CUMULATIVE DIGEST

MATTERS REFERRED TO IN DECISIONS OF INDUSTRIAL APPEAL COURT, INDUSTRIAL COMMISSION AND INDUSTRIAL MAGISTRATES CONTAINED IN VOL. 75 PART 2, SUB PART 5.

NOTE: [1] Denotes Industrial Appeal Court Decision
[2] Denotes Full Bench Decision
[3] Denotes Commission in Court Session Decision
[4] Denotes Decision of President

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ABSENCE WITHOUT LEAVE

Application for reinstatement on the grounds of unfair dismissal - Applicant claimed family circumstances caused the need for him to be absent from his employment, that he was unable to obtain definitive advice as to when he could return and that his failure to comply with the necessary documentation was an oversight attributable to the difficulties he had been experiencing and not a conscious act - Respondent argued that Applicant's prolonged absence had attributed to serious manning difficulties, irregularities in usual rostering systems, increased hours of work for other staff and decreased staff morale and that special leave could not be granted because of staff shortages - Commission found on evidence that whilst Applicant had been confronted with several domestic problems that had required his absence from work, he had ignored the needs of the Respondent and as all leave except special leave had been granted, termination was not unfair - Dismissed - GN Smith -v- Western Mining Corporation Ltd - APPL 1067 of 1994 - PARKS C - 30/10/95 - Services to Mining 3072

ACT - INTERPRETATION OF

Conference referred re pro-rata long service leave entitlements - Applicant claimed that after having completed more than 12 months work and in accordance to Award provisions was entitled to pro-rata long service leave upon his termination - Respondent argued that as this was an enforcement of an award the Commission did not have the jurisdiction as matter was solely the province of the Industrial Magistrate - Commission reviewed authorities and found on evidence that it lacked jurisdiction as the claim was an enforcement of an Award and as no industrial matter existed there was no basis for bald interpretation - Dismissed for want of jurisdiction - D Bell -v- Fire Brigades Board - CR 43 of 1995 - SCOTT C. - 22/06/95 - Fire Brigade Services 2252

Conference referred re long service leave entitlements - Applicant Union claimed that when calculating long service leave entitlements, Respondent incorrectly applied terms of long service leave provisions and the employee was entitled to the correct amount - Respondent argued that Commission lacked jurisdiction to hear and determine matter as the employment relationship was not continuous and as there was no likelihood that one would be re-established there was no basis for the claim - Commission reviewed authorities and found on evidence that although s.44 of the Act allowed the interpretation of an award as an element in the process of arbitration, it did not empower it to judicially act to interpret the terms of an award - Dismissed - AUST MEAT INDUSTRY EMPL UNION -v- Metro Meats - CR 121 of 1994 - PARKS C - 13/06/95 - Meat Product Manufacturing 2255

[2]Appeal against decision of Industrial Magistrate (75 WAIG 137) re payment for pro-rata annual leave and public holidays - Appellant claimed that Industrial Magistrate erred in failing to find commission paid should have been taken into account in calculating amount due to be paid - Respondent argued that the Act itself took effect and no provision existed to average out commission paid, as commission was payable when transaction was completed - Full Bench reviewed s.18 of Minimum Conditions of Employment Act 1993 and found that it was not possible to calculate a weekly accrued pro-rata entitlement against total amount of commission earned and Appellant could not prove claim - Dismissed - J Bombak -v- Didco T/A Nik Varga Real Estate - APPL 1292 of 1994 - Full Bench - SHARKEY P/PARKS C/GIFFORD C. - 28/07/95 - Property and Business Services 2313

[2]Appeal against decision of Industrial Magistrate (unreported) re failure to order payment of wages and rates of annual leave - Appellant claimed Industrial Magistrate erred in law in "offsetting payments in excess of 25 hours per week for 24 hour week period when employee had received $350 per week" and further failed to have regard to s.114 of I.R. Act - Full Bench reviewed authorities and found that an incorrect calculation of the pro-rata being in the same proportion as number of hours worked to 38 hours had been done - Upheld - R D Jose -v- Geraldton Resource Centre Inc - APPL 1263 of 1994 - Full Bench - SHARKEY P/HALLIWELL SC/SCOTT C. - 27/06/95 - Retail Trade 2316

[1]Appeal against decision of Full Bench (75 WAIG 551) re upheld and remitted appeal against decision of Commission (74 WAIG 3040) re dismissed claim for orders of discontinuance of Local Court Proceedings - Appellant claimed that Full Bench exceeded jurisdiction and erred in law in holding that Commission had jurisdiction to issue order sought which interfered with Local Court justice, in holding that provisions of I.R. Act were interpreted as conferring jurisdiction and that Commission had not afforded procedural fairness - Respondent argued that central issue was whether Commission had the power to make an order against matter relating to Local Court proceedings - IAC reviewed authorities and found that effect of orders sought before the Commission would have terminated action in Local Court and that as respondent's claim of Local Court judgement be stayed by Commission and become under the Commission control would not be made possible by Parliament, appeal is granted and Commission application pending be dismissed for want of jurisdiction - Granted - Robe River Iron -v- METALS & ENGINEERING WORKERS' - IAC 1 of 1995 - Industrial Appeal Court - FRANKLYN J/MURRAY J/SCOTT J. - 04/08/95 - Metal Ore Mining 2478

[2]Appeal against decision of the Commission (75 WAIG 745 and 976) re granted reinstatement without the loss of entitlements on the grounds of unfair dismissal - Appellant claimed that the decision should be quashed as the reinstatement exceeded the jurisdiction of the Commission, as it was not an industrial matter and raised public interest, that Commission erred in finding of terminated employment and that the appellant was engaged in the racing industry when the industry was of "labour hire" - Full Bench reviewed authorities and found on evidence that there was no justifiable reason for dismissal established on the evidence and as there was no agreement either collective or individual, nothing existed to suggest that the Commission erred in law - Full Bench further found Commission did have jurisdiction as order arose out of an industrial matter affecting and relating to the relationship of employee/employer - Dismissed - Southbrook Enterprises Pty -v- AUST MUNICIPAL, CLERICAL & SER - APPL 470 of 1995 - Full Bench - SHARKEY P/HALLIWELL SC/SCOTT C. - 01/09/95 - Sport and Recreation 2485

Applications for registration of new agreement - Applicants claimed that there existed a mandatory requirement for Commission to register agreement and that each of companies constituted "single enterprise" as defined in the act- Applicant further claimed that Commission in Court Session application had little relevance to instant proceeding and it was essential to have industrial coverage finalised to enable certainty into contract tenering - Respondent argued that it was inappropriate to address true meaning of s.41(2) of the act until conditions needed to satisfy s.41(3) and 41(a) were dealt with and that as terms 'business, project or undertaking' were referred to in the definition of industry they applied to more than one business and were not single enterprise - Respondent further argued it was appropriate for proceedings not to continue to determination until Commission In Court Session decision was issued and that the delay in proceedings would not create prejudice as terms and conditions corresponded with those already in place - Commission found that four questions needed to be addressed by parties and that mandatory obligation existed to register agreements although Commission was unable to conclusively determine question posed - Commission further found that there contained compelling reasons to await the Commission In Court Session decision and that it was not of view that any significant prejudice would result in the proceedings further delay - Declared Accordingly - Aurum Catering Pty Ltd -v- LIQUOR & ALLIED INDUST UNION - AG 16,42,97 of 1994 - GIFFORD C. - 23/08/95 - Accommodation, Cafes&Restaurants 2526

CUMULATIVE DIGEST—*continued*

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ACT - INTERPRETATION OF—*continued*

Application for a stay of inquiry - Applicant claimed thatin the inquiry some bias relating to the suspension of the applicant without pay existed, an intervention for further hearing and determination and a stay pending that hearing and determination was required - Respondent argued that as the conduct of inquiry was not an industrial matter, the application be dismissed and if classified as an industrial matter, Commission's involvement would create duplication as application was at a premature state - Commission found on evidence that as employer action prevented work, the matter was an industrial matter and under s.7C of the Education Act, there was no unnecessary duplication with Commission's involvement and inquiry be stayed to enable current application to be dealt with - Ordered Accordingly - STATE SCHOOL TEACHERS UNION -v- Min for Educ, Employ - C 173 of 1995 - BEECH C. - 31/07/95 - Education 2631

[1]Appeal against decision of Full Bench (75 WAIG 843) re dismissal of appeal concerning the conversion of temporary lecturers to permanent appointments - Appellant claimed Full Bench had erred in law as matter neither concerned the interpretation, application or inequity arising out of any Act or regulation governing the service of a teacher - Appellant accepted that under the Education Act regulations, he had the power to appoint temporary teachers to a permanent appointment, however argued that as a result of the agreement reached, offers were made to teachers and applications received but appointments did not follow as a result of a further administrative decision, therefore power to appoint was never exercised - IAC noted that above argument would mean all negotiations, agreements, promises and undertakings made on the part of the Appellant could be ignored, breached or withdrawn by him and that the GST Tribunal would have no power to deal with any inequity arising therefrom - IAC found this proposition to be entirely inconsistent with the objects of the Act - Dismissed - Hon Min for Education -v- STATE SCHOOL TEACHERS UNION - IAC 3 of 1995 - Industrial Appeal Court - KENNEDY J/ FRANKLYN J/SCOTT J. - 08/09/95 - Education..... 2677

[1]Appeal against decision President (75 WAIG 888) re orders and declarations to alter union rule - Appellant claimed that President erred in law in declaring that union rule 18(a) was inconsistent with section 56 of the Industrial Relations Act 1979 and in ordering liberty to apply to disallow the existing rule upon notice to the Commission, and exceeded jurisdiction in altering union rule to provide for office to be elected for a 2 year term - Respondent argued that no contract of employment by way of offer and acceptance had existed - Industrial Appeal Court reviewed union rules and Industrial Relations Act 1979 and found that President erred in finding as the rules clearly stated that as, aside from subordinate duties, General Secretary was subject to control and direction of the General Committee and the Delegate Meeting no discretionary powers existed - IAC further found that by virtue of appointment it was lead to conclude that member was an employee and for the purposes of section 7 or section 56 of the Act was not relevantly an officer - Granted - LOCOMOTIVE ENGINE DRIVERS UNION -v- D K Hathaway - IAC 2 of 1995 - Industrial Appeal Court - KENNEDY J/FRANDLYN J/ROWLAND J. - 08/09/95 - Unions..... 2680

[2]Appeal against decision of Government School Teachers Tribunal re granted application for stay of inquiry (75 WAIG 1026) - Appellant claimed Tribunal erred in concluding that it had jurisdiction to stay an inquiry being conducted pursuant to Section 7C of Education Act and that it was not in the public interest to allow decisions of the Commission to take effect without jurisdiction - Respondent argued Full Bench lacked jurisdiction to determine appeal as sections of the Act when read together failed to take account of appeals from constituent authorities - Full Bench reviewed authorities and sections 7, 22A and 49 of the Act and found on evidence that it was entitled to deal with appeal and in the public interest, that stay of inquiry was only pending hearing and determination of T15 of 1994 and that Tribunal had jurisdiction to deal with matter by virtue of Section 78(1)(a)(ii) of the I.R. Act - Dismissed - Hon Min for Education -v- STATE SCHOOL TEACHERS UNION - APPL 116 of 1995 - Full Bench - SHARKEY P/GEORGE C/SCOTT C. - 27/09/95 - Education.... 2684

[2]Appeal against decision of Government School Teachers Tribunal re dismissed application for abolishment and re -advertising of particular positions (75 WAIG 1033) - Appellant claimed Tribunal erred in concluding that it lacked jurisdiction to deal with matter when proceedings concerned an industrial matter and interpretation of Acts governing teachers - Respondent argued that under Section 78(1) of the Act jurisdiction could not be founded - Full Bench reviewed authorities and found on evidence that under Section 78(1)(a)(ii) of the I.R. Act Tribunal had jurisdiction to deal with matter as positions required teaching qualifications included in definition of 'teacher' - Upheld and Remitted - STATE SCHOOL TEACHERS UNION -v- Hon Minister for Education - APPL 382 of 1995 - Full Bench - SHARKEY P/SCOTT C/GIFFORD C. - 20/09/95 - Education 2689

Application re registration as an employer - Applicant claimed workers employed as technical assistants (survey) were not employed in a comparable classification in construction industry - Respondent argued Applicant should register under CIPPLSL Act given they employ workers performing duties of 'chainman' under Award in construction industry - Board of Reference found that whilst the industry in which technical assistants (survey) and chainmen worked was similar, the classification of work was different - Dismissed - Hille, Thompson & Delfos -v- Construction Indust LSL Board - BOR 14 of 1994 - Board of Reference - LOVEGROVE DR - 12/09/95 - General Construction..... 2848

Application for alleged unfair dismissal - Applicant claimed that as employer/employee relationship existed, termination without notice was unfair and that compensation for damages to his car during an industrial dispute be paid - Respondent alleged that the Applicant was a self-employed contractor and that as there was a contract for services between the parties, the Commission lacked jurisdiction and that the application be struck out - Commission applied various tests to determine the true relationship between the parties and found on evidence that no employer/employee relationship existed - Commission further reviewed I.R. Act and found that the definition of "employee" was defined to also include "any person whose usual status is that of an employee" although in the circumstances of this case as no evidence existed that the Respondent had control in the Applicant's work, but rather that the Applicant was controlled by others, claim could not succeed based upon the definition of "employee" - Dismissed for want of jurisdiction - R Borg -v- Troubleshooters Available - APPL 731 of 1995 - BEECH C - 15/09/95 - Business Services 2852

Conference referred re date of resignation - Applicant claimed Respondent provided incorrect information upon which his resignation was based and that it was an industrial matter - Respondent argued Commission had no jurisdiction to deal with matter as no employer/employee relationship existed at time of application and recent amendments to the Act did not remedy the problem - Commission reviewed authorities and found on evidence that it did not have jurisdiction to deal with matter as it did not relate to existing or soon to be re-established employment relationship or a contractual benefit and therefore was not an industrial matter - Dismissed - CONSTRUCTION, MINING, ENERGY -v- Homeswest - CR 180 of 1995 - SCOTT C. - 16/08/95 - Community Services..... 2872

[4]Application for orders re breach of union rules - Applicants claimed Respondent failed to adhere to organisations rules by authorising payment of amounts exceeding $800 and honoraria payments beyond the registered rules - Respondent Union argued that General Committee should be made responsible as they had authorised honoraria payments beyond the rules and that orders could not be made against General Trustees or binding General Trustees under rule 22 without first hearing them - President reviewed authorities and registered rules of organisation and found that amounts exceeding $800 had been passed for payment without referendums; that application to alter rules 16, 17, 18 and 46 had not been made prior to resolutions being passed; unauthorised honoraria amounts were paid to recipients who were not entitled to monies - President further found that General Trustees did not need to be heard before orders sought could be issued as General Committee had a clear duty to recover unauthorised payments - Ordered Accordingly - E Schmid & Others -v- LOCOMOTIVE ENGINE DRIVERS UNION - APPL 531 of 1995 - President - SHARKEY P. - 21/09/95 - Unions..... 2950

CUMULATIVE DIGEST—*continued*

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ACT - INTERPRETATION OF—*continued*

[1]Appeal against decision of Full Bench (75 WAIG 1518) dismissing appeal against decision of Commission in granting reinstatement on the grounds of unfair dismissal - Appellant claimed that application did not fall into "resign or be fired case" and was dealt with on the basis of significant breach of contract - IAC reviewed I.R. Act, 1979 and authorities and found that Commission had accepted constructive dismissal on the basis of Cargill's case when the case could not support the conclusion reached - IAC further found that in both Cargill case and current application the claim was not under s29, but rather for resolution of industrial matter under s44 and as the court was not called to decide whether "constructive dismissal" fell into category of unfair dismissal, no generalisation be made and each case be looked at on its own facts - Dismissed - Attorney General -v- PRISON OFFICERS' UNION - IAC 8 of 1995 - Industrial Appeal Court -KENNEDY J./ROWLAND J./ANDERSON J. - 03/11/95 - Other Services 3166

[4]Application for stay of decision - Applicant claimed that decision PSA AG2 of 1995 (75 WAIG 3052) be stayed pending the outcome of an appeal to the Full Bench with regards to questioning of an interpretation of section 41 of the I.R. Act, 1979 and a decision regarding the CSA's right for intervention - Applicant further claimed that the Public Service Arbitrator had not considered the provisions stipulated by section 80C(4) and section 41 of the Act and had erred in finding that the union had constitutional coverage when it did not consider the circumstances in which the amendments to constitution were sought - Respondent argued that the test set out in the "Hathaway Case" applied to the situation and that the Applicant did not satisfy it - President reviewed authorities and found on evidence that the decision of the Public Service Arbitrator be stayed temporarily pending the appeal to the Full Bench as the balance of to the question of coverage of the Path Centre and other health service enterprises - Furthermore, President found the seriousness of those questions pertaining to the application of sections 41 and 80C of the Act were also being addressed in the appeal - Granted - CIVIL SERVICE ASSOCIATION -v- WA Centre for Path & Med Resch - APPL 1311 of 1995 - President - SHARKEY P - 04/12/95 - Health Services 3177

Conference referred re site allowance at Crawley Avenue/Mounts Bay Road construction site - Applicant union claimed that the Commission according to section 26A of the I.R. Act, 1979 could not receive in evidence, or inform itself, of any workplace agreement in existence to determine its jurisdiction and that the work performed by the employees on the site was covered by the I.R. Act - Respondent argued that the employees on the worksite were covered by Workplace Agreements pursuant to the Workplace Agreements Act and that the Commission lacked jurisdiction to deal with the matter - Commission found on evidence that no work performed by the Applicant in any period was covered by the I.R. Act and in accordance to section 7C and 7D of the I.R. Act, lacked jurisdiction as it did not constitute an industrial matter - Decision Issued - Relative Reasons for Decision and Order published at 75 WAIG 3088 - BUILDERS LAB, PAINTERS, PLAST -v- Southdown Construction Co P/L & Others - CR 218 of 1995 - SCOTT C. - 19/09/95 - General Construction 3357

Conference referred re termination and denied access - Applicant Union claimed industrial matter existed as employee/employer relationship was affected by third party - Respondents opposed claims on grounds that Commission lacked jurisdiction as no employer/employee relationship existed - Commission found on evidence that industrial matter existed and that it had jurisdiction to make order sought - Discontinued - METALS & ENGINEERING WORKERS' -v- East Perth Electrical Services - CR 463 of 1994 - HALLIWELL SC - 16/02/95 - Metal Ore Mining 3358

ALLOWANCES

Conference referred re claim for a site allowance at the Tiwest Pigment Process Plant, Kwinana - Applicant claimed that the requirements for site allowances set out by previous Full Bench case had been met and that the allowance in place was inadequate and needed to be varied in line with the Wage Fixing Principles - Respondent argued that as the requirements were not met it objected and opposed claim - Commission reviewed authorities and found on evidence that due to the hazardous nature of the work performed on site, the requirements were met - Granted in Part - METALS & ENGINEERING WORKERS' -v- Vulcan Engineering & Others - CR 92 of 1995 - HALLIWELL SC - 07/06/95 - Construction 2257

Application to vary award re second $8.00 arbitrated safety net adjustment - Parties consented to variation - Commission found that as 1st arbitrated safety net application had been granted, application complied with the requirements of the Principles and that to delay application would be counterproductive and delay reform initiatives - Granted - SALARIED PHARMACISTS ASSOC -v- Perth United Friendly & Others - APPL 540 of 1995 - GEORGE C. - 08/08/95 - Personal & Household Good Retailing 2596

Application for a site allowance - Applicant claimed that a site allowance be provided as the work environments were often excessively hot, dirty, noisy and excessive vibration was experienced - Respondent argued that the precedent cases were not valid and that in line with the Wage Fixing Principles the applicant had not shown a significant change in the work, the skill or responsibility required or the conditions to warrant an increase - Commission reviewed authorities and found on evidence that as application did not seek to vary the award it could not attract the consideration of the Work Value Principle and the rate already paid was not adequate to compensate for the conditions and the duration to which the employees were subjected to such disabilities - Granted in Part - AUST ELECT, ELECTRONICS FOUND -v- ABB Installation and Service - CRA 133 of 1995 - COLEMAN CC - 24/08/95 - Construction Trade Services 2633

Application re severance payment - Applicant Union claimed that employees affected by National Rail Corporation arrangements were eligible for severance payments as they related to Category B employees in booklet - Respondent argued that Commission lacked jurisdiction to deal with matter as its power was removed by Public Sector Management Act and Public Sector Management (Redeployment and Redundancy) Regulations 1994 - Commission found on evidence that it lacked jurisdiction to hear matter on redundancy payments by lack of virtue of PSM Act and to issue order would be in conflict with public interest - Dismissed - METALS & ENGINEERING WORKERS' -v- W.A.G.R.C. - CR 151 of 1995 - SCOTT C. - 02/08/95 - Rail Transport 2874

Conference referred re claim for a site allowance - Respondent argued that a site allowance was not warranted and that the Commission should refrain from further dealing with matter as AIRC found employees to have federal award coverage which was also subject to appeal - Commission found on evidence that given the decision to grant federal coverage for labourers employed by virtue of the extension of the federal award and given the dismissed appeal, no claim could be made for such an entitlement - Dismissed - BUILDERS LAB, PAINTERS, PLAST -v- Building Management Authority - CR 72,73 of 1995 - SCOTT C. - 26/10/95 - General Construction 3087

Conference referred re claim for a site allowance at Crawley Avenue/Mounts Bay Road construction site - Applicant Union claimed site allowance was warranted given the size and nature of project, the number of trades working together, restricted access to site, uneven levels, untidiness, exposure to elements, safety problems, noise and associated stress - Commission reviewed authorities and found that the size, cost and circumstances of project warranted consideration for site allowance, particularly given site access, untidiness resulting from size and the way in which materials had to be stored and difficulties associated with other aspects of the project - Granted - BUILDERS LAB, PAINTERS, PLAST -v- Southdown Construction Co P/L & Others - CR 218 of 1995 - SCOTT C. - 10/10/95 - General Construction 3088

CUMULATIVE DIGEST—*continued*

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ALLOWANCES—*continued*

Conference referred re claim for site allowance - Applicant claimed that a disability/discomfort allowance should be paid to employees who were required to wear a full face mask breathing apparatus during project - Respondent argued the presence of lead in the work environment was not uncommon at the site; that it did not present a new condition under which work was performed and that comparable sites in the area had not been awarded such an allowance for the wearing of protective equipment - Commission found on evidence that an Agreement was in place that incorporated such an allowance (which considered all features of the work site) and that the requirement to wear protective clothing itself did not attract the payment of an allowance - Dismissed - METALS AND ENGINEERING UNION -v- BP Refinery (Kwinana) Pty Ltd & Other - CR 267 of 1995 - GEORGE C. - 13/10/95 - Metal Product Manufacturing 3089

Conference referred re site allowance at Crawley Avenue/Mounts Bay Road construction site - Applicant union claimed that the Commission according to section 26A of the I.R. Act, 1979 could not receive in evidence, or inform itself, of any workplace agreement in existence to determine its jurisdiction and that the work performed by the employees on the site was covered by the I.R. Act - Respondent argued that the employees on the worksite were covered by Workplace Agreements pursuant to the Workplace Agreements Act and that the Commission lacked jurisdiction to deal with the matter - Commission found on evidence that no work performed by the Applicant in any period was covered by the I.R. Act and in accordance to section 7C and 7D of the I.R. Act, lacked jurisdiction as it did not constitute an industrial matter - Decision Issued - Relative Reasons for Decision and Order published at 75 WAIG 3088 - BUILDERS LAB, PAINTERS, PLAST -v- Southdown Construction Co P/L & Others - CR 218 of 1995 - SCOTT C. - 19/09/95 - General Construction 3357

Application for continuation of tool allowance payment - Applicant union claimed that the employees' utilisation of their own tools was a clear custom and practice and that the relevant allowance was part and parcel of their remuneration - Respondent argued that the allowance was unnecessary as tools were currently provided to employees in review of security and operational procedures on the premises - Commission found on evidence that the payment of the tool allowance had not arisen from custom and practice but was an award obligation and that as Respondent had exercised its discretion fairly, did not have to continue the payment - Ordered Accordingly - METALS & ENGINEERING WORKERS' -v- WA MINT - CR 171 of 1995 - GIFFORD C. - 06/10/95 - Metal Product Manufacturing 3364

ANNUAL LEAVE

[2]Appeal against decision of Industrial Magistrate (75 WAIG 137) re payment for pro-rata annual leave and public holidays - Appellant claimed that Industrial Magistrate erred in failing to find commission paid should have been taken into account in calculating amount due to be paid - Respondent argued that the Act itself took effect and no provision existed to average out commission paid, as commission was payable when transaction was completed - Full Bench reviewed s.18 of Minimum Conditions of Employment Act 1993 and found that it was not possible to calculate a weekly accrued pro-rata entitlement against total amount of commission earned and Appellant could not prove claim - Dismissed - J Bombak -v- Didco T/A Nik Varga Real Estate - APPL 1292 of 1994 - Full Bench - SHARKEY P/PARKS C/GIFFORD C. - 28/07/95 - Property and Business Services 2313

[2]Appeal against decision of Industrial Magistrate (unreported) re failure to order payment of wages and rates of annual leave - Appellant claimed Industrial Magistrate erred in law in "offsetting payments in excess of 25 hours per week for 24 hour week period when employee had received $350 per week" and further failed to have regard to s.114 of I.R. Act - Full Bench reviewed authorities and found that an incorrect calculation of the pro-rata being in the same proportion as number of hours worked to 38 hours had been done - Upheld - R D Jose -v- Geraldton Resource Centre Inc - APPL 1263 of 1994 - Full Bench - SHARKEY P/HALLIWELL SC/SCOTT C. - 27/06/95 - Retail Trade 2316

APPEAL

[2]Appeal against decision of Industrial Magistrate (75 WAIG 137) re payment for pro-rata annual leave and public holidays - Appellant claimed that Industrial Magistrate erred in failing to find commission paid should have been taken into account in calculating amount due to be paid - Respondent argued that the Act itself took effect and no provision existed to average out commission paid, as commission was payable when transaction was completed - Full Bench reviewed s.18 of Minimum Conditions of Employment Act 1993 and found that it was not possible to calculate a weekly accrued pro-rata entitlement against total amount of commission earned and Appellant could not prove claim - Dismissed - J Bombak -v- Didco T/A Nik Varga Real Estate - APPL 1292 of 1994 - Full Bench - SHARKEY P/PARKS C/GIFFORD C. - 28/07/95 - Property and Business Services 2313

[2]Appeal against decision of Industrial Magistrate (unreported) re failure to order payment of wages and rates of annual leave - Appellant claimed Industrial Magistrate erred in law in "offsetting payments in excess of 25 hours per week for 24 hour week period when employee had received $350 per week" and further failed to have regard to s.114 of I.R. Act - Full Bench reviewed authorities and found that an incorrect calculation of the pro-rata being in the same proportion as number of hours worked to 38 hours had been done - Upheld - R D Jose -v- Geraldton Resource Centre Inc - APPL 1263 of 1994 - Full Bench - SHARKEY P/HALLIWELL SC/SCOTT C. - 27/06/95 - Retail Trade 2316

[3]Appeal against decision of Board of Reference (75 WAIG 1956) re Long Service Leave Entitlements - Applicant claimed Board of Reference erred in finding that nature of sickness was not demonstrated to justify termination - CICS reviewed authorities and found that it lacked jurisdiction as employment was found to be by termination not resignation - Dismissed - AUSTRALIAN WORKERS' UNION -v- Western Mining Corporation Ltd - APPL 643 of 1995 - Commission in Court Session - HALLIWELL SC/SCOTT C/GIFFORD C. - 25/07/95 - Mining 2318

[1]Appeal against decision of Commission in Court Session (75 WAIG 22) re dismissed claim for Long Service Leave Entitlement - Appellant claimed Commission in Court Session erred in law by concluding that jurisdiction to hear matter came from incorrect section of the Act and that grounds of appeal constituted challenges to finding when they were challengeable on appeal - Respondent argued that 2 questions of whether the limitation of Commission in Court Session's jurisdiction was to review only errors of law and whether court could go behind finding of facts to determine sufficient evidence to support findings of fact needed to be addressed - Industrial Appeal Court reviewed authorities and found on evidence that it was not open to either the Commission in Court Session or the Industrial Appeal Court to go behind findings of fact and as Commission in Court Session was bound by findings there was no power to review findings for erred of law or to remit matter back to Board of Reference - Dismissed - Thomas Massam Real Estate -v- D Evans - IAC 19 of 1994 - Industrial Appeal Court - KENNEDY J/ROWLAND J/MURRAY J. - 04/08/95 - Property and Business Services 2473

CUMULATIVE DIGEST—*continued*

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APPEAL—*continued*

[1]Appeal against decision of Full Bench (75 WAIG 551) re upheld and remitted appeal against decision of Commission (74 WAIG 3040) re dismissed claim for orders of discontinuance of Local Court Proceedings - Appellant claimed that Full Bench exceeded jurisdiction and erred in law in holding that Commission had jurisdiction to issue order sought which interfered with Local Court justice, in holding that provisions of I.R. Act were interpreted as conferring jurisdiction and that Commission had not afforded procedural fairness - Respondent argued that central issue was whether Commission had the power to make an order against matter relating to Local Court proceedings - IAC reviewed authorities and found that effect of orders sought before the Commission would have terminated action in Local Court and that as respondent's claim of Local Court judgement be stayed by Commission and become under the Commission control would not be made possible by Parliament, appeal is granted and Commission application pending be dismissed for want of jurisdiction - Granted - Robe River Iron -v- METALS & ENGINEERING WORKERS' - IAC 1 of 1995 - Industrial Appeal Court - FRANKLYN J/MURRAY J/SCOTT J. - 04/08/95 - Metal Ore Mining 2478

[2]Appeal against decision of Commission (75 WAIG 401 & 955) re dismissed application for correction to omission of application - Appellant claimed matter should be relisted as failure of the order to take into account Fifth Schedule of award resulted from an omission in original application and members would be denied benefits - Full Bench reviewed authorities and found that as application was for variation of First not Fifth Schedule of award, Commission had not erred and as it had discharged all of its function, was functus officio and could not entertain application to relist matter - Full Bench further found that application for extension of time was dismissed and as no grounds of appeal had been made, so must appeals - Dismissed - AUST ELECT, ELECTRONICS FOUND & Other -v- Building Management Authority - APPL 455,495 of 1995 - Full Bench - SHARKEY P/COLEMAN CC/GEORGE C - 23/08/95 - Construction Trade Services 2483

[2]Appeal against decision of the Commission (75 WAIG 745 and 976) re granted reinstatement without the loss of entitlements on the grounds of unfair dismissal - Appellant claimed that the decision should be quashed as the reinstatement exceeded the jurisdiction of the Commission, as it was not an industrial matter and raised public interest, that Commission erred in finding of terminated employment and that the appellant was engaged in the racing industry when the industry was of "labour hire" - Full Bench reviewed authorities and found on evidence that there was no justifiable reason for dismissal established on the evidence and as there was no agreement either collective or individual, nothing existed to suggest that the Commission erred in law - Full Bench further found Commission did have jurisdiction as order arose out of an industrial matter affecting and relating to the relationship of employee/employer - Dismissed - Southbrook Enterprises Pty -v- AUST MUNICIPAL, CLERICAL & SER - APPL 470 of 1995 - Full Bench - SHARKEY P/HALLIWELL SC/SCOTT C. - 01/09/95 - Sport and Recreation 2485

[2]Appeal against decision of Coal Industry Tribunal (unreported) re incorrect application of award and bias in determining matter - Appellant claimed Tribunal did not have jurisdiction to declare true meaning and effect of award, that it had erred in its interpretation of clause 26 of the award, that in declaring true meaning of award it failed to consider custom and practice of parties and that it was bias in its hearing and determination of matter - Respondent argued that the test was whether it was able to resolve questions with a fair and unprejudiced mind - Full Bench reviewed authorities and found Tribunal had erred and that a review of the decision of the Tribunal was warranted - Granted and Quashed - COAL MINERS' UNION, COLLIE -v- Western Collieries - APPL 153 of 1995 - Full Bench - SHARKEY P/COLEMAN CC/SCOTT C. - 10/08/95 - Coal Mining 2492

Appeal re unfair dismissal - Appellant claimed termination of his services were unfair and sought reinstatement on the grounds that services were rendered continuous - Respondent argued that no dismissal existed as the contract of employment had come to an end by frustration due to the employee's incapacitating illness and that Board lacked jurisdiction - Board reviewed authorities and found on evidence that as expectations of an extended period and there being no need to fill the position on a permanent basis existed, the employment came to an end by force of law due to frustration - Board further found that in the interests of equity, matter should re-convene to determine how appeal should be disposed of and later determined it lacked jurisdiction - Dismissed for want of jurisdiction - F Sirous -v- Homeswest - PSAB 24 of 1994 - Public Service Appeal Board - GEORGE C - 09/08/95 - Property and Business Services 2641

[1]Appeal against decision of Full Bench (75 WAIG 843) re dismissal of appeal concerning the conversion of temporary lecturers to permanent appointments - Appellant claimed Full Bench had erred in law as matter neither concerned the interpretation, application or inequity arising out of any Act or regulation governing the service of a teacher - Appellant accepted that under the Education Act regulations, he had the power to appoint temporary teachers to a permanent appointment, however argued that as a result of the agreement reached, offers were made to teachers and applications received but appointments did not follow as a result of a further administrative decision, therefore power to appoint was never exercised - IAC noted that above argument would mean all negotiations, agreements, promises and undertakings made on the part of the Appellant could be ignored, breached or withdrawn by him and that the GST Tribunal would have no power to deal with any inequity arising therefrom - IAC found this proposition to be entirely inconsistent with the objects of the Act - Dismissed - Hon Min for Education -v- STATE SCHOOL TEACHERS UNION - IAC 3 of 1995 - Industrial Appeal Court - KENNEDY J/FRANKLYN J/SCOTT J. - 08/09/95 - Education 2677

[1]Appeal against decision President (75 WAIG 888) re orders and declarations to alter union rule - Appellant claimed that President erred in law in declaring that union rule 18(a) was inconsistent with section 56 of the Industrial Relations Act 1979 and in ordering liberty to apply to disallow the existing rule upon notice to the Commission, and exceeded jurisdiction in altering union rule to provide for office to be elected for a 2 year term - Respondent argued that no contract of employment by way of offer and acceptance had existed - Industrial Appeal Court reviewed union rules and Industrial Relations Act 1979 and found that President erred in finding as the rules clearly stated that as, aside from subordinate duties, General Secretary was subject to control and direction of the General Committee and the Delegate Meeting no discretionary powers existed - IAC further found that by virtue of appointment it was lead to conclude that member was an employee and for the purposes of section 7 or section 56 of the Act was not relevantly an officer - Granted - LOCOMOTIVE ENGINE DRIVERS UNION -v- D K Hathaway - IAC 2 of 1995 - Industrial Appeal Court - KENNEDY J/FRANKLYN J/ROWLAND J. - 08/09/95 - Unions 2680

[2]Appeal against decision of Government School Teachers Tribunal re granted application for stay of inquiry (75 WAIG 1026) - Appellant claimed Tribunal erred in concluding that it had jurisdiction to stay an inquiry being conducted pursuant to Section 7C of Education Act and that it was not in the public interest to allow decisions of the Commission to take effect without jurisdiction - Respondent argued Full Bench lacked jurisdiction to determine appeal as sections of the Act when read together failed to take account of appeals from constituent authorities - Full Bench reviewed authorities and sections 7, 22A and 49 of the Act and found on evidence that it was entitled to deal with appeal and in the public interest, that stay of inquiry was only pending hearing and determination of T15 of 1994 and that Tribunal had jurisdiction to deal with matter by virtue of Section 78(1)(a)(ii) of the I.R. Act - Dismissed - Hon Min for Education -v- STATE SCHOOL TEACHERS UNION - APPL 116 of 1995 - Full Bench - SHARKEY P/GEORGE C/SCOTT C. - 27/09/95 - Education.... 2684

CUMULATIVE DIGEST—*continued*

Page

APPEAL—*continued*

[2]Appeal against decision of Government School Teachers Tribunal re dismissed application for abolishment and re -advertising of particular positions (75 WAIG 1033) - Appellant claimed Tribunal erred in concluding that it lacked jurisdiction to deal with matter when proceedings concerned an industrial matter and interpretation of Acts governing teachers - Respondent argued that under Section 78(1) of the Act jurisdiction could not be founded - Full Bench reviewed authorities and found on evidence that under Section 78(1)(a)(ii) of the I.R. Act Tribunal had jurisdiction to deal with matter as positions required teaching qualifications included in definition of 'teacher' - Upheld and Remitted - STATE SCHOOL TEACHERS UNION -v- Hon Minister for Education - APPL 382 of 1995 - Full Bench - SHARKEY P/SCOTT C./GIFFORD C. - 20/09/95 - Education 2689

[2]Appeal re decision of Industrial Magistrate (74 WAIG 2377) re dismissed complaints for breaches of awards and for costs - Appellant made no submission regarding the Appeal and gave reasons of why it should not be pursued - Respondent claimed that as the proceedings were "frivolous, vexatious and abusive" by fault of Appellant and a cause of embarrassment, costs should be awarded in relation to the Appeal - Full Bench reviewed authorities and found on evidence that it agreed with Appellant's claim to dismiss Appeal - Full Bench further found that Respondent's claim for costs had not attracted the provisions of s84(5) of the I.R. Act as it failed to establish sufficiently the circumstances covered by jurisdiction - Dismissed - G McCorry - Ind Inspector -v- Geraldton Car Wash and Fuel - APPL 658 of 1994 - Full Bench - SHARKEY P/SCOTT C./GIFFORD C. - 20/09/95 - Motor Vehicle Retailing & Services 2692

[2]Appeal against decision of Commission (75 WAIG 1662) re dismissed claim for contractual entitlements on the grounds of unfair dismissal - Appellant claimed that Commission erred at first instance because he wanted the proceedings to remain open until certain matters were cleared and to have the retraction of the accusation of theft made by the Respondent to be in writing - Full Bench reviewed authorities and found on evidence that the Commission did not err in the exercise of its discretion as the Agreement struck between the parties had been partially performed by the Appellant and completely performed by the Respondent and therefore extinguished Appellant's application - Application for cost by Respondent dismissed - Ordered Accordingly - M Bradbury -v- Great Western Real Estate - APPL 462 of 1995 - Full Bench - SHARKEY P/BEECH C/GIFFORD C. - 24/10/95 - Property Services 2927

[2]Appeal against decision of Commission (75 WAIG 2874) re severance payments - Appellant claimed that Commission erred in holding that it firstly lacked jurisdiction because by virtue of the Minister's decision, the employees were entitled to severance pay as defined by the agreement reached and in accordance to the appropriate Regulations and secondly, that it was not in the public interest to deal with the application as they were not given an opportunity to be heard in relation to that matter - Respondent argued that the order sought by the Appellant would be inconsistent with the Regulations and power granted to the Minister, and that a properly conducted hearing would not have produced a different result - Full Bench reviewed authorities and found on evidence that Commission had erred as it had a conditioned special power of review for aggrieved employees as the Minister's approval for higher severance payment to members of a particular class, advised by notice, effectively approved payment to individual employees which was consistent with the Regulations when read as a whole - Furthermore, Full Bench found Commission's decision to be wrong in law as it failed to afford natural justice by not providing a reasonable opportunity for the parties to be heard on the question of public interest and the question of any dismissal on that ground - Upheld and Remitted - METALS & ENGINEERING WORKERS' & Others -v- W.A.G.R.C. - APPL 941 of 1995 - Full Bench - SHARKEY P/BEECH C/GIFFORD C. - 30/10/95 - Rail Transport 2929

[2]Appeal against decision of Commission (75 WAIG 1916) re application granting insertion of Easter Tuesday holiday clause - Appellant claimed Commission erred in finding; employees were legally entitled to Easter Tuesday as a paid holiday; by reaffirming a clause in the award that by error had been administratively included that was not the subject of an application by the parties; by not correcting the Commission Record of Order No. 308 of 1984 and by acting in excess of its jurisdiction by failing to refer the matter as a special case - Respondent raised preliminary point that some grounds for appeal should not be heard given that they were not raised in proceedings before the Commission at first instance - Full Bench reviewed authorities and found that all grounds should be heard as all matters were live issues - Full Bench further found Commission was not entitled to vary award by deleting Easter Tuesday as a paid holiday as the entitlement had existed by custom and usage since 1983 and was therefore an entitlement under a contract of service and that Commission at first instance did not act in excess of its jurisdiction by not referring the matter as a special case - Dismissed - Minister for Health -v- LIQUOR, HOSPITALITY & MISC - APPL 608 of 1995 - Full Bench - SHARKEY P/GEORGE C/SCOTT C. - 08/11/95 - Health Services 2934

[2]Appeal against decision of Industrial Magistrate (unreported) re failure to order adequate penalties for breaches of award - Appellant claimed Industrial Magistrate erred in finding penalties should be minimal contrary to weight of evidence and in finding that penalties should not be paid to Complainants - Respondent argued that as a small business, it could not afford increased penalties - Full Bench reviewed authorities and found on evidence that penalties imposed were inadequate given amount of maximum penalty, time over which breaches occurred, number of breaches involved, evidence of previous breaches, the admission of breaches and that breaches related to apprentices - Upheld and Ordered Accordingly - AUST ELECT, ELECTRONICS FOUND -v- Apollo Electrotech Pty Ltd - APPL 615 of 1995 - Full Bench - SHARKEY P/SCOTT C./GIFFORD C. - 16/10/95 - Construction Trade Services 2937

[2]Appeal against decision of Industrial Magistrate (unreported) re breach of Award - Appellant sought that decisions issued by Industrial Magistrate ordering the supply of certain particulars of complaint be quashed - Full Bench reviewed authorities and found on evidence that as the complaints were made in relation to a Federal Award by a Federal Organisation, they did not satisfy the relevant criteria of the Act and although the lack of jurisdiction in the Industrial Magistrate's Court to hear and determine such complaints was not brought up as a ground of appeal, it was the duty of the appellate court to entertain such a plea - Upheld and Quashed - TRANSPORT WORKERS UNION -v- Kalgoorlie Fuel - APPL 544 of 1995 - Full Bench - SHARKEY P/PARKS C/GIFFORD C. - 23/10/95 - Services to Transport 2944

[1]Appeal against decision of Full Bench (75 WAIG 1787) upholding appeal against decision of Commission in dismissing application for reinstatement on the grounds of unfair dismissal - Appellant claimed that majority Full Bench erred in accepting that unfairness did not exist in circumstances and findings of minority decision should be made to be correct - Respondent argued that Commission and majority Full Bench decisions were correct in that employment was finalised on the basis that no alternative position existed and employee's intention to resolve claim in common law arena - IAC found on evidence that the facts found could not lead to finding of "unilateral" termination as no duress or threats existed and could not discern neither error of law or fact in the results drawn by the majority Full Bench in their disposal of the matter - Dismissed - Durham -v- Westrail - IAC 9 of 1995 - Industrial Appeal Court -KENNEDY J./ROWLAND J./PARKER J. - 03/11/95 - Rail Transport 3163

[1]Appeal against decision of Full Bench (75 WAIG 1518) dismissing appeal against decision of Commission in granting reinstatement on the grounds of unfair dismissal - Appellant claimed that application did not fall into "resign or be fired case" and was dealt with on the basis of significant breach of contract - IAC reviewed I.R. Act, 1979 and authorities and found that Commission had accepted constructive dismissal on the basis of Cargill's case when the case could not support the conclusion reached - IAC further found that in both Cargill case and current application the claim was not under s29, but rather for resolution of industrial matter under s44 and as the court was not called to decide whether "constructive dismissal" fell into category of unfair dismissal, no generalisation be made and each case be looked at on its own facts - Dismissed - Attorney General -v- PRISON OFFICERS' UNION - IAC 8 of 1995 - Industrial Appeal Court - KENNEDY J./ROWLAND J./ANDERSON J.- 03/11/95 - Other Services 3166

CUMULATIVE DIGEST—*continued*

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APPRENTICES AND JUNIORS

[3]Recommendation to Minister re review of Minimum Weekly Rates of Pay - CICS invited submissions, and peak employer/employee organisations made submissions - Parties advocated an increase to rate of pay, however the quantum of increase varied - CICS noted submissions and by majority found no reason to depart from previous recommendation of aligning the datum point to be achieved to 78% of the Tradespersons rate - Dissenting member noted that the relevance of the above concept had eroded with the role of centralised wage fixing - CICS unanimously recommended the continuation of existing relativities for junior rates in relation to an adult (21 years) - Recommendation Issued - (Commission's Own Motion) - APPL 143 of 1995 - Commission in Court Session - COLEMAN CC/HALLIWELL SC/SCOTT C. - 31/05/95 - Various 2695

[2]Appeal against decision of Industrial Magistrate (unreported) re failure to order adequate penalties for breaches of award - Appellant claimed Industrial Magistrate erred in finding penalties should be minimal contrary to weight of evidence and in finding that penalties should not be paid to Complainants - Respondent argued that as a small business, it could not afford increased penalties - Full Bench reviewed authorities and found on evidence that penalties imposed were inadequate given amount of maximum penalty, time over which breaches occurred, number of breaches involved, evidence of previous breaches, the admission of breaches and that breaches related to apprentices - Upheld and Ordered Accordingly - AUST ELECT, ELECTRONICS FOUND -v- Apollo Electrotech Pty Ltd - APPL 615 of 1995 - Full Bench - SHARKEY P/SCOTT C./GIFFORD C. - 16/10/95 - Construction Trade Services 2937

AWARDS

Application to vary awards re rostering, shift allowances, weekend and holiday allowances and underground travel time provisions - Applicant union claimed that the current seven and a half hour shifts be maintained and a provision for overtime in relation to shifts worked beyond those hours be included to accommodate two hour shifts - Respondent argued that the history and nature of contracts demonstrated the remuneration was over and above remuneration covered by awards and shift work was found to be less desirable as it brought certain social problems and health concerns - Respondent further argued that as there was a linkage between the legislative requirements for underground work and the award provisions, negotiations involving more working hours or days could not be done - Commission reviewed authorities and found on evidence that, on balance, whilst there were were some disadvantages for some employees, there was generally a vast improvement in their working situation and their personal lives and that the awards should be amended accordingly - Granted in Part - Western Mining Corporation Ltd -v- AUSTRALIAN WORKERS' UNION - APPL 1522 of 1991;APPL 1108,1109 of 1992 - GREGOR C - 20/01/95 - Mining 2181

Application for interpretation of award re shift work and over-tally and penalty rates - Applicant Union claimed that upon the introduction of an afternoon shift employees on day work were deemed by the award to be on morning shift - Commission reviewed authorities and Clauses 11, 12, 15 and 30 of the award and found that as day workers were not deemed morning shift workers or shift workers by any provision of the award and that the introduction of an afternoon shift would not change their status and issuance of decision would, to necessary extent, cancel previous Order C375 of 1994 - Decision Issued Only - Metro Meat International -v- AUST MEAT INDUSTRY EMPL UNION - APPL 1051 of 1994 - BEECH C - 05/07/95 - Meat Product Manufacturing 2241

Conference referred re claim for a site allowance at the Tiwest Pigment Process Plant, Kwinana - Applicant claimed that the requirements for site allowances set out by previous Full Bench case had been met and that the allowance in place was inadequate and needed to be varied in line with the Wage Fixing Principles - Respondent argued that as the requirements were not met it objected and opposed claim - Commission reviewed authorities and found on evidence that due to the hazardous nature of the work performed on site, the requirements were met - Granted in Part - METALS & ENGINEERING WORKERS' -v- Vulcan Engineering & Others - CR 92 of 1995 - HALLIWELL SC - 07/06/95 - Construction 2257

[3]Conference referred re claim to vary awards re redundancy schedule - Applicant claimed that as former municipality was divided into four, the provisions for compulsory and voluntary redundancy as set out in sections of Act should be replicated and included in the awards - Respondent argued that as no circumstances of compulsory redundancy had or was likely to arise and voluntary redundancy was covered by Voluntary Redundancy Package the schedule was unnecessary - CICS reviewed s.21 and s.22 of the Local Government Act and found on evidence that as the division was provided for the Act there did not exist justification for replication of the terms and intervention was not needed - Dismissed - METALS & ENGINEERING WORKERS' -v- City of Perth - CR 455 of 1994 - Commission in Court Session - HALLIWELL SC/SCOTT C./GIFFORD C. - 27/07/95 - Local Government 2319

[3]Applications for variations to awards re $8.00 Arbitrated Safety Net Adjustment - Applicant claimed that applications had satisfied requirements set out in Principles for second arbitrated safety net adjustment and they did not impede on operation of $8.00 wage adjustment as "offsetting" provisions were included - Respondent argued that Award Modernisation clause which operated in awards was inadequate to satisfy award variation under arbitrated safety net adjustment Principle and existing provisions were inconsistent with Wage Fixing Principles - CICS reviewed authorities and found that none of the applications gave rise to special circumstances with regard to date of operation second arbitrated safety net, that the applications whose period had elapsed since first arbitrated safety net would apply in June and the others would be an efflux of time from first $8.00 adjustment - Granted in Part - LIQUOR, HOSPITALITY & MISC -v- Min for Community Development - APPL 1106 of 1994 - Commission in Court Session - COLEMAN CC/GEORGE C/SCOTT C. - 29/06/95 - Various 2322

Application to vary award re $8.00 Arbitrated Safety Net Adjustment - Applicant claimed that absorption of $8.00 could not occur as other increases were awarded prior to November 1991 - Respondent argued that $8.00 payment would be absorbed into the $12.00 payment, resulting in no net increase to employees concerned - Commission reviewed authorities and found on evidence that as employees had not received a wage increase since November 1991 and that the parties appeared to be continuing to implement award restructuring, the first arbitrated safety net adjustment should be absorbed into the $12.00 payment - Granted - AUSTRALIAN WORKERS' UNION -v- Hon Min for Education & Others - APPL 268 of 1995 - BEECH C - 11/07/95 - Education 2427

Application to vary award re $8.00 Safety Net Adjustment - Applicant claimed that the single classification of probationary security officer (shift employee) had not received a wage increase since the 1992 Order and should recieve the first arbitrated safety net increase - Respondent argued that employees covered by the Order had received wage increases in excess of $8.00 due to enterprise bargaining - Commission reviewed authorities and found on evidence that circumstances warranting previous increase and 1992 order did not generally apply to security officers, that increases had been awarded for reasons of enterprise bargaining and to award an increase to a single classification in which no-one was employed would have little purpose - Dismissed - LIQUOR, HOSPITALITY & MISC -v- Wormald Security - APPL 1609 of 1993 - BEECH C - 14/07/95 - Property and Business Services 2442

CUMULATIVE DIGEST—*continued*

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AWARDS—*continued*

[2]Appeal against decision of Commission (75 WAIG 401 & 955) re dismissed application for correction to omission of application - Appellant claimed matter should be relisted as failure of the order to take into account Fifth Schedule of award resulted from an omission in original application and members would be denied benefits - Full Bench reviewed authorities and found that as application was for variation of First not Fifth Schedule of award, Commission had not erred and as it had discharged all of its function, was functus officio and could not entertain application to relist matter - Full Bench further found that application for extension of time was dismissed and as no grounds of appeal had been made, so must appeals - Dismissed - AUST ELECT, ELECTRONICS FOUND -v- Building Management Authority - APPL 455,495 of 1995 - Full Bench - SHARKEY P/COLEMAN CC/GEORGE C - 23/08/95 - Construction Trade Services 2483

[2]Appeal against decision of Coal Industry Tribunal (unreported) re incorrect application of award and bias in determining matter - Appellant claimed Tribunal did not have jurisdiction to declare true meaning and effect of award, that it had erred in its interpretation of clause 26 of the award, that in declaring true meaning of award it failed to consider custom and practice of parties and that it was bias in its hearing and determination of matter - Respondent argued that the test was whether it was able to resolve questions with a fair and unprejudiced mind - Full Bench reviewed authorities and found Tribunal had erred and that a review of the decision of the Tribunal was warranted - Granted and Quashed - COAL MINERS' UNION, COLLIE -v- Western Collieries - APPL 153 of 1995 - Full Bench - SHARKEY P/COLEMAN CC/SCOTT C. - 10/08/95 - Coal Mining 2492

Application for registration of an industrial agreement to vary and renew a registered agreement and leave for intervention - Intervening union claimed that registration of the agreement should not occur as sufficient legitimate interest was demonstrated for intervention - Parties argued that no intervention of the union should occur as the extent of interest was only of passing significance - Commission reviewed authorities and found on evidence that although the union had sufficient interest to intervene if the Commission was obligated to register the industrial agreement the union would not have further scope to oppose the registration - Commission further found that matter further be heard to deal with the question of whether a mandatory obligation existed to register the agreement - Declared and Ordered Accordingly - Burswood Resort (Management) -v- LIQUOR & ALLIED INDUST UNION - AG 132 of 1995 - GIFFORD C. - 30/08/95 - Sport and Recreation 2522

Applications for registration of new agreement - Applicants claimed that there existed a mandatory requirement for Commission to register agreement and that each of companies constituted "single enterprise" as defined in the act- Applicant further claimed that Commission in Court Session application had little relevance to instant proceeding and it was essential to have industrial coverage finalised to enable certainty into contract tenering - Respondent argued that it was inappropriate to address true meaning of s.41(2) of the act until conditions needed to satisfy s.41(3) and 41(a) were dealt with and that as terms 'business, project or undertaking' were referred to in the definition of industry they applied to more than one business and were not single enterprise - Respondent further argued it was appropriate for proceedings not to continue to determination until Commission In Court Session decision was issued and that the delay in proceedings would not create prejudice as terms and conditions corresponded with those already in place - Commission found that four questions needed to be addressed by parties and that mandatory obligation existed to register agreements although Commission was unable to conclusively determine question posed - Commission further found that there contained compelling reasons to await the Commission In Court Session decision and that it was not of view that any significant prejudice would result in the proceedings further delay - Declared Accordingly - Aurum Catering Pty Ltd -v- LIQUOR & ALLIED INDUST UNION - AG 16,42,97 of 1994 - GIFFORD C. - 23/08/95 - Accommodation, Cafes&Restaurants 2526

Application to vary award re $8.00 Safety Net Adjustment -Respondent argued that variation of $8.00 safety net pursuant to December 1993 State Wage Case could not occur as award was paid rates award - Commission reviewed authorities and found that rates paid were minimum rates and commitment of parties to structural reform enabled the variation to occur - Granted - LIQUOR, HOSPITALITY & MISC -v- Ministry of Education - APPL 1553 of 1993 - COLEMAN CC - 15/08/95 - Various 2547

Application to vary award re second $8.00 arbitrated safety net adjustment - Parties consented to variation - Commission found that as 1st arbitrated safety net application had been granted, application complied with the requirements of the Principles and that to delay application would be counterproductive and delay reform initiatives - Granted - SALARIED PHARMACISTS ASSOC -v- Perth United Friendly & Others - APPL 540 of 1995 - GEORGE C - 08/08/95 - Personal & Household Good Retailing 2596

[3]Application to vary awards re insertion of redundancy provisions - Applicant Unions claimed as 'test cases' established proposition, awards should contain redundancy provisions and provisions should be relevant to construction industry in which awards operated and that cost associated with insertion would be insignificant - Respondent to Foremen (Building Trades) Award totally opposed inclusion of provisions - Respondents argued Artworkers Award did not classify as a construction award and that provisions should replicate terms of 'general standard' under Metal Trades General Award - Respondent further consented to the inclusion of redundancy provisions but opposed terms sought - CICS reviewed authorities and found that employees covered by Artworkers Award who were engaged on construction projects should receive the same considerations in respect of redundancy and that in matter of public interest provisions for redundancy should be inserted in awards - Decision Only - C.M.E.T.S.W.U. and Others -v- M.B.A. and Others - APPL 1176,1177,1178,1222,1223 of 1993 - Commission in Court Session - COLEMAN CC/HALLIWELL SC/SCOTT C. - 09/10/95 - General Construction 2699

Application for new enterprise based award - Applicant Union claimed that award should reflect contractual entitlements to be paid on termination and award offered as alternative to workplace agreement for new employees - Applicant Union further claimed that award should include part-time employment provision for 'permanent casuals', casual employment to be less than one month, paid commission structure, changes in ordinary hours worked on Saturday, position based classification structure, continuous employment service, a 'no reduction' clause and retrospect date of operation - Respondent argued contractual entitlements should be paid to terminated employees by the fifteenth of the following month and that legislation gave it the right to offer new employees workplace agreements rather than awards - Respondent further argued that employment of casuals for less than one month would be too restrictive, that the right to vary structure of commission on basis of changes in market should be retained, that award did not need a 'no reduction' clause and that retrospectivity should not be granted - Commission reviewed authorities and found on evidence that all claims had been developed in argument aside from annual leave claim and that Commission could not see any justification to depart from usual annual leave provisions and payment at double time for hour worked after 12 pm was not a feature of the industry - Granted in Part - LIQUOR, HOSPITALITY & MISC -v- Jenny Craig Weight Loss Centres - A 1 of 1994 - BEECH C - 26/09/95 - Personal Services 2746

CUMULATIVE DIGEST—*continued*

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AWARDS—*continued*

Application to vary award re $8.00 Arbitrated Safety Net Adjustment - Applicant Union claimed as Appendix D had been amended for first safety net adjustment and it satisfied State Wage Principles, both Appendix D and Clause 9 should be amended to reflect second safety net adjustment - Respondent consented to Appendix D receiving second safety net adjustment, but argued that application for amendment to Clause 9 did not comply with Principles - Commission reviewed authorities and found on evidence that second safety net adjustment could not be applied to Clause 9 as it did not comply with Principles, but that the first safety net adjustment and structural efficiency increase should be applied as no wage increase had been granted since November 1991 - Granted in Part - BUILDERS LAB, PAINTERS, PLAST & Others -v- Hon Min for Works & Others - APPL 520 of 1995 and 639 of 1995- SCOTT C. - 02/08/95 - General Construction 2802

Application for variation of award re $8.00 Arbitrated Safety Net Adjustment - Parties consented for Application No. 400B to be divided into two to deal with amendment in respect to wage increase available under the State Wage Case and an enterprise flexibility clause, respectively - Commission found on evidence that the tests to be applied were met for wage adjustments and that retrospectivity was also fair as other parties to the Award had already received the increase - Commission further found that application for enterprise flexibility clause was dismissed as parties consented that it should not be varied - Granted in Part - AUST MUNICIPAL, CLERICAL & SER -v- Totalisator Agency Board & Other - APPL 400B of 1995 - SCOTT C. - 24/07/95 - Sport and Recreation 2809

Application to vary awards re $8.00 Arbitrated Safety Net Adjustment and enterprise flexibility provisions - Applicant Union claimed enterprise flexibility provisions should ensure formal establishment and observance of consultative processes involving the Union - Respondents argued State Wage Case Principles did not pronounce an expanded role for unions as a result of enterprise related efficiencies, that the role sought would impinge upon the existing rights of employers and employees and it was unnecessary given protections contained in proposed clause - Commission reviewed authorities and found on evidence that although Applicant Union had status of party principal, it should not be granted an unlimited right to involvement in enterprise based negotiations - Reasons Issued Only - LIQUOR, HOSPITALITY & MISC -v- Homes of Peace (Inc) - APPL 1090,1091,1102,1121,1129,1135,1146 of 1994 - PARKS C - 13/09/95 - Health Services... 2815

Application to vary award re appropriate rate of pay - Applicant Union claimed wages clause of Building Trades (Government) Award should be altered to reflect changes to wages paid to tradespeople, that claim was in accordance with Structural Efficiency Principles and definitions and skill levels applicable to tradespeople covered by the two awards were equal - Respondent argued that comparison of the two awards was inappropriate given one was a paid rates award whilst the other was a minimum rates award and that it would be a misconstruction of Principles to compare them - Commission reviewed authorities, compared the Building Trades (Government) Award 1968 with the Engineering Trades (Government) Award 1967, reviewed Principles and found on evidence that it would be contrary to the Statement of Principles to compare minimum rates award with a paid rates award to fix the minimum rates award wages rates - Dismissed - BUILDERS LAB, PAINTERS, PLAST & Others -v- Hon Min for Works & Others - APPL 347 of 1995 - SCOTT C. - 22/09/95 - General Construction 2841

Application for interpretation of Award - Applicant claimed illness had caused her absence from work and was entitled to payment for holidays incurred in that period pursuant to Clause 17(3) of Meat Industry (State) Award No. R9 of 1979 - Respondent argued that absence was on the working day before, on and after the public holiday due to illness and was on unpaid sick leave without pay - Commission reviewed authorities and Award and found on evidence that Applicant was not entitled to payment as she was absent from work on the holidays and could not have performed work on those days, as required by the provisions of the Award - Reasons for Decision Issued Only - AUST MEAT INDUSTRY EMPL UNION -v - Action Food Barns - APPL 341 of 1995 - BEECH C - 26/09/95 - Food Retailing 2846

Application re re-establishment of continuous employment prior to termination - Applicant claimed that she was employed by the Respondent in several occupations without a break in service and therefore was entitled to pro-rata long service leave entitlements - Board of Reference reviewed authorities and found on evidence that it lacked jurisdiction to deal with matter under the Long Service Leave Act 1958 since the Applicant was employed under the provisions of an Award and therefore the Board would have to be constituted under Long Service Leave Standard Provisions - Dismissed - D A Evans -v- Meccan T/A Thomas Massam Real - BOR 5 of 1994 - Board of Reference - LOVEGROVE DR - 11/09/95 - Property Services 2848

Conference referred re reinstatement without loss of entitlements on the grounds of unfair dismissal - Applicant claimed that the failure to offer further contract was harsh and unfair as there was no evidence to conclude that employment was other than continuous and that Respondent's actions were unlawful as proper notice was not given and they failed to comply with Award and General Order - Respondent argued that Applicant's appointment had ceased as no position was available and therefore reinstatement was not possible - Respondent further argued that Commission lacked jurisdiction to deal with matters relating to non-compliance of Award and General Order provisions - Commission reviewed authorities and found on evidence that termination was unfair as Respondent had failed to apply the provisions of the General Order to the applicant and that parties should confer regarding remedy - Dismissed - LIQUOR, HOSPITALITY & MISC -v- Hon Min for Education - CR 14 of 1994 - GEORGE C - 12/07/95 - Education 2877

Application for reduction in time to file answers in relation to Application No. 1031 of 1995 re deduction of union subscriptions - Applicant claimed that as a result of the long running dispute with the Respondent and resultant industrial action, the deduction of union subscriptions was no longer an industrial matter and therefore they should be removed from the provisions of the Award - Respondent Union opposed the application on the grounds that the substantive application would raise major issues of fact and law which would be addressed in answers - Commission reviewed authorities and found on evidence that granting of application would not directly cause industrial action to cease, and that Applicant had not presented valid grounds for the reduction - Dismissed - Hon Minister for Education -v- STATE SCHOOL TEACHERS UNION - APPL 1032 of 1995 - BEECH C - 21/09/95 - Education 2885

[2]Appeal against decision of Commission (75 WAIG 1916) re application granting insertion of Easter Tuesday holiday clause - Appellant claimed Commission erred in finding; employees were legally entitled to Easter Tuesday as a paid holiday; by reaffirming a clause in the award that by error had been administratively included that was not the subject of an application by the parties; by not correcting the Commission Record of Order No. 308 of 1984 and by acting in excess of its jurisdiction by failing to refer the matter as a special case - Respondent raised preliminary point that some grounds for appeal should not be heard given that they were not raised in proceedings before the Commission at first instance - Full Bench reviewed authorities and found that all grounds should be heard as all matters were live issues - Full Bench further found Commission was not entitled to vary award by deleting Easter Tuesday as a paid holiday as the entitlement had existed by custom and usage since 1983 and was therefore an entitlement under a contract of service and that Commission at first instance did not act in excess of its jurisdiction by not referring the matter as a special case - Dismissed - Minister for Health -v- LIQUOR, HOSPITALITY & MISC - APPL 608 of 1995 - Full Bench - SHARKEY P/GEORGE C/SCOTT C. - 08/11/95 - Health Services 2934

CUMULATIVE DIGEST—*continued*

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AWARDS—*continued*

Application to vary award re insertion of introduction of change and redundancy clauses - Applicant Unions claimed the word 'attempt' rather than 'consider' should be contained in redundancy clause as it imposed a heavier obligation on the employer, that employees should be entitled to those benefits applicable to public sector employees even though they are not employed pursuant to PSM Act and that a definition of 'suitable alternative employment' should be included to avoid widely different interpretations - Respondent argued that the word 'consider' provided an obligation most appropriate to the management of a small organisation as it only required commencement of redeployment where possible - Commission found on evidence that 'shall attempt to redeploy' provided a code of some certainty for employees whose jobs had been abolished as a result of change and that a definition of 'suitable alternative employment' was necessary and preferred wording submitted in Schedules to the Commission - Granted - MISCELLANEOUS WORKERS' UNION -v- The Governor of Western Aust - APPL 1423 of 1993 - GEORGE C - 11/10/95 - Government Administration 3044

Conference referred re claim for a site allowance - Respondent argued that a site allowance was not warranted and that the Commission should refrain from further dealing with matter as AIRC found employees to have federal award coverage which was also subject to appeal - Commission found on evidence that given the decision to grant federal coverage for labourers employed by virtue of the extension of the federal award and given the dismissed appeal, no claim could be made for such an entitlement - Dismissed - BUILDERS LAB, PAINTERS, PLAST -v- Building Management Authority - CR 72,73 of 1995 - SCOTT C. - 26/10/95 - General Construction 3087

[4]Application for stay of decision - Applicant claimed that decision PSA AG2 of 1995 (75 WAIG 3052) be stayed pending the outcome of an appeal to the Full Bench with regards to questioning of an interpretation of section 41 of the I.R. Act, 1979 and a decision regarding the CSA's right for intervention - Applicant further claimed that the Public Service Arbitrator had not considered the provisions stipulated by section 80C(4) and section 41 of the Act and had erred in finding that the union had constitutional coverage when it did not consider the circumstances in which the amendments to constitution were sought - Respondent argued that the test set out in the "Hathaway Case" applied to the situation and that the Applicant did not satisfy it - President reviewed authorities and found on evidence that the decision of the Public Service Arbitrator be stayed temporarily pending the appeal to the Full Bench as the balance of to the question of coverage of the Path Centre and other health service enterprises - Furthermore, President found the seriousness of those questions pertaining to the application of sections 41 and 80C of the Act were also being addressed in the appeal - Granted - CIVIL SERVICE ASSOCIATION -v- WA Centre for Path & Med Resch - APPL 1311 of 1995 - President - SHARKEY P - 04/12/95 - Health Services 3177

Application for continuation of tool allowance payment - Applicant union claimed that the employees' utilisation of their own tools was a clear custom and practice and that the relevant allowance was part and parcel of their remuneration - Respondent argued that the allowance was unnecessary as tools were currently provided to employees in review of security and operational procedures on the premises - Commission found on evidence that the payment of the tool allowance had not arisen from custom and practice but was an award obligation and that as Respondent had exercised its discretion fairly, did not have to continue the payment - Ordered Accordingly - METALS & ENGINEERING WORKERS' -v- WA MINT - CR 171 of 1995 - GIFFORD C. - 06/10/95 - Metal Product Manufacturing 3364

BOARD OF REFERENCE

Application re entitlement to pro-rata long service leave and quantum - Applicant claimed that her absence from employment was a result of her taking annual leave and that her employment was continuous as she did not enter into new employment contractual relationships when she changed positions within the organisation - Respondent argued that absence from employment was due to termination - Board of Reference reviewed authorities and found on evidence that Applicant's employment revealed neither an actual termination nor a re-engagement - BOR further found that the Applicant had continuity of employment with the Respondent and was therefore entitled to pro-rata long service leave entitlements - Granted - D A Evans -v- Meccan T/A Thomas Massam Real - BOR 4 of 1995 - Board of Reference - LOVEGROVE DR - 11/09/95 - Property Services 2846

Application re re-establishment of continuous employment prior to termination - Applicant claimed that she was employed by the Respondent in several occupations without a break in service and therefore was entitled to pro-rata long service leave entitlements - Board of Reference reviewed authorities and found on evidence that it lacked jurisdiction to deal with matter under the Long Service Leave Act 1958 since the Applicant was employed under the provisions of an Award and therefore the Board would have to be constituted under Long Service Leave Standard Provisions - Dismissed - D A Evans -v- Meccan T/A Thomas Massam Real - BOR 5 of 1994 - Board of Reference - LOVEGROVE DR - 11/09/95 - Property Services 2848

Application re registration as an employer - Applicant claimed workers employed as technical assistants (survey) were not employed in a comparable classification in construction industry - Respondent argued Applicant should register under CIPPLSL Act given they employ workers performing duties of 'chainman' under Award in construction industry - Board of Reference found that whilst the industry in which technical assistants (survey) and chainmen worked was similar, the classification of work was different - Dismissed - Hille, Thompson & Delfos -v- Construction Indust LSL Board - BOR 14 of 1994 - Board of Reference - LOVEGROVE DR - 12/09/95 - General Construction 2848

Application for pro-rata long service leave entitlements - Applicant claimed that she was entitled to pro-rata long service leave on the grounds sought as notice of termination was received in an unjust manner - Respondent argued that termination of employment was due to the shop being sold and self managed by the new proprietor, so services were no longer required - Board of Reference found on evidence that Applicant's employment with the Respondent was less than the period required for long service leave and did not qualify for such an entitlement - Dismissed - Goodlich -v- Gumnut Nom T/A Colt Stationery - BOR 9 of 1995 - Board of Reference - CARRIGG R./Jones D.M./Latter W.S. - 10/11/95 - Personal & Household Good Rtlg 3331

BREACH OF AWARD

[2]Appeal re decision of Industrial Magistrate (74 WAIG 2377) re dismissed complaints for breaches of awards and for costs - Appellant made no submission regarding the Appeal and gave reasons of why it should not be pursued - Respondent claimed that as the proceedings were "frivolous, vexatious and abusive" by fault of Appellant and a cause of embarrassment, costs should be awarded in relation to the Appeal - Full Bench reviewed authorities and found on evidence that it agreed with Appellant's claim to dismiss Appeal - Full Bench further found that Respondent's claim for costs had not attracted the provisions of s84(5) of the I.R. Act as it failed to establish sufficiently the circumstances covered by jurisdiction - Dismissed - G McCorry - Ind Inspector -v- Geraldton Car Wash and Fuel - APPL 658 of 1994 - Full Bench - SHARKEY P/SCOTT C./GIFFORD C. - 20/09/95 - Motor Vehicle Retailing & Services 2692

CUMULATIVE DIGEST—*continued*

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BREACH OF AWARD—*continued*

[2]Appeal against decision of Industrial Magistrate (unreported) re failure to order adequate penalties for breaches of award - Appellant claimed Industrial Magistrate erred in finding penalties should be minimal contrary to weight of evidence and in finding that penalties should not be paid to Complainants - Respondent argued that as a small business, it could not afford increased penalties - Full Bench reviewed authorities and found on evidence that penalties imposed were inadequate given amount of maximum penalty, time over which breaches occurred, number of breaches involved, evidence of previous breaches, the admission of breaches and that breaches related to apprentices - Upheld and Ordered Accordingly - AUST ELECT, ELECTRONICS FOUND -v- Apollo Electrotech Pty Ltd - APPL 615 of 1995 - Full Bench - SHARKEY P/SCOTT C./GIFFORD C. - 16/10/95 - Construction Trade Services 2937

2Appeal against decision of Industrial Magistrate (unreported) re breach of Award - Appellant sought that decisions issued by Industrial Magistrate ordering the supply of certain particulars of complaint be quashed - Full Bench reviewed authorities and found on evidence that as the complaints were made in relation to a Federal Award by a Federal Organisation, they did not satisfy the relevant criteria of the Act and although the lack of jurisdiction in the Industrial Magistrate's Court to hear and determine such complaints was not brought up as a ground of appeal, it was the duty of the appellate court to entertain such a plea - Upheld and Quashed - TRANSPORT WORKERS UNION -v- Kalgoorlie Fuel - APPL 544 of 1995 - Full Bench - SHARKEY P/PARKS C/GIFFORD C. - 23/10/95 - Services to Transport 2944

CASUAL WORK

[2]Appeal against decision of the Commission (75 WAIG 745 and 976) re granted reinstatement without the loss of entitlements on the grounds of unfair dismissal - Appellant claimed that the decision should be quashed as the reinstatement exceeded the jurisdiction of the Commission, as it was not an industrial matter and raised public interest, that Commission erred in finding of terminated employment and that the appellant was engaged in the racing industry when the industry was of "labour hire" - Full Bench reviewed authorities and found on evidence that there was no justifiable reason for dismissal established on the evidence and as there was no agreement either collective or individual, nothing existed to suggest that the Commission erred in law - Full Bench further found Commission did have jurisdiction as order arose out of an industrial matter affecting and relating to the relationship of employee/employer - Dismissed - Southbrook Enterprises Pty -v- AUST MUNICIPAL, CLERICAL & SER - APPL 470 of 1995 - Full Bench - SHARKEY P/HALLIWELL SC/SCOTT C. - 01/09/95 - Sport and Recreation 2485

Application for reinstatement on the grounds of unfair dismissal - Applicant claimed that the company for which he had worked for had contracted out its services and had accepted a permanent position, similar to his previous role, offered by the new company in control, namely the Respondent - Respondent denied making this offer and argued that the Applicant had resigned his own services, that he was employed as a "required as" casual, and that trust between the parties had broken down making reinstatement problematic - Commission reviewed authorities and found on evidence that the Respondent did not offer the position to the Applicant but was merely "sounding out" interest and whilst there was conflicting evidence presented by both parties, the Applicant was terminated unfairly as he was not notified adequately - Furthermore, Commission found that the Applicant was not a permanent employee but an "ongoing" casual and could therefore only be re-instated to his former position - Ordered Accordingly - J J Moreno -v- Serco (Australia) Pty Ltd - APPL 542 of 1995 - GIFFORD C. - 27/10/95 - Personal & Household Good Retailing 3068

COMPARATIVE WAGE JUSTICE

Application to vary work order re insertion of redundancy provisions - Applicant Unions claimed redundant employees be paid equivalent of 26 weeks' pay, pro-rata long service leave (regardless of length of service), relocation and travel expenses as awards applicable in area of project contained these provisions and intention existed to provide security employees with wages and conditions similar to those of award regulated employees of Woodside - Respondent did not oppose introduction of redundancy provisions but argued that according to State Wage Principles, claims based on a nexus with provisions applicable to other employees could not be relied upon; that the purpose of relocation and travel expenses was to return employees to their place of engagement and the definition of redundancy should be more expressly defined so as not to include the loss of a contract - Commission reviewed authorities and found that it was open to prescribe redundancy provisions as contained in Metal Trades (General) Award but in the best interest of all it would consolidate terms of order and redundancy provisions - Granted in Part - LIQUOR, HOSPITALITY & MISC -v- Wormald Security - APPL 326 of 1993;APPL 344 of 1994 - PARKS C - 05/09/95 - Business Services 3340

COMPENSATION

Application for costs re unfair dismissal claim - Applicant claimed that they were required to expend a great deal of time and money in preparation to defend the application for reinstatement which was later withdrawn at the last minute and therefore, should be reimbursed for the costs incurred - Respondent argued that an "understanding" that application numbers 295 and 296 of 1986 had been joined existed and the prospect of a precedent carried sufficient weight to dismiss the claim for costs - Commission reviewed authorities and found on evidence that the reasons advanced for the late withdrawal of the application for reinstatement were not on fair and reasonable grounds as legal advice was not sought and concluded that the Respondents should be indemnified for the costs - Granted - G Dawes -v- Foodland Associated Limited - APPL 886 of 1994 - HALLIWELL SC - 27/06/95 - Food Retailing 2437

Application for hearing and determination of appeal against decision of Commission (74 WAIG 2274) and for production of documents - Appellant claimed as grounds for appeal had not been dealt with the matter should be listed for hearing - Respondent argued Commission should discontinue appeal as it was served on two years after the fact and that documents sought were not relevant to grounds of appeal - Commission found on evidence that appeal had not been extinguished by amending legislation, that Respondent was aware of the appeal, that a remedy to the appeal could be effected notwithstanding the passage of time and that the grounds of appeal should be amended to allow for production of documents - Preliminary Reasons for Decision Issued Only - W G Antoniak -v- Ministry of Education - APPL 764 of 1995 - BEECH C - 07/09/95 - Education 2610

Application for compensation for lost wages - Applicant Union claimed relegation to part time position was harsh and unfair, that a breach of social justice had occurred and that custom and practice was not considered when decreasing Applicant's hours - Respondent argued part time employment was a fair and proper outcome of circumstances existing at time - Majority GSST found custom and practice required Respondent to provide Applicant with full time work load, even when demand for subjects decreased - Granted - STATE SCHOOL TEACHERS UNION -v- Hon Min for Education - TCR 24 of 1994 - Government School Teachers Tribunal - BEECH C - 24/07/95 - Education 2645

[2]Appeal re decision of Industrial Magistrate (74 WAIG 2377) re dismissed complaints for breaches of awards and for costs - Appellant made no submission regarding the Appeal and gave reasons of why it should not be pursued - Respondent claimed that as the proceedings were "frivolous, vexatious and abusive" by fault of Appellant and a cause of embarrassment, costs should be awarded in relation to the Appeal - Full Bench reviewed authorities and found on evidence that it agreed with Appellant's claim to dismiss Appeal - Full Bench further found that Respondent's claim for costs had not attracted the provisions of s84(5) of the I.R. Act as it failed to establish sufficiently the circumstances covered by jurisdiction - Dismissed - G McCorry - Ind Inspector -v- Geraldton Car Wash and Fuel - APPL 658 of 1994 - Full Bench - SHARKEY P/SCOTT C./GIFFORD C. - 20/09/95 - Motor Vehicle Retailing & Services 2692

CUMULATIVE DIGEST—*continued*

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COMPENSATION—*continued*

Application for contractual entitlements on grounds of unfair dismissal - Applicant claimed that he was owed monies relating to a telephone account and commission, and as no notice was given for termination, it warranted it as unfair - Respondent argued that the commission did not constitute part of Applicant's contractual arrangements and that dismissal resulted from misconduct for accepting premiums, for taking money from the tin and for dishonouring cheques - Commission reviewed authorities and found on evidence that the events which led to the Applicant's dismissal constituted misconduct and as notice was also given dismissal was not unjust or harsh - Commission further found that the deduction for telephone expenses should not have occurred - Ordered Accordingly - P R Courtland -v- Oaklea Pty Ltd - APPL 501 of 1995 - SCOTT C. - 24/08/95 - Insurance 2854

Application re unfair dismissal - Applicant claimed that as no prior notice of unsatisfactory performance was given, dismissal was unfair - Respondent argued that termination resulted from the Applicant being unproductive and not doing the work for which he had been engaged and as employment was casual termination notice was 1 hour - Commission reviewed authorities and found on evidence that as an implied contract of continued employment existed the tests for permanent employee dismissal could not be applied - Commission further found in the light of unfairness compensation be paid to Applicant within 21 days of the date of the order - Ordered Accordingly - A Cumberbirch -v- Total Peripherals - APPL 655 of 1995 - BEECH C - 07/08/95 - Business Services 2862

Conference referred re reinstatement without loss of entitlements on the grounds of unfair dismissal - Applicant claimed that the failure to offer further contract was harsh and unfair as there was no evidence to conclude that employment was other than continuous and that Respondent's actions were unlawful as proper notice was not given and they failed to comply with Award and General Order - Respondent argued that Applicant's appointment had ceased as no position was available and therefore reinstatement was not possible - Respondent further argued that Commission lacked jurisdiction to deal with matters relating to non-compliance of Award and General Order provisions - Commission reviewed authorities and found on evidence that termination was unfair as Respondent had failed to apply the provisions of the General Order to the applicant and that parties should confer regarding remedy - Dismissed - LIQUOR, HOSPITALITY & MISC -v- Hon Min for Education - CR 14 of 1994 - GEORGE C - 12/07/95 - Education 2877

[1]Appeal against decision of Full Bench (75 WAIG 1787) upholding appeal against decision of Commission in dismissing application for reinstatement on the grounds of unfair dismissal - Appellant claimed that majority Full Bench erred in accepting that unfairness did not exist in circumstances and findings of minority decision should be made to be correct - Respondent argued that Commission and majority Full Bench decisions were correct in that employment was finalised on the basis that no alternative position existed and employee's intention to resolve claim in common law arena - IAC found on evidence that the facts found could not lead to finding of "unilateral" termination as no duress or threats existed and could not discern neither error of law or fact in the results drawn by the majority Full Bench in their disposal of the matter - Dismissed - Durham -v- Westrail - IAC 9 of 1995 - Industrial Appeal Court - KENNEDY J./ROWLAND J./ANDERSON J. - 03/11/95 - Rail Transport 3163

CONFERENCE

Conference referred re long service leave entitlements - Applicant Union claimed that when calculating long service leave entitlements, Respondent incorrectly applied terms of long service leave provisions and the employee was entitled to the correct amount - Respondent argued that Commission lacked jurisdiction to hear and determine matter as the employment relationship was not continuous and as there was no likelihood that one would be re-established there was no basis for the claim - Commission reviewed authorities and found on evidence that although s.44 of the Act allowed the interpretation of an award as an element in the process of arbitration, it did not empower it to judicially act to interpret the terms of an award - Dismissed - AUST MEAT INDUSTRY EMPL UNION -v- Metro Meats - CR 121 of 1994 - PARKS C - 13/06/95 - Meat Product Manufacturing 2255

Application for a stay of inquiry - Applicant claimed that in the inquiry some bias relating to the suspension of the applicant without pay existed, an intervention for further hearing and determination and a stay pending that hearing and determination was required - Respondent argued that as the conduct of inquiry was not an industrial matter, the application be dismissed and if classified as an industrial matter, Commission's involvement would create duplication as application was at a premature state - Commission found on evidence that as employer action prevented work, the matter was an industrial matter and under s.7C of the Education Act, there was no unnecessary duplication with Commission's involvement and inquiry be stayed to enable current application to be dealt with - Ordered Accordingly - STATE SCHOOL TEACHERS UNION -v- Min for Educ, Employ - C 173 of 1995 - BEECH C - 31/07/95 - Education 2631

Application for a site allowance - Applicant claimed that a site allowance be provided as the work environments were often excessively hot, dirty, noisy and excessive vibration was experienced - Respondent argued that the precedent cases were not valid and that in line with the Wage Fixing Principles the applicant had not shown a significant change in the work, the skill or responsibility required or the conditions to warrant an increase - Commission reviewed authorities and found on evidence that as application did not seek to vary the award it could not attract the consideration of the Work Value Principle and the rate already paid was not adequate to compensate for the conditions and the duration to which the employees were subjected to such disabilities - Granted in Part - AUST ELECT, ELECTRONICS FOUND -v- ABB Installation and Service - CRA 133 of 1995 - COLEMAN CC - 24/08/95 - Construction Trade Services 2633

Application for stay of inquiry on the grounds of denied natural justice - Applicants claimed that they were not informed of the allegations made against them and that the inquiry under s.7 of the Education Act had denied them natural justice - Commission found on evidence that it could not intervene as inquiry had been conducted in proper manner and therefore, the Chief Executive Officer had a right to initiate such an inquiry - Dismissed - STATE SCHOOL TEACHERS UNION -v- Hon Min for Education - C 251 of 1995 - BEECH C - Education 2871

Conference referred re date of resignation - Applicant claimed Respondent provided incorrect information upon which his resignation was based and that it was an industrial matter - Respondent argued Commission had no jurisdiction to deal with matter as no employer/employee relationship existed at time of application and recent amendments to the Act did not remedy the problem - Commission reviewed authorities and found on evidence that it did not have jurisdiction to deal with matter as it did not relate to existing or soon to be re-established employment relationship or a contractual benefit and therefore was not an industrial matter - Dismissed - CONSTRUCTION, MINING, ENERGY -v- Homeswest - CR 180 of 1995 - SCOTT C. - 16/08/95 - Community Services 2872

Conference referred re reinstatement without loss of entitlements on the grounds of unfair dismissal - Applicant claimed that the failure to offer further contract was harsh and unfair as there was no evidence to conclude that employment was other than continuous and that Respondent's actions were unlawful as proper notice was not given and they failed to comply with Award and General Order - Respondent argued that Applicant's appointment had ceased as no position was available and therefore reinstatement was not possible - Respondent further argued that Commission lacked jurisdiction to deal with matters relating to non-compliance of Award and General Order provisions - Commission reviewed authorities and found on evidence that termination was unfair as Respondent had failed to apply the provisions of the General Order to the applicant and that parties should confer regarding remedy - Dismissed - LIQUOR, HOSPITALITY & MISC -v- Hon Min for Education - CR 14 of 1994 - GEORGE C - 12/07/95 - Education 2877

CUMULATIVE DIGEST—*continued*

Page

CONFERENCE—*continued*

Conference referred re application for reassignment to original location on the grounds of unfair transfer - Applicant Union claimed transfer was harsh and unjust as Applicant had raised her concerns that working arrangements had been changed and Applicant's ill-health left her in no position to relocate or travel the distances required - Respondent argued Applicant did not lodge formal grievance regarding her transfer for some time after notification, that talk of telecommuting was not in fact finalised and that Applicant had actually accepted the offer to work in Northam - Commission reviewed authorities and found on evidence that although no concluded arrangements were made regarding telecommuting, the Applicant did accept an offer to work in Northam and although Respondent had not handled Applicant's grievance professionally, selection for transfer was fair - Dismissed - STATE SCHOOL TEACHERS UNION -v- Hon Min for Education - CR 166 of 1995 - BEECH C - 10/10/95 - Education 2882

Conference referred re industrial action due to safety hazard on site - Applicant Union claimed that its members were entitled to payment for lost time due to a work shutdown, given they had reasonable grounds to believe that to continue working on site would have exposed them to a risk of imminent and serious harm to their health due to inadequate handling procedures of asbestos - Respondent argued that all necessary measures had been taken to ensure that employees were not at risk from the asbestos, that employees could have continued work in areas not affected and that its efforts to resolve the issue was unnecessarily prolonged by the continual raising of additional issues and stoppage undertaken by the Applicant Union - Commission reviewed authorities and found on evidence that concerns of employees relating to the risk of asbestos stemmed from fear rather than fact, and was insufficient in establishing reasonable grounds for the application - Commission further found that whilst the Respondent took all reasonable steps to ensure the safety of employees were not at risk, the need for concern should not have arisen - Recommendation issued regarding appropriate payment for settlement of matter - Dismissed - DOM-UIE Pty Ltd -v- AUTO, FOOD, METAL, ENGINE UNION - CR 277 of 1995 - SCOTT C. - 13/10/95 - Construction Trade Services 3082

Conference referred re claim for a site allowance - Respondent argued that a site allowance was not warranted and that the Commission should refrain from further dealing with matter as AIRC found employees have federal award coverage which was subject to appeal - Commission found on evidence that given the decision to grant federal award coverage for labourers employed by virtue of the extension of the federal award and given the dismissed appeal, no claim could be made for such an entitlement - Dismissed - BUILDERS LAB, PAINTERS, PLAST -v- Building Management Authority - CR 72,73 of 1995 - SCOTT C. - 26/10/95 - General Construction 3087

Conference referred re claim for site allowance - Applicant claimed that a disability/discomfort allowance should be paid to employees who were required to wear a full face mask breathing apparatus during project - Respondent argued the presence of lead in the work environment was not uncommon at the site; that it did not present a new condition under which work was performed and that comparable sites in the area had not been awarded such an allowance for the wearing of protective equipment - Commission found on evidence that an Agreement was in place that incorporated such an allowance (which considered all features of the work site) and that the requirement to wear protective clothing itself did not attract the payment of an allowance - Dismissed - METALS AND ENGINEERING UNION -v- BP Refinery (Kwinana) Pty Ltd & Other - CR 267 of 1995 - GEORGE C - 13/10/95 - Metal Product Manufacturing 3089

Conference referred re site allowance at Crawley Avenue/Mounts Bay Road construction site - Applicant union claimed that the Commission according to section 26A of the I.R. Act, 1979 could not receive in evidence, or inform itself, of any workplace agreement in existence to determine its jurisdiction and that the work performed by the employees on the site was covered by the I.R. Act - Respondent argued that the employees on the worksite were covered by Workplace Agreements pursuant to the Workplace Agreements Act and that the Commission lacked jurisdiction to deal with the matter - Commission found on evidence that no work performed by the Applicant in any period was covered by the I.R. Act and in accordance to sections 7C and 7D of the I.R. Act, lacked jurisdiction as it did not constitute an industrial matter - Decision Issued - Relative Reasons for Decision and Order published at 75 WAIG 3088 - BUILDERS LAB, PAINTERS, PLAST -v- Southdown Construction Co P/L & Others - CR 218 of 1995 - SCOTT C. - 19/09/95 - General Construction 3357

Application for continuation of tool allowance payment - Applicant union claimed that the employees' utilisation of their own tools was a clear custom and practice and that the relevant allowance was part and parcel of their remuneration - Respondent argued that the allowance was unnecessary as tools were currently provided to employees in review of security and operational procedures on the premises - Commission found on evidence that the payment of the tool allowance had not arisen from custom and practice but was an award obligation and that as Respondent had exercised its discretion fairly, did not have to continue the payment - Ordered Accordingly - METALS & ENGINEERING WORKERS' -v- WA MINT - CR 171 of 1995 - GIFFORD C. - 06/10/95 - Metal Product Manufacturing 3364

CONFINED SPACE

Conference referred re claim for a site allowance at Crawley Avenue/Mounts Bay Road construction site - Applicant Union claimed site allowance was warranted given the size and nature of project, the number of trades working together, restricted access to site, uneven levels, untidiness, exposure to elements, safety problems, noise and associated stress - Commission reviewed authorities and found that the size, cost and circumstances of project warranted consideration for site allowance, particularly given site access, untidiness resulting from size and the way in which materials had to be stored and difficulties associated with other aspects of the project - Granted - BUILDERS LAB, PAINTERS, PLAST -v- Southdown Construction Co P/L & Others - CR 218 of 1995 - SCOTT C. - 10/10/95 - General Construction 3088

CONTRACT OF SERVICE

Application for alleged unfair dismissal - Applicant claimed that as employer/employee relationship existed, termination without notice was unfair and that compensation for damages to his car during an industrial dispute be paid - Respondent alleged that the Applicant was a self-employed contractor and that as there was a contract for services between the parties, the Commission lacked jurisdiction and that the application be struck out - Commission applied various tests to determine the true relationship between the parties and found on evidence that no employer/employee relationship existed - Commission further reviewed I.R. Act and found that the definition of "employee" was defined to also include "any person whose usual status is that of an employee" although in the circumstances of this case as no evidence existed that the Respondent had control in the Applicant's work, but rather that the Applicant was controlled by others, claim could not succeed based upon the definition of "employee" - Dismissed for want of jurisdiction - R Borg -v- Troubleshooters Available - APPL 731 of 1995 - BEECH C - 15/09/95 - Business Services 2852

Application re unfair dismissal - Applicant claimed that as no prior notice of unsatisfactory performance was given, dismissal was unfair - Respondent argued that termination resulted from the Applicant being unproductive and not doing the work for which he had been engaged and as employment was casual termination notice was 1 hour - Commission reviewed authorities and found on evidence that as an implied contract of continued employment existed the tests for permanent employee dismissal could not be applied - Commission further found in the light of unfairness compensation be paid to Applicant within 21 days of the date of the order - Ordered Accordingly - A Cumberbirch -v- Total Peripherals - APPL 655 of 1995 - BEECH C - 07/08/95 - Business Services 2862

CUMULATIVE DIGEST—*continued*

Page

CONTRACT OF SERVICE—*continued*

Application for denied contractual benefits - Applicant claimed he had not been paid commissions he was entitled to pursuant to his contract of employment - Respondent did not contest the fact that monies were owed but argued that advertising costs should be deducted - Commission found on evidence that no written contract existed whereby advertising costs should be deducted, nor had there been previous practice of deducting such costs from earnings of employees and that no evidence was presented to the contrary that monies were owed - Granted - J N Glossop -v- Affirm P/L T/A Port City 1st - APPL 801 of 1995 - SCOTT C. - 10/10/95 - Property Services 3066

Application for contractual entitlements on the grounds of unfair dismissal - Applicant claimed he was entitled to non -award contractual entitlements - Respondent argued that the Commission lacked jurisdiction as no industrial matter existed because there was no employment relationship and furthermore negotiations between the parties resulted in matters being settled - Commission reviewed authorities and noted that although the responsibility for the implementation of the Company's concepts lay with the Respondent, relevant indicia proving continuation of previous employment relationship could not be demonstrated by Applicant - Commission found on evidence that Applicant was conducting his own business and thus no industrial matter existed - Dismissed - D A Wedd -v- Interactive Tele Media P/L - APPL 596 of 1995 - SCOTT C. - 01/11/95 - Communication Services 3074

Application for denied contractual entitlements on the grounds of unfair dismissal - Applicant claimed that a weekly contract of employment was entered into and included annual leave of four weeks with a loading, paid public holiday, pay in lieu of notice and occupational superannuation - Respondent argued that the contract was on an hourly basis when work was available and that Applicant was paid on that basis and termination was from lack of work - Commission found on evidence that it preferred Respondent's argument - Dismissed - Fane M. -v- Schiavi Simpson Hutson Pty Ltd- APPL 719 of 1995 - HALLIWELL SC - 21/11/95 - Finance 3331

CUSTOM AND PRACTICE

Application for compensation for lost wages - Applicant Union claimed relegation to part time position was harsh and unfair, that a breach of social justice had occurred and that custom and practice was not considered when decreasing Applicant's hours - Respondent argued part time employment was a fair and proper outcome of circumstances existing at time - Majority GSST found custom and practice required Respondent to provide Applicant with full time work load, even when demand for subjects decreased - Granted - STATE SCHOOL TEACHERS UNION -v- Hon Min for Education - TCR 24 of 1994 - Government School Teachers Tribunal - BEECH C - 24/07/95 - Education 2645

[2]Appeal against decision of Commission (75 WAIG 1916) re application granting insertion of Easter Tuesday holiday clause - Appellant claimed Commission erred in finding; employees were legally entitled to Easter Tuesday as a paid holiday; by reaffirming a clause in the award that by error had been administratively included that was not the subject of an application by the parties; by not correcting the Commission Record of Order No. 308 of 1984 and by acting in excess of its jurisdiction by failing to refer the matter as a special case - Respondent raised preliminary point that some grounds for appeal should not be heard given that they were not raised in proceedings before the Commission at first instance - Full Bench reviewed authorities and found that all grounds should be heard as all matters were live issues - Full Bench further found Commission was not entitled to vary award by deleting Easter Tuesday as a paid holiday as the entitlement had existed by custom and usage since 1983 and was therefore an entitlement under a contract of service and that Commission at first instance did not act in excess of its jurisdiction by not referring the matter as a special case - Dismissed - Minister for Health -v- LIQUOR, HOSPITALITY & MISC - APPL 608 of 1995 - Full Bench - SHARKEY P/GEORGE C/SCOTT C. - 08/11/95 - Health Services 2934

Application for reinstatement on the grounds of unfair dismissal - Applicant claimed family circumstances caused the need for him to be absent from his employment, that he was unable to obtain definitive advice as to when he could return and that his failure to comply with the necessary documentation was an oversight attributable to the difficulties he had been experiencing and not a conscious act - Respondent argued that Applicant's prolonged absence had attributed to serious manning difficulties, irregularities in usual rostering systems, increased hours of work for other staff and decreased staff morale and that special leave could not be granted because of staff shortages - Commission found on evidence that whilst Applicant had been confronted with several domestic problems that had required his absence from work, he had ignored the needs of the Respondent and as all leave except special leave had been granted, termination was not unfair - Dismissed - GN Smith -v- Western Mining Corporation Ltd - APPL 1067 of 1994 - PARKS C - 30/10/95 - Services to Mining 3072

Application for continuation of tool allowance payment - Applicant union claimed that the employees' utilisation of their own tools was a clear custom and practice and that the relevant allowance was part and parcel of their remuneration - Respondent argued that the allowance was unnecessary as tools were currently provided to employees in review of security and operational procedures on the premises - Commission found on evidence that the payment of the tool allowance had not arisen from custom and practice but was an award obligation and that as Respondent had exercised its discretion fairly, did not have to continue the payment - Ordered Accordingly - METALS & ENGINEERING WORKERS' -v- WA MINT - CR 171 of 1995 - GIFFORD C. - 06/10/95 - Metal Product Manufacturing 3364

DANGEROUS WORK

Application for payment of wages as a result of a safety hazard on work site - Applicant claimed that workers who removed themselves from the job due to an on site rockwool safety hazard were entitled to payment of wages lost due to absence, as the necessary test applied to the situation and the workers did not leave the site but remained in crib huts - Respondent argued that the workers failed to follow the guidelines set down by the legislation set out on the data sheets and that a state of hysteria eventuated as a result of such ignorance - Commission reviewed authorities and found on evidence that the employees did have reasonable grounds to believe that to continue work on the site would expose them to a risk of imminent and serious harm to their health - Granted - METALS & ENGINEERING WORKERS' -v- AMEC Construction & Others - CR 89 of 1995 - HALLIWELL SC - 30/05/95 - Mining 2444

Application for a site allowance - Applicant claimed that a site allowance be provided as the work environments were often excessively hot, dirty, noisy and excessive vibration was experienced - Respondent argued that the precedent cases were not valid and that in line with the Wage Fixing Principles the applicant had not shown a significant change in the work, the skill or responsibility required or the conditions to warrant an increase - Commission reviewed authorities and found on evidence that as application did not seek to vary the award it could not attract the consideration of the Work Value Principle and the rate already paid was not adequate to compensate for the conditions and the duration to which the employees were subjected to such disabilities - Granted in Part - AUST ELECT, ELECTRONICS FOUND -v- ABB Installation and Service - CRA 133 of 1995 - COLEMAN CC - 24/08/95 - Construction Trade Services 2633

CUMULATIVE DIGEST—*continued*

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DANGEROUS WORK—*continued*

Conference referred re industrial action due to safety hazard on site - Applicant Union claimed that its members were entitled to payment for lost time due to a work shutdown, given they had reasonable grounds to believe that to continue working on site would have exposed them to a risk of imminent and serious harm to their health due to inadequate handling procedures of asbestos - Respondent argued that all necessary measures had been taken to ensure that employees were not at risk from the asbestos, that employees could have continued work in areas not affected and that its efforts to resolve the issue was unnecessarily prolonged by the continual raising of additional issues and stoppage undertaken by the Applicant Union - Commission reviewed authorities and found on evidence that concerns of employees relating to the risk of asbestos stemmed from fear rather than fact, and was insufficient in establishing reasonable grounds for the application - Commission further found that whilst the Respondent took all reasonable steps to ensure the safety of employees were not at risk, the need for concern should not have arisen - Recommendation issued regarding appropriate payment for settlement of matter - Dismissed - DOM-UIE Pty Ltd -v- AUTO, FOOD, METAL, ENGINE UNION - CR 277 of 1995 - SCOTT C. - 13/10/95 - Construction Trade Services 3082

Conference referred re claim for site allowance - Applicant claimed that a disability/discomfort allowance should be paid to employees who were required to wear a full face mask breathing apparatus during project - Respondent argued the presence of lead in the work environment was not uncommon at the site; that it did not present a new condition under which work was performed and that comparable sites in the area had not been awarded such an allowance for the wearing of protective equipment - Commission found on evidence that an Agreement was in place that incorporated such an allowance (which considered all features of the work site) and that the requirement to wear protective clothing itself did not attract the payment of an allowance - Dismissed - METALS AND ENGINEERING UNION -v- BP Refinery (Kwinana) Pty Ltd & Other - CR 267 of 1995 - GEORGE C - 13/10/95 - Metal Product Manufacturing..... 3089

DATE OF OPERATION

[3]Applications for variations to awards re $8.00 Arbitrated Safety Net Adjustment - Applicant claimed that applications had satisfied requirements set out in Principles for second arbitrated safety net adjustment and they did not impede on operation of $8.00 wage adjustment as "offsetting" provisions were included - Respondent argued that Award Modernisation clause which operated in awards was inadequate to satisfy award variation under arbitrated safety net adjustment Principle and existing provisions were inconsistent with Wage Fixing Principles - CICS reviewed authorities and found that none of the applications gave rise to special circumstances with regard to date of operation second arbitrated safety net, that the applications whose period had elapsed since first arbitrated safety net would apply in June and the others would be an efflux of time from first $8.00 adjustment - Granted in Part - LIQUOR, HOSPITALITY & MISC -v- Min for Community Development - APPL 1106 of 1994 - Commission in Court Session - COLEMAN CC/GEORGE C/SCOTT C. - 29/06/95 - Various..... 2322

Application for new enterprise based award - Applicant Union claimed that award should reflect contractual entitlements to be paid on termination and award offered as alternative to workplace agreement for new employees - Applicant Union further claimed that award should include part-time employment provision for 'permanent casuals', casual employment to be less than one month, paid commission structure, changes in ordinary hours worked on Saturday, position based classification structure, continuous employment service, a 'no reduction' clause and retrospect date of operation - Respondent argued contractual entitlements should be paid to terminated employees by the fifteenth of the following month and that legislation gave it the right to offer new employees workplace agreements rather than awards - Respondent further argued that employment of casuals for less than one month would be too restrictive, that the right to vary structure of commission on basis of changes in market should be retained, that award did not need a 'no reduction' clause and that retrospectivity should not be granted - Commission reviewed authorities and found on evidence that all claims had been developed in argument aside from annual leave claim and that Commission could not see any justification to depart from usual annual leave provisions and payment at double time for hour worked after 12 pm was not a feature of the industry - Granted in Part - LIQUOR, HOSPITALITY & MISC -v- Jenny Craig Weight Loss Centres - A 1 of 1994 - BEECH C - 26/09/95 - Personal Services..... 2746

Application for variation of award re $8.00 Arbitrated Safety Net Adjustment - Parties consented for Application No. 400B to be divided into two to deal with amendment in respect to wage increase available under the State Wage Case and an enterprise flexibility clause, respectively - Commission found on evidence that the tests to be applied were met for wage adjustments and that retrospectivity was also fair as other parties to the Award had already received the increase - Commission further found that application for enterprise flexibility clause was dismissed as parties consented that it should not be varied - Granted in Part - AUST MUNICIPAL, CLERICAL & SER -v- Totalisator Agency Board & Other - APPL 400B of 1995 - SCOTT C. - 24/07/95 - Sport and Recreation 2809

DISABILITIES

Conference referred re claim for a site allowance at Crawley Avenue/Mounts Bay Road construction site - Applicant Union claimed site allowance was warranted given the size and nature of project, the number of trades working together, restricted access to site, uneven levels, untidiness, exposure to elements, safety problems, noise and associated stress - Commission reviewed authorities and found that the size, cost and circumstances of project warranted consideration for site allowance, particularly given site access, untidiness resulting from size and the way in which materials had to be stored and difficulties associated with other aspects of the project - Granted - BUILDERS LAB, PAINTERS, PLAST -v- Southdown Construction Co P/L & Others - CR 218 of 1995 - SCOTT C. - 10/10/95 - General Construction..... 3088

EMPLOYEE

Application re entitlement to pro-rata long service leave and quantum - Applicant claimed that her absence from employment was a result of her taking annual leave and that her employment was continuous as she did not enter into new employment contractual relationships when she changed positions within the organisation - Respondent argued that absence from employment was due to termination - Board of Reference reviewed authorities and found on evidence that Applicant's employment revealed neither an actual termination nor a re-engagement - BOR further found that the Applicant had continuity of employment with the Respondent and was therefore entitled to pro-rata long service leave entitlements - Granted - D A Evans -v- Meccan T/A Thomas Massam Real - BOR 4 of 1995 - Board of Reference - LOVEGROVE DR - 11/09/95 - Property Services..... 2846

Application re re-establishment of continuous employment prior to termination - Applicant claimed that she was employed by the Respondent in several occupations without a break in service and therefore was entitled to pro-rata long service leave entitlements - Board of Reference reviewed authorities and found on evidence that it lacked jurisdiction to deal with matter under the Long Service Leave Act 1958 since the Applicant was employed under the provisions of an Award and therefore the Board would have to be constituted under Long Service Leave Standard Provisions - Dismissed - D A Evans -v- Meccan T/A Thomas Massam Real - BOR 5 of 1994 - Board of Reference - LOVEGROVE DR - 11/09/95 - Property Services..... 2848

CUMULATIVE DIGEST—*continued*

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EMPLOYEE—*continued*

Application for alleged unfair dismissal - Applicant claimed that as employer/employee relationship existed, termination without notice was unfair and that compensation for damages to his car during an industrial dispute be paid - Respondent alleged that the Applicant was a self-employed contractor and that as there was a contract for services between the parties, the Commission lacked jurisdiction and that the application be struck out - Commission applied various tests to determine the true relationship between the parties and found on evidence that no employer/employee relationship existed - Commission further reviewed I.R. Act and found that the definition of "employee" was defined to also include "any person whose usual status is that of an employee" although in the circumstances of this case as no evidence existed that the Respondent had control in the Applicant's work, but rather that the Applicant was controlled by others, claim could not succeed based upon the definition of "employee" - Dismissed for want of jurisdiction - R Borg -v- Troubleshooters Available - APPL 731 of 1995 - BEECH C - 15/09/95 - Business Services 2852

Application re unfair dismissal - Applicant claimed that as no prior notice of unsatisfactory performance was given, dismissal was unfair - Respondent argued that termination resulted from the Applicant being unproductive and not doing the work for which he had been engaged and as employment was casual termination notice was 1 hour - Commission reviewed authorities and found on evidence that as an implied contract of continued employment existed the tests for permanent employee dismissal could not be applied - Commission further found in the light of unfairness compensation be paid to Applicant within 21 days of the date of the order - Ordered Accordingly - A Cumberbirch -v- Total Peripherals - APPL 655 of 1995 - BEECH C - 07/08/95 - Business Services 2862

Application for contractual entitlements on the grounds of unfair dismissal - Applicant claimed he was entitled to non -award contractual entitlements - Respondent argued that the Commission lacked jurisdiction as no industrial matter existed because there was no employment relationship and furthermore negotiations between the parties resulted in matters being settled - Commission reviewed authorities and noted that although the responsibility for the implementation of the Company's concepts lay with the Respondent, relevant indicia proving continuation of previous employment relationship could not be demonstrated by Applicant - Commission found on evidence that Applicant was conducting his own business and thus no industrial matter existed - Dismissed - D A Wedd -v- Interactive Tele Media P/L - APPL 596 of 1995 - SCOTT C. - 01/11/95 - Communication Services 3074

Conference referred re termination and denied access - Applicant Union claimed industrial matter existed as employee/employer relationship was affected by third party - Respondents opposed claims on grounds that Commission lacked jurisdiction as no employer/employee relationship existed - Commission found on evidence that industrial matter existed and that it had jurisdiction to make order sought - Discontinued - METALS & ENGINEERING WORKERS' -v- East Perth Electrical Services - CR 463 of 1994 - HALLIWELL SC - 16/02/95 - Metal Ore Mining 3358

ENFORCEMENT OF AWARDS/ORDERS

[2]Appeal against decision of Industrial Magistrate (unreported) re breach of Award - Appellant sought that decisions issued by Industrial Magistrate ordering the supply of certain particulars of complaint be quashed - Full Bench reviewed authorities and found on evidence that as the complaints were made in relation to a Federal Award by a Federal Organisation, they did not satisfy the relevant criteria of the Act and although the lack of jurisdiction in the Industrial Magistrate's Court to hear and determine such complaints was not brought up as a ground of appeal, it was the duty of the appellate court to entertain such a plea - Upheld and Quashed - TRANSPORT WORKERS UNION -v- Kalgoorlie Fuel - APPL 544 of 1995 - Full Bench - SHARKEY P/PARKS C/GIFFORD C. - 23/10/95 - Services to Transport 2944

HOURS OF WORK

Application to vary awards re rostering, shift allowances, weekend and holiday allowances and underground travel time provisions - Applicant union claimed that the current seven and a half hour shifts be maintained and a provision for overtime in relation to shifts worked beyond those hours be included to accommodate two hour shifts - Respondent argued that the history and nature of contracts demonstrated the remuneration was over and above remuneration covered by awards and shift work was found to be less desirable as it brought certain social problems and health concerns - Respondent further argued that as there was a linkage between the legislative requirements for underground work and the award provisions, negotiations involving more working hours or days could not be done - Commission reviewed authorities and found on evidence that, on balance, whilst there were were some disadvantages for some employees, there was generally a vast improvement in their working situation and their personal lives and that the awards should be amended accordingly - Granted in Part - AUSTRALIAN WORKERS' UNION -v- Kalgoorlie Mining Associates - APPL 1522 of 1991;APPL 1108,1109 of 1992 - GREGOR C - 20/01/95 - Mining 2181

Application for new enterprise based award - Applicant Union claimed that award should reflect contractual entitlements to be paid on termination and award offered as alternative to workplace agreement for new employees - Applicant Union further claimed that award should include part-time employment provision for 'permanent casuals', casual employment to be less than one month, paid commission structure, changes in ordinary hours worked on Saturday, position based classification structure, continuous employment service, a 'no reduction' clause and retrospect date of operation - Respondent argued contractual entitlements should be paid to terminated employees by the fifteenth of the following month and that legislation gave it the right to offer new employees workplace agreements rather than awards - Respondent further argued that employment of casuals for less than one month would be too restrictive, that the right to vary structure of commission on basis of changes in market should be retained, that award did not need a 'no reduction' clause and that retrospectivity should not be granted - Commission reviewed authorities and found on evidence that all claims had been developed in argument aside from annual leave claim and that Commission could not see any justification to depart from usual annual leave provisions and payment at double time for hour worked after 12 pm was not a feature of the industry - Granted in Part - LIQUOR, HOSPITALITY & MISC -v- Jenny Craig Weight Loss Centres - A 1 of 1994 - BEECH C - 26/09/95 - Personal Services 2746

INDUSTRIAL ACTION

[4]Application for stay of order against Commission (75 WAIG 2443) pending appeal to Full Bench - Appellant claimed that the orders were ultra vires and unenforceable as they denied union members access to elected representatives and breached the Act as they denied natural justice and were without precise term or limitations - Appellant further claimed that the Commission erred in law in issuing orders which compelled officers to breach organisation rules - Respondent argued that the industrial action was unjustified and in breach of the orders in place - President reviewed authorities and found on evidence that as no inconvenience other than an inability to communicate had occurred, no circumstances existed to grant a stay of order and it would be a matter for the Full Bench should the grounds of appeal be expedited - Dismissed - CONSTRUCTION, MINING, ENERGY & Others -v- SCM Chemicals - APPL 854 of 1995 - President - SHARKEY P - 07/08/95 - Petroleum Coal Chemical Assoc 2510

CUMULATIVE DIGEST—*continued*

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INDUSTRIAL ACTION—*continued*

[4]Applications for interpretation of union rules - Applicants claimed that a Commission order effectively compelled breach of union rules by defining industrial action so that it prohibited consultation of its members through the requirements outlined in Rule 7.5 and 7.6 and sought a declaration as true interpretation of rules 7.5 and 7.6 - Respondent did not oppose application but sought clarification of the issue mentioned and requested that applications be joined - President reviewed authorities and found on evidence that as the definitions of rules 7.5 and 7.6 were plain and unambiguous, a declaration as to true meaning of the rules to be made - Declared and Ordered Accordingly - A Armstrong and Others -v- AUST ELECT, ELECTRONICS FOUND - APPL 832,845,846,847 of 1995 - President - SHARKEY P - 22/08/95 - Petroleum Coal Chemical Assoc 2515

Application for reduction in time to file answers in relation to Application No. 1031 of 1995 re deduction of union subscriptions - Applicant claimed that as a result of the long running dispute with the Respondent and resultant industrial action, the deduction of union subscriptions was no longer an industrial matter and therefore they should be removed from the provisions of the Award - Respondent Union opposed the application on the grounds that the substantive application would raise major issues of fact and law which would be addressed in answers - Commission reviewed authorities and found on evidence that granting of application would not directly cause industrial action to cease, and that Applicant had not presented valid grounds for the reduction - Dismissed - Hon Minister for Education -v- STATE SCHOOL TEACHERS UNION - APPL 1032 of 1995 - BEECH C - 21/09/95 - Education 2885

Conference referred re industrial action due to safety hazard on site - Applicant Union claimed that its members were entitled to payment for lost time due to a work shutdown, given they had reasonable grounds to believe that to continue working on site would have exposed them to a risk of imminent and serious harm to their health due to inadequate handling procedures of asbestos - Respondent argued that all necessary measures had been taken to ensure that employees were not at risk from the asbestos, that employees could have continued work in areas not affected and that its efforts to resolve the issue was unnecessarily prolonged by the continual raising of additional issues and stoppage undertaken by the Applicant Union - Commission reviewed authorities and found on evidence that concerns of employees relating to the risk of asbestos stemmed from fear rather than fact, and was insufficient in establishing reasonable grounds for the application - Commission further found that whilst the Respondent took all reasonable steps to ensure the safety of employees were not at risk, the need for concern should not have arisen - Recommendation issued regarding appropriate payment for settlement of matter - Dismissed - DOM-UIE Pty Ltd -v- AUTO, FOOD, METAL, ENGINE UNION - CR 277 of 1995 - SCOTT C. - 13/10/95 - Construction Trade Services 3082

INDUSTRIAL MATTER

Conference referred re pro-rata long service leave entitlements - Applicant claimed that after having completed more than 12 months work and in accordance to Award provisions was entitled to pro-rata long service leave upon his termination - Respondent argued that as this was an enforcement of an award the Commission did not have the jurisdiction as matter was solely the province of the Industrial Magistrate - Commission reviewed authorities and found on evidence that it lacked jurisdiction as the claim was an enforcement of an Award and as no industrial matter existed there was no basis for bald interpretation - Dismissed for want of jurisdiction - D Bell -v- Fire Brigades Board - CR 43 of 1995 - SCOTT C. - 22/06/95 - Fire Brigade Services 2252

[2]Appeal against decision of the Commission (75 WAIG 745 and 976) re granted reinstatement without the loss of entitlements on the grounds of unfair dismissal - Appellant claimed that the decision should be quashed as the reinstatement exceeded the jurisdiction of the Commission, as it was not an industrial matter and raised public interest, that Commission erred in finding of terminated employment and that the appellant was engaged in the racing industry when the industry was of "labour hire" - Full Bench reviewed authorities and found on evidence that there was no justifiable reason for dismissal established on the evidence and as there was no agreement either collective or individual, nothing existed to suggest that the Commission erred in law - Full Bench further found Commission did have jurisdiction as order arose out of an industrial matter affecting and relating to the relationship of employee/employer - Dismissed - Southbrook Enterprises Pty -v- AUST MUNICIPAL, CLERICAL & SER - APPL 470 of 1995 - Full Bench - SHARKEY P/HALLIWELL SC/SCOTT C. - 01/09/95 - Sport and Recreation 2485

Application for a stay of inquiry - Applicant claimed that in the inquiry some bias relating to the suspension of the applicant without pay existed, an intervention for further hearing and determination and a stay pending that hearing and determination was required - Respondent argued that as the conduct of inquiry was not an industrial matter, the application be dismissed and if classified as an industrial matter, Commission's involvement would create duplication as application was at a premature state - Commission found on evidence that as employer action prevented work, the matter was an industrial matter and under s.7C of the Education Act, there was no unnecessary duplication with Commission's involvement and inquiry be stayed to enable current application to be dealt with - Ordered Accordingly - STATE SCHOOL TEACHERS UNION -v- Hon Min for Educ, Employ & Training - C 173 of 1995 - BEECH C - 31/07/95 - Education 2631

[2]Appeal against decision of Government School Teachers Tribunal re dismissed application for abolishment and re -advertising of particular positions (75 WAIG 1033) - Appellant claimed Tribunal erred in concluding that it lacked jurisdiction to deal with matter when proceedings concerned an industrial matter and interpretation of Acts governing teachers - Respondent argued that under Section 78(1) of the Act jurisdiction could not be founded - Full Bench reviewed authorities and found on evidence that under Section 78(1)(a)(ii) of the I.R. Act Tribunal had jurisdiction to deal with matter as positions required teaching qualifications included in definition of 'teacher' - Upheld and Remitted - STATE SCHOOL TEACHERS UNION -v- Hon Minister for Education - APPL 382 of 1995 - Full Bench - SHARKEY P/SCOTT C./GIFFORD C. - 20/09/95 - Education 2689

Conference referred re date of resignation - Applicant claimed Respondent provided incorrect information upon which his resignation was based and that it was an industrial matter - Respondent argued Commission had no jurisdiction to deal with matter as no employer/employee relationship existed at time of application and recent amendments to the Act did not remedy the problem - Commission reviewed authorities and found on evidence that it did not have jurisdiction to deal with matter as it did not relate to existing or soon to be re-established employment relationship or a contractual benefit and therefore was not an industrial matter - Dismissed - CONSTRUCTION, MINING, ENERGY -v- Homeswest - CR 180 of 1995 - SCOTT C. - 16/08/95 - Community Services 2872

Application re severance payment - Applicant Union claimed that employees affected by National Rail Corporation arrangements were eligible for severance payments as they related to Category B employees in booklet - Respondent argued that Commission lacked jurisdiction to deal with matter as its power was removed by Public Sector Management Act and Public Sector Management (Redeployment and Redundancy) Regulations 1994 - Commission found on evidence that it lacked jurisdiction to hear matter on redundancy payments by lack of virtue of PSM Act and to issue order would be in conflict with public interest - Dismissed - METALS & ENGINEERING WORKERS' -v- W.A.G.R.C. - CR 151 of 1995 - SCOTT C. - 02/08/95 - Rail Transport 2874

CUMULATIVE DIGEST—*continued*

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INDUSTRIAL MATTER—*continued*

Application for reduction in time to file answers in relation to Application No. 1031 of 1995 re deduction of union subscriptions - Applicant claimed that as a result of the long running dispute with the Respondent and resultant industrial action, the deduction of union subscriptions was no longer an industrial matter and therefore they should be removed from the provisions of the Award - Respondent Union opposed the application on the grounds that the substantive application would raise major issues of fact and law which would be addressed in answers - Commission reviewed authorities and found on evidence that granting of application would not directly cause industrial action to cease, and that Applicant had not presented valid grounds for the reduction - Dismissed - Hon Minister for Education -v- STATE SCHOOL TEACHERS UNION - APPL 1032 of 1995 - BEECH C - 21/09/95 - Education 2885

[2]Appeal against decision of Commission (75 WAIG 2874) re severance payments - Appellant claimed that Commission erred in holding that it firstly lacked jurisdiction because by virtue of the Minister's decision, the employees were entitled to severance pay as defined by the agreement reached and in accordance to the appropriate Regulations and secondly, that it was not in the public interest to deal with the application as they were not given an opportunity to be heard in relation to that matter - Respondent argued that the order sought by the Appellant would be inconsistent with the Regulations and power granted to the Minister, and that a properly conducted hearing would not have produced a different result - Full Bench reviewed authorities and found on evidence that Commission had erred as it had a conditioned special power of review for aggrieved employees as the Minister's approval for higher severance payment to members of a particular class, advised by notice, effectively approved payment to individual employees which was consistent with the Regulations when read as a whole - Furthermore, Full Bench found Commission's decision to be wrong in law as it failed to afford natural justice by not providing a reasonable opportunity for the parties to be heard on the question of public interest and the question of any dismissal on that ground - Upheld and Remitted - METALS & ENGINEERING WORKERS' & Others -v- W.A.G.R.C. - APPL 941 of 1995 - Full Bench - SHARKEY P/BEECH C/GIFFORD C. - 30/10/95 - Rail Transport 2929

Application for contractual entitlements on the grounds of unfair dismissal - Applicant claimed he was entitled to non -award contractual entitlements - Respondent argued that the Commission lacked jurisdiction as no industrial matter existed because there was no employment relationship and furthermore negotiations between the parties resulted in matters being settled - Commission reviewed authorities and noted that although the responsibility for the implementation of the Company's concepts lay with the Respondent, relevant indicia proving continuation of previous employment relationship could not be demonstrated by Applicant - Commission found on evidence that Applicant was conducting his own business and thus no industrial matter existed - Dismissed - D A Wedd -v- Interactive Tele Media P/L - APPL 596 of 1995 - SCOTT C. - 01/11/95 - Communication Services 3074

[1]Appeal against decision of Full Bench (75 WAIG 1518) dismissing appeal against decision of Commission in granting reinstatement on the grounds of unfair dismissal - Appellant claimed that application did not fall into "resign or be fired case" and was dealt with on the basis of significant breach of contract - IAC reviewed I.R. Act, 1979 and authorities and found that Commission had accepted constructive dismissal on the basis of Cargill's case when the case could not support the conclusion reached - IAC further found that in both Cargill case and current application the claim was not under s29, but rather for resolution of industrial matter under s44 and as the court was not called to decide whether "constructive dismissal" fell into category of unfair dismissal, no generalisation be made and each case be looked at on its own facts - Dismissed - Attorney General -v- PRISON OFFICERS' UNION - IAC 8 of 1995 - Industrial Appeal Court - KENNEDY J./ROWLAND J./ANDERSON J. - 03/11/95 - Other Services 3166

Conference referred re site allowance at Crawley Avenue/Mounts Bay Road construction site - Applicant union claimed that the Commission according to section 26A of the I.R. Act, 1979 could not receive in evidence, or inform itself, of any workplace agreement in existence to determine its jurisdiction and that the work performed by the employees on the site was covered by the I.R. Act - Respondent argued that the employees on the worksite were covered by Workplace Agreements pursuant to the Workplace Agreements Act and that the Commission lacked jurisdiction to deal with the matter - Commission found on evidence that no work performed by the Applicant in any period was covered by the I.R. Act and in accordance to sections 7C and 7D of the I.R. Act, lacked jurisdiction as it did not constitute an industrial matter - Decision Issued - Relative Reasons for Decision and Order published at 75 WAIG 3088 - BUILDERS LAB, PAINTERS, PLAST -v- Southdown Construction Co P/L & Others - CR 218 of 1995 - SCOTT C. - 19/09/95 - General Construction 3357

Conference referred re termination and denied access - Applicant Union claimed industrial matter existed as employee/employer relationship was affected by third party - Respondents opposed claims on grounds that Commission lacked jurisdiction as no employer/employee relationship existed - Commission found on evidence that industrial matter existed and that it had jurisdiction to make order sought - Discontinued - METALS & ENGINEERING WORKERS' -v- East Perth Electrical Services - CR 463 of 1994 - HALLIWELL SC - 16/02/95 - Metal Ore Mining 3358

INDUSTRY

[2]Appeal against decision of the Commission (75 WAIG 745 and 976) re granted reinstatement without the loss of entitlements on the grounds of unfair dismissal - Appellant claimed that the decision should be quashed as the reinstatement exceeded the jurisdiction of the Commission, as it was not an industrial matter and raised public interest, that Commission erred in finding of terminated employment and that the appellant was engaged in the racing industry when the industry was of "labour hire" - Full Bench reviewed authorities and found on evidence that there was no justifiable reason for dismissal established on the evidence and as there was no agreement either collective or individual, nothing existed to suggest that the Commission erred in law - Full Bench further found Commission did have jurisdiction as order arose out of an industrial matter affecting and relating to the relationship of employee/employer - Dismissed - Southbrook Enterprises Pty -v- AUST MUNICIPAL, CLERICAL & SER - APPL 470 of 1995 - Full Bench - SHARKEY P/HALLIWELL SC/SCOTT C. - 01/09/95 - Sport and Recreation 2485

Applications for registration of new agreement - Applicants claimed that there existed a mandatory requirement for Commission to register agreement and that each of companies constituted "single enterprise" as defined in the act- Applicant further claimed that Commission in Court Session application had little relevance to instant proceeding and it was essential to have industrial coverage finalised to enable certainty into contract tenering - Respondent argued that it was inappropriate to address true meaning of s.41(2) of the act until conditions needed to satisfy s.41(3) and 41(a) were dealt with and that as terms 'business, project or undertaking' were referred to in the definition of industry they applied to more than one business and were not single enterprise - Respondent further argued it was appropriate for proceedings not to continue to determination until Commission In Court Session decision was issued and that the delay in proceedings would not create prejudice as terms and conditions corresponded with those already in place - Commission found that four questions needed to be addressed by parties and that mandatory obligation existed to register agreements although Commission was unable to conclusively determine question posed - Commission further found that there contained compelling reasons to await the Commission In Court Session decision and that it was not of view that any significant prejudice would result in the proceedings further delay - Declared Accordingly - P & O Catering and Services -v- LIQUOR & ALLIED INDUST UNION - AG 16,42,97 of 1994 - GIFFORD C. - 23/08/95 - Accommodation, Cafes&Restaurants 2526

CUMULATIVE DIGEST—*continued*

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INDUSTRY—*continued*

Application re registration as an employer - Applicant claimed workers employed as technical assistants (survey) were not employed in a comparable classification in construction industry - Respondent argued Applicant should register under CIPPLSL Act given they employ workers performing duties of 'chainman' under Award in construction industry - Board of Reference found that whilst the industry in which technical assistants (survey) and chainmen worked was similar, the classification of work was different - Dismissed - Hille, Thompson & Delfos -v- Construction Indust LSL Board - BOR 14 of 1994 - Board of Reference - LOVEGROVE DR - 12/09/95 - General Construction 2848

INTERPRETATION—WORDS & PHRASES

Application for interpretation of award re shift work and over-tally and penalty rates - Applicant Union claimed that upon the introduction of an afternoon shift employees on day work were deemed by the award to be on morning shift - Commission reviewed authorities and Clauses 11, 12, 15 and 30 of the award and found that as day workers were not deemed morning shift workers or shift workers by any provision of the award and that the introduction of an afternoon shift would not change their status and issuance of decision would, to necessary extent, cancel previous Order C375 of 1994 - Decision Issued Only - Metro Meat International -v- AUST MEAT INDUSTRY EMPL UNION - APPL 1051 of 1994 - BEECH C - 05/07/95 - Meat Product Manufacturing 2241

[1]Appeal against decision of Full Bench (75 WAIG 551) re upheld and remitted appeal against decision of Commission (74 WAIG 3040) re dismissed claim for orders of discontinuance of Local Court Proceedings - Appellant claimed that Full Bench exceeded jurisdiction and erred in law in holding that Commission had jurisdiction to issue order sought which interfered with Local Court justice, in holding that provisions of I.R. Act were interpreted as conferring jurisdiction and that Commission had not afforded procedural fairness - Respondent argued that central issue was whether Commission had the power to make an order against matter relating to Local Court proceedings - IAC reviewed authorities and found that effect of orders sought before the Commission would have terminated action in Local Court and that as respondent's claim of Local Court judgement be stayed by Commission and become under the Commission control would not be made possible by Parliament, appeal is granted and Commission application pending be dismissed for want of jurisdiction - Granted - Robe River Iron -v- METALS & ENGINEERING WORKERS' - IAC 1 of 1995 - Industrial Appeal Court - FRANKLYNJ/MURRAYJ/SCOTT J. - 04/08/95 - Metal Ore Mining 2478

[2]Appeal against decision of Coal Industry Tribunal (unreported) re incorrect application of award and bias in determining matter - Appellant claimed Tribunal did not have jurisdiction to declare true meaning and effect of award, that it had erred in its interpretation of clause 26 of the award, that in declaring true meaning of award it failed to consider custom and practice of parties and that it was bias in its hearing and determination of matter - Respondent argued that the test was whether it was able to resolve questions with a fair and unprejudiced mind - Full Bench reviewed authorities and found Tribunal had erred and that a review of the decision of the Tribunal was warranted - Granted and Quashed - COAL MINERS' UNION, COLLIE -v- Western Collieries - APPL 153 of 1995 - Full Bench - SHARKEY P/COLEMAN CC/SCOTT C. - 10/08/95 - Coal Mining 2492

[4]Application for stay of order against decision of Commission (75 WAIG 2443) pending appeal to Full Bench - Applicant claimed application for stay did not abuse process and contained substance, as previous application for stay was in relation to different appeal and that an application had been lodged for appeals to be joined and heard together - Respondent argued application was an abuse of process given that several appeals had been lodged against the same order and no new matters of relevance had arisen since the previous application for stay had been dismissed - President reviewed authorities and found on evidence that as application duplicated an application which had already been heard and determined and no persuasion of charged circumstance nor justification of stay had occurred, multiplicity of unnecessary and incompetent applications should not be dealt with - Dismissed - AUST ELECT, ELECTRONICS FOUND & Others -v- SCM Chemicals Ltd - APPL 918 of 1995 - President - SHARKEY P - 23/08/95 - Metal Ore Mining 2507

Applications for registration of new agreement - Applicants claimed that there existed a mandatory requirement for Commission to register agreement and that each of companies constituted "single enterprise" as defined in the act- Applicant further claimed that Commission in Court Session application had little relevance to instant proceeding and it was essential to have industrial coverage finalised to enable certainty into contract tenering - Respondent argued that it was inappropriate to address true meaning of s.41(2) of the act until conditions needed to satisfy s.41(3) and 41(a) were dealt with and that as terms 'business, project or undertaking' were referred to in the definition of industry they applied to more than one business and were not single enterprise - Respondent further argued it was appropriate for proceedings not to continue to determination until Commission In Court Session decision was issued and that the delay in proceedings would not create prejudice as terms and conditions corresponded with those already in place - Commission found that four questions needed to be addressed by parties and that mandatory obligation existed to register agreements although Commission was unable to conclusively determine question posed - Commission further found that there contained compelling reasons to await the Commission In Court Session decision and that it was not of view that any significant prejudice would result in the proceedings further delay - Declared Accordingly - P & O Catering and Services -v- LIQUOR & ALLIED INDUST UNION - AG 16,42,97 of 1994 - GIFFORD C. - 23/08/95 - Accommodation, Cafes&Restaurants 2526

Application for a stay of inquiry - Applicant claimed that in the inquiry some bias relating to the suspension of the applicant without pay existed, an intervention for further hearing and determination and a stay pending that hearing and determination was required - Respondent argued that as the conduct of inquiry was not an industrial matter, the application be dismissed and if classified as an industrial matter, Commission's involvement would create duplication as application was at a premature state - Commission found on evidence that as employer action prevented work, the matter was an industrial matter and under s.7C of the Education Act, there was no unnecessary duplication with Commission's involvement and inquiry be stayed to enable current application to be dealt with - Ordered Accordingly - STATE SCHOOL TEACHERS UNION -v- Hon Min for Educ, Employ & Training - C 173 of 1995 - BEECH C - 31/07/95 - Education 2631

[1]Appeal against decision President (75 WAIG 888) re orders and declarations to alter union rule - Appellant claimed that President erred in law in declaring that union rule 18(a) was inconsistent with section 56 of the Industrial Relations Act 1979 and in ordering liberty to apply to disallow the existing rule upon notice to the Commission, and exceeded jurisdiction in altering union rule to provide for office to be elected for a 2 year term - Respondent argued that no contract of employment by way of offer and acceptance had existed - Industrial Appeal Court reviewed union rules and Industrial Relations Act 1979 and found that President erred in finding as the rules clearly stated that as, aside from subordinate duties, General Secretary was subject to control and direction of the General Committee and the Delegate Meeting no discretionary powers existed - IAC further found that by virtue of appointment it was lead to conclude that member was an employee and for the purposes of section 7 or section 56 of the Act was not relevantly an officer - Granted - LOCOMOTIVE ENGINE DRIVERS UNION -v- D K Hathaway - IAC 2 of 1995 - Industrial Appeal Court - KENNEDY J/FRANKLYN J/ROWLAND J. - 08/09/95 - Unions 2680

CUMULATIVE DIGEST—*continued*

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INTERPRETATION—WORDS & PHRASES—*continued*

[2]Appeal against decision of Government School Teachers Tribunal re dismissed application for abolishment and re -advertising of particular positions (75 WAIG 1033) - Appellant claimed Tribunal erred in concluding that it lacked jurisdiction to deal with matter when proceedings concerned an industrial matter and interpretation of Acts governing teachers - Respondent argued that under Section 78(1) of the Act jurisdiction could not be founded - Full Bench reviewed authorities and found on evidence that under Section 78(1)(a)(ii) of the I.R. Act Tribunal had jurisdiction to deal with matter as positions required teaching qualifications included in definition of 'teacher' - Upheld and Remitted - STATE SCHOOL TEACHERS UNION -v- Hon Minister for Education - APPL 382 of 1995 - Full Bench - SHARKEY P/SCOTT C./GIFFORD C. - 20/09/95 - Education 2689

Application for interpretation of Award - Applicant claimed illness had caused her absence from work and was entitled to payment for holidays incurred in that period pursuant to Clause 17(3) of Meat Industry (State) Award No. R9 of 1979 - Respondent argued that absence was on the working day before, on and after the public holiday due to illness and was on unpaid sick leave without pay - Commission reviewed authorities and Award and found on evidence that Applicant was not entitled to payment as she was absent from work on the holidays and could not have performed work on those days, as required by the provisions of the Award - Reasons for Decision Issued Only - AUST MEAT INDUSTRY EMPL UNION -v - Action Food Barns - APPL 341 of 1995 - BEECH C - 26/09/95 - Food Retailing 2846

Application for alleged unfair dismissal - Applicant claimed that as employer/employee relationship existed, termination without notice was unfair and that compensation for damages to his car during an industrial dispute be paid - Respondent alleged that the Applicant was a self-employed contractor and that as there was a contract for services between the parties, the Commission lacked jurisdiction and that the application be struck out - Commission applied various tests to determine the true relationship between the parties and found on evidence that no employer/employee relationship existed - Commission further reviewed I.R. Act and found that the definition of "employee" was defined to also include "any person whose usual status is that of an employee" although in the circumstances of this case as no evidence existed that the Respondent had control in the Applicant's work, but rather that the Applicant was controlled by others, claim could not succeed based upon the definition of "employee" - Dismissed for want of jurisdiction - R Borg -v- Troubleshooters Available - APPL 731 of 1995 - BEECH C - 15/09/95 - Business Services 2852

[4]Application for declaration re interpretation of rules - Applicant sought true interpretation of organisation's rules regarding definition of Industrial Magistrate's Court, definition of 'preparation of cases' and of correct procedures - Respondent Union did not oppose application - President reviewed authorities, rules 10 and 11 of organisation and found that declaration as to true meaning of rules should be issued - Declared Accordingly - A Lovell -v- COMM, ELECTRIC, ELECT, ENERGY - APPL 1025 of 1995 - President - SHARKEY P - 26/10/95 - Unions 2945

Application for denied contractual entitlements - Applicant claimed contract of employment entitled a six months' Base Remuneration Package upon termination and that pay in lieu of notice was incorrectly calculated - Respondent argued payment of six months' Base Remuneration Package was only applicable upon completion of three month review period - Commission found all terms and conditions, including redundancy payment had applied during three month review period; and despite confusion between terms, Base Remuneration Package meant Base Salary Package and six months payment based on total in Base Remuneration Package was owed to Applicant - Commission further found that although an absence of an provision regarding notice period existed, one month's pay in lieu of notice had been received and Applicant could not demonstrate further entitlements - Granted in Part - Potts D.A. -v- Robowash Pty Ltd - APPL 831 of 1995 - SCOTT C. - 02/11/95 - Business Services 3334

INTERVENTION

[4]Application for stay of order against decision of Commission (75 WAIG 2443) pending appeal to Full Bench - Applicant claimed application for stay did not abuse process and contained substance, as previous application for stay was in relation to different appeal and that an application had been lodged for appeals to be joined and heard together - Respondent argued application was an abuse of process given that several appeals had been lodged against the same order and no new matters of relevance had arisen since the previous application for stay had been dismissed - President reviewed authorities and found on evidence that as application duplicated an application which had already been heard and determined and no persuasion of charged circumstance nor justification of stay had occurred, multiplicity of unnecessary and incompetent applications should not be dealt with - Dismissed - AUST ELECT, ELECTRONICS FOUND & Others -v- SCM Chemicals Ltd - APPL 918 of 1995 - President - SHARKEY P - 23/08/95 - Metal Ore Mining 2507

Application for registration of an industrial agreement to vary and renew a registered agreement and leave for intervention - Intervening union claimed that registration of the agreement should not occur as sufficient legitimate interest was demonstrated for intervention - Parties argued that no intervention of the union should occur as the extent of interest was only of passing significance - Commission reviewed authorities and found on evidence that although the union had sufficient interest to intervene if the Commission was obligated to register the industrial agreement the union would not have further scope to oppose the registration - Commission further found that matter further be heard to deal with the question of whether a mandatory obligation existed to register the agreement - Declared and Ordered Accordingly - Burswood Resort (Management) -v- LIQUOR & ALLIED INDUST UNION - AG 132 of 1995 - GIFFORD C. - 30/08/95 - Sport and Recreation 2522

Application for a stay of inquiry - Applicant claimed that in the inquiry some bias relating to the suspension of the applicant without pay existed, an intervention for further hearing and determination and a stay pending that hearing and determination was required - Respondent argued that as the conduct of inquiry was not an industrial matter, the application be dismissed and if classified as an industrial matter, Commission's involvement would create duplication as application was at a premature state - Commission found on evidence that as employer action prevented work, the matter was an industrial matter and under s.7C of the Education Act, there was no unnecessary duplication with Commission's involvement and inquiry be stayed to enable current application to be dealt with - Ordered Accordingly - STATE SCHOOL TEACHERS UNION -v- Hon Min for Educ, Employ & Training - C 173 of 1995 - BEECH C - 31/07/95 - Education 2631

Application for stay of inquiry on the grounds of denied natural justice - Applicants claimed that they were not informed of the allegations made against them and that the inquiry under s.7 of the Education Act had denied them natural justice - Commission found on evidence that it could not intervene as inquiry had been conducted in proper manner and therefore, the Chief Executive Officer had a right to initiate such an inquiry - Dismissed - STATE SCHOOL TEACHERS UNION -v- Hon Min for Education - C 251 of 1995 - BEECH C - Education 2871

CUMULATIVE DIGEST—*continued*

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INTERVENTION—*continued*

[4]Application for stay of decision - Applicant claimed that decision PSA AG2 of 1995 (75 WAIG 3052) be stayed pending the outcome of an appeal to the Full Bench with regards to questioning of an interpretation of section 41 of the I.R. Act, 1979 and a decision regarding the CSA's right for intervention - Applicant further claimed that the Public Service Arbitrator had not considered the provisions stipulated by section 80C(4) and section 41 of the Act and had erred in finding that the union had constitutional coverage when it did not consider the circumstances in which the amendments to constitution were sought - Respondent argued that the test set out in the "Hathaway Case" applied to the situation and that the Applicant did not satisfy it - President reviewed authorities and found on evidence that the decision of the Public Service Arbitrator be stayed temporarily pending the appeal to the Full Bench as the balance of to the question of coverage of the Path Centre and other health service enterprises - Furthermore, President found the seriousness of those questions pertaining to the application of sections 41 and 80C of the Act were also being addressed in the appeal - Granted - CIVIL SERVICE ASSOCIATION -v- WA Centre for Path & Med Resch - APPL 1311 of 1995 - President - SHARKEY P - 04/12/95 - Health Services 3177

JURISDICTION

Conference referred re long service leave entitlements - Applicant Union claimed that when calculating long service leave entitlements, Respondent incorrectly applied terms of long service leave provisions and the employee was entitled to the correct amount - Respondent argued that Commission lacked jurisdiction to hear and determine matter as the employment relationship was not continuous and as there was no likelihood that one would be re-established there was no basis for the claim - Commission reviewed authorities and found on evidence that although s.44 of the Act allowed the interpretation of an award as an element in the process of arbitration, it did not empower it to judicially act to interpret the terms of an award - Dismissed - AUST MEAT INDUSTRY EMPL UNION -v- Metro Meats - CR 121 of 1994 - PARKS C - 13/06/95 - Meat Product Manufacturing 2255

Conference referred re pro-rata long service leave entitlements - Applicant claimed that after having completed more than 12 months work and in accordance to Award provisions was entitled to pro-rata long service leave upon his termination - Respondent argued that as this was an enforcement of an award the Commission did not have the jurisdiction as matter was solely the province of the Industrial Magistrate - Commission reviewed authorities and found on evidence that it lacked jurisdiction as the claim was an enforcement of an Award and as no industrial matter existed there was no basis for bald interpretation - Dismissed for want of jurisdiction - D Bell -v- Fire Brigades Board - CR 43 of 1995 - SCOTT C. - 22/06/95 - Fire Brigade Services 2252

[2]Appeal against decision of Coal Industry Tribunal (unreported) re incorrect application of award and bias in determining matter - Appellant claimed Tribunal did not have jurisdiction to declare true meaning and effect of award, that it had erred in its interpretation of clause 26 of the award, that in declaring true meaning of award it failed to consider custom and practice of parties and that it was bias in its hearing and determination of matter - Respondent argued that the test was whether it was able to resolve questions with a fair and unprejudiced mind - Full Bench reviewed authorities and found Tribunal had erred and that a review of the decision of the Tribunal was warranted - Granted and Quashed - COAL MINERS' UNION, COLLIE -v- Western Collieries - APPL 153 of 1995 - Full Bench - SHARKEY P/COLEMAN CC/SCOTT C. - 10/08/95 - Coal Mining 2492

[1]Appeal against decision of Commission in Court Session (75 WAIG 22) re dismissed claim for Long Service Leave Entitlement - Appellant claimed Commission in Court Session erred in law by concluding that jurisdiction to hear matter came from incorrect section of the Act and that grounds of appeal constituted challenges to finding when they were challengeable on appeal - Respondent argued that 2 questions of whether the limitation of Commission in Court Session's jurisdiction was to review only errors of law and whether court could go behind finding of facts to determine sufficient evidence to support findings of fact needed to be addressed - Industrial Appeal Court reviewed authorities and found on evidence that it was not open to either the Commission in Court Session or the Industrial Appeal Court to go behind findings of fact and as Commission in Court Session was bound by findings there was no power to review findings for erred of law or to remit matter back to Board of Reference - Dismissed - Thomas Massam Real Estate -v- D Evans - IAC 19 of 1994 - Industrial Appeal Court - KENNEDY J/ROWLAND J/MURRAY J. - 04/08/95 - Property and Business Services 2473

[1]Appeal against decision of Full Bench (75 WAIG 551) re upheld and remitted appeal against decision of Commission (74 WAIG 3040) re dismissed claim for orders of discontinuance of Local Court Proceedings - Appellant claimed that Full Bench exceeded jurisdiction and erred in law in holding that Commission had jurisdiction to issue order sought which interfered with Local Court justice, in holding that provisions of I.R. Act were interpreted as conferring jurisdiction and that Commission had not afforded procedural fairness - Respondent argued that central issue was whether Commission had the power to make an order against matter relating to Local Court proceedings - IAC reviewed authorities and found that effect of orders sought before the Commission would have terminated action in Local Court and that as respondent's claim of Local Court judgement be stayed by Commission and become under the Commission control would not be made possible by Parliament, appeal is granted and Commission application pending be dismissed for want of jurisdiction - Granted - Robe River Iron -v- METALS & ENGINEERING WORKERS' - IAC 1 of 1995 - Industrial Appeal Court - FRANKLYN J/MURRAY J/SCOTT J. - 04/08/95 - Metal Ore Mining 2478

[2]Appeal against decision of the Commission (75 WAIG 745 and 976) re granted reinstatement without the loss of entitlements on the grounds of unfair dismissal - Appellant claimed that the decision should be quashed as the reinstatement exceeded the jurisdiction of the Commission, as it was not an industrial matter and raised public interest, that Commission erred in finding of terminated employment and that the appellant was engaged in the racing industry when the industry was of "labour hire" - Full Bench reviewed authorities and found on evidence that there was no justifiable reason for dismissal established on the evidence and as there was no agreement either collective or individual, nothing existed to suggest that the Commission erred in law - Full Bench further found Commission did have jurisdiction as order arose out of an industrial matter affecting and relating to the relationship of employee/employer - Dismissed - Southbrook Enterprises Pty -v- AUST MUNICIPAL, CLERICAL & SER - APPL 470 of 1995 - Full Bench - SHARKEY P/HALLIWELL SC/SCOTT C. - 01/09/95 - Sport and Recreation 2485

[4]Application for stay of decision of Commission (75 WAIG 2631) re hearing and determination of application - Appellant claimed Commission's jurisdiction to hear and determine matter was subject of an appeal to Full Bench and that matter should not proceed until appeal had been determined - Respondent argued no serious issue could be raised as application was premature and if stay was granted, Applicant could revoke earlier decision and suspend Respondent without pay - President found on evidence that serious issue of jurisdiction existed and appeal had been instituted with Appellant having sufficient interest - Granted - Hon Minister for Education -v- STATE SCHOOL TEACHERS UNION - APPL 938 of 1995 - President - SHARKEY P - 05/09/95 - Education 2509

CUMULATIVE DIGEST—*continued*

Page

JURISDICTION—*continued*

Application for a stay of inquiry - Applicant claimed that in the inquiry some bias relating to the suspension of the applicant without pay existed, an intervention for further hearing and determination and a stay pending that hearing and determination was required - Respondent argued that as the conduct of inquiry was not an industrial matter, the application be dismissed and if classified as an industrial matter, Commission's involvement would create duplication as application was at a premature state - Commission found on evidence that as employer action prevented work, the matter was an industrial matter and under s.7C of the Education Act, there was no unnecessary duplication with Commission's involvement and inquiry be stayed to enable current application to be dealt with - Ordered Accordingly - STATE SCHOOL TEACHERS UNION -v- Hon Min for Educ, Employ & Training - C 173 of 1995 - BEECH C - 31/07/95 - Education 2631

[1]Appeal against decision of Full Bench (75 WAIG 843) re dismissal of appeal concerning the conversion of temporary lecturers to permanent appointments - Appellant claimed Full Bench had erred in law as matter neither concerned the interpretation, application or inequity arising out of any Act or regulation governing the service of a teacher - Appellant accepted that under the Education Act regulations, he had the power to appoint temporary teachers to a permanent appointment, however argued that as a result of the agreement reached, offers were made to teachers and applications received but appointments did not follow as a result of a further administrative decision, therefore power to appoint was never exercised - IAC noted that above argument would mean all negotiations, agreements, promises and undertakings made on the part of the Appellant could be ignored, breached or withdrawn by him and that the GST Tribunal would have no power to deal with any inequity arising therefrom - IAC found this proposition to be entirely inconsistent with the objects of the Act - Dismissed - Hon Min for Education -v- STATE SCHOOL TEACHERS UNION - IAC 3 of 1995 - Industrial Appeal Court - KENNEDY J/FRANKLYN J/SCOTT J. - 08/09/95 - Education 2677

[2]Appeal against decision of Government School Teachers Tribunal re granted application for stay of inquiry (75 WAIG 1026) - Appellant claimed Tribunal erred in concluding that it had jurisdiction to stay an inquiry being conducted pursuant to Section 7C of Education Act and that it was not in the public interest to allow decisions of the Commission to take effect without jurisdiction - Respondent argued Full Bench lacked jurisdiction to determine appeal as sections of the Act when read together failed to take account of appeals from constituent authorities - Full Bench reviewed authorities and sections 7, 22A and 49 of the Act and found on evidence that it was entitled to deal with appeal and in the public interest, that stay of inquiry was only pending hearing and determination of T15 of 1994 and that Tribunal had jurisdiction to deal with matter by virtue of Section 78(1)(a)(ii) of the I.R. Act - Dismissed - Hon Min for Education -v- STATE SCHOOL TEACHERS UNION - APPL 116 of 1995 - Full Bench - SHARKEY P/GEORGE C/SCOTT C. - 27/09/95 - Education 2684

[2]Appeal against decision of Government School Teachers Tribunal re dismissed application for abolishment and re -advertising of particular positions (75 WAIG 1033) - Appellant claimed Tribunal erred in concluding that it lacked jurisdiction to deal with matter when proceedings concerned an industrial matter and interpretation of Acts governing teachers - Respondent argued that under Section 78(1) of the Act jurisdiction could not be founded - Full Bench reviewed authorities and found on evidence that under Section 78(1)(a)(ii) of the I.R. Act Tribunal had jurisdiction to deal with matter as positions required teaching qualifications included in definition of 'teacher' - Upheld and Remitted - STATE SCHOOL TEACHERS UNION -v- Hon Minister for Education - APPL 382 of 1995 - Full Bench - SHARKEY P/SCOTT C./GIFFORD C. - 20/09/95 - Education 2689

Application for alleged unfair dismissal - Applicant claimed that as employer/employee relationship existed, termination without notice was unfair and that compensation for damages to his car during an industrial dispute be paid - Respondent alleged that the Applicant was a self-employed contractor and that as there was a contract for services between the parties, the Commission lacked jurisdiction and that the application be struck out - Commission applied various tests to determine the true relationship between the parties and found on evidence that no employer/employee relationship existed - Commission further reviewed I.R. Act and found that the definition of "employee" was defined to also include "any person whose usual status is that of an employee" although in the circumstances of this case as no evidence existed that the Respondent had control in the Applicant's work, but rather that the Applicant was controlled by others, claim could not succeed based upon the definition of "employee" - Dismissed for want of jurisdiction - R Borg -v- Troubleshooters Available - APPL 731 of 1995 - BEECH C - 15/09/95 - Business Services 2852

Conference referred re date of resignation - Applicant claimed Respondent provided incorrect information upon which his resignation was based and that it was an industrial matter - Respondent argued Commission had no jurisdiction to deal with matter as no employer/employee relationship existed at time of application and recent amendments to the Act did not remedy the problem - Commission reviewed authorities and found on evidence that it did not have jurisdiction to deal with matter as it did not relate to existing or soon to be re-established employment relationship or a contractual benefit and therefore was not an industrial matter - Dismissed - CONSTRUCTION, MINING, ENERGY -v- Homeswest - CR 180 of 1995 - SCOTT C. - 16/08/95 - Community Services 2872

Application re severance payment - Applicant Union claimed that employees affected by National Rail Corporation arrangements were eligible for severance payments as they related to Category B employees in booklet - Respondent argued that Commission lacked jurisdiction to deal with matter as its power was removed by Public Sector Management Act and Public Sector Management (Redeployment and Redundancy) Regulations 1994 - Commission found on evidence that it lacked jurisdiction to hear matter on redundancy payments by lack of virtue of PSM Act and to issue order would be in conflict with public interest - Dismissed - METALS & ENGINEERING WORKERS' -v- W.A.G.R.C. - CR 151 of 1995 - SCOTT C. - 02/08/95 - Rail Transport 2874

[2]Appeal against decision of Commission (75 WAIG 2874) re severance payments - Appellant claimed that Commission erred in holding that it firstly lacked jurisdiction because by virtue of the Minister's decision, the employees were entitled to severance pay as defined by the agreement reached and in accordance to the appropriate Regulations and secondly, that it was not in the public interest to deal with the application as they were not given an opportunity to be heard in relation to that matter - Respondent argued that the order sought by the Appellant would be inconsistent with the Regulations and power granted to the Minister, and that a properly conducted hearing would not have produced a different result - Full Bench reviewed authorities and found on evidence that Commission had erred as it had a conditioned special power of review for aggrieved employees as the Minister's approval for higher severance payment to members of a particular class, advised by notice, effectively approved payment to individual employees which was consistent with the Regulations when read as a whole - Furthermore, Full Bench found Commission's decision to be wrong in law as it failed to afford natural justice by not providing a reasonable opportunity for the parties to be heard on the question of public interest and the question of any dismissal on that ground - Upheld and Remitted - METALS & ENGINEERING WORKERS' & Others -v- W.A.G.R.C. - APPL 941 of 1995 - Full Bench - SHARKEY P/BEECH C/GIFFORD C. - 30/10/95 - Rail Transport 2929

CUMULATIVE DIGEST—*continued*

Page

JURISDICTION—*continued*

[2]Appeal against decision of Commission (75 WAIG 1916) re application granting insertion of Easter Tuesday holiday clause - Appellant claimed Commission erred in finding; employees were legally entitled to Easter Tuesday as a paid holiday; by reaffirming a clause in the award that by error had been administratively included that was not the subject of an application by the parties; by not correcting the Commission Record of Order No. 308 of 1984 and by acting in excess of its jurisdiction by failing to refer the matter as a special case - Respondent raised preliminary point that some grounds for appeal should not be heard given that they were not raised in proceedings before the Commission at first instance - Full Bench reviewed authorities and found that all grounds should be heard as all matters were live issues - Full Bench further found Commission was not entitled to vary award by deleting Easter Tuesday as a paid holiday as the entitlement had existed by custom and usage since 1983 and was therefore an entitlement under a contract of service and that Commission at first instance did not act in excess of its jurisdiction by not referring the matter as a special case - Dismissed - Minister for Health -v- LIQUOR, HOSPITALITY & MISC - APPL 608 of 1995 - Full Bench - SHARKEY P/GEORGE C/SCOTT C. - 08/11/95 - Health Services 2934

Application for contractual entitlements on the grounds of unfair dismissal - Applicant claimed he was entitled to non -award contractual entitlements - Respondent argued that the Commission lacked jurisdiction as no industrial matter existed because there was no employment relationship and furthermore negotiations between the parties resulted in matters being settled - Commission reviewed authorities and noted that although the responsibility for the implementation of the Company's concepts lay with the Respondent, relevant indicia proving continuation of previous employment relationship could not be demonstrated by Applicant - Commission found on evidence that Applicant was conducting his own business and thus no industrial matter existed - Dismissed - D A Wedd -v- Interactive Tele Media P/L - APPL 596 of 1995 - SCOTT C. - 01/11/95 - Communication Services 3074

Conference referred re claim for a site allowance - Respondent argued that a site allowance was not warranted and that the Commission should refrain from further dealing with matter as AIRC found employees have federal award coverage which was subject to appeal - Commission found on evidence that given the decision to grant federal award coverage for labourers employed by virtue of the extension of the federal award and given the dismissed appeal, no claim could be made for such an entitlement - Dismissed - BUILDERS LAB, PAINTERS, PLAST -v- Building Management Authority - CR 72,73 of 1995 - SCOTT C. - 26/10/95 - General Construction 3087

[2]Appeal against decision of Industrial Magistrate (unreported) re breach of Award - Appellant sought that decisions issued by Industrial Magistrate ordering the supply of certain particulars of complaint be quashed - Full Bench reviewed authorities and found on evidence that as the complaints were made in relation to a Federal Award by a Federal Organisation, they did not satisfy the relevant criteria of the Act and although the lack of jurisdiction in the Industrial Magistrate's Court to hear and determine such complaints was not brought up as a ground of appeal, it was the duty of the appellate court to entertain such a plea - Upheld and Quashed - TRANSPORT WORKERS UNION -v- Kalgoorlie Fuel - APPL 544 of 1995 - Full Bench - SHARKEY P/PARKS C/GIFFORD C. - 23/10/95 - Services to Transport 2944

Conference referred re site allowance at Crawley Avenue/Mounts Bay Road construction site - Applicant union claimed that the Commission according to section 26A of the I.R. Act, 1979 could not receive in evidence, or inform itself, of any workplace agreement in existence to determine its jurisdiction and that the work performed by the employees on the site was covered by the I.R. Act - Respondent argued that the employees on the worksite were covered by Workplace Agreements pursuant to the Workplace Agreements Act and that the Commission lacked jurisdiction to deal with the matter - Commission found on evidence that no work performed by the Applicant in any period was covered by the I.R. Act and in accordance to sections 7C and 7D of the I.R. Act, lacked jurisdiction as it did not constitute an industrial matter - Decision Issued - Relative Reasons for Decision and Order published at 75 WAIG 3088 - BUILDERS LAB, PAINTERS, PLAST -v- Southdown Construction Co P/L & Others - CR 218 of 1995 - SCOTT C. - 19/09/95 - General Construction 3357

Conference referred re termination and denied access - Applicant Union claimed industrial matter existed as employee/employer relationship was affected by third party - Respondents opposed claims on grounds that Commission lacked jurisdiction as no employer/employee relationship existed - Commission found on evidence that industrial matter existed and that it had jurisdiction to make order sought - Discontinued - METALS & ENGINEERING WORKERS' -v- East Perth Electrical Services - CR 463 of 1994 - HALLIWELL SC - 16/02/95 - Metal Ore Mining 3358

LEAVE WITHOUT PAY

Application for reinstatement on the grounds of unfair dismissal - Applicant claimed termination was unfair as the consequences of taking unauthorised leave or of continued poor work/store performance were not brought to her attention - Respondent argued Applicant was advised that to proceed overseas was at her own risk in so far as continuity of employment as Manager was concerned - Commission found on evidence that as it was made clear to Applicant that taking leave of absence (albeit unpaid) was a direct breach of a lawful order from the Respondent and could lead to an alteration to position within the store during her absence termination was justified - Dismissed - E Nydegger -v- Tredways Shoe Store & Other - APPL 133 of 1995 - HALLIWELL SC - 07/07/95 - Retail Trade 2244

Application for interpretation of Award - Applicant claimed illness had caused her absence from work and was entitled to payment for holidays incurred in that period pursuant to Clause 17(3) of Meat Industry (State) Award No. R9 of 1979 - Respondent argued that absence was on the working day before, on and after the public holiday due to illness and was on unpaid sick leave without pay - Commission reviewed authorities and Award and found on evidence that Applicant was not entitled to payment as she was absent from work on the holidays and could not have performed work on those days, as required by the provisions of the Award - Reasons for Decision Issued Only - AUST MEAT INDUSTRY EMPL UNION -v - Action Food Barns - APPL 341 of 1995 - BEECH C - 26/09/95 - Food Retailing 2846

Application for reinstatement on the grounds of unfair dismissal - Applicant claimed family circumstances caused the need for him to be absent from his employment, that he was unable to obtain definitive advice as to when he could return and that his failure to comply with the necessary documentation was an oversight attributable to the difficulties he had been experiencing and not a conscious act - Respondent argued that Applicant's prolonged absence had attributed to serious manning difficulties, irregularities in usual rostering systems, increased hours of work for other staff and decreased staff morale and that special leave could not be granted because of staff shortages - Commission found on evidence that whilst Applicant had been confronted with several domestic problems that had required his absence from work, he had ignored the needs of the Respondent and as all leave except special leave had been granted, termination was not unfair - Dismissed - GN Smith -v- Western Mining Corporation Ltd - APPL 1067 of 1994 - PARKS C - 30/10/95 - Services to Mining 3072

CUMULATIVE DIGEST—*continued*

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LONG SERVICE LEAVE

Conference referred re pro-rata long service leave entitlements - Applicant claimed that after having completed more than 12 months work and in accordance to Award provisions was entitled to pro-rata long service leave upon his termination - Respondent argued that as this was an enforcement of an award the Commission did not have the jurisdiction as matter was solely the province of the Industrial Magistrate - Commission reviewed authorities and found on evidence that it lacked jurisdiction as the claim was an enforcement of an Award and as no industrial matter existed there was no basis for bald interpretation - Dismissed for want of jurisdiction - D Bell -v- Fire Brigades Board - CR 43 of 1995 - SCOTT C. - 22/06/95 - Fire Brigade Services 2252

Conference referred re long service leave entitlements - Applicant Union claimed that when calculating long service leave entitlements, Respondent incorrectly applied terms of long service leave provisions and the employee was entitled to the correct amount - Respondent argued that Commission lacked jurisdiction to hear and determine matter as the employment relationship was not continuous and as there was no likelihood that one would be re-established there was no basis for the claim - Commission reviewed authorities and found on evidence that although s.44 of the Act allowed the interpretation of an award as an element in the process of arbitration, it did not empower it to judicially act to interpret the terms of an award - Dismissed - AUST MEAT INDUSTRY EMPL UNION -v- Metro Meats - CR 121 of 1994 - PARKS C - 13/06/95 - Meat Product Manufacturing 2255

[3]Appeal against decision of Board of Reference (75 WAIG 1956) re Long Service Leave Entitlements - Applicant claimed Board of Reference erred in finding that nature of sickness was not demonstrated to justify termination - CICS reviewed authorities and found that it lacked jurisdiction as employment was found to be by termination not resignation - Dismissed - AUSTRALIAN WORKERS' UNION -v- Western Mining Corporation Ltd - APPL 643 of 1995 - Commission in Court Session - HALLIWELL SC/SCOTT C./GIFFORD C. - 25/07/95 - Mining 2318

Application for supplementary hearing re pro-rata long service leave entitlements - Applicant claimed that he had failed to submit the correct evidence in the previous hearing (BOR 22 of 1995; 75 WAIG 438) and requested a further hearing on the grounds of sufficient evidence seeking previous determination - Respondent argued that within the provisions of the Long Service Leave Act 1958 an appeal process was available to the Applicant and that the Board of Reference was not able to deal with the matter again - BOR found on evidence that it did not have the wide discretion under the Act to allow a supplementary hearing - Dismissed - J Yewdall -v- Midland Datsun Pty Ltd - BOR 3 of 1995 - Board of Reference - CARRIGG R./UPHILL J./LATTER W.S. - 31/07/95 - Motor Vehicle Retailing & Services 2430

Application re entitlement to pro-rata long service leave and quantum - Applicant claimed that her absence from employment was a result of her taking annual leave and that her employment was continuous as she did not enter into new employment contractual relationships when she changed positions within the organisation - Respondent argued that absence from employment was due to termination - Board of Reference reviewed authorities and found on evidence that Applicant's employment revealed neither an actual termination nor a re-engagement - BOR further found that the Applicant had continuity of employment with the Respondent and was therefore entitled to pro-rata long service leave entitlements - Granted - D A Evans -v- Meccan T/A Thomas Massam Real - BOR 4 of 1995 - Board of Reference - LOVEGROVE DR - 11/09/95 - Property Services 2846

Application re re-establishment of continuous employment prior to termination - Applicant claimed that she was employed by the Respondent in several occupations without a break in service and therefore was entitled to pro-rata long service leave entitlements - Board of Reference reviewed authorities and found on evidence that it lacked jurisdiction to deal with matter under the Long Service Leave Act 1958 since the Applicant was employed under the provisions of an Award and therefore the Board would have to be constituted under Long Service Leave Standard Provisions - Dismissed - D A Evans -v- Meccan T/A Thomas Massam Real - BOR 5 of 1994 - Board of Reference - LOVEGROVE DR - 11/09/95 - Property Services 2848

Application for pro-rata long service leave entitlements - Applicant claimed that she was entitled to pro-rata long service leave on the grounds sought as notice of termination was received in an unjust manner - Respondent argued that termination of employment was due to the shop being sold and self managed by the new proprietor, so services were no longer required - Board of Reference found on evidence that Applicant's employment with the Respondent was less than the period required for long service leave and did not qualify for such an entitlement - Dismissed - Goodlich -v- Gumnut Nom T/A Colt Stationery - BOR 9 of 1995 - Board of Reference - CARRIGG R./Jones D.M./Latter W.S. - 10/11/95 - Personal & Household Good Rtlg 3331

MANAGERIAL PREROGATIVE

[1]Appeal against decision of Full Bench (75 WAIG 1787) upholding appeal against decision of Commission in dismissing application for reinstatement on the grounds of unfair dismissal - Appellant claimed that majority Full Bench erred in accepting that unfairness did not exist in circumstances and findings of minority decision should be made to be correct - Respondent argued that Commission and majority Full Bench decisions were correct in that employment was finalised on the basis that no alternative position existed and employee's intention to resolve claim in common law arena - IAC found on evidence that the facts found could not lead to finding of "unilateral" termination as no duress or threats existed and could not discern neither error of law or fact in the results drawn by the majority Full Bench in their disposal of the matter - Dismissed - Durham -v- Westrail - IAC 9 of 1995 - Industrial Appeal Court - KENNEDY J./ROWLAND J./ANDERSON J. - 03/11/95 - Rail Transport 3163

Application for continuation of tool allowance payment - Applicant union claimed that the employees' utilisation of their own tools was a clear custom and practice and that the relevant allowance was part and parcel of their remuneration - Respondent argued that the allowance was unnecessary as tools were currently provided to employees in review of security and operational procedures on the premises - Commission found on evidence that the payment of the tool allowance had not arisen from custom and practice but was an award obligation and that as Respondent had exercised its discretion fairly, did not have to continue the payment - Ordered Accordingly - METALS & ENGINEERING WORKERS' -v- WA MINT - CR 171 of 1995 - GIFFORD C. - 06/10/95 - Metal Product Manufacturing 3364

MANNING

Application for reinstatement on the grounds of unfair dismissal - Applicant claimed family circumstances caused the need for him to be absent from his employment, that he was unable to obtain definitive advice as to when he could return and that his failure to comply with the necessary documentation was an oversight attributable to the difficulties he had been experiencing and not a conscious act - Respondent argued that Applicant's prolonged absence had attributed to serious manning difficulties, irregularities in usual rostering systems, increased hours of work for other staff and decreased staff morale and that special leave could not be granted because of staff shortages - Commission found on evidence that whilst Applicant had been confronted with several domestic problems that had required his absence from work, he had ignored the needs of the Respondent and as all leave except special leave had been granted, termination was not unfair - Dismissed - GN Smith -v- Western Mining Corporation Ltd - APPL 1067 of 1994 - PARKS C - 30/10/95 - Services to Mining 3072

CUMULATIVE DIGEST—*continued*

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MISCONDUCT

Application for reinstatement on the grounds of unfair dismissal - Applicant claimed termination was unfair as the consequences of taking unauthorised leave or of continued poor work/store performance were not brought to her attention - Respondent argued Applicant was advised that to proceed overseas was at her own risk in so far as continuity of employment as Manager was concerned - Commission found on evidence that as it was made clear to Applicant that taking leave of absence (albeit unpaid) was a direct breach of a lawful order from the Respondent and could lead to an alteration to position within the store during her absence termination was justified - Dismissed - E Nydegger -v- Tredways Shoe Store & Other - APPL 133 of 1995 - HALLIWELL SC - 07/07/95 - Retail Trade 2244

Application for reinstatement on the grounds of unfair dismissal - Applicant union claimed termination based upon activities as union shop steward was materially unrelated to employment, and as employee recieved no adequate warning, termination was unjust - Respondent argued termination was a result of poor performance and in using position as shop steward to victimise member of management - Commission found on evidence that as employee's behaviour could not be excused on the basis of union position and as there existed lack of managerial trust, the relationship could not be restored and Commission's interference could not be justified - Dismissed - SHOP, DIST & ALLIED EMPL UNION -v- Foodland Associated Limited - CR 48 of 1994 - COLEMAN CC - 19/04/95 - Wholesale Trade 2258

Application for reinstatement without loss of entitlements on the grounds of unfair dismissal - Applicant claimed that the process which led to dismissal was harsh and unjust as performance and conduct had not been reasonably and competently assessed and that the reasons for dismissal were other than those stated - Respondent argued that dismissal was for poor performance and unsatisfactory conduct and that dismissal was not unfair - Commission reviewed authorities and found on evidence that Applicant had not discharged onus of proof necessary to establish that there was unfairness associated with his dismissal on account of poor performance and unsatisfactory conduct - Dismissed - BM Drake -v- B.P. Refinery (Kwinana) - APPL 640 of 1994 - PARKS C - 25/07/95 - Mining 2431

Application for reinstatement on the grounds of unfair dismissal - Applicant claimed that termination was unfair as it was based on the outcome of an accident which was not caused by negligence - Respondent argued that Applicant's work and safety performance was of poor standard and malicious damage had been caused to company property - Commission found on evidence that accident was a result of Applicant's error of judgement and that although behaviour was unsafe, it was a first offence and as a seven year satisfactory safety and work service record existed, the dismissal was unfair - Discontinued - C A Duthie -v- Hamersley Iron Pty Limited - APPL 583 of 1995 - HALLIWELL SC - 04/07/95 - Mining. 2434

Application for hearing and determination of appeal against decision of Commission (74 WAIG 2274) and for production of documents - Appellant claimed as grounds for appeal had not been dealt with the matter should be listed for hearing - Respondent argued Commission should discontinue appeal as it was served on two years after the fact and that documents sought were not relevant to grounds of appeal - Commission found on evidence that appeal had not been extinguished by amending legislation, that Respondent was aware of the appeal, that a remedy to the appeal could be effected notwithstanding the passage of time and that the grounds of appeal should be amended to allow for production of documents - Preliminary Reasons for Decision Issued Only - W G Antoniak -v- Ministry of Education - APPL 764 of 1995 - BEECH C - 07/09/95 - Education 2610

Application for contractual entitlements on grounds of unfair dismissal - Applicant claimed that he was owed monies relating to a telephone account and commission, and as no notice was given for termination, it warranted it as unfair - Respondent argued that the commission did not constitute part of Applicant's contractual arrangements and that dismissal resulted from misconduct for accepting premiums, for taking money from the tin and for dishonouring cheques - Commission reviewed authorities and found on evidence that the events which led to the Applicant's dismissal constituted misconduct and as notice was also given dismissal was not unjust or harsh - Commission further found that the deduction for telephone expenses should not have occurred - Ordered Accordingly - P R Courtland -v- Oaklea Pty Ltd - APPL 501 of 1995 - SCOTT C. - 24/08/95 - Insurance 2854

[2]Appeal against decision of Commission (75 WAIG 1662) re dismissed claim for contractual entitlements on the grounds of unfair dismissal - Appellant claimed that Commission erred at first instance because he wanted the proceedings to remain open until certain matters were cleared and to have the retraction of the accusation of theft made by the Respondent to be in writing - Full Bench reviewed authorities and found on evidence that the Commission did not err in the exercise of its discretion as the Agreement struck between the parties had been partially performed by the Appellant and completely performed by the Respondent and therefore extinguished Appellant's application - Application for cost by Respondent dismissed - Ordered Accordingly - M Bradbury -v- Great Western Real Estate - APPL 462 of 1995 - Full Bench - SHARKEY P/BEECH C/GIFFORD C. - 24/10/95 - Property Services 2927

[4]Application re breach of Union Rules - Applicant claimed that his improper suspension from the General Committee be declared null and void and that he be reinstated with all his rights and privileges being restored because he was harassed by General Officers and General Committee members who also did not observe and administer the registered rules of the Union in a proper manner - Respondent denied allegations of harassment and argued that the Applicant was suspended for an indefinite period on charges of misconduct and that the decision was revoked prior to the hearing and determination of this application - President found on evidence that the manner in which the meeting was held involving the suspension of the Applicant was not provided for in the rules, and whilst there was insufficient evidence of harassment and intimidation, the President of the Union had failed to carry out his duties to control the effectively - Ordered Accordingly - D K Hathaway -v- LOCOMOTIVE ENGINE DRIVERS UNION - APPL 502 of 1995 - President - SHARKEY P - 17/07/95 - Various 2948

Application for reinstatement without loss of entitlements on the grounds of unfair dismissal - Applicant denied having smoked cannabis during a shift and claimed that he had been denied procedural fairness, that as the investigation was not conducted in a proper and thorough manner it contained procedural flaws and that he was not made aware of the 'Discipline Procedure' or 'Fair Treatment Procedure' - Respondent argued a proper and extensive investigation followed the incident and that they had reasonable grounds for believing that the Applicant had smoked cannabis during a shift - Commission reviewed authorities and found on evidence that cannabis had been smoked in one of the Respondent's trucks during the shift; that Applicant had been made aware of implications of smoking cannabis; that Respondent had exercised fairness in carrying out investigation into incident and that although Applicant had not exhibited effects of cannabis smoking, his termination was justified on the grounds of misconduct - Dismissed - N G Benck -v- Hamersley Iron Pty Limited - APPL 73 of 1995 - GIFFORD C. - 30/10/95 - Metal Ore Mining 3058

CUMULATIVE DIGEST—*continued*

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NATURAL JUSTICE

[4]Application for stay of order against Commission (75 WAIG 2443) pending appeal to Full Bench - Appellant claimed that the orders were ultra vires and unenforceable as they denied union members access to elected representatives and breached the Act as they denied natural justice and were without precise term or limitations - Appellant further claimed that the Commission erred in law in issuing orders which compelled officers to breach organisation rules - Respondent argued that the industrial action was unjustified and in breach of the orders in place - President reviewed authorities and found on evidence that as no inconvenience other than an inability to communicate had occurred, no circumstances existed to grant a stay of order and it would be a matter for the Full Bench should the grounds of appeal be expedited - Dismissed - CONSTRUCTION, MINING, ENERGY & Others -v- SCM Chemicals - APPL 854 of 1995 - President - SHARKEY P - 07/08/95 - Petroleum Coal Chemical Assoc 2510

Application for stay of inquiry on the grounds of denied natural justice - Applicants claimed that they were not informed of the allegations made against them and that the inquiry under s.7 of the Education Act had denied them natural justice - Commission found on evidence that it could not intervene as inquiry had been conducted in proper manner and therefore, the Chief Executive Officer had a right to initiate such an inquiry - Dismissed - STATE SCHOOL TEACHERS UNION -v- Hon Min for Education - C 251 of 1995 - BEECH C - Education 2871

[2]Appeal against decision of Commission (75 WAIG 2874) re severance payments - Appellant claimed that Commission erred in holding that it firstly lacked jurisdiction because by virtue of the Minister's decision, the employees were entitled to severance pay as defined by the agreement reached and in accordance to the appropriate Regulations and secondly, that it was not in the public interest to deal with the application as they were not given an opportunity to be heard in relation to that matter - Respondent argued that the order sought by the Appellant would be inconsistent with the Regulations and power granted to the Minister, and that a properly conducted hearing would not have produced a different result - Full Bench reviewed authorities and found on evidence that Commission had erred as it had a conditioned special power of review for aggrieved employees as the Minister's approval for higher severance payment to members of a particular class, advised by notice, effectively approved payment to individual employees which was consistent with the Regulations when read as a whole - Furthermore, Full Bench found Commission's decision to be wrong in law as it failed to afford natural justice by not providing a reasonable opportunity for the parties to be heard on the question of public interest and the question of any dismissal on that ground - Upheld and Remitted - METALS & ENGINEERING WORKERS' & Others -v- W.A.G.R.C. - APPL 941 of 1995 - Full Bench - SHARKEY P/BEECH C/GIFFORD C. - 30/10/95 - Rail Transport 2929

NEXUS

Application for variation of award re $8.00 Arbitrated Safety Net Adjustment - Parties consented for Application No. 400B to be divided into two to deal with amendment in respect to wage increase available under the State Wage Case and an enterprise flexibility clause, respectively - Commission found on evidence that the tests to be applied were met for wage adjustments and that retrospectivity was also fair as other parties to the Award had already received the increase - Commission further found that application for enterprise flexibility clause was dismissed as parties consented that it should not be varied - Granted in Part - AUST MUNICIPAL, CLERICAL & SER -v- Totalisator Agency Board & Other - APPL 400B of 1995 - SCOTT C. - 24/07/95 - Sport and Recreation 2809

Application to vary work order re insertion of redundancy provisions - Applicant Unions claimed redundant employees be paid equivalent of 26 weeks' pay, pro-rata long service leave (regardless of length of service), relocation and travel expenses as awards applicable in area of project contained these provisions and intention existed to provide security employees with wages and conditions similar to those of award regulated employees of Woodside - Respondent did not oppose introduction of redundancy provisions but argued that according to State Wage Principles, claims based on a nexus with provisions applicable to other employees could not be relied upon; that the purpose of relocation and travel expenses was to return employees to their place of engagement and the definition of redundancy should be more expressly defined so as not to include the loss of a contract - Commission reviewed authorities and found that it was open to prescribe redundancy provisions as contained in Metal Trades (General) Award but in the best interest of all it would consolidate terms of order and redundancy provisions - Granted in Part - LIQUOR, HOSPITALITY & MISC -v- Wormald Security - APPL 326 of 1993;APPL 344 of 1994 - PARKS C - 05/09/95 - Business Services 3340

ORDER

[4]Application for stay of decision of Commission (75 WAIG 2631) re hearing and determination of application - Appellant claimed Commission's jurisdiction to hear and determine matter was subject of an appeal to Full Bench and that matter should not proceed until appeal had been determined - Respondent argued no serious issue could be raised as application was premature and if stay was granted, Applicant could revoke earlier decision and suspend Respondent without pay - President found on evidence that serious issue of jurisdiction existed and appeal had been instituted with Appellant having sufficient interest - Granted - Hon Minister for Education -v- STATE SCHOOL TEACHERS UNION - APPL 938 of 1995 - President - SHARKEY P - 05/09/95 - Education 2509

[4]Application for stay of order against Commission (75 WAIG 2443) pending appeal to Full Bench - Appellant claimed that the orders were ultra vires and unenforceable as they denied union members access to elected representatives and breached the Act as they denied natural justice and were without precise term or limitations - Appellant further claimed that the Commission erred in law in issuing orders which compelled officers to breach organisation rules - Respondent argued that the industrial action was unjustified and in breach of the orders in place - President reviewed authorities and found on evidence that as no inconvenience other than an inability to communicate had occurred, no circumstances existed to grant a stay of order and it would be a matter for the Full Bench should the grounds of appeal be expedited - Dismissed - CONSTRUCTION, MINING, ENERGY & Others -v- SCM Chemicals - APPL 854 of 1995 - President - SHARKEY P - 07/08/95 - Petroleum Coal Chemical Assoc 2510

[4]Application for an order re suspension of union rules with regards to elections - Applicant claimed rules which required elections to be held should be suspended pending the hearing and determination of Application Nos. 658 and 659 of 1995 which sought a certificate under section 71 of the I.R. Act - Respondent Union supported application as State members were informed of the applications, Federal and State organisations operated from the same office, Federal branch elections were approaching and that disruption of orderly management of branches would occur if State and Federal branches selected different officers - President reviewed authorities and found on evidence that if applications were successful, election would be unnecessarily held, organisation would incur expense and possible disruption, democratic control of organisation would be detracted from and thus, provided members were informed of postponement of State elections, stay would be granted - Ordered Accordingly - W Game -v- AUST ELECT, ELECTRONICS FOUND - APPL 662 of 1995 - President - SHARKEY P - 28/07/95 - Unions 2512

CUMULATIVE DIGEST—*continued*

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PENALTY RATES

Application for interpretation of award re shift work and over-tally and penalty rates - Applicant Union claimed that upon the introduction of an afternoon shift employees on day work were deemed by the award to be on morning shift - Commission reviewed authorities and Clauses 11, 12, 15 and 30 of the award and found that as day workers were not deemed morning shift workers or shift workers by any provision of the award and that the introduction of an afternoon shift would not change their status and issuance of decision would, to necessary extent, cancel previous Order C375 of 1994 - Decision Issued Only - Metro Meat International -v- AUST MEAT INDUSTRY EMPL UNION - APPL 1051 of 1994 - BEECH C - 05/07/95 - Meat Product Manufacturing 2241

Application for new enterprise based award - Applicant Union claimed that award should reflect contractual entitlements to be paid on termination and award offered as alternative to workplace agreement for new employees - Applicant Union further claimed that award should include part-time employment provision for 'permanent casuals', casual employment to be less than one month, paid commission structure, changes in ordinary hours worked on Saturday, position based classification structure, continuous employment service, a 'no reduction' clause and retrospect date of operation - Respondent argued contractual entitlements should be paid to terminated employees by the fifteenth of the following month and that legislation gave it the right to offer new employees workplace agreements rather than awards - Respondent further argued that employment of casuals for less than one month would be too restrictive, that the right to vary structure of commission on basis of changes in market should be retained, that award did not need a 'no reduction' clause and that retrospectivity should not be granted - Commission reviewed authorities and found on evidence that all claims had been developed in argument aside from annual leave claim and that Commission could not see any justification to depart from usual annual leave provisions and payment at double time for hour worked after 12 pm was not a feature of the industry - Granted in Part - LIQUOR, HOSPITALITY & MISC -v- Jenny Craig Weight Loss Centres - A 1 of 1994 - BEECH C - 26/09/95 - Personal Services 2746

PRINCIPLES

Application to vary awards re rostering, shift allowances, weekend and holiday allowances and underground travel time provisions - Applicant union claimed that the current seven and a half hour shifts be maintained and a provision for overtime in relation to shifts worked beyond those hours be included to accommodate two hour shifts - Respondent argued that the history and nature of contracts demonstrated the remuneration was over and above remuneration covered by awards and shift work was found to be less desirable as it brought certain social problems and health concerns - Respondent further argued that as there was a linkage between the legislative requirements for underground work and the award provisions, negotiations involving more working hours or days could not be done - Commission reviewed authorities and found on evidence that, on balance, whilst there were were some disadvantages for some employees, there was generally a vast improvement in their working situation and their personal lives and that the awards should be amended accordingly - Granted in Part - AUSTRALIAN WORKERS' UNION -v- Western Mining Corporation Ltd - APPL 1522 of 1991;APPL 1108,1109 of 1992 - GREGOR C - 20/01/95 - Mining 2181

Conference referred re claim for a site allowance at the Tiwest Pigment Process Plant, Kwinana - Applicant claimed that the requirements for site allowances set out by previous Full Bench case had been met and that the allowance in place was inadequate and needed to be varied in line with the Wage Fixing Principles - Respondent argued that as the requirements were not met it objected and opposed claim - Commission reviewed authorities and found on evidence that due to the hazardous nature of the work performed on site, the requirements were met - Granted in Part - METALS & ENGINEERING WORKERS' -v- Vulcan Engineering & Others - CR 92 of 1995 - HALLIWELL SC - 07/06/95 - Construction 2257

[3]Applications for variations to awards re $8.00 Arbitrated Safety Net Adjustment - Applicant claimed that applications had satisfied requirements set out in Principles for second arbitrated safety net adjustment and they did not impede on operation of $8.00 wage adjustment as "offsetting" provisions were included - Respondent argued that Award Modernisation clause which operated in awards was inadequate to satisfy award variation under arbitrated safety net adjustment Principle and existing provisions were inconsistent with Wage Fixing Principles - CICS reviewed authorities and found that none of the applications gave rise to special circumstances with regard to date of operation second arbitrated safety net, that the applications whose period had elapsed since first arbitrated safety net would apply in June and the others would be an efflux of time from first $8.00 adjustment - Granted in Part - LIQUOR, HOSPITALITY & MISC -v- Min for Community Development - APPL 1106 of 1994 - Commission in Court Session - COLEMAN CC/GEORGE C/SCOTT C. - 29/06/95 - Various 2322

Application to vary award re $8.00 Arbitrated Safety Net Adjustment - Applicant claimed that absorption of $8.00 could not occur as other increases were awarded prior to November 1991 - Respondent argued that $8.00 payment would be absorbed into the $12.00 payment, resulting in no net increase to employees concerned - Commission reviewed authorities and found on evidence that as employees had not received a wage increase since November 1991 and that the parties appeared to be continuing to implement award restructuring, the first arbitrated safety net adjustment should be absorbed into the $12.00 payment - Granted - AUSTRALIAN WORKERS' UNION -v- Hon Min for Education & Others - APPL 268 of 1995 - BEECH C - 11/07/95 - Education 2427

Application to vary award re $8.00 Safety Net Adjustment - Applicant claimed that the single classification of probationary security officer (shift employee) had not received a wage increase since the 1992 Order and should recieve the first arbitrated safety net increase - Respondent argued that employees covered by the Order had received wage increases in excess of $8.00 due to enterprise bargaining - Commission reviewed authorities and found on evidence that circumstances warranting previous increase and 1992 order did not generally apply to security officers, that increases had been awarded for reasons of enterprise bargaining and to award an increase to a single classification in which no-one was employed would have little purpose - Dismissed - LIQUOR, HOSPITALITY & MISC -v- Wormald Security - APPL 1609 of 1993 - BEECH C - 14/07/95 - Property and Business Services 2442

[2]Appeal against decision of Commission (75 WAIG 401 & 955) re dismissed application for correction to omission of application - Appellant claimed matter should be relisted as failure of the order to take into account Fifth Schedule of award resulted from an omission in original application and members would be denied benefits - Full Bench reviewed authorities and found that as application was for variation of First not Fifth Schedule of award, Commission had not erred and as it had discharged all of its function, was functus officio and could not entertain application to relist matter - Full Bench further found that application for extension of time was dismissed and as no grounds of appeal had been made, so must appeals - Dismissed - AUST ELECT, ELECTRONICS FOUND & Other -v- Building Management Authority - APPL 455,495 of 1995 - Full Bench - SHARKEY P/COLEMAN CC/GEORGE C - 23/08/95 - Construction Trade Services 2483

Application to vary award re $8.00 Safety Net Adjustment - Respondent argued that variation of $8.00 safety net pursuant to December 1993 State Wage Case could not occur as award was paid rates award - Commission reviewed authorities and found that rates paid were minimum rates and commitment of parties to structural reform enabled the variation to occur - Granted - LIQUOR, HOSPITALITY & MISC -v- Ministry of Education - APPL 1553 of 1993 - COLEMAN CC - 15/08/95 - Various 2547

CUMULATIVE DIGEST—*continued*

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PRINCIPLES—*continued*

Application to vary award re second $8.00 arbitrated safety net adjustment - Parties consented to variation - Commission found that as 1st arbitrated safety net application had been granted, application complied with the requirements of the Principles and that to delay application would be counterproductive and delay reform initiatives - Granted - SALARIED PHARMACISTS ASSOC -v- Perth United Friendly & Others - APPL 540 of 1995 - GEORGE C - 08/08/95 - Personal & Household Good Retailing 2596

Application for a site allowance - Applicant claimed that a site allowance be provided as the work environments were often excessively hot, dirty, noisy and excessive vibration was experienced - Respondent argued that the precedent cases were not valid and that in line with the Wage Fixing Principles the applicant had not shown a significant change in the work, the skill or responsibility required or the conditions to warrant an increase - Commission reviewed authorities and found on evidence that as application did not seek to vary the award it could not attract the consideration of the Work Value Principle and the rate already paid was not adequate to compensate for the conditions and the duration to which the employees were subjected to such disabilities - Granted in Part - AUST ELECT, ELECTRONICS FOUND -v- ABB Installation and Service - CRA 133 of 1995 - COLEMAN CC - 24/08/95 - Construction Trade Services..... 2633

Application to vary award re $8.00 Arbitrated Safety Net Adjustment - Applicant Union claimed as Appendix D had been amended for first safety net adjustment and it satisfied State Wage Principles, both Appendix D and Clause 9 should be amended to reflect second safety net adjustment - Respondent consented to Appendix D receiving second safety net adjustment, but argued that application for amendment to Clause 9 did not comply with Principles - Commission reviewed authorities and found on evidence that second safety net adjustment could not be applied to Clause 9 as it did not comply with Principles, but that the first safety net adjustment and structural efficiency increase should be applied as no wage increase had been granted since November 1991 - Granted in Part - BUILDERS LAB, PAINTERS, PLAST & Others -v- Hon Min for Works & Others - APPL 520 of 1995 and 639 of 1995 - SCOTT C. - 02/08/95 - General Construction 2802

Application for variation of award re $8.00 Arbitrated Safety Net Adjustment - Parties consented for Application No. 400B to be divided into two to deal with amendment in respect to wage increase available under the State Wage Case and an enterprise flexibility clause, respectively - Commission found on evidence that the tests to be applied were met for wage adjustments and that retrospectivity was also fair as other parties to the Award had already received the increase - Commission further found that application for enterprise flexibility clause was dismissed as parties consented that it should not be varied - Granted in Part - AUST MUNICIPAL, CLERICAL & SER -v- Totalisator Agency Board & Other - APPL 400B of 1995 - SCOTT C. - 24/07/95 - Sport and Recreation 2809

Application to vary awards re $8.00 Arbitrated Safety Net Adjustment and enterprise flexibility provisions - Applicant Union claimed enterprise flexibility provisions should ensure formal establishment and observance of consultative processes involving the Union - Respondents argued State Wage Case Principles did not pronounce an expanded role for unions as a result of enterprise related efficiencies, that the role sought would impinge upon the existing rights of employers and employees and it was unnecessary given protections contained in proposed clause - Commission reviewed authorities and found on evidence that although Applicant Union had status of party principal, it should not be granted an unlimited right to involvement in enterprise based negotiations - Reasons Issued Only - LIQUOR, HOSPITALITY & MISC -v- Crothall Hospital Services P/L - APPL 1090,1091,1102,1121,1129,1135,1146 of 1994 - PARKS C - 13/09/95 - Health Services..... 2815

Application to vary award re appropriate rate of pay - Applicant Union claimed wages clause of Building Trades (Government) Award should be altered to reflect changes to wages paid to tradespeople, that claim was in accordance with Structural Efficiency Principles and definitions and skill levels applicable to tradespeople covered by the two awards were equal - Respondent argued that comparison of the two awards was inappropriate given one was a paid rates award whilst the other was a minimum rates award and that it would be a misconstruction of Principles to compare them - Commission reviewed authorities, compared the Building Trades (Government) Award 1968 with the Engineering Trades (Government) Award 1967, reviewed Principles and found on evidence that it would be contrary to the Statement of Principles to compare minimum rates award with a paid rates award to fix the minimum rates award wages rates - Dismissed - BUILDERS LAB, PAINTERS, PLAST & Others -v- Hon Min for Works & Others - APPL 347 of 1995 - SCOTT C. - 22/09/95 - General Construction 2841

PROCEDURAL MATTERS

Application for reduction in time to file answers in relation to Application No. 1031 of 1995 re deduction of union subscriptions - Applicant claimed that as a result of the long running dispute with the Respondent and resultant industrial action, the deduction of union subscriptions was no longer an industrial matter and therefore they should be removed from the provisions of the Award - Respondent Union opposed the application on the grounds that the substantive application would raise major issues of fact and law which would be addressed in answers - Commission reviewed authorities and found on evidence that granting of application would not directly cause industrial action to cease, and that Applicant had not presented valid grounds for the reduction - Dismissed - Hon Minister for Education -v- STATE SCHOOL TEACHERS UNION - APPL 1032 of 1995 - BEECH C - 21/09/95 - Education..... 2885

PUBLIC HOLIDAYS

[2]Appeal against decision of Industrial Magistrate (75 WAIG 137) re payment for pro-rata annual leave and public holidays - Appellant claimed that Industrial Magistrate erred in failing to find commission paid should have been taken into account in calculating amount due to be paid - Respondent argued that the Act itself took effect and no provision existed to average out commission paid, as commission was payable when transaction was completed - Full Bench reviewed s.18 of Minimum Conditions of Employment Act 1993 and found that it was not possible to calculate a weekly accrued pro-rata entitlement against total amount of commission earned and Appellant could not prove claim - Dismissed - J Bombak -v- Didco T/A Nik Varga Real Estate - APPL 1292 of 1994 - Full Bench - SHARKEY P/PARKS C/GIFFORD C. - 28/07/95 - Property and Business Services 2313

Application for interpretation of Award - Applicant claimed illness had caused her absence from work and was entitled to payment for holidays incurred in that period pursuant to Clause 17(3) of Meat Industry (State) Award No. R9 of 1979 - Respondent argued that absence was on the working day before, on and after the public holiday due to illness and was on unpaid sick leave without pay - Commission reviewed authorities and Award and found on evidence that Applicant was not entitled to payment as she was absent from work on the holidays and could not have performed work on those days, as required by the provisions of the Award - Reasons for Decision Issued Only - AUST MEAT INDUSTRY EMPL UNION -v - Action Food Barns - APPL 341 of 1995 - BEECH C - 26/09/95 - Food Retailing 2846

CUMULATIVE DIGEST—*continued*

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PUBLIC HOLIDAYS—*continued*

[2]Appeal against decision of Commission (75 WAIG 1916) re application granting insertion of Easter Tuesday holiday clause - Appellant claimed Commission erred in finding; employees were legally entitled to Easter Tuesday as a paid holiday; by reaffirming a clause in the award that by error had been administratively included that was not the subject of an application by the parties; by not correcting the Commission Record of Order No. 308 of 1984 and by acting in excess of its jurisdiction by failing to refer the matter as a special case - Respondent raised preliminary point that some grounds for appeal should not be heard given that they were not raised in proceedings before the Commission at first instance - Full Bench reviewed authorities and found that all grounds should be heard as all matters were live issues - Full Bench further found Commission was not entitled to vary award by deleting Easter Tuesday as a paid holiday as the entitlement had existed by custom and usage since 1983 and was therefore an entitlement under a contract of service and that Commission at first instance did not act in excess of its jurisdiction by not referring the matter as a special case - Dismissed - Minister for Health -v- LIQUOR, HOSPITALITY & MISC - APPL 608 of 1995 - Full Bench - SHARKEY P/GEORGE C/SCOTT C. - 08/11/95 - Health Services 2934

PUBLIC INTEREST

[2]Appeal against decision of the Commission (75 WAIG 745 and 976) re granted reinstatement without the loss of entitlements on the grounds of unfair dismissal - Appellant claimed that the decision should be quashed as the reinstatement exceeded the jurisdiction of the Commission, as it was not an industrial matter and raised public interest, that Commission erred in finding of terminated employment and that the appellant was engaged in the racing industry when the industry was of "labour hire" - Full Bench reviewed authorities and found on evidence that there was no justifiable reason for dismissal established on the evidence and as there was no agreement either collective or individual, nothing existed to suggest that the Commission erred in law - Full Bench further found Commission did have jurisdiction as order arose out of an industrial matter affecting and relating to the relationship of employee/employer - Dismissed - Southbrook Enterprises Pty -v- AUST MUNICIPAL, CLERICAL & SER - APPL 470 of 1995 - Full Bench - SHARKEY P/HALLIWELL SC/SCOTT C. - 01/09/95 - Sport and Recreation 2485

[4]Application for stay of order against decision of Commission (75 WAIG 2443) pending appeal to Full Bench - Applicant claimed application for stay did not abuse process and contained substance, as previous application for stay was in relation to different appeal and that an application had been lodged for appeals to be joined and heard together - Respondent argued application was an abuse of process given that several appeals had been lodged against the same order and no new matters of relevance had arisen since the previous application for stay had been dismissed - President reviewed authorities and found on evidence that as application duplicated an application which had already been heard and determined and no persuasion of charged circumstance nor justification of stay had occurred, multiplicity of unnecessary and incompetent applications should not be dealt with - Dismissed - AUST ELECT, ELECTRONICS FOUND & Others -v- SCM Chemicals Ltd - APPL 918 of 1995 - President - SHARKEY P - 23/08/95 - Metal Ore Mining 2507

[2]Appeal against decision of Government School Teachers Tribunal re granted application for stay of inquiry (75 WAIG 1026) - Appellant claimed Tribunal erred in concluding that it had jurisdiction to stay an inquiry being conducted pursuant to Section 7C of Education Act and that it was not in the public interest to allow decisions of the Commission to take effect without jurisdiction - Respondent argued Full Bench lacked jurisdiction to determine appeal as sections of the Act when read together failed to take account of appeals from constituent authorities - Full Bench reviewed authorities and sections 7, 22A and 49 of the Act and found on evidence that it was entitled to deal with appeal and in the public interest, that stay of inquiry was only pending hearing and determination of T15 of 1994 and that Tribunal had jurisdiction to deal with matter by virtue of Section 78(1)(a)(ii) of the I.R. Act - Dismissed - Hon Min for Education -v- STATE SCHOOL TEACHERS UNION - APPL 116 of 1995 - Full Bench - SHARKEY P/GEORGE C/SCOTT C. - 27/09/95 - Education.... 2684

Application re severance payment - Applicant Union claimed that employees affected by National Rail Corporation arrangements were eligible for severance payments as they related to Category B employees in booklet - Respondent argued that Commission lacked jurisdiction to deal with matter as its power was removed by Public Sector Management Act and Public Sector Management (Redeployment and Redundancy) Regulations 1994 - Commission found on evidence that it lacked jurisdiction to hear matter on redundancy payments by lack of virtue of PSM Act and to issue order would be in conflict with public interest - Dismissed - METALS & ENGINEERING WORKERS' -v- W.A.G.R.C. - CR 151 of 1995 - SCOTT C. - 02/08/95 - Rail Transport 2874

[2]Appeal against decision of Commission (75 WAIG 1662) re dismissed claim for contractual entitlements on the grounds of unfair dismissal - Appellant claimed that Commission erred at first instance because he wanted the proceedings to remain open until certain matters were cleared and to have the retraction of the accusation of theft made by the Respondent to be in writing - Full Bench reviewed authorities and found on evidence that the Commission did not err in the exercise of its discretion as the Agreement struck between the parties had been partially performed by the Appellant and completely performed by the Respondent and therefore extinguished Appellant's application - Application for cost by Respondent dismissed - Ordered Accordingly - M Bradbury -v- Great Western Real Estate - APPL 462 of 1995 - Full Bench - SHARKEY P/BEECH C/GIFFORD C. - 24/10/95 - Property Services 2927

[2]Appeal against decision of Commission (75 WAIG 2874) re severance payments - Appellant claimed that Commission erred in holding that it firstly lacked jurisdiction because by virtue of the Minister's decision, the employees were entitled to severance pay as defined by the agreement reached and in accordance to the appropriate Regulations and secondly, that it was not in the public interest to deal with the application as they were not given an opportunity to be heard in relation to that matter - Respondent argued that the order sought by the Appellant would be inconsistent with the Regulations and power granted to the Minister, and that a properly conducted hearing would not have produced a different result - Full Bench reviewed authorities and found on evidence that Commission had erred as it had a conditioned special power of review for aggrieved employees as the Minister's approval for higher severance payment to members of a particular class, advised by notice, effectively approved payment to individual employees which was consistent with the Regulations when read as a whole - Furthermore, Full Bench found Commission's decision to be wrong in law as it failed to afford natural justice by not providing a reasonable opportunity for the parties to be heard on the question of public interest and the question of any dismissal on that ground - Upheld and Remitted - METALS & ENGINEERING WORKERS' & Others -v- W.A.G.R.C. - APPL 941 of 1995 - Full Bench - SHARKEY P/BEECH C/GIFFORD C. - 30/10/95 - Rail Transport 2929

REDUNDANCY/RETRENCHMENT

[3]Conference referred re claim to vary awards re redundancy schedule - Applicant claimed that as former municipality was divided into four, the provisions for compulsory and voluntary redundancy as set out in sections of Act should be replicated and included in the awards - Respondent argued that as no circumstances of compulsory redundancy had or was likely to arise and voluntary redundancy was covered by Voluntary Redundancy Package the schedule was unnecessary - CICS reviewed s.21 and s.22 of the Local Government Act and found on evidence that as the division was provided for the Act there did not exist justification for replication of the terms and intervention was not needed - Dismissed - METALS & ENGINEERING WORKERS' -v- City of Perth - CR 455 of 1994 - Commission in Court Session - HALLIWELL SC/SCOTT C/GIFFORD C. - 27/07/95 - Local Government 2319

CUMULATIVE DIGEST—*continued*

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REDUNDANCY/RETRENCHMENT—*continued*

[3]Application to vary awards re insertion of redundancy provisions - Applicant Unions claimed as 'test cases' established proposition, awards should contain redundancy provisions and provisions should be relevant to construction industry in which awards operated and that cost associated with insertion would be insignificant - Respondent to Foremen (Building Trades) Award totally opposed inclusion of provisions - Respondents argued Artworkers Award did not classify as a construction award and that provisions should replicate terms of 'general standard' under Metal Trades General Award - Respondent further consented to the inclusion of redundancy provisions but opposed terms sought - CICS reviewed authorities and found that employees covered by Artworkers Award who were engaged on construction projects should receive the same considerations in respect of redundancy and that in matter of public interest provisions for redundancy should be inserted in awards - Decision Only - C.M.E.T.S.W.U. and Others -v- M.B.A. and Others - APPL 1176,1177,1178,1222,1223 of 1993 - Commission in Court Session - COLEMAN CC/HALLIWELL SC/SCOTT C. - 09/10/95 - General Construction 2699

Application re severance payment - Applicant Union claimed that employees affected by National Rail Corporation arrangements were eligible for severance payments as they related to Category B employees in booklet - Respondent argued that Commission lacked jurisdiction to deal with matter as its power was removed by Public Sector Management Act and Public Sector Management (Redeployment and Redundancy) Regulations 1994 - Commission found on evidence that it lacked jurisdiction to hear matter on redundancy payments by lack of virtue of PSM Act and to issue order would be in conflict with public interest - Dismissed - METALS & ENGINEERING WORKERS' -v- W.A.G.R.C. - CR 151 of 1995 - SCOTT C. - 02/08/95 - Rail Transport 2874

Conference referred re reinstatement without loss of entitlements on the grounds of unfair dismissal - Applicant claimed that the failure to offer further contract was harsh and unfair as there was no evidence to conclude that employment was other than continuous and that Respondent's actions were unlawful as proper notice was not given and they failed to comply with Award and General Order - Respondent argued that Applicant's appointment had ceased as no position was available and therefore reinstatement was not possible - Respondent further argued that Commission lacked jurisdiction to deal with matters relating to non-compliance of Award and General Order provisions - Commission reviewed authorities and found on evidence that termination was unfair as Respondent had failed to apply the provisions of the General Order to the applicant and that parties should confer regarding remedy - Dismissed - LIQUOR, HOSPITALITY & MISC -v- Hon Min for Education - CR 14 of 1994 - GEORGE C - 12/07/95 - Education 2877

[2]Appeal against decision of Commission (75 WAIG 2874) re severance payments - Appellant claimed that Commission erred in holding that it firstly lacked jurisdiction because by virtue of the Minister's decision, the employees were entitled to severance pay as defined by the agreement reached and in accordance to the appropriate Regulations and secondly, that it was not in the public interest to deal with the application as they were not given an opportunity to be heard in relation to that matter - Respondent argued that the order sought by the Appellant would be inconsistent with the Regulations and power granted to the Minister, and that a properly conducted hearing would not have produced a different result - Full Bench reviewed authorities and found on evidence that Commission had erred as it had a conditioned special power of review for aggrieved employees as the Minister's approval for higher severance payment to members of a particular class, advised by notice, effectively approved payment to individual employees which was consistent with the Regulations when read as a whole - Furthermore, Full Bench found Commission's decision to be wrong in law as it failed to afford natural justice by not providing a reasonable opportunity for the parties to be heard on the question of public interest and the question of any dismissal on that ground - Upheld and Remitted - METALS & ENGINEERING WORKERS' & Others -v- W.A.G.R.C. - APPL 941 of 1995 - Full Bench - SHARKEY P/BEECH C/GIFFORD C. - 30/10/95 - Rail Transport 2929

Application to vary award re insertion of introduction of change and redundancy clauses - Applicant Unions claimed the word 'attempt' rather than 'consider' should be contained in redundancy clause as it imposed a heavier obligation on the employer, that employees should be entitled to those benefits applicable to public sector employees even though they are not employed pursuant to PSM Act and that a definition of 'suitable alternative employment' should be included to avoid widely different interpretations - Respondent argued that the word 'consider' provided an obligation most appropriate to the management of a small organisation as it only required commencement of redeployment where possible - Commission found on evidence that 'shall attempt to redeploy' provided a code of some certainty for employees whose jobs had been abolished as a result of change and that a definition of 'suitable alternative employment' was necessary and preferred wording submitted in Schedules to the Commission - Granted - MISCELLANEOUS WORKERS' UNION -v- The Governor of Western Aust - APPL 1423 of 1993 - GEORGE C - 11/10/95 - Government Administration 3044

Application for denied contractual entitlements - Applicant claimed contract of employment entitled a six months' Base Remuneration Package upon termination and that pay in lieu of notice was incorrectly calculated - Respondent argued payment of six months' Base Remuneration Package was only applicable upon completion of three month review period - Commission found all terms and conditions, including redundancy payment had applied during three month review period; and despite confusion between terms, Base Remuneration Package meant Base Salary Package and six months payment based on total in Base Remuneration Package was owed to Applicant - Commission further found that although an absence of an provision regarding notice period existed, one month's pay in lieu of notice had been received and Applicant could not demonstrate further entitlements - Granted in Part - Potts D.A. -v- Robowash Pty Ltd - APPL 831 of 1995 - SCOTT C. - 02/11/95 - Business Services 3334

Application to vary work order re insertion of redundancy provisions - Applicant Unions claimed redundant employees be paid equivalent of 26 weeks' pay, pro-rata long service leave (regardless of length of service), relocation and travel expenses as awards applicable in area of project contained these provisions and intention existed to provide security employees with wages and conditions similar to those of award regulated employees of Woodside - Respondent did not oppose introduction of redundancy provisions but argued that according to State Wage Principles, claims based on a nexus with provisions applicable to other employees could not be relied upon; that the purpose of relocation and travel expenses was to return employees to their place of engagement and the definition of redundancy should be more expressly defined so as not to include the loss of a contract - Commission reviewed authorities and found that it was open to prescribe redundancy provisions as contained in Metal Trades (General) Award but in the best interest of all it would consolidate terms of order and redundancy provisions - Granted in Part - LIQUOR, HOSPITALITY & MISC -v- Wormald Security - APPL 326 of 1993;APPL 344 of 1994 - PARKS C - 05/09/95 - Business Services 3340

REINSTATEMENT

Application for reinstatement on the grounds of unfair dismissal - Applicant claimed termination was unfair as the consequences of taking unauthorised leave or of continued poor work/store performance were not brought to her attention - Respondent argued Applicant was advised that to proceed overseas was at her own risk in so far as continuity of employment as Manager was concerned - Commission found on evidence that as it was made clear to Applicant that taking leave of absence (albeit unpaid) was a direct breach of a lawful order from the Respondent and could lead to an alteration to position within the store during her absence termination was justified - Dismissed - E Nydegger -v- Tredways Shoe Store & Other - APPL 133 of 1995 - HALLIWELL SC - 07/07/95 - Retail Trade 2244

CUMULATIVE DIGEST—*continued*

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REINSTATEMENT—*continued*

Application for reinstatement on the grounds of unfair dismissal - Applicant union claimed termination based upon activities as union shop steward was materially unrelated to employment, and as employee recieved no adequate warning, termination was unjust - Respondent argued termination was a result of poor performance and in using position as shop steward to victimise member of management - Commission found on evidence that as employee's behaviour could not be excused on the basis of union position and as there existed lack of managerial trust, the relationship could not be restored and Commission's interference could not be justified - Dismissed - SHOP, DIST & ALLIED EMPL UNION -v- Foodland Associated Limited - CR 48 of 1994 - COLEMAN CC - 19/04/95 - Wholesale Trade 2258

Application for reinstatement without loss of entitlements on the grounds of unfair dismissal - Applicant claimed that the process which led to dismissal was harsh and unjust as performance and conduct had not been reasonably and competently assessed and that the reasons for dismissal were other than those stated - Respondent argued that dismissal was for poor performance and unsatisfactory conduct and that dismissal was not unfair - Commission reviewed authorities and found on evidence that Applicant had not discharged onus of proof necessary to establish that there was unfairness associated with his dismissal on account of poor performance and unsatisfactory conduct - Dismissed - BM Drake -v- B.P. Refinery (Kwinana) - APPL 640 of 1994 - PARKS C - 25/07/95 - Mining 2431

Application for reinstatement on the grounds of unfair dismissal - Applicant claimed that termination was unfair as it was based on the outcome of an accident which was not caused by negligence - Respondent argued that Applicant's work and safety performance was of poor standard and malicious damage had been caused to company property - Commission found on evidence that accident was a result of Applicant's error of judgement and that although behaviour was unsafe, it was a first offence and as a seven year satisfactory safety and work service record existed, the dismissal was unfair - Discontinued - C A Duthie -v- Hamersley Iron Pty Limited - APPL 583 of 1995 - HALLIWELL SC - 04/07/95 - Mining 2434

Application for costs re unfair dismissal claim - Applicant claimed that they were required to expend a great deal of time and money in preparation to defend the application for reinstatement which was later withdrawn at the last minute and therefore, should be reimbursed for the costs incurred - Respondent argued that an "understanding" that application numbers 295 and 296 of 1986 had been joined existed and the prospect of a precedent carried sufficient weight to dismiss the claim for costs - Commission reviewed authorities and found on evidence that the reasons advanced for the late withdrawal of the application for reinstatement were not on fair and reasonable grounds as legal advice was not sought and concluded that the Respondents should be indemnified for the costs - Granted - G Dawes -v- Foodland Associated Limited - APPL 886 of 1994 - HALLIWELL SC - 27/06/95 - Food Retailing 2437

[2]Appeal against decision of the Commission (75 WAIG 745 and 976) re granted reinstatement without the loss of entitlements on the grounds of unfair dismissal - Appellant claimed that the decision should be quashed as the reinstatement exceeded the jurisdiction of the Commission, as it was not an industrial matter and raised public interest, that Commission erred in finding of terminated employment and that the appellant was engaged in the racing industry when the industry was of "labour hire" - Full Bench reviewed authorities and found on evidence that there was no justifiable reason for dismissal established on the evidence and as there was no agreement either collective or individual, nothing existed to suggest that the Commission erred in law - Full Bench further found Commission did have jurisdiction as order arose out of an industrial matter affecting and relating to the relationship of employee/employer - Dismissed - Southbrook Enterprises Pty -v- AUST MUNICIPAL, CLERICAL & SER - APPL 470 of 1995 - Full Bench - SHARKEY P/HALLIWELL SC/SCOTT C. - 01/09/95 - Sport and Recreation 2485

Application for reinstatement on the grounds of unfair dismissal - Applicant claimed he was coerced into signing his resignation - Respondent argued Applicant was not coerced into signing his resignation and therefore, he was not dismissed - Commission addressed preliminary matter of whether or not Applicant was dismissed and found as no threat was made by Respondent causing coercion upon the Applicant to sign his resignation, that application was not competent - Dismissed - BG Humes -v- Commissioner of Police - APPL 1408 of 1993 - PARKS C - 23/08/95 - Other Services 2613

Appeal re unfair dismissal - Appellant claimed termination of his services were unfair and sought reinstatement on the grounds that services were rendered continuous - Respondent argued that no dismissal existed as the contract of employment had come to an end by frustration due to the employee's incapacitating illness and that Board lacked jurisdiction - Board reviewed authorities and found on evidence that as expectations of an extended period and there being no need to fill the position on a permanent basis existed, the employment came to an end by force of law due to frustration - Board further found that in the interests of equity, matter should re-convene to determine how appeal should be disposed of and later determined it lacked jurisdiction - Dismissed for want of jurisdiction - F Sirous -v- Homeswest - PSAB 24 of 1994 - Public Service Appeal Board - GEORGE C - 09/08/95 - Property and Business Services 2641

Conference referred re reinstatement without loss of entitlements on the grounds of unfair dismissal - Applicant claimed that the failure to offer further contract was harsh and unfair as there was no evidence to conclude that employment was other than continuous and that Respondent's actions were unlawful as proper notice was not given and they failed to comply with Award and General Order - Respondent argued that Applicant's appointment had ceased as no position was available and therefore reinstatement was not possible - Respondent further argued that Commission lacked jurisdiction to deal with matters relating to non-compliance of Award and General Order provisions - Commission reviewed authorities and found on evidence that termination was unfair as Respondent had failed to apply the provisions of the General Order to the applicant and that parties should confer regarding remedy - Dismissed - LIQUOR, HOSPITALITY & MISC -v- Hon Min for Education - CR 14 of 1994 - GEORGE C - 12/07/95 - Education 2877

Application for reinstatement without loss of entitlements on the grounds of unfair dismissal - Applicant denied having smoked cannabis during a shift and claimed that he had been denied procedural fairness, that as the investigation was not conducted in a proper and thorough manner it contained procedural flaws and that he was not made aware of the 'Discipline Procedure' or 'Fair Treatment Procedure' - Respondent argued a proper and extensive investigation followed the incident and that they had reasonable grounds for believing that the Applicant had smoked cannabis during a shift - Commission reviewed authorities and found on evidence that cannabis had been smoked in one of the Respondent's trucks during the shift; that Applicant had been made aware of implications of smoking cannabis; that Respondent had exercised fairness in carrying out investigation into incident and that although Applicant had not exhibited effects of cannabis smoking, his termination was justified on the grounds of misconduct - Dismissed - N G Benck -v- Hamersley Iron Pty Limited - APPL 73 of 1995 - GIFFORD C. - 30/10/95 - Metal Ore Mining 3058

Application for reinstatement on the grounds of unfair dismissal - Applicant claimed that the company for which he had worked for had contracted out its services and had accepted a permanent position, similar to his previous role, offered by the new company in control, namely the Respondent - Respondent denied making this offer and argued that the Applicant had resigned his own services, that he was employed as a "required as" casual, and that trust between the parties had broken down making reinstatement problematic - Commission reviewed authorities and found on evidence that the Respondent did not offer the position to the Applicant but was merely "sounding out" interest and whilst there was conflicting evidence presented by both parties, the Applicant was terminated unfairly as he was not notified adequately - Furthermore, Commission found that the Applicant was not a permanent employee but an "ongoing" casual and could therefore only be re-instated to his former position - Ordered Accordingly - J J Moreno -v- Serco (Australia) Pty Ltd - APPL 542 of 1995 - GIFFORD C. - 27/10/95 - Personal & Household Good Retailing 3068

CUMULATIVE DIGEST—*continued*

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REINSTATEMENT—*continued*

Application for reinstatement on the grounds of unfair dismissal - Applicant claimed family circumstances caused the need for him to be absent from his employment, that he was unable to obtain definitive advice as to when he could return and that his failure to comply with the necessary documentation was an oversight attributable to the difficulties he had been experiencing and not a conscious act - Respondent argued that Applicant's prolonged absence had attributed to serious manning difficulties, irregularities in usual rostering systems, increased hours of work for other staff and decreased staff morale and that special leave could not be granted because of staff shortages - Commission found on evidence that whilst Applicant had been confronted with several domestic problems that had required his absence from work, he had ignored the needs of the Respondent and as all leave except special leave had been granted, termination was not unfair - Dismissed - GN Smith -v- Western Mining Corporation Ltd - APPL 1067 of 1994 - PARKS C - 30/10/95 - Services to Mining 3072

[1]Appeal against decision of Full Bench (75 WAIG 1787) upholding appeal against decision of Commission in dismissing application for reinstatement on the grounds of unfair dismissal - Appellant claimed that majority Full Bench erred in accepting that unfairness did not exist in circumstances and findings of minority decision should be made to be correct - Respondent argued that Commission and majority Full Bench decisions were correct in that employment was finalised on the basis that no alternative position existed and employee's intention to resolve claim in common law arena - IAC found on evidence that the facts found could not lead to finding of "unilateral" termination as no duress or threats existed and could not discern neither error of law or fact in the results drawn by the majority Full Bench in their disposal of the matter - Dismissed - Durham -v- Westrail - IAC 9 of 1995 - Industrial Appeal Court - KENNEDY J./ROWLAND J./PARKER J. - 03/11/95 - Rail Transport 3163

[1]Appeal against decision of Full Bench (75 WAIG 1518) dismissing appeal against decision of Commission in granting reinstatement on the grounds of unfair dismissal - Appellant claimed that application did not fall into "resign or be fired case" and was dealt with on the basis of significant breach of contract - IAC reviewed I.R. Act, 1979 and authorities and found that Commission had accepted constructive dismissal on the basis of Cargill's case when the case could not support the conclusion reached - IAC further found that in both Cargill case and current application the claim was not under s29, but rather for resolution of industrial matter under s44 and as the court was not called to decide whether "constructive dismissal" fell into category of unfair dismissal, no generalisation be made and each case be looked at on its own facts - Dismissed - Attorney General -v- PRISON OFFICERS' UNION - IAC 8 of 1995 - Industrial Appeal Court - KENNEDY J./ROWLAND J./ANDERSON J. - 03/11/95 - Other Services 3166

SAFETY

Application for reinstatement on the grounds of unfair dismissal - Applicant claimed that termination was unfair as it was based on the outcome of an accident which was not caused by negligence - Respondent argued that Applicant's work and safety performance was of poor standard and malicious damage had been caused to company property - Commission found on evidence that accident was a result of Applicant's error of judgement and that although behaviour was unsafe, it was a first offence and as a seven year satisfactory safety and work service record existed, the dismissal was unfair - Discontinued - C A Duthie -v- Hamersley Iron Pty Limited - APPL 583 of 1995 - HALLIWELL SC - 04/07/95 - Mining 2434

Application for payment of wages as a result of a safety hazard on work site - Applicant claimed that workers who removed themselves from the job due to an on site rockwool safety hazard were entitled to payment of wages lost due to absence, as the necessary test applied to the situation and the workers did not leave the site but remained in crib huts - Respondent argued that the workers failed to follow the guidelines set down by the legislation set out on the data sheets and that a state of hysteria eventuated as a result of such ignorance - Commission reviewed authorities and found on evidence that the employees did have reasonable grounds to believe that to continue work on the site would expose them to a risk of imminent and serious harm to their health - Granted - METALS & ENGINEERING WORKERS' -v- AMEC Construction & Others - CR 89 of 1995 - HALLIWELL SC - 30/05/95 - Mining 2444

Application for a site allowance - Applicant claimed that a site allowance be provided as the work environments were often excessively hot, dirty, noisy and excessive vibration was experienced - Respondent argued that the precedent cases were not valid and that in line with the Wage Fixing Principles the applicant had not shown a significant change in the work, the skill or responsibility required or the conditions to warrant an increase - Commission reviewed authorities and found on evidence that as application did not seek to vary the award it could not attract the consideration of the Work Value Principle and the rate already paid was not adequate to compensate for the conditions and the duration to which the employees were subjected to such disabilities - Granted in Part - AUST ELECT, ELECTRONICS FOUND -v- ABB Installation and Service - CRA 133 of 1995 - COLEMAN CC - 24/08/95 - Construction Trade Services 2633

Application for reinstatement without loss of entitlements on the grounds of unfair dismissal - Applicant denied having smoked cannabis during a shift and claimed that he had been denied procedural fairness, that as the investigation was not conducted in a proper and thorough manner it contained procedural flaws and that he was not made aware of the 'Discipline Procedure' or 'Fair Treatment Procedure' - Respondent argued a proper and extensive investigation followed the incident and that they had reasonable grounds for believing that the Applicant had smoked cannabis during a shift - Commission reviewed authorities and found on evidence that cannabis had been smoked in one of the Respondent's trucks during the shift; that Applicant had been made aware of implications of smoking cannabis; that Respondent had exercised fairness in carrying out investigation into incident and that although Applicant had not exhibited effects of cannabis smoking, his termination was justified on the grounds of misconduct - Dismissed - N G Benck -v- Hamersley Iron Pty Limited - APPL 73 of 1995 - GIFFORD C. - 30/10/95 - Metal Ore Mining 3058

Conference referred re industrial action due to safety hazard on site - Applicant Union claimed that its members were entitled to payment for lost time due to a work shutdown, given they had reasonable grounds to believe that to continue working on site would have exposed them to a risk of imminent and serious harm to their health due to inadequate handling procedures of asbestos - Respondent argued that all necessary measures had been taken to ensure that employees were not at risk from the asbestos, that employees could have continued work in areas not affected and that its efforts to resolve the issue was unnecessarily prolonged by the continual raising of additional issues and stoppage undertaken by the Applicant Union - Commission reviewed authorities and found on evidence that concerns of employees relating to the risk of asbestos stemmed from fear rather than fact, and was insufficient in establishing reasonable grounds for the application - Commission further found that whilst the Respondent took all reasonable steps to ensure the safety of employees were not at risk, the need for concern should not have arisen - Recommendation issued regarding appropriate payment for settlement of matter - Dismissed - DOM-UIE Pty Ltd -v- AUTO, FOOD, METAL, ENGINE UNION - CR 277 of 1995 - SCOTT C. - 13/10/95 - Construction Trade Services 3082

Conference referred re claim for a site allowance at Crawley Avenue/Mounts Bay Road construction site - Applicant Union claimed site allowance was warranted given the size and nature of project, the number of trades working together, restricted access to site, uneven levels, untidiness, exposure to elements, safety problems, noise and associated stress - Commission reviewed authorities and found that the size, cost and circumstances of project warranted consideration for site allowance, particularly given site access, untidiness resulting from size and the way in which materials had to be stored and difficulties associated with other aspects of the project - Granted - BUILDERS LAB, PAINTERS, PLAST -v- Southdown Construction Co P/L & Others - CR 218 of 1995 - SCOTT C. - 10/10/95 - General Construction 3088

CUMULATIVE DIGEST—*continued*

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SAFETY—*continued*

Conference referred re claim for site allowance - Applicant claimed that a disability/discomfort allowance should be paid to employees who were required to wear a full face mask breathing apparatus during project - Respondent argued the presence of lead in the work environment was not uncommon at the site; that it did not present a new condition under which work was performed and that comparable sites in the area had not been awarded such an allowance for the wearing of protective equipment - Commission found on evidence that an Agreement was in place that incorporated such an allowance (which considered all features of the work site) and that the requirement to wear protective clothing itself did not attract the payment of an allowance - Dismissed - METALS AND ENGINEERING UNION -v- BP Refinery (Kwinana) Pty Ltd & Other - CR 267 of 1995 - GEORGE C - 13/10/95 - Metal Product Manufacturing 3089

SHIFT WORK

Application to vary awards re rostering, shift allowances, weekend and holiday allowances and underground travel time provisions - Applicant union claimed that the current seven and a half hour shifts be maintained and a provision for overtime in relation to shifts worked beyond those hours be included to accommodate two hour shifts - Respondent argued that the history and nature of contracts demonstrated the remuneration was over and above remuneration covered by awards and shift work was found to be less desirable as it brought certain social problems and health concerns - Respondent further argued that as there was a linkage between the legislative requirements for underground work and the award provisions, negotiations involving more working hours or days could not be done - Commission reviewed authorities and found on evidence that, on balance, whilst there were were some disadvantages for some employees, there was generally a vast improvement in their working situation and their personal lives and that the awards should be amended accordingly - Granted in Part - Western Mining Corporation Ltd -v- AUSTRALIAN WORKERS' UNION - APPL 1522 of 1991;APPL 1108,1109 of 1992 - GREGOR C - 20/01/95 - Mining 2181

Application for interpretation of award re shift work and over-tally and penalty rates - Applicant Union claimed that upon the introduction of an afternoon shift employees on day work were deemed by the award to be on morning shift - Commission reviewed authorities and Clauses 11, 12, 15 and 30 of the award and found that as day workers were not deemed morning shift workers or shift workers by any provision of the award and that the introduction of an afternoon shift would not change their status and issuance of decision would, to necessary extent, cancel previous Order C375 of 1994 - Decision Issued Only - Metro Meat International -v- AUST MEAT INDUSTRY EMPL UNION - APPL 1051 of 1994 - BEECH C - 05/07/95 - Meat Product Manufacturing 2241

STAY OF PROCEEDINGS

[4]Application for stay of order against decision of Commission (75 WAIG 2443) pending appeal to Full Bench - Applicant claimed application for stay did not abuse process and contained substance, as previous application for stay was in relation to different appeal and that an application had been lodged for appeals to be joined and heard together - Respondent argued application was an abuse of process given that several appeals had been lodged against the same order and no new matters of relevance had arisen since the previous application for stay had been dismissed - President reviewed authorities and found on evidence that as application duplicated an application which had already been heard and determined and no persuasion of charged circumstance nor justification of stay had occurred, multiplicity of unnecessary and incompetent applications should not be dealt with - Dismissed - AUST ELECT, ELECTRONICS FOUND & Others -v- SCM Chemicals Ltd - APPL 918 of 1995 - President - SHARKEY P - 23/08/95 - Metal Ore Mining 2507

[4]Application for stay of decision of Commission (75 WAIG 2631) re hearing and determination of application - Appellant claimed Commission's jurisdiction to hear and determine matter was subject of an appeal to Full Bench and that matter should not proceed until appeal had been determined - Respondent argued no serious issue could be raised as application was premature and if stay was granted, Applicant could revoke earlier decision and suspend Respondent without pay - President found on evidence that serious issue of jurisdiction existed and appeal had been instituted with Appellant having sufficient interest - Granted - Hon Minister for Education -v- STATE SCHOOL TEACHERS UNION - APPL 938 of 1995 - President - SHARKEY P - 05/09/95 - Education 2509

[4]Application for stay of order against Commission (75 WAIG 2443) pending appeal to Full Bench - Appellant claimed that the orders were ultra vires and unenforceable as they denied union members access to elected representatives and breached the Act as they denied natural justice and were without precise term or limitations - Appellant further claimed that the Commission erred in law in issuing orders which compelled officers to breach organisation rules - Respondent argued that the industrial action was unjustified and in breach of the orders in place - President reviewed authorities and found on evidence that as no inconvenience other than an inability to communicate had occurred, no circumstances existed to grant a stay of order and it would be a matter for the Full Bench should the grounds of appeal be expedited - Dismissed - CONSTRUCTION, MINING, ENERGY & Others -v- SCM Chemicals - APPL 854 of 1995 - President - SHARKEY P - 07/08/95 - Petroleum Coal Chemical Assoc 2510

[4]Application re stay of operation and orders - Applicant claimed that as the election of the respondent branch secretary and general meeting were not in conformity with rules, orders or directions be issued to hold that the decision of the general meeting be held null and void ultra vires the respondent's rules, to stay the closing and election of branch secretary and to reverse the returning officer's decision rejecting nomination for the position of branch secretary - President reviewed authorities and found on evidence that the real issue in the matter was eligibility to stand for office and as opportunity to amend defect was given but no remedy taken, the meeting was held to be valid, with the resolutions concerning member's absence, be declared null and void - Dismissed - W Sieczka -v- LOCOMOTIVE ENGINE DRIVRS UNION - APPL 527 of 1995 - President - SHARKEY P - 03/08/95 - Unions 2516

Application for a stay of inquiry - Applicant claimed that in the inquiry some bias relating to the suspension of the applicant without pay existed, an intervention for further hearing and determination and a stay pending that hearing and determination was required - Respondent argued that as the conduct of inquiry was not an industrial matter, the application be dismissed and if classified as an industrial matter, Commission's involvement would create duplication as application was at a premature state - Commission found on evidence that as employer action prevented work, the matter was an industrial matter and under s.7C of the Education Act, there was no unnecessary duplication with Commission's involvement and inquiry be stayed to enable current application to be dealt with - Ordered Accordingly - STATE SCHOOL TEACHERS UNION -v- Hon Min for Educ, Employ & Training - C 173 of 1995 - BEECH C - 31/07/95 - Education 2631

[2]Appeal against decision of Government School Teachers Tribunal re granted application for stay of inquiry (75 WAIG 1026) - Appellant claimed Tribunal erred in concluding that it had jurisdiction to stay an inquiry being conducted pursuant to Section 7C of Education Act and that it was not in the public interest to allow decisions of the Commission to take effect without jurisdiction - Respondent argued Full Bench lacked jurisdiction to determine appeal as sections of the Act when read together failed to take account of appeals from constituent authorities - Full Bench reviewed authorities and sections 7, 22A and 49 of the Act and found on evidence that it was entitled to deal with appeal and in the public interest, that stay of inquiry was only pending hearing and determination of T15 of 1994 and that Tribunal had jurisdiction to deal with matter by virtue of Section 78(1)(a)(ii) of the I.R. Act - Dismissed - Hon Min for Education -v- STATE SCHOOL TEACHERS UNION - APPL 116 of 1995 - Full Bench - SHARKEY P/GEORGE C/SCOTT C. - 27/09/95 - Education.... 2684

CUMULATIVE DIGEST—*continued*

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STAY OF PROCEEDINGS—*continued*

Application for stay of inquiry on the grounds of denied natural justice - Applicants claimed that they were not informed of the allegations made against them and that the inquiry under s.7 of the Education Act had denied them natural justice - Commission found on evidence that it could not intervene as inquiry had been conducted in proper manner and therefore, the Chief Executive Officer had a right to initiate such an inquiry - Dismissed - STATE SCHOOL TEACHERS UNION -v- Hon Min for Education - C 251 of 1995 - BEECH C - Education 2871

[4]Application for stay of decision - Applicant claimed that decision PSA AG2 of 1995 (75 WAIG 3052) be stayed pending the outcome of an appeal to the Full Bench with regards to questioning of an interpretation of section 41 of the I.R. Act, 1979 and a decision regarding the CSA's right for intervention - Applicant further claimed that the Public Service Arbitrator had not considered the provisions stipulated by section 80C(4) and section 41 of the Act and had erred in finding that the union had constitutional coverage when it did not consider the circumstances in which the amendments to constitution were sought - Respondent argued that the test set out in the "Hathaway Case" applied to the situation and that the Applicant did not satisfy it - President reviewed authorities and found on evidence that the decision of the Public Service Arbitrator be stayed temporarily pending the appeal to the Full Bench as the balance of to the question of coverage of the Path Centre and other health service enterprises - Furthermore, President found the seriousness of those questions pertaining to the application of sections 41 and 80C of the Act were also being addressed in the appeal - Granted - CIVIL SERVICE ASSOCIATION -v- WA Centre for Path & Med Resch - APPL 1311 of 1995 - President - SHARKEY P - 04/12/95 - Health Services 3177

TERMINATION

Application for reinstatement on the grounds of unfair dismissal - Applicant claimed termination was unfair as the consequences of taking unauthorised leave or of continued poor work/store performance were not brought to her attention - Respondent argued Applicant was advised that to proceed overseas was at her own risk in so far as continuity of employment as Manager was concerned - Commission found on evidence that as it was made clear to Applicant that taking leave of absence (albeit unpaid) was a direct breach of a lawful order from the Respondent and could lead to an alteration to position within the store during her absence termination was justified - Dismissed - E Nydegger -v- Tredways Shoe Store & Other - APPL 133 of 1995 - HALLIWELL SC - 07/07/95 - Retail Trade 2244

Conference referred re pro-rata long service leave entitlements - Applicant claimed that after having completed more than 12 months work and in accordance to Award provisions was entitled to pro-rata long service leave upon his termination - Respondent argued that as this was an enforcement of an award the Commission did not have the jurisdiction as matter was solely the province of the Industrial Magistrate - Commission reviewed authorities and found on evidence that it lacked jurisdiction as the claim was an enforcement of an Award and as no industrial matter existed there was no basis for bald interpretation - Dismissed for want of jurisdiction - D Bell -v- Fire Brigades Board - CR 43 of 1995 - SCOTT C. - 22/06/95 - Fire Brigade Services 2252

Application for reinstatement on the grounds of unfair dismissal - Applicant union claimed termination based upon activities as union shop steward was materially unrelated to employment, and as employee recieved no adequate warning, termination was unjust - Respondent argued termination was a result of poor performance and in using position as shop steward to victimise member of management - Commission found on evidence that as employee's behaviour could not be excused on the basis of union position and as there existed lack of managerial trust, the relationship could not be restored and Commission's interference could not be justified - Dismissed - SHOP, DIST & ALLIED EMPL UNION -v- Foodland Associated Limited - CR 48 of 1994 - COLEMAN CC - 19/04/95 - Wholesale Trade 2258

Application for reinstatement without loss of entitlements on the grounds of unfair dismissal - Applicant claimed that the process which led to dismissal was harsh and unjust as performance and conduct had not been reasonably and competently assessed and that the reasons for dismissal were other than those stated - Respondent argued that dismissal was for poor performance and unsatisfactory conduct and that dismissal was not unfair - Commission reviewed authorities and found on evidence that Applicant had not discharged onus of proof necessary to establish that there was unfairness associated with his dismissal on account of poor performance and unsatisfactory conduct - Dismissed - BM Drake -v- B.P. Refinery (Kwinana) - APPL 640 of 1994 - PARKS C - 25/07/95 - Mining 2431

Application for reinstatement on the grounds of unfair dismissal - Applicant claimed that termination was unfair as it was based on the outcome of an accident which was not caused by negligence - Respondent argued that Applicant's work and safety performance was of poor standard and malicious damage had been caused to company property - Commission found on evidence that accident was a result of Applicant's error of judgement and that although behaviour was unsafe, it was a first offence and as a seven year satisfactory safety and work service record existed, the dismissal was unfair - Discontinued - C A Duthie -v- Hamersley Iron Pty Limited - APPL 583 of 1995 - HALLIWELL SC - 04/07/95 - Mining. 2434

[2]Appeal against decision of the Commission (75 WAIG 745 and 976) re granted reinstatement without the loss of entitlements on the grounds of unfair dismissal - Appellant claimed that the decision should be quashed as the reinstatement exceeded the jurisdiction of the Commission, as it was not an industrial matter and raised public interest, that Commission erred in finding of terminated employment and that the appellant was engaged in the racing industry when the industry was of "labour hire" - Full Bench reviewed authorities and found on evidence that there was no justifiable reason for dismissal established on the evidence and as there was no agreement either collective or individual, nothing existed to suggest that the Commission erred in law - Full Bench further found Commission did have jurisdiction as order arose out of an industrial matter affecting and relating to the relationship of employee/employer - Dismissed - Southbrook Enterprises Pty -v- AUST MUNICIPAL, CLERICAL & SER - APPL 470 of 1995 - Full Bench - SHARKEY P/HALLIWELL SC/SCOTT C. - 01/09/95 - Sport and Recreation 2485

Application for reinstatement on the grounds of unfair dismissal - Applicant claimed he was coerced into signing his resignation - Respondent argued Applicant was not coerced into signing his resignation and therefore, he was not dismissed - Commission addressed preliminary matter of whether or not Applicant was dismissed and found as no threat was made by Respondent causing coercion upon the Applicant to sign his resignation, that application was not competent - Dismissed - BG Humes -v- Commissioner of Police - APPL 1408 of 1993 - PARKS C - 23/08/95 - Other Services 2613

Appeal re unfair dismissal - Appellant claimed termination of his services were unfair and sought reinstatement on the grounds that services were rendered continuous - Respondent argued that no dismissal existed as the contract of employment had come to an end by frustration due to the employee's incapacitating illness and that Board lacked jurisdiction - Board reviewed authorities and found on evidence that as expectations of an extended period and there being no need to fill the position on a permanent basis existed, the employment came to an end by force of law due to frustration - Board further found that in the interests of equity, matter should re-convene to determine how appeal should be disposed of and later determined it lacked jurisdiction - Dismissed for want of jurisdiction - F Sirous -v- Homeswest - PSAB 24 of 1994 - Public Service Appeal Board - GEORGE C - 09/08/95 - Property and Business Services 2641

CUMULATIVE DIGEST—*continued*

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TERMINATION—*continued*

Application re entitlement to pro-rata long service leave and quantum - Applicant claimed that her absence from employment was a result of her taking annual leave and that her employment was continuous as she did not enter into new employment contractual relationships when she changed positions within the organisation - Respondent argued that absence from employment was due to termination - Board of Reference reviewed authorities and found on evidence that Applicant's employment revealed neither an actual termination nor a re-engagement - BOR further found that the Applicant had continuity of employment with the Respondent and was therefore entitled to pro-rata long service leave entitlements - Granted - D A Evans -v- Meccan T/A Thomas Massam Real - BOR 4 of 1995 - Board of Reference - LOVEGROVE DR - 11/09/95 - Property Services 2846

Application re re-establishment of continuous employment prior to termination - Applicant claimed that she was employed by the Respondent in several occupations without a break in service and therefore was entitled to pro-rata long service leave entitlements - Board of Reference reviewed authorities and found on evidence that it lacked jurisdiction to deal with matter under the Long Service Leave Act 1958 since the Applicant was employed under the provisions of an Award and therefore the Board would have to be constituted under Long Service Leave Standard Provisions - Dismissed - D A Evans -v- Meccan T/A Thomas Massam Real - BOR 5 of 1994 - Board of Reference - LOVEGROVE DR - 11/09/95 - Property Services 2848

Application for alleged unfair dismissal - Applicant claimed that as employer/employee relationship existed, termination without notice was unfair and that compensation for damages to his car during an industrial dispute be paid - Respondent alleged that the Applicant was a self-employed contractor and that as there was a contract for services between the parties, the Commission lacked jurisdiction and that the application be struck out - Commission applied various tests to determine the true relationship between the parties and found on evidence that no employer/employee relationship existed - Commission further reviewed I.R. Act and found that the definition of "employee" was defined to also include "any person whose usual status is that of an employee" although in the circumstances of this case as no evidence existed that the Respondent had control in the Applicant's work, but rather that the Applicant was controlled by others, claim could not succeed based upon the definition of "employee" - Dismissed for want of jurisdiction - R Borg -v- Troubleshooters Available - APPL 731 of 1995 - BEECH C - 15/09/95 - Business Services 2852

Application for contractual entitlements on grounds of unfair dismissal - Applicant claimed that he was owed monies relating to a telephone account and commission, and as no notice was given for termination, it warranted it as unfair - Respondent argued that the commission did not constitute part of Applicant's contractual arrangements and that dismissal resulted from misconduct for accepting premiums, for taking money from the tin and for dishonouring cheques - Commission reviewed authorities and found on evidence that the events which led to the Applicant's dismissal constituted misconduct and as notice was also given dismissal was not unjust or harsh - Commission further found that the deduction for telephone expenses should not have occurred - Ordered Accordingly - P R Courtland -v- Oaklea Pty Ltd - APPL 501 of 1995 - SCOTT C. - 24/08/95 - Insurance 2854

Application re unfair dismissal - Applicant claimed that as no prior notice of unsatisfactory performance was given, dismissal was unfair - Respondent argued that termination resulted from the Applicant being unproductive and not doing the work for which he had been engaged and as employment was casual termination notice was 1 hour - Commission reviewed authorities and found on evidence that as an implied contract of continued employment existed the tests for permanent employee dismissal could not be applied - Commission further found in the light of unfairness compensation be paid to Applicant within 21 days of the date of the order - Ordered Accordingly - A Cumberbirch -v- Total Peripherals - APPL 655 of 1995 - BEECH C - 07/08/95 - Business Services 2862

Conference referred re reinstatement without loss of entitlements on the grounds of unfair dismissal - Applicant claimed that the failure to offer further contract was harsh and unfair as there was no evidence to conclude that employment was other than continuous and that Respondent's actions were unlawful as proper notice was not given and they failed to comply with Award and General Order - Respondent argued that Applicant's appointment had ceased as no position was available and therefore reinstatement was not possible - Respondent further argued that Commission lacked jurisdiction to deal with matters relating to non-compliance of Award and General Order provisions - Commission reviewed authorities and found on evidence that termination was unfair as Respondent had failed to apply the provisions of the General Order to the applicant and that parties should confer regarding remedy - Dismissed - LIQUOR, HOSPITALITY & MISC -v- Hon Min for Education - CR 14 of 1994 - GEORGE C - 12/07/95 - Education 2877

[2]Appeal against decision of Commission (75 WAIG 1662) re dismissed claim for contractual entitlements on the grounds of unfair dismissal - Appellant claimed that Commission erred at first instance because he wanted the proceedings to remain open until certain matters were cleared and to have the retraction of the accusation of theft made by the Respondent to be in writing - Full Bench reviewed authorities and found on evidence that the Commission did not err in the exercise of its discretion as the Agreement struck between the parties had been partially performed by the Appellant and completely performed by the Respondent and therefore extinguished Appellant's application - Application for cost by Respondent dismissed - Ordered Accordingly - M Bradbury -v- Great Western Real Estate - APPL 462 of 1995 - Full Bench - SHARKEY P/BEECH C/GIFFORD C. - 24/10/95 - Property Services 2927

Application for reinstatement without loss of entitlements on the grounds of unfair dismissal - Applicant denied having smoked cannabis during a shift and claimed that he had been denied procedural fairness, that as the investigation was not conducted in a proper and thorough manner it contained procedural flaws and that he was not made aware of the 'Discipline Procedure' or 'Fair Treatment Procedure' - Respondent argued a proper and extensive investigation followed the incident and that they had reasonable grounds for believing that the Applicant had smoked cannabis during a shift - Commission reviewed authorities and found on evidence that cannabis had been smoked in one of the Respondent's trucks during the shift; that Applicant had been made aware of implications of smoking cannabis; that Respondent had exercised fairness in carrying out investigation into incident and that although Applicant had not exhibited effects of cannabis smoking, his termination was justified on the grounds of misconduct - Dismissed - N G Benck -v- Hamersley Iron Pty Limited - APPL 73 of 1995 - GIFFORD C. - 30/10/95 - Metal Ore Mining 3058

Application for reinstatement on the grounds of unfair dismissal - Applicant claimed that the company for which he had worked for had contracted out its services and had accepted a permanent position, similar to his previous role, offered by the new company in control, namely the Respondent - Respondent denied making this offer and argued that the Applicant had resigned his own services, that he was employed as a "required as" casual, and that trust between the parties had broken down making reinstatement problematic - Commission reviewed authorities and found on evidence that the Respondent did not offer the position to the Applicant but was merely "sounding out" interest and whilst there was conflicting evidence presented by both parties, the Applicant was terminated unfairly as he was not notified adequately - Furthermore, Commission found that the Applicant was not a permanent employee but an "ongoing" casual and could therefore only be re-instated to his former position - Ordered Accordingly - J J Moreno -v- Serco (Australia) Pty Ltd - APPL 542 of 1995 - GIFFORD C. - 27/10/95 - Personal & Household Good Retailing 3068

CUMULATIVE DIGEST—*continued*

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TERMINATION—*continued*

Application for reinstatement on the grounds of unfair dismissal - Applicant claimed family circumstances caused the need for him to be absent from his employment, that he was unable to obtain definitive advice as to when he could return and that his failure to comply with the necessary documentation was an oversight attributable to the difficulties he had been experiencing and not a conscious act - Respondent argued that Applicant's prolonged absence had attributed to serious manning difficulties, irregularities in usual rostering systems, increased hours of work for other staff and decreased staff morale and that special leave could not be granted because of staff shortages - Commission found on evidence that whilst Applicant had been confronted with several domestic problems that had required his absence from work, he had ignored the needs of the Respondent and as all leave except special leave had been granted, termination was not unfair - Dismissed - GN Smith -v- Western Mining Corporation Ltd - APPL 1067 of 1994 - PARKS C - 30/10/95 - Services to Mining 3072

Application for contractual entitlements on the grounds of unfair dismissal - Applicant claimed he was entitled to non -award contractual entitlements - Respondent argued that the Commission lacked jurisdiction as no industrial matter existed because there was no employment relationship and furthermore negotiations between the parties resulted in matters being settled - Commission reviewed authorities and noted that although the responsibility for the implementation of the Company's concepts lay with the Respondent, relevant indicia proving continuation of previous employment relationship could not be demonstrated by Applicant - Commission found on evidence that Applicant was conducting his own business and thus no industrial matter existed - Dismissed - D A Wedd -v- Interactive Tele Media P/L - APPL 596 of 1995 - SCOTT C. - 01/11/95 - Communication Services 3074

[1]Appeal against decision of Full Bench (75 WAIG 1787) upholding appeal against decision of Commission in dismissing application for reinstatement on the grounds of unfair dismissal - Appellant claimed that majority Full Bench erred in accepting that unfairness did not exist in circumstances and findings of minority decision should be made to be correc . - Respondent argued that Commission and majority Full Bench decisions were correct in that employment was finalised on the basis that no alternative position existed and employee's intention to resolve claim in common law arena - IAC found on evidence that the facts found could not lead to finding of "unilateral" termination as no duress or threats existed and could not discern neither error of law or fact in the results drawn by the majority Full Bench in their disposal of the matter - Dismissed - Durham -v- Westrail - IAC 9 of 1995 - Industrial Appeal Court - KENNEDY J./ROWLAND J./PARKER J. - 03/11/95 - Rail Transport 3163

[1]Appeal against decision of Full Bench (75 WAIG 1518) dismissing appeal against decision of Commission in granting reinstatement on the grounds of unfair dismissal - Appellant claimed that application did not fall into "resign or be fired case" and was dealt with on the basis of significant breach of contract - IAC reviewed I.R. Act, 1979 and authorities and found that Commission had accepted constructive dismissal on the basis of Cargill's case when the case could not support the conclusion reached - IAC further found that in both Cargill case and current application the claim was not under s29, but rather for resolution of industrial matter under s44 and as the court was not called to decide whether "constructive dismissal" fell into category of unfair dismissal, no generalisation be made and each case be looked at on its own facts - Dismissed - Attorney General -v- PRISON OFFICERS' UNION - IAC 8 of 1995 - Industrial Appeal Court - KENNEDY J./ROWLAND J./ANDERSON J. - 03/11/95 - Other Services 3166

Application for denied contractual entitlements on the grounds of unfair dismissal - Applicant claimed that a weekly contract of employment was entered into and included annual leave of four weeks with a loading, paid public holiday, pay in lieu of notice and occupational superannuation - Respondent argued that the contract was on an hourly basis when work was available and that Applicant was paid on that basis and termination was from lack of work - Commission found on evidence that it preferred Respondent's argument - Dismissed - Fane M. -v- Schiavi Simpson Hutson Pty Ltd - APPL 719 of 1995 - HALLIWELL SC - 21/11/95 - Finance 3331

Application for pro-rata long service leave entitlements - Applicant claimed that she was entitled to pro-rata long service leave on the grounds sought as notice of termination was received in an unjust manner - Respondent argued that termination of employment was due to the shop being sold and self managed by the new proprietor, so services were no longer required - Board of Reference found on evidence that Applicant's employment with the Respondent was less than the period required for long service leave and did not qualify for such an entitlement - Dismissed - Goodlich -v- Gumnut Nom T/A Colt Stationery - BOR 9 of 1995 - Board of Reference - CARRIGG R./Jones D.M./Latter W.S. - 10/11/95 - Personal & Household Good Rtlg 3331

Conference referred re termination and denied access - Applicant Union claimed industrial matter existed as employee/employer relationship was affected by third party - Respondents opposed claims on grounds that Commission lacked jurisdiction as no employer/employee relationship existed - Commission found on evidence that industrial matter existed and that it had jurisdiction to make order sought - Discontinued - METALS & ENGINEERING WORKERS' -v- East Perth Electrical Services - CR 463 of 1994 - HALLIWELL SC - 16/02/95 - Metal Ore Mining 3358

TRANSFER

Application for hearing and determination of appeal against decision of Commission (74 WAIG 2274) and for production of documents - Appellant claimed as grounds for appeal had not been dealt with the matter should be listed for hearing - Respondent argued Commission should discontinue appeal as it was served on two years after the fact and that documents sought were not relevant to grounds of appeal - Commission found on evidence that appeal had not been extinguished by amending legislation, that Respondent was aware of the appeal, that a remedy to the appeal could be effected notwithstanding the passage of time and that the grounds of appeal should be amended to allow for production of documents - Preliminary Reasons for Decision Issued Only - W G Antoniak -v- Ministry of Education - APPL 764 of 1995 - BEECH C - 07/09/95 - Education 2610

Application for compensation for lost wages - Applicant Union claimed relegation to part time position was harsh and unfair, that a breach of social justice had occurred and that custom and practice was not considered when decreasing Applicant's hours - Respondent argued part time employment was a fair and proper outcome of circumstances existing at time - Majority GSST found custom and practice required Respondent to provide Applicant with full time work load, even when demand for subjects decreased - Granted - STATE SCHOOL TEACHERS UNION -v- Hon Min for Education - TCR 24 of 1994 - Government School Teachers Tribunal - BEECH C - 24/07/95 - Education 2645

Conference referred re application for reassignment to original location on the grounds of unfair transfer - Applicant Union claimed transfer was harsh and unjust as Applicant had raised her concerns that working arrangements had been changed and Applicant's ill-health left her in no position to relocate or travel the distances required - Respondent argued Applicant did not lodge formal grievance regarding her transfer for some time after notification, that talk of telecommuting was not in fact finalised and that Applicant had actually accepted the offer to work in Northam - Commission reviewed authorities and found on evidence that although no concluded arrangements were made regarding telecommuting, the Applicant did accept an offer to work in Northam and although Respondent had not handled Applicant's grievance professionally, selection for transfer was fair - Dismissed - STATE SCHOOL TEACHERS UNION -v- Hon Min for Education - CR 166 of 1995 - BEECH C - 10/10/95 - Education 2882

CUMULATIVE DIGEST—*continued*

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UNIONS

Application re breach of Union Rules - Applicants claimed that the giving of evidence in the Federal or State Commission in accordance with the law did not constitute a breach of union rules and sought Order declaring no breach had occurred and altering of rules so no suggestion of breach could occur - Respondent argued that as evidence and sworn affidavits had been given in Federal Industrial Relations Commission, union rules had been breached and as summonses had been withdrawn the applications lacked any relevant subject matter and should be dismissed - President reviewed authorities and found on evidence that as threatened disciplinary proceedings had been withdrawn and as matter had ended, it was not in the public interest to further hear the applications - Dismissed - K W Cuneo and Others -v- UNITED FIREFIGHTERS UNION - APPL 451,452,453 of 1995 - President - SHARKEY P - 22/06/95 - Personal and Other Services 2344

Application for reinstatement without loss of entitlements on the grounds of unfair dismissal - Applicant claimed that the process which led to dismissal was harsh and unjust as performance and conduct had not been reasonably and competently assessed and that the reasons for dismissal were other than those stated - Respondent argued that dismissal was for poor performance and unsatisfactory conduct and that dismissal was not unfair - Commission reviewed authorities and found on evidence that Applicant had not discharged onus of proof necessary to establish that there was unfairness associated with his dismissal on account of poor performance and unsatisfactory conduct - Dismissed - BM Drake -v- B.P. Refinery (Kwinana) - APPL 640 of 1994 - PARKS C - 25/07/95 - Mining 2431

Application for reinstatement on the grounds of unfair dismissal - Applicant claimed that termination was unfair as it was based on the outcome of an accident which was not caused by negligence - Respondent argued that Applicant's work and safety performance was of poor standard and malicious damage had been caused to company property - Commission found on evidence that accident was a result of Applicant's error of judgement and that although behaviour was unsafe, it was a first offence and as a seven year satisfactory safety and work service record existed, the dismissal was unfair - Discontinued - C A Duthie -v- Hamersley Iron Pty Limited - APPL 583 of 1995 - HALLIWELL SC - 04/07/95 - Mining. 2434

[4]Application for an order re suspension of union rules with regards to elections - Applicant claimed rules which required elections to be held should be suspended pending the hearing and determination of Application Nos. 658 and 659 of 1995 which sought a certificate under section 71 of the I.R. Act - Respondent Union supported application as State members were informed of the applications, Federal and State organisations operated from the same office, Federal branch elections were approaching and that disruption of orderly management of branches would occur if State and Federal branches selected different officers - President reviewed authorities and found on evidence that if applications were successful, election would be unnecessarily held, organisation would incur expense and possible disruption, democratic control of organisation would be detracted from and thus, provided members were informed of postponement of State elections, stay would be granted - Ordered Accordingly - W Game -v- AUST ELECT, ELECTRONICS FOUND - APPL 662 of 1995 - President - SHARKEY P - 28/07/95 - Unions 2512

[4]Applications for interpretation of union rules - Applicants claimed that a Commission order effectively compelled breach of union rules by defining industrial action so that it prohibited consultation of its members through the requirements outlined in Rule 7.5 and 7.6 and sought a declaration as true interpretation of rules 7.5 and 7.6 - Respondent did not oppose application but sought clarification of the issue mentioned and requested that applications be joined - President reviewed authorities and found on evidence that as the definitions of rules 7.5 and 7.6 were plain and unambiguous, a declaration as to true meaning of the rules to be made - Declared and Ordered Accordingly - N L Folvig and Others -v- AUST ELECT, ELECTRONICS FOUND - APPL 832,845,846,847 of 1995 - President - SHARKEY P - 22/08/95 - Petroleum Coal Chemical Assoc 2515

[4]Application re stay of operation and orders - Applicant claimed that as the election of the respondent branch secretary and general meeting were not in conformity with rules, orders or directions be issued to hold that the decision of the general meeting be held null and void ultra vires the respondent's rules, to stay the closing and election of branch secretary and to reverse the returning officer's decision rejecting nomination for the position of branch secretary - President reviewed authorities and found on evidence that the real issue in the matter was eligibility to stand for office and as opportunity to amend defect was given but no remedy taken, the meeting was held to be valid, with the resolutions concerning member's absence, be declared null and void - Dismissed - W Sieczka -v- LOCOMOTIVE ENGINE DRIVRS UNION - APPL 527 of 1995 - President - SHARKEY P - 03/08/95 - Unions 2516

Application for registration of an industrial agreement to vary and renew a registered agreement and leave for intervention - Intervening union claimed that registration of the agreement should not occur as sufficient legitimate interest was demonstrated for intervention - Parties argued that no intervention of the union should occur as the extent of interest was only of passing significance - Commission reviewed authorities and found on evidence that although the union had sufficient interest to intervene if the Commission was obligated to register the industrial agreement the union would not have further scope to oppose the registration - Commission further found that matter further be heard to deal with the question of whether a mandatory obligation existed to register the agreement - Declared and Ordered Accordingly - Burswood Resort (Management) -v- LIQUOR & ALLIED INDUST UNION - AG 132 of 1995 - GIFFORD C. - 30/08/95 - Sport and Recreation 2522

[1]Appeal against decision President (75 WAIG 888) re orders and declarations to alter union rule - Appellant claimed that President erred in law in declaring that union rule 18(a) was inconsistent with section 56 of the Industrial Relations Act 1979 and in ordering liberty to apply to disallow the existing rule upon notice to the Commission, and exceeded jurisdiction in altering union rule to provide for office to be elected for a 2 year term - Respondent argued that no contract of employment by way of offer and acceptance had existed - Industrial Appeal Court reviewed union rules and Industrial Relations Act 1979 and found that President erred in finding as the rules clearly stated that as, aside from subordinate duties, General Secretary was subject to control and direction of the General Committee and the Delegate Meeting no discretionary powers existed - IAC further found that by virtue of appointment it was lead to conclude that member was an employee and for the purposes of section 7 or section 56 of the Act was not relevantly an officer - Granted - LOCOMOTIVE ENGINE DRIVERS UNION -v- D K Hathaway - IAC 2 of 1995 - Industrial Appeal Court - KENNEDYJ/FRANKLYN J/ROWLAND J. - 08/09/95 - Unions 2680

[2]Application for alteration of union rules - Applicant sought a declaration that Union's membership rules be same as its Federal Counterpart body and for rules to be inserted - Full Bench found the rules of the Federal Counterpart to be the same as the Applicant's and allowed amendments by alteration to rules re Name and Management of the Applicant organisation - Granted - AUST ELECT, ELECTRONICS FOUND - APPL 658 of 1995 - Full Bench - SHARKEY P/BEECH C/GIFFORD C. - 15/09/95 - Various 2693

[2]Application for registration of new organisation by amalgamation - Full Bench was satisfied that relevant sections of the I.R. Act had been complied with, that the new organisation's eligibility for membership rules covered only those of the Applicant Unions and that the Application was sealed and signed by the appropriate officers - Granted - METALS & ENGINEERING WORKERS' & Other - APPL 707 of 1995 - Full Bench - SHARKEY P/COLEMAN CC/GIFFORD C. - 20/09/95 - Various 2694

CUMULATIVE DIGEST—*continued*

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UNIONS—*continued*

Application to vary awards re $8.00 Arbitrated Safety Net Adjustment and enterprise flexibility provisions - Applicant Union claimed enterprise flexibility provisions should ensure formal establishment and observance of consultative processes involving the Union - Respondents argued State Wage Case Principles did not pronounce an expanded role for unions as a result of enterprise related efficiencies, that the role sought would impinge upon the existing rights of employers and employees and it was unnecessary given protections contained in proposed clause - Commission reviewed authorities and found on evidence that although Applicant Union had status of party principal, it should not be granted an unlimited right to involvement in enterprise based negotiations - Reasons Issued Only - LIQUOR, HOSPITALITY & MISC -v- Homes of Peace (Inc) - APPL 1090,1091,1102,1121,1129,1135,1146 of 1994 - PARKS C - 13/09/95 - Health Services... 2815

[4]Application for declaration re interpretation of rules - Applicant sought true interpretation of organisation's rules regarding definition of Industrial Magistrate's Court, definition of 'preparation of cases' and of correct procedures - Respondent Union did not oppose application - President reviewed authorities, rules 10 and 11 of organisation and found that declaration as to true meaning of rules should be issued - Declared Accordingly - A Lovell -v- COMM, ELECTRIC, ELECT, ENERGY - APPL 1025 of 1995 - President - SHARKEY P - 26/10/95 - Unions 2945

[4]Application re breach of Union Rules - Applicant claimed that his improper suspension from the General Committee be declared null and void and that he be reinstated with all his rights and privileges being restored because he was harassed by General Officers and General Committee members who also did not observe and administer the registered rules of the Union in a proper manner - Respondent denied allegations of harassment and argued that the Applicant was suspended for an indefinite period on charges of misconduct and that the decision was revoked prior to the hearing and determination of this application - President found on evidence that the manner in which the meeting was held involving the suspension of the Applicant was not provided for in the rules, and whilst there was insufficient evidence of harassment and intimidation, the President of the Union had failed to carry out his duties to control the effectively - Ordered Accordingly - D K Hathaway -v- LOCOMOTIVE ENGINE DRIVERS UNION - APPL 502 of 1995 - President - SHARKEY P - 17/07/95 - Various..... 2948

[4]Application for orders re breach of union rules - Applicants claimed Respondent failed to adhere to organisations rules by authorising payment of amounts exceeding $800 and honoraria payments beyond the registered rules - Respondent Union argued that General Committee should be made responsible as they had authorised honoraria payments beyond the rules and that orders could not be made against General Trustees or binding General Trustees under rule 22 without first hearing them - President reviewed authorities and registered rules of organisation and found that amounts exceeding $800 had been passed for payment without referendums; that application to alter rules 16, 17, 18 and 46 had not been made prior to resolutions being passed; unauthorised honoraria amounts were paid to recipients who were not entitled to monies - President further found that General Trustees did not need to be heard before orders sought could be issued as General Committee had a clear duty to recover unauthorised payments - Ordered Accordingly - E Schmid & Others -v- LOCOMOTIVE ENGINE DRIVERS UNION - APPL 531 of 1995 - President - SHARKEY P - 21/09/95 - Unions..... 2950

[4]Application for stay of decision - Applicant claimed that decision PSA AG2 of 1995 (75 WAIG 3052) be stayed pending the outcome of an appeal to the Full Bench with regards to questioning of an interpretation of section 41 of the I.R. Act, 1979 and a decision regarding the CSA's right for intervention - Applicant further claimed that the Public Service Arbitrator had not considered the provisions stipulated by section 80C(4) and section 41 of the Act and had erred in finding that the union had constitutional coverage when it did not consider the circumstances in which the amendments to constitution were sought - Respondent argued that the test set out in the "Hathaway Case" applied to the situation and that the Applicant did not satisfy it - President reviewed authorities and found on evidence that the decision of the Public Service Arbitrator be stayed temporarily pending the appeal to the Full Bench as the balance of to the question of coverage of the Path Centre and other health service enterprises - Furthermore, President found the seriousness of those questions pertaining to the application of sections 41 and 80C of the Act were also being addressed in the appeal - Granted - CIVIL SERVICE ASSOCIATION -v- WA Centre for Path & Med Resch - APPL 1311 of 1995 - President - SHARKEY P - 04/12/95 - Health Services..... 3177

UTILISATION OF CONTRACTORS

[2]Appeal against decision of Coal Industry Tribunal (unreported) re incorrect application of award and bias in determining matter - Appellant claimed Tribunal did not have jurisdiction to declare true meaning and effect of award, that it had erred in its interpretation of clause 26 of the award, that in declaring true meaning of award it failed to consider custom and practice of parties and that it was bias in its hearing and determination of matter - Respondent argued that the test was whether it was able to resolve questions with a fair and unprejudiced mind - Full Bench reviewed authorities and found Tribunal had erred and that a review of the decision of the Tribunal was warranted - Granted and Quashed - COAL MINERS' UNION, COLLIE -v- Western Collieries - APPL 153 of 1995 - Full Bench - SHARKEY P/COLEMAN CC/SCOTT C. - 10/08/95 - Coal Mining 2492

Application to vary work order re insertion of redundancy provisions - Applicant Unions claimed redundant employees be paid equivalent of 26 weeks' pay, pro-rata long service leave (regardless of length of service), relocation and travel expenses as awards applicable in area of project contained these provisions and intention existed to provide security employees with wages and conditions similar to those of award regulated employees of Woodside - Respondent did not oppose introduction of redundancy provisions but argued that according to State Wage Principles, claims based on a nexus with provisions applicable to other employees could not be relied upon; that the purpose of relocation and travel expenses was to return employees to their place of engagement and the definition of redundancy should be more expressly defined so as not to include the loss of a contract - Commission reviewed authorities and found that it was open to prescribe redundancy provisions as contained in Metal Trades (General) Award but in the best interest of all it would consolidate terms of order and redundancy provisions - Granted in Part - MISCELLANEOUS WORKERS' UNION -v- Wormald Security - APPL 326 of 1993;APPL 344 of 1994 - PARKS C - 05/09/95 - Business Services..... 3340

Conference referred re termination and denied access - Applicant Union claimed industrial matter existed as employee/employer relationship was affected by third party - Respondents opposed claims on grounds that Commission lacked jurisdiction as no employer/employee relationship existed - Commission found on evidence that industrial matter existed and that it had jurisdiction to make order sought - Discontinued - METALS & ENGINEERING WORKERS' -v- East Perth Electrical Services - CR 463 of 1994 - HALLIWELL SC - 16/02/95 - Metal Ore Mining..... 3358

VICTIMISATION

[1]Appeal against decision of Full Bench (75 WAIG 1518) dismissing appeal against decision of Commission in granting reinstatement on the grounds of unfair dismissal - Appellant claimed that application did not fall into "resign or be fired case" and was dealt with on the basis of significant breach of contract - IAC reviewed I.R. Act, 1979 and authorities and found that Commission had accepted constructive dismissal on the basis of Cargill's case when the case could not support the conclusion reached - IAC further found that in both Cargill case and current application the claim was not under s29, but rather for resolution of industrial matter under s44 and as the court was not called to decide whether "constructive dismissal" fell into category of unfair dismissal, no generalisation be made and each case be looked at on its own facts - Dismissed - Attorney General -v- PRISON OFFICERS' UNION - IAC 8 of 1995 - Industrial Appeal Court - KENNEDY J./ROWLAND J./ANDERSON J. - 03/11/95 - Other Services 3166

CUMULATIVE DIGEST—*continued*

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WAGES

Application to vary awards re rostering, shift allowances, weekend and holiday allowances and underground travel time provisions - Applicant union claimed that the current seven and a half hour shifts be maintained and a provision for overtime in relation to shifts worked beyond those hours be included to accommodate two hour shifts - Respondent argued that the history and nature of contracts demonstrated the remuneration was over and above remuneration covered by awards and shift work was found to be less desirable as it brought certain social problems and health concerns - Respondent further argued that as there was a linkage between the legislative requirements for underground work and the award provisions, negotiations involving more working hours or days could not be done - Commission reviewed authorities and found on evidence that, on balance, whilst there were were some disadvantages for some employees, there was generally a vast improvement in their working situation and their personal lives and that the awards should be amended accordingly - Granted in Part - AUSTRALIAN WORKERS' UNION -v- Western Mining Corporation Ltd - APPL 1522 of 1991, APPL 1108, 1109 of 1992 - GREGOR C - 20/01/95 - Mining 2181

[2]Appeal against decision of Industrial Magistrate (unreported) re failure to order payment of wages and rates of annual leave - Appellant claimed Industrial Magistrate erred in law in "offsetting payments in excess of 25 hours per week for 24 hour week period when employee had received $350 per week" and further failed to have regard to s.114 of I.R. Act - Full Bench reviewed authorities and found that an incorrect calculation of the pro-rata being in the same proportion as number of hours worked to 38 hours had been done - Upheld - R D Jose -v- Geraldton Resource Centre Inc - APPL 1263 of 1994 - Full Bench - SHARKEY P/HALLIWELL SC/SCOTT C. - 27/06/95 - Retail Trade 2316

[3]Applications for variations to awards re $8.00 Arbitrated Safety Net Adjustment - Applicant claimed that applications had satisfied requirements set out in Principles for second arbitrated safety net adjustment and they did not impede on operation of $8.00 wage adjustment as "offsetting" provisions were included - Respondent argued that Award Modernisation clause which operated in awards was inadequate to satisfy award variation under arbitrated safety net adjustment Principle and existing provisions were inconsistent with Wage Fixing Principles - CICS reviewed authorities and found that none of the applications gave rise to special circumstances with regard to date of operation second arbitrated safety net, that the applications whose period had elapsed since first arbitrated safety net would apply in June and the others would be an efflux of time from first $8.00 adjustment - Granted in Part - LIQUOR, HOSPITALITY & MISC -v- Min for Community Development - APPL 1106 of 1994 - Commission in Court Session - COLEMAN CC/GEORGE C/SCOTT C. - 29/06/95 - Various 2322

Application to vary award re $8.00 Arbitrated Safety Net Adjustment - Applicant claimed that absorption of $8.00 could not occur as other increases were awarded prior to November 1991 - Respondent argued that $8.00 payment would be absorbed into the $12.00 payment, resulting in no net increase to employees concerned - Commission reviewed authorities and found on evidence that as employees had not received a wage increase since November 1991 and that the parties appeared to be continuing to implement award restructuring, the first arbitrated safety net adjustment should be absorbed into the $12.00 payment - Granted - AUSTRALIAN WORKERS' UNION -v- Hon Min for Education & Others - APPL 268 of 1995 - BEECH C - 11/07/95 - Education 2427

Application to vary award re $8.00 Safety Net Adjustment - Applicant claimed that the single classification of probationary security officer (shift employee) had not received a wage increase since the 1992 Order and should recieve the first arbitrated safety net increase - Respondent argued that employees covered by the Order had received wage increases in excess of $8.00 due to enterprise bargaining - Commission reviewed authorities and found on evidence that circumstances warranting previous increase and 1992 order did not generally apply to security officers, that increases had been awarded for reasons of enterprise bargaining and to award an increase to a single classification in which no-one was employed would have little purpose - Dismissed - LIQUOR, HOSPITALITY & MISC -v- Wormald Security - APPL 1609 of 1993 - BEECH C - 14/07/95 - Property and Business Services 2442

[1]Appeal against decision of Commission in Court Session (75 WAIG 22) re dismissed claim for Long Service Leave Entitlement - Appellant claimed Commission in Court Session erred in law by concluding that jurisdiction to hear matter came from incorrect section of the Act and that grounds of appeal constituted challenges to finding when they were challengeable on appeal - Respondent argued that 2 questions of whether the limitation of Commission in Court Session's jurisdiction was to review only errors of law and whether court could go behind finding of facts to determine sufficient evidence to support findings of fact needed to be addressed - Industrial Appeal Court reviewed authorities and found on evidence that it was not open to either the Commission in Court Session or the Industrial Appeal Court to go behind findings of fact and as Commission in Court Session was bound by findings there was no power to review findings for erred of law or to remit matter back to Board of Reference - Dismissed - Thomas Massam Real Estate -v- D Evans - IAC 19 of 1994 - Industrial Appeal Court - 04/08/95 - Property and Business Services 2473

[2]Appeal against decision of Commission (75 WAIG 401 & 955) re dismissed application for correction to omission of application - Appellant claimed matter should be relisted as failure of the order to take into account Fifth Schedule of award resulted from an omission in original application and members would be denied benefits - Full Bench reviewed authorities and found that as application was for variation of First not Fifth Schedule of award, Commission had not erred and as it had discharged all of its function, was functus officio and could not entertain application to relist matter - Full Bench further found that application for extension of time was dismissed and as no grounds of appeal had been made, so must appeals - Dismissed - AUST ELECT, ELECTRONICS FOUND -v- Building Management Authority - APPL 455,495 of 1995 - Full Bench - SHARKEY P/COLEMAN CC/GEORGE C - 23/08/95 - Construction Trade Services 2483

Applications for registration of new agreement - Applicants claimed that there existed a mandatory requirement for Commission to register agreement and that each of companies constituted "single enterprise" as defined in the act- Applicant further claimed that Commission in Court Session application had little relevance to instant proceeding and it was essential to have industrial coverage finalised to enable certainty into contract tenering - Respondent argued that it was inappropriate to address true meaning of s.41(2) of the act until conditions needed to satisfy s.41(3) and 41(a) were dealt with and that as terms 'business, project or undertaking' were referred to in the definition of industry they applied to more than one business and were not single enterprise - Respondent further argued it was appropriate for proceedings not to continue to determination until Commission In Court Session decision was issued and that the delay in proceedings would not create prejudice as terms and conditions corresponded with those already in place - Commission found that four questions needed to be addressed by parties and that mandatory obligation existed to register agreements although Commission was unable to conclusively determine question posed - Commission further found that there contained compelling reasons to await the Commission In Court Session decision and that it was not of view that any significant prejudice would result in the proceedings further delay - Declared Accordingly - Fisher Catering Services P/L -v- LIQUOR & ALLIED INDUST UNION - AG 16,42,97 of 1994 - GIFFORD C. - 23/08/95 - Accommodation, Cafes&Restaurants 2526

CUMULATIVE DIGEST—*continued*

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WAGES—*continued*

Application to vary award re $8.00 Safety Net Adjustment - Respondent argued that variation of $8.00 safety net pursuant to December 1993 State Wage Case could not occur as award was paid rates award - Commission reviewed authorities and found that rates paid were minimum rates and commitment of parties to structural reform enabled the variation to occur - Granted - LIQUOR, HOSPITALITY & MISC -v- Ministry of Education - APPL 1553 of 1993 - COLEMAN CC - 15/08/95 - Various 2547

Application to vary award re second $8.00 arbitrated safety net adjustment - Parties consented to variation - Commission found that as 1st arbitrated safety net application had been granted, application complied with the requirements of the Principles and that to delay application would be counterproductive and delay reform initiatives - Granted - SALARIED PHARMACISTS ASSOC -v- Perth United Friendly & Others - APPL 540 of 1995 - GEORGE C - 08/08/95 - Personal & Household Good Rtl 2596

[3]Recommendation to Minister re review of Minimum Weekly Rates of Pay - CICS invited submissions, and peak employer/employee organisations made submissions - Parties advocated an increase to rate of pay, however the quantum of increase varied - CICS noted submissions and by majority found no reason to depart from previous recommendation of aligning the datum point to be achieved to 78% of the Tradespersons rate - Dissenting member noted that the relevance of the above concept had eroded with the role of centralised wage fixing - CICS unanimously recommended the continuation of existing relativities for junior rates in relation to an adult (21 years) - Recommendation Issued - (Commission's Own Motion) -v- (Not - APPL 143 of 1995 - Commission in Court Session - COLEMAN CC/HALLIWELL SC/SCOTT C. - 31/05/95 - Various 2695

Application to vary award re $8.00 Arbitrated Safety Net Adjustment - Applicant Union claimed as Appendix D had been amended for first safety net adjustment and it satisfied State Wage Principles, both Appendix D and Clause 9 should be amended to reflect second safety net adjustment - Respondent consented to Appendix D receiving second safety net adjustment, but argued that application for amendment to Clause 9 did not comply with Principles - Commission reviewed authorities and found on evidence that second safety net adjustment could not be applied to Clause 9 as it did not comply with Principles, but that the first safety net adjustment and structural efficiency increase should be applied as no wage increase had been granted since November 1991 - Granted in Part - Min for Works & Others -v- BUILDERS LAB, PAINTERS, PLAST & Others - APPL 520 of 1995 and 639 of 1995 - SCOTT C. - 02/08/95 - General Construction 2802

Application for variation of award re $8.00 Arbitrated Safety Net Adjustment - Parties consented for Application No. 400B to be divided into two to deal with amendment in respect to wage increase available under the State Wage Case and an enterprise flexibility clause, respectively - Commission found on evidence that the tests to be applied were met for wage adjustments and that retrospectivity was also fair as other parties to the Award had already received the increase - Commission further found that application for enterprise flexibility clause was dismissed as parties consented that it should not be varied - Granted in Part - AUST MUNICIPAL, CLERICAL & SER -v- Totalisator Agency Board & Other - APPL 400B of 1995 - SCOTT C. - 24/07/95 - Sport and Recreation 2809

Application to vary awards re $8.00 Arbitrated Safety Net Adjustment and enterprise flexibility provisions - Applicant Union claimed enterprise flexibility provisions should ensure formal establishment and observance of consultative processes involving the Union - Respondents argued State Wage Case Principles did not pronounce an expanded role for unions as a result of enterprise related efficiencies, that the role sought would impinge upon the existing rights of employers and employees and it was unnecessary given protections contained in proposed clause - Commission reviewed authorities and found on evidence that although Applicant Union had status of party principal, it should not be granted an unlimited right to involvement in enterprise based negotiations - Reasons Issued Only - LIQUOR, HOSPITALITY & MISC -v- Crothall Hospital Services P/L - APPL 1090,1091,1102,1121,1129,1135,1146 of 1994 - PARKS C - 13/09/95 - Health Services 2815

Application to vary award re appropriate rate of pay - Applicant Union claimed wages clause of Building Trades (Government) Award should be altered to reflect changes to wages paid to tradespeople, that claim was in accordance with Structural Efficiency Principles and definitions and skill levels applicable to tradespeople covered by the two awards were equal - Respondent argued that comparison of the two awards was inappropriate given one was a paid rates award whilst the other was a minimum rates award and that it would be a misconstruction of Principles to compare them - Commission reviewed authorities, compared the Building Trades (Government) Award 1968 with the Engineering Trades (Government) Award 1967, reviewed Principles and found on evidence that it would be contrary to the Statement of Principles to compare minimum rates award with a paid rates award to fix the minimum rates award wages rates - Dismissed - BUILDERS LAB, PAINTERS, PLAST & Others -v- Hon Min for Works & Others - APPL 347 of 1995 - SCOTT C. - 22/09/95 - General Construction 2841

Application for contractual entitlements on grounds of unfair dismissal - Applicant claimed that he was owed monies relating to a telephone account and commission, and as no notice was given for termination, it warranted it as unfair - Respondent argued that the commission did not constitute part of Applicant's contractual arrangements and that dismissal resulted from misconduct for accepting premiums, for taking money from the tin and for dishonouring cheques - Commission reviewed authorities and found on evidence that the events which led to the Applicant's dismissal constituted misconduct and as notice was also given dismissal was not unjust or harsh - Commission further found that the deduction for telephone expenses should not have occurred - Ordered Accordingly - P R Courtland -v- Oaklea Pty Ltd - APPL 501 of 1995 - SCOTT C. - 24/08/95 - Insurance 2854

[2]Appeal against decision of Industrial Magistrate (unreported) re failure to order adequate penalties for breaches of award - Appellant claimed Industrial Magistrate erred in finding penalties should be minimal contrary to weight of evidence and in finding that penalties should not be paid to Complainants - Respondent argued that as a small business, it could not afford increased penalties - Full Bench reviewed authorities and found on evidence that penalties imposed were inadequate given amount of maximum penalty, time over which breaches occurred, number of breaches involved, evidence of previous breaches, the admission of breaches and that breaches related to apprentices - Upheld and Ordered Accordingly - AUST ELECT, ELECTRONICS FOUND -v- Apollo Electrotech Pty Ltd - APPL 615 of 1995 - Full Bench - SHARKEY P/SCOTT C./GIFFORD C. - 16/10/95 - Construction Trade Services 2937

Application for denied contractual benefits - Applicant claimed he had not been paid commissions he was entitled to pursuant to his contract of employment - Respondent did not contest the fact that monies were owed but argued that advertising costs should be deducted - Commission found on evidence that no written contract existed whereby advertising costs should be deducted, nor had there been previous practice of deducting such costs from earnings of employees and that no evidence was presented to the contrary that monies were owed - Granted - J N Glossop -v- Affirm P/L T/A Port City 1st - APPL 801 of 1995 - SCOTT C. - 10/10/95 - Property Services 3066

CUMULATIVE DIGEST—*continued*

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WAGES—*continued*

Application for denied contractual entitlements - Applicant claimed contract of employment entitled a six months' Base Remuneration Package upon termination and that pay in lieu of notice was incorrectly calculated - Respondent argued payment of six months' Base Remuneration Package was only applicable upon completion of three month review period - Commission found all terms and conditions, including redundancy payment had applied during three month review period; and despite confusion between terms, Base Remuneration Package meant Base Salary Package and six months payment based on total in Base Remuneration Package was owed to Applicant - Commission further found that although an absence of an provision regarding notice period existed, one month's pay in lieu of notice had been received and Applicant could not demonstrate further entitlements - Granted in Part - Potts D.A. -v- Robowash Pty Ltd - APPL 831 of 1995 - SCOTT C. - 02/11/95 - Business Services 3334

WORKERS COMPENSATION

1Appeal against decision of Full Bench (75 WAIG 1787) upholding appeal against decision of Commission in dismissing application for reinstatement on the grounds of unfair dismissal - Appellant claimed that majority Full Bench erred in accepting that unfairness did not exist in circumstances and findings of minority decision should be made to be correct - Respondent argued that Commission and majority Full Bench decisions were correct in that employment was finalised on the basis that no alternative position existed and employee's intention to resolve claim in common law arena - IAC found on evidence that the facts found could not lead to finding of "unilateral" termination as no duress or threats existed and could not discern neither error of law or fact in the results drawn by the majority Full Bench in their disposal of the matter - Dismissed - Durham -v- Westrail - IAC 9 of 1995 - Industrial Appeal Court - KENNEDY J./ROWLAND J./PARKER J. - 03/11/95 - Rail Transport 3163