to an ambiguity that does not otherwise emerge from a consideration of the text of the document as a whole, including whatever can be gleaned from that source as to the purpose or object of the contract.
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> 77 The word "ambiguous", when juxtaposed by Mason J with the expression "or susceptible of more than one meaning", means any situation in which the scope or applicability of a contract is doubtful: *Bowtell v Goldsbrough, Mort & Co Ltd* (1905) 3 CLR 444, 456 - 457. Ambiguity is not confined to lexical, grammatical or syntactical ambiguity.
>
> 78 Moreover, the extent to which admissible evidence of surrounding circumstances can influence the interpretation of a contract depends, in the final analysis, on how far the language of the contract is legitimately capable of stretching. Generally, the language can never be construed as having a meaning it cannot reasonably bear. There are exceptions (absurdity or a special meaning as the result of trade, custom or usage) that are of no relevance in this context.

> 79 Further, on my reading of Codelfa, pre-contractual surrounding circumstances are admissible for the purpose of determining whether a term is implied in fact. That may be because the stringent test for the implication of a term in fact excludes any possibility of an implied term contradicting the express terms.
>
> 80 If extrinsic evidence is admissible, the next issue is the scope of the "surrounding circumstances" for the purpose of construction. Mason J in Codelfa also answered that question. He said:
>
> > "Generally speaking facts existing when the contract was made will not be receivable as part of the surrounding circumstances as an aid to construction, unless they were known to both parties, although … if the facts are notorious knowledge of them will be presumed.
> >
> > It is here that a difficulty arises with respect to the evidence of prior negotiations. Obviously the prior negotiations will tend to establish objective background facts which were known to both parties and the subject matter of the contract. To the extent to which they have this tendency they are admissible. But in so far as they consist of statements and actions of the parties which are reflective of their actual intentions and expectations they are not receivable (352)."

34 Additionally, as interpretation is a text-based activity, the process must always begin with the text of the instrument to be construed: *Amcor Limited v CFMEU* (2005) 222 CLR 241 per Kirby J at par 67. I adopt this approach in the determination of this matter.

Serious and wilful misconduct

35 There is no definition of "serious and wilful misconduct" in the Cartage Contract. In this respect, the applicant relied on *Buitendag v Ravensthorpe Nickel Operations Pty Ltd* [2012] WASC 425 as authority for the proposition that only in exceptional circumstances is an employer entitled to summarily dismiss an employee, and these exceptional circumstances did not exist in this case.

36 The respondent submitted that the phrase "serious misconduct" should be given its ordinary meaning, which is most typically considered in employment cases. For this reason, the usage of the phrase in employment cases has also been applied to owner-driver contracts. In support of this proposition, the respondent relied on *ADA Cartage Pty Ltd v Holcim (Australia) Pty Ltd* [2010] VCAT 1771. In this context, the respondent said the Tribunal should have regard to the definition of serious misconduct in Regulation 1.07(2)(a) and (b) of the *Fair Work Regulations 2009* (Cth).

37 In my view, there is merit in having regard, as a guide, to the concept of serious and wilful misconduct, as it is applied in employment law. However, some caution needs to be taken in this respect, as there are features of a contract of employment, such as the implied term of fidelity and good faith for example, and the application of principles of fiduciary duty, in certain types of employment, for example senior executives, that would not generally apply under owner-driver

contracts, absent express terms. With this caveat in mind however, in this sense, "serious and wilful misconduct" should be regarded, relevantly adapted to present circumstances, as conduct by an owner-driver party to the Cartage Agreement, that strikes at the heart of the contract, such that there has been a disregarding of an essential condition of the contract: *Laws v London Chronicle (Indicator Newspapers) Ltd* [1959] 1 WLR 698 per Lord Evershed MR at 700. It can also be described, relevantly adapted to present circumstances, as involving such a serious breach of the contract that the employer (or hirer) could not reasonably be expected to keep the employee (or owner-driver) in their employment: *North v Television Corporation Ltd* (1976) 11 ALR 599 per Smithers and Evatt JJ at 607.

38 Taking the employment law context as a guide, the categories of conduct that may constitute misconduct are not fixed and there are a variety of types of conduct that may be involved (see generally the discussion in Sappideen, O'Grady and O'Riley *Mackens Law of Employment* 8th Edition pars [8.250] to [8.340]). There is no doubt that a safety breach could constitute misconduct, if it can be characterised as "serious and wilful". I note also however, that such a breach was expressly contemplated as a separate ground to terminate the Cartage Agreement without compensation, in cl 9.1(f).

39 Returning to *Buitendag*, in this case Le Miere J set out the relevant principles in relation to summary dismissal of an employee at common law, at pars 46 to 49. The "exceptional circumstances" relate to the observations of Kirby J in *Concut v Worrell* [2000] HCA; (2000) 103 IR 160; (2000) 176 ALR 693 at par 51. Whilst Kirby J's comments in that case refer to the common law position, importantly in this case, the Cartage Contract itself requires a "fundamental breach", to trigger the right to terminate without compensation, regardless as to whether the relevant event can be characterised as an "exceptional circumstance" or not.

Misrepresentation

40 In *Halsbury's Laws of Australia 110 – Contract - (A) Misrepresentation in Contract – Introduction* at par [110-5025] a misrepresentation in contract is described as:

> A misrepresentation is a false statement of a material fact made by one person (the representor) to another (the representee) in order to induce that other party to enter into the contract and which has this effect. The misrepresentation does not prevent the contract coming into being, or render the contract void. Instead, the contract is voidable and the principal response of the law of misrepresentation to this misinformation is to say that because the representee's decision to contract was based on a false understanding, the representee should be permitted to resile from the contract. Rescission is thus the usual remedy for misrepresentation.

> Although damages may be recovered in tort or under statute in relation to certain misrepresentations, damages for breach of contract are not available for misrepresentation unless the false statement of fact is also a term of the contract.

41 Furthermore, misrepresentations may be characterised as fraudulent or innocent.

Consideration

Meaning of the Cartage Agreement

42 The first issue to consider is the meaning of cl 9.1(i) i of the Cartage Agreement in relation to "serious and wilful misconduct (including theft, violence or violent threats and fraud)". As noted above, the applicant contended that this provision limited the grounds on which the respondent could rely to summarily terminate the Cartage Agreement for misconduct, to the particularised conduct set out in the brackets. Thus, as the submission went, the conduct of the applicant on the day in question did not involve any such behaviour and therefore, the respondent could not rely on this provision to summarily terminate the Cartage Agreement. On the other hand, the respondent submitted that the terms of a contract are to be interpreted objectively and given their ordinary and plain meaning. Attention was drawn to the words "including but not limited to" in cl 9.1(i) in support of the construction that the Cartage Agreement did not intend to limit "serious and wilful misconduct" to specific examples, as advanced by the applicant.

43 I am not able to accept this narrow construction of cl 9.1(i) i. First, the language of this provision, taken in its ordinary and natural sense, is inconsistent with the applicant's approach. The use of the word "including" in the brackets after the words "serious and wilful misconduct" suggests that the examples cited are words of extension and are not intended to be exclusive and limiting. I see no reason to restrict or read down cl 9.1(i) i as contended by the applicant. Second, the reference to other grounds of termination without compensation for fundamental breach in cl 9.1(i) ii– vi suggests too, that objectively, the clause is intended to cover an expansive list of possible grounds on which the respondent could rely to terminate the Cartage Agreement summarily without compensation. For example, it may well be arguable, at least in the context of employment law principles, which may provide some guidance as to what "serious and wilful misconduct" may mean for present purposes, that it also encompasses the sort of conduct set out in cl 9.1(i) ii – v and possibly even vi. Additionally, as to the argument of the applicant that this clause of the Cartage Agreement should be construed *contra proferentem*, as against the respondent as the drafter of the clause, this argument cannot survive the effect of cl 1.2 (e) of the Cartage

Agreement, which expressly precludes the operation of this principle of construction.

44 Some idea of what, objectively viewed, a reasonable businessperson in the position of the parties may consider cl 9.1(i) i to mean, is to be gleaned from the introductory words of cl 9.1(i) where reference is made to "a fundamental breach". Regardless of the type of conduct or behaviour to be relied on under the various categories of conduct in cl 9.1 (i), the conduct must meet this criterion.

The incident-findings

45 In relation to the incident that occurred on 8 December 2018, an overview of the incident has been set out above. An important piece of evidence in this respect, was the IVMS footage taken from truck number 8239. The footage was played during the hearing and the parties have had an opportunity to extensively review it and make submissions to the Tribunal. The footage shows that both Mr Khiple's vehicle (truck number 8257) and truck number 8239 (driven by Alex) were parked on the left-hand side of the site roadway, facing the Kintail Road site exit. Both Alex and Mr Khiple are seen towards the right-hand rear of Mr Khiple's truck, talking. At an earlier time, at about 08:16:18 minutes on the footage, Mr Khiple is seen getting out of his truck. It shows the truck door opening fully as he gets out of the cab but then partially closing. The driver's door to Mr Khiple's truck is left open but it is not fully open.

46 At 08:18:16 on the footage, Mr Holden's truck approaches both Alex and Mr Khiple. Alex gestures towards Mr Holden's truck by raising his right arm which seems to be signalling Mr Holden to stop. No direct evidence was before the Tribunal as to why Alex did this. I think it is fair to observe that Mr Holden's truck was moving at quite a speed for an onsite access way. As Mr Holden's truck stops, Mr Khiple looks to his left over his shoulder, in the direction of his truck driver's door. On Mr Holden's version of events, given to the respondent's management during the investigation, Mr Holden said he had politely asked Mr Khiple to close the door to his truck, so he had room to exit the site. In his witness statement, Mr Holden said "I brought my truck to a stop and motioned with my hand to Sookie to close the open driver's door". In cross-examination Mr Holden denied he was abusive towards Mr Khiple. Mr Holden then said that Mr Khiple stepped to the front left of his truck and raised both middle fingers at him.

47 The footage then shows at approximately 08:18:19 Mr Khiple took a step or two to his left, which placed him directly in front of and to the left side of Mr Holden's truck, as it was facing the Kintail Road exit. He raised both hands towards the cab of Mr Holden's truck. This is the "middle finger" gesture that

Mr Holden said he saw Mr Khiple give him. Importantly, at the time Mr Khiple is raising both hands towards Mr Holden's truck cab, Mr Holden's truck is moving forward. As it is doing so, the wheels of Mr Holden's truck turn left in Mr Khiple's direction at about 08:18:19 on the footage. Importantly also, and critically for present purposes, Mr Khiple does not move from the position he was first in when he raised both hands towards the cab of Mr Holden's truck. Mr Holden said that he clearly saw Mr Khiple raising both middle fingers at him. At 08:18:21 Mr Holden's truck continues forward and contacts Mr Khiple on the front left-hand side of the cab. Mr Khiple moved to his right as this occurred, with both hands pushing away from Mr Holden's truck.

48 After this occurs, Mr Holden's truck then continues towards the Kintail Road exit. Mr Khiple is then seen running after Mr Holden's truck, picking up an object, and throwing it towards the rear of the truck. The footage then shows both Mr Khiple and Mr Holden, after Mr Holden got out of the truck, having an altercation.

49 As I have noted already, Mr Khiple was not called by either party to give evidence. It was common ground that Mr Khiple was dismissed by his employer as a result of the incident. Also, neither party called Alex, who was the only other person present at the time. There was no submission made of a *Jones v Dunkel* kind, by either party. In all of the circumstances, I draw no adverse inference by the failure to call either Mr Khiple or Alex to give evidence. The upshot is however, that the Tribunal is limited to the direct evidence of Mr Holden and the IVMS footage.

50 Several matters arise from the footage, which I regard as important independent evidence as to the incident. It would appear from the footage and the location of the various trucks, that there was a reasonable gap on the right-hand side of the roadway, enough for Mr Holden's truck to pass both Mr Khiple and Alex's truck, even with Mr Khiple's truck door being in an open position. This was also the evidence of Mr Antonioli, who had some 11 years' experience on the road as a professional driver, that there was enough space to navigate past the two trucks on the left and the obstructions on the right. The fact is as the footage shows, Mr Holden's truck did proceed forward towards the exit, past Mr Khiple's truck with its door open, with some room to spare on the right-hand side of the roadway.

51 Furthermore, it is also apparent from the footage, that Mr Khiple's truck's driver's door was not fully open, rather it appeared to be about three quarters open. It would also appear from the footage that there must have been some words used or gestures made by Mr Holden towards Mr Khiple, that caused him to turn to look over his left shoulder towards the open door of his truck. As to Mr Khiple's response, by raising both middle fingers towards Mr Holden, I find it

very difficult to accept the applicant's submission that Mr Khiple would have been motivated to do this without any form of provocation or reason. It defies common sense that he would have behaved in this offensive manner, without some words or conduct from Mr Holden, to provoke him to do so. I therefore do not accept that Mr Holden politely requested Mr Khiple to shut the door of his truck.

52 When Mr Khiple raised both his hands towards Mr Holden's truck cab, the evidence established that he was in clear sight of Mr Holden. Mr Holden admitted this. Importantly as I have already observed, once Mr Khiple raised both middle fingers towards Mr Holden's truck cab, he did not move from his then position. Therefore, on this evidence, all other things being equal, Mr Khiple must have remained within sight when Mr Holden's truck continued to move towards Mr Khiple after Mr Khiple had raised his middle fingers towards the cab of Mr Holden's truck. If he was in clear view of Mr Holden when he first raised his middle fingers, if anything, with a turning of Mr Holden's truck wheels to the left, this placed Mr Khiple further towards the driver's side of Mr Holden's truck cab. It is thus difficult to accept the contention of Mr Holden that Mr Khiple was not able to be seen from the cab of Mr Holden's truck and was in a blind spot when contact was made by Mr Holden's truck with Mr Khiple. I also conclude that Mr Holden's truck continued to move forward towards Mr Khiple when Mr Holden either was, or at the very least, should have been aware, that Mr Khiple was most likely to have been directly in front of the left side of Mr Holden's truck. I therefore do not accept that any blind spot prevented Mr Khiple from being visible from the cab of Mr Holden's truck.

53 There was some suggestion in the interview notes taken by the respondent's management that Mr Holden said at the time immediately after Mr Khiple raised both middle fingers, that he was either looking down or to the right and did not notice Mr Khiple was still standing in front of the truck. In his evidence Mr Holden said that he was looking to his right to see that he was clear of the building materials over on the right-hand side of the roadway. However, the footage revealed that the building materials on the right-hand side were on an area of gravel beyond the dirt road itself. Immediately after striking Mr Khiple, there is shown to be an ample gap between Mr Holden's truck and the right-hand side where the building materials were, such that the truck did not even run over the gravelled area. This is even allowing for the fact that Mr Holden's truck was some way to the left of Mr Khiple's truck, certainly well clear of the driver's door.

54 On the evidence, Mr Khiple must have been in plain sight when he raised both middle fingers and the video footage shows that he did not move. It is difficult to see how Mr Khiple would not have been noticed but in any event, it would have

been in my view dangerous and quite reckless for Mr Holden's truck to continue to move forward in the knowledge that Mr Khiple had been standing right in front of it moments before contact was made with him. In those circumstances, there was the obvious potential for a serious injury to Mr Khiple. I am therefore satisfied on the evidence that the circumstances of the incident are largely as outlined by the respondent. I am particularly persuaded by the IVMS footage.

55 On any view of the situation, a truck continuing towards a person standing in very close proximity to it in a confined space in circumstances where the individual was moments before clearly in the vision of the truck driver, constitutes in my opinion, misconduct which is both serious, and in the circumstances, wilful also. As I have said, it is inconceivable that Mr Holden was not aware of the danger of the situation unfolding in front of him, alternatively, he was recklessly indifferent to the possibility. Whilst Mr Khiple's conduct was also inexcusable and provocative, the evidence was Mr Khiple was dismissed by his employer, as a result. Irrespective of whether Mr Holden's conduct constituted serious and wilful misconduct for the purposes of cl 9.1(i) i, it certainly would constitute a serious safety breach for the purposes of cl 9.1(f) of the Cartage Agreement. Whilst the respondent's letter of termination of the Cartage Agreement did not refer to this provision, in my view, its contravention would also justify the termination of the Cartage Agreement immediately and without compensation. Nonetheless, I am satisfied that the ground relied on by the respondent was justified at the time the decision was made.

56 Accordingly, for the foregoing reasons, I am not persuaded that the termination of the applicant's Cartage Agreement by the respondent was unlawful.

The obligation to afford procedural fairness

57 I need also to consider the further submissions of the applicant to the effect that the applicant was denied procedural fairness in the course of the respondent's decision making leading to the termination of the Cartage Agreement. The essence of that claim has been set out above.

58 It is important to observe that the proceedings before the Tribunal in this matter concern a dispute, as that term is defined in s 37(1) of the OD Act. The allegation made by the applicant is that the respondent contravened the Cartage Agreement, as an owner-driver contract, by summarily terminating it without paying the applicant compensation. By s 38(1)(a), the Tribunal is empowered to hear and determine such disputes. As set out above, on the hearing and determination of such disputes, the Tribunal is empowered by ss 47(1) and (4), to determine such a dispute and make various orders and declarations.

59 The Tribunal's jurisdiction under the OD Act is quite different to the Commission's jurisdiction under the *Industrial Relations Act 1979* (WA). Except in relation to certain aspects of the Tribunal's jurisdiction concerning the negotiation of owner-driver contracts and matters in relation to unconscionable conduct, the Tribunal's jurisdiction in matters of the present kind, is the enforcement of what are, in essence, commercial contracts. In determining matters and making orders under ss 47(1) and (4), the Tribunal is not required to consider general notions of industrial or procedural fairness. The only exception to this is if an applicant can establish that in a particular case, there exists a contractual provision, express or implied, to the effect that a hirer will adopt a particular procedure prior to termination of the contract and the hirer was in breach of it. The applicant was not able to point to any specific provision of the Cartage Agreement of that kind, in this case. Even in the case of an employee summarily dismissed for misconduct, an employer is not generally required to comply with principles of natural justice or procedural fairness before dismissing the employee: *Buitendag v Ravensthorpe Nickel Operations Pty Ltd* [2012] WASC 425 per Le Miere J at par 60.

60 Therefore, in my view, the jurisdiction of the Tribunal in this case is limited to considering whether on the facts, the respondent exercised its right to terminate the Cartage Agreement without compensation in accordance with the contract and thus, lawfully. In the alternative, if I am incorrect and there was an obligation under the Cartage Agreement or imposed generally on the Tribunal, for the respondent to demonstrate that it complied with the principles of procedural fairness, and it is a matter that the Tribunal may have regard to under s 47 of the OD Act, which I do not consider it is, then, for the following reasons, I do not consider that the applicant was denied such procedural fairness in any event.

61 I have referred to the applicant's complaints in this respect earlier in these reasons. The first complaint was that the applicant was not given written particulars of the allegations against him. In my view, none were necessary. The circumstances of the incident alleged by the respondent were simple. Mr Holden was aware of the incident because he himself had reported his version of it, by email, the day after the incident occurred. In the circumstances too, there was an obligation on the respondent to promptly investigate the matter which it did by the commencement of interviews with those directly involved, starting on Monday 10 December 2018. At both this meeting and the subsequent meeting with the respondent's senior management on 17 December, there was ample opportunity for Mr Holden to explain the incident from his point of view, which he clearly did do. The notes of the interview attached to the witness statements of Messers Malcolm and Moss show this. Importantly too, the respondent was

not required to adhere to the investigating standards of the police. The respondent was attempting to find out what occurred by interviewing the parties concerned. It is clear from these steps, that the substance of the contentions against Mr Holden were made plain.

62 My comments in respect of the above matters equally apply to the applicant's second complaint, that he was not given a copy of minutes of meetings in a timely way. As pointed out by the respondent in its submissions, the applicant was given a copy of the notes of the meetings held on 10 and 17 December on 19 December 2018. However, procedural fairness would not require that a copy of these notes, which were for the respondent's internal investigation purposes, be given to the applicant. Procedural fairness would require that the substance of the allegations be put to the applicant and they were.

63 Finally, in relation to the IVMS footage, it is apparent from the evidence of both Messers Malcolm and Moss, that the IVMS footage from truck number 8239 was not available at the time of the first interview with Mr Holden on the morning of 10 December. It was later shown to Mr Holden in the meeting on 17 December. Mr Holden viewed the footage several times. Mr Holden's version of events had not changed. I cannot see how a failure to show the footage at some point earlier in time than 17 December, disadvantaged Mr Holden in any material way.

64 Additionally, at the meetings Mr Holden was given the opportunity to and he did take the opportunity, to have a support person with him. I am therefore not persuaded that even if the obligation to afford procedural fairness applied, that the respondent failed to comply with procedural fairness in this case.

Were there misrepresentations?

65 Finally, as to the applicant's complaint of misrepresentations by the respondent in relation to the further five-year contract, I am not persuaded that this claim can succeed. As noted above, the thrust of the applicant's claim in this respect was that the Cartage Agreement would be renewed by the respondent for a further five-year term, if the applicant purchased the Running Gear and the mixing bowl. The applicant contended that but for these representations, it would not have made these purchases.

66 The difficulty with the applicant's argument in this respect is that it was not established, and the respondent never said, that it would not seek to rely on the express terms of the Cartage Agreement in relation to its termination. The terms of the Cartage Agreement, a copy of which was provided to Mr Holden prior to it being signed, required the applicant to obtain independent advice as to its terms. Mr Holden in his evidence confirmed that he got legal advice in relation to the contract and he relied on it. He also obtained financial advice. Mr Holden

confirmed in his evidence that he was aware of the Cartage Agreement provisions in relation to early termination, both with and without compensation. Furthermore, there was no evidence from Mr Holden that he felt he was in some way misled by the respondent, prior to entering into the new Cartage Agreement. He may have not been entirely happy about the price he had to pay for the Running Gear, but that is a very different thing to an operative misrepresentation by the respondent.

67 As pointed out by the respondent in its submissions, if the applicant's contentions in this respect were correct, the respondent would never be able to terminate the applicant's Cartage Agreement in reliance on the express terms of the contract. It was also clear in the Cartage Agreement itself, that the agitator was to be provided and maintained by the applicant. The applicant was made aware that the mixing bowl was second hand and may need replacing within a year or so, as this was what Mr Moss told Mr Holden at the time. Additionally, the purchase of the Running Gear, entitled the applicant to a higher level of remuneration under the Cartage Agreement, if there was a termination for reasons other than fundamental breach.

68 At the end of the day, this was simply a commercial transaction where the respondent offered the applicant a further five-year contract, if it would agree to do certain things, which it did. The applicant stood to gain the benefit of ongoing work for the respondent. Therefore, I am not persuaded that the respondent engaged in misleading conduct in relation to the renewal of the Cartage Agreement, as alleged.

69 Additionally, the terms of cl 49 – Entire Understanding of the Cartage Agreement, work against any contentions by the applicant in this regard. Any prior representations, understandings, negotiations and arrangements, even if established on the evidence, were overtaken by the parties entering into the further Cartage Agreement (See too *Ferguson v TNT Australia Pty Ltd* [2014] WAIRC 00020; (2014) 94 WAIG 110 per Kenner C at par 23 and the cases there cited). An exception to reliance on such a provision would be if it could be established that any representations made were fraudulent. I do not consider, even if the applicant's claim could be made out, and comments by the respondent's senior management constituted a representation made about the contract being for a period of five years without the capacity for earlier termination, that the respondent's conduct, on the evidence, could be in any way characterised as deliberately dishonest or deceitful. Furthermore, even if such misrepresentations were made out by the applicant, there may be some doubt as to the relief the Tribunal could grant, having regard to the terms of s 47 of the OD Act, given an action for fraudulent misrepresentation is a tortious action for deceit at common law.

Conclusions

70 The Tribunal is not persuaded that the applicant's claims have been made out. The application must be dismissed.