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FULL BENCH—
Appeals against decision of Commission—

2001 WAIRC 02484

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	CABLE SANDS (WA) PTY LTD, APPELLANT
	v.
	ROBERT SULLIVAN AND OTHERS, RESPONDENTS
CORAM	FULL BENCH
	HIS HONOUR THE PRESIDENT P J SHARKEY
	COMMISSIONER J F GREGOR
	COMMISSIONER S WOOD
DELIVERED	FRIDAY, 30 MARCH 2001
FILE NO/S	FBA 10 OF 2001
CITATION NO.	2001 WAIRC 02484

Decision	Appeal discontinued by consent.

Order.

The Notice of Appeal herein, having been filed in the Registry of the Commission on the 8th day of March 2001, and having been served upon the respondents on the 9th day of March 2001 and a Declaration of Service having been filed in the Registry of the Commission on the 9th day of March 2001, and Counsel for the abovenamed appellant, on the 22nd day of March 2001, having filed a Notice of Discontinuance in the Registry of the Commission, and Counsel for the abovenamed respondents, on the 26th day of March 2001, having advised the Commission, in writing, that the respondents consented to the appeal being discontinued by the appellant, and the Full Bench having decided that the consent to the discontinuance of the appeal constituted special circumstances so as to exempt the parties and each of them from further compliance with Regulation 29 of the *Industrial Relations Commission Regulations* 1985 and having so exempted them, it is this day, the 30th day of March 2001, ordered, by consent, as follows—

(1) THAT there be leave granted and leave is hereby granted for appeal No FBA 10 of 2001 to be withdrawn.

(2) THAT the Full Bench refrain from hearing the said appeal further.

By the Full Bench,

(Sgd.) P.J. SHARKEY,
[L.S.] President.

2001 WAIRC 02287

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	COMMUNICATIONS, ELECTRICAL, ELECTRONIC, ENERGY, INFORMATION, POSTAL, PLUMBING, AND ALLIED WORKERS UNION OF AUSTRALIA, ENGIN & ELECT DIV, WA BRANCH, APPELLANT
	v.
	BHP IRON ORE PTY LTD, RESPONDENT
CORAM	FULL BENCH
	HIS HONOUR THE PRESIDENT P J SHARKEY
	CHIEF COMMISSIONER W S COLEMAN
	COMMISSIONER P E SCOTT
DELIVERED	WEDNESDAY, 14 MARCH 2001
FILE NO/S	FBA 52 OF 2000
CITATION NO.	2001 WAIRC 02287

Decision	Applications dismissed.
Appearances	
Appellant	Mr C Young
Respondent	Mr A J Power (of Counsel), by leave, and with him Mr H M Downes

Reasons for Decision.

THE PRESIDENT—

INTRODUCTION

1 This is an application by the abovenamed applicant organisation of employees (hereinafter referred to as "the

CEPU"), the appellant in appeal No FBA 52 of 2000, for leave to extend time within which to appeal and for leave to extend time within which to make application to extend time.

2 The applications were opposed by the abovenamed respondent employer (hereinafter referred to as "BHP"), which is the respondent to the appeal.

BACKGROUND

3 The background to the matter is as follows—

4 The abovenamed parties were parties to proceedings before the Commission at first instance, constituted by a single Commissioner, in matter No CR20 of 2000. The Senior Commissioner made an order which was perfected by its being deposited in the office of the Registrar on 2 November 2000.

5 This matter came before the Commission at first instance pursuant to s.44 of the *Industrial Relations Act* 1979 (as amended) (hereinafter referred to as "the Act") because, arising out of events involving Mr Paul Donnelly Kilmartin, he was given a final warning on 25 January 2000 for allegedly intimidating a fellow employee and abusing the wife of another employee. Mr Kilmartin denied so doing and the CEPU sought an order, opposed by BHP, directing BHP to withdraw the warning.

6 The order, formal parts omitted, was in the following terms—

> "THAT the Respondent replace the written Final Warning given to Mr Kilmartin on 25 January 2000 with a written Warning in terms that "any repetition of intimidatory or threatening behaviour inconsistent with the Non-Harassment Policy may leave the Company with little option but to terminate your contract of employment".

7 The Notice of Appeal was filed on behalf of the CEPU on 30 November 2000 and served on BHP on 1 December 2000. The Notice of Appeal should have been instituted on or before 24 November 2000. It was six days late.

8 The applications which came before the Full Bench were both filed on 30 November 2000.

9 The following evidence on behalf of the CEPU was given by assertion from the bar table. The CEPU only became aware that the order was perfected on 7 November 2000, because the faxed copy of the order received by the CEPU on 2 November 2000 was not stamped with the Registrar's seal. The CEPU's advocate needed to consult with Mr Kilmartin, the employee and union member at the centre of the proceedings, the subject of the application at first instance.

10 Mr Kilmartin, according to the evidence at first instance, was a resident of South Hedland in this State, a town a very long distance from Perth. It was necessary for Mr Young, as advocate for the CEPU, to consult with Mr Kilmartin and also with local CEPU officials at BHP's operations in the Pilbara.

11 Further, the Senior Commissioner had not ordered transcript and it was necessary for Mr Young to order the transcript and then arrange payment for the same from "local" funds.

12 Next, there was delay occasioned by the necessity to consult with officials in Port Hedland concerning the grounds of appeal. All this contributed to the delay, the Full Bench was told.

13 Further, on 2 November 2000, the advocate for the CEPU had orally advised representatives of BHP that an appeal would be considered.

14 There was no evidence adduced on the point of delay or the reasons therefor by or on behalf of BHP. Objection was taken, however, to the evidence being asserted from the bar table.

15 The law relating to evidence by assertion from the bar table in industrial tribunals is well settled. In *R v The Commonwealth Conciliation and Arbitration Commission and Others; Ex parte The Melbourne and Metropolitan Tramways Board* [1965] 113 CLR 228 at 243, Barwick CJ, with whom Kitto, Taylor, Menzies and Owen JJ agreed, held—

> "The Commissioner was not disentitled to act upon the assertions of the Union advocate, merely because they were not made on oath, or because he might not have been competent as a witness according to the ordinary rules of evidence to make them. No doubt, if the correctness of his assertions were challenged, it would at the least be imprudent on the part of the Commissioner not to have further examined the matter, so as to satisfy him of the actual facts, if need be, by evidence formally given. But there was nothing in the instant case which, it seems to me, the Commissioner might not properly regard in the circumstances as sufficiently "evidenced" by the statements of the Union advocate,"

(See also per Menzies J at page 252.)

16 That authority has been applied for the same purpose in this Commission for many years (see, for example, *S & M Bennett Pty Ltd trading as Rockingham Sheetmetal Works v Scott* 77 WAIG 2869, *CSA v Perth Theatre Trust* 77 WAIG 1086 (FB), *Commissioner of Police and Minister for Police v Smith* 73 WAIG 716 and *WA Dental Technicians and Employees' Union of Workers, Perth v Devenish Dental Laboratories and Others* 60 WAIG 1330 (FB)).

17 In this case, these were interlocutory proceedings, the correctness of the assertions were not challenged and it was not necessary for the Full Bench to have examined the matter further. The fact of the matter was that, due to delays in preparing and drafting the Notice of Appeal, it was filed six days late, an almost negligible delay.

PRINCIPLES

18 The principles in relation to applications to extend time have been authoritatively laid down by the Industrial Appeal Court in this jurisdiction in *Tip Top Bakeries v TWU* 74 WAIG 1189 at 1190-1191 (IAC) and in *Ryan v Hazelby and Lester trading as Carnarvon Waste Disposals* 73 WAIG 1752 at 1752-1753 (IAC) and followed, as they are required to do by Full Benches of this Commission. It is not necessary and is confusing to refer to persuasive authority from other jurisdictions.

19 The principles to be extracted from those authorities were set out by the Full Bench in *Rosemist Holdings Pty Ltd v Khoury* 79 WAIG 645 (FB) per Sharkey P at page 645 and Scott C at page 647 and reproduced in *Stokes v The Typing Centre of Perth Pty Ltd t/as Australian International College of Commerce* 81 WAIG 22 at 27 (FB) per Sharkey P and Kenner C, with whom Smith C agreed.

20 Summarised, they are as follows—

1. The grant of an extension of time is not automatic.
2. The object of a rule or power to extend time is to ensure that legislative provisions or rules which fix times for doing acts do not become incidents of injustice.
3. The discretion to extend time is given for the sole purposes of enabling the Commission to do justice between the parties.
4. This means that the discretion can only be exercised in favour of an applicant upon proof that strict compliance with the rules will work an injustice upon the applicant.
5. In order to determine whether the rules will work an injustice, it is necessary to have regard to the history of the proceedings, the conduct of the parties, the nature of the litigation and the consequence for the parties of the grant or refusal of the application for extension of time.
6. When the application is for an extension of time in which to file an appeal, it is always necessary to consider the prospects of the applicant succeeding in the appeal.
7. It is also necessary to bear in mind in such application that, upon the expiry of the time for

appealing, the respondent has "a vested right to retain the judgment", unless the application is granted.

8. It follows that, before the applicant can succeed upon such an application, there must be material upon which the Commission can be satisfied that to refuse the application would constitute an injustice.
9. The initial step in determining whether there would otherwise be an injustice to the appellant may often be to decide whether the prospect of the appellant succeeding in the substantive appeal if an extension of time were to be granted is a real one.

21 This is such a case. There was substantial argument on behalf of both parties directed to that point.

PROSPECTS OF SUCCESS

Factual Background

22 Mr Young, who appeared for the CEPU in this matter, outlined the factual background at first instance. Shortly put and with some additions extracted from the evidence at first instance by me, it was this.

23 BHP is and was the employer of persons at Port Hedland and Newman in this State who are or were subject to the *Iron Ore Production and Processing Award* (hereinafter referred to as "the award").

24 Before this matter reached the Commission at first instance, BHP purported to offer employees, subject to the award, individual workplace agreements, the subject of the *Workplace Agreements Act* 1993. The CEPU and other unions objected to this and commenced industrial action. That industrial action included the use of picket lines to prevent employees who had entered into workplace agreements going into the workplace. In order to get these employees to work, BHP provided buses to transport them. The buses travelled in convoy, sometimes accompanied by a police escort, and sought to cross the picket lines.

25 Mr Kilmartin, on 19 January 2000, was on strike. He followed two of the buses to which I referred above to a carpark near the Cemetery Beach Park at Port Hedland where, on what Mr Young informed us, he abused some of the occupants. He was upset. He referred to them, inter alia, as scabs and emphasised his view of them by the use of commonly used and coarse nouns, verbs and adjectives, all of which contain the short vowel "u".

26 Mr Michael Patrick Wheeler and Ms Susan Jane Stutsel-Kelly, who were personnel managers, were in one bus. The other bus contained employees some of whom Mr Kilmartin knew. These events did not occur at the workplace.

27 About two days later, whilst attending to banking in town, Mr Kilmartin encountered Mrs Katherine Anne Forrest, the wife of a fellow employee whom he knew to be one of those who had recently entered into a workplace agreement. She greeted him. Mr Kilmartin replied that he was good, but "no thanks to your old man". Mrs Forrest told him that he should grow up and they then went off about their own affairs.

28 There was an investigation and he was given a Final Warning in writing that "any further similar behaviour on your part, or any acts of serious misconduct of any nature, will result in the termination of your employment" (see page 18 of the appeal book (hereinafter referred to as "AB")).

29 It was not denied that Mr Kilmartin abused the employees. He said that he gave them a "gobful", but denied that he threatened them.

30 BHP's allegation was that Mr Kilmartin's conduct was in breach of the "BHP Iron Ore Non-Harassment Policy". That contains the following statements—

> "BHPIO is opposed to all forms of work related harassment including that related to sex, race, membership or non-membership of trade unions and acceptance or non-acceptance of workplace agreements
>
> .....
>
> Work related harassment, including threats and intimidation, is unacceptable to BHPIO and any employees found to have engaged in such behaviour will be subject to disciplinary action up to and including summary dismissal"

(See page 19(AB).)

31 BHP had also issued a memorandum to all employees at Port Hedland forbidding the use of the word "scab" (see page 23(AB)).

32 The Senior Commissioner found that the conduct in the carpark was intimidating and threatening. He found that Mr Kilmartin's conduct in relation to Mrs Forrest was not intimidating, but that her telling Mr Kilmartin that his conduct was childish was a fair and accurate assessment of that conduct. He found, too, that there was no evidence of employees to whom the accusation of "scab" was addressed were offended by the words.

33 The Senior Commissioner held that the final warning issued was "outside the range of a reasonable response" and made the order to which I have referred, which was far less condemnatory or grave in its terms, although the Senior Commissioner did not accede to the application to revoke the warning.

ARGUABLE CASE

34 First, Ground 1 is not a ground which, on the face of it, is fatal to the appeal, even if established because his conduct was admitted by Mr Kilmartin himself.

35 As to Ground 2, the conduct found to be intimidating and threatening was that in the Cemetery Beach Park carpark. I refer now to that conduct.

36 In my opinion, without the witnesses being called, the Senior Commissioner was entitled to and required to determine whether the conduct was intimidating. He could have determined it solely on the basis of Mr Kilmartin's evidence of what he did. The Senior Commissioner could have and was entitled to find it intimidating and harassing by an examination of the nature of the conduct itself. However, it was arguable that Mr Kilmartin's conduct was abusive, offensive and obscene (see Ms Stutsel-Kelly's evidence at page 100-101(AB)).

37 There was no direct evidence from any "targeted person" that Mr Kilmartin's conduct had any effect on the "targeted persons". There was no complaint by them in evidence. There was no evidence that the workplace was made unpleasant or humiliating, although an inference might be drawn.

38 Grounds 2 and 4(a), (b) and (c) raise a clear issue and an argument as to the nature of conduct, but I am not persuaded, given that Mr Kilmartin admitted himself what occurred, that it is necessarily a strong one.

39 As to Ground 3, there is no substance in that allegation. The Senior Commissioner did not find that Mrs Forrest was harassed or humiliated nor, on the evidence, was it open to him to so find.

40 I now turn to Ground 4(d). For BHP, it was submitted that this was a matter which was not raised at first instance and could not, pursuant to s.49(4) of the Act, be raised on appeal. In support of that submission, it was submitted that Mr Young had, in his opening, said that it was a case confined to the facts; thus, as I understand the submission, no question of whether the events which occurred were subject to the policy as not being in the workplace and the reasonableness of the policy in its scope and content and application, were simply not raised.

41 In reply, Mr Young took the Full Bench to pages 163-164(AB), where the scope of the policy was specifically raised by him in his final address, particularly in the context of its coverage of situations outside the workplace, which was the case with both the Cemetery Beach Park carpark incident and the incident involving Mrs Forrest (see page 165(AB) also).

42 The intent of the policy and its alleged ludicrousness were also referred to (see page 166(AB)). It was also submitted that, in its breadth, the policy was unreasonable.

43 In my opinion, Ground 4(d) was therefore quite directly enough raised to constitute a valid and permissible ground

of appeal in most of its elements. Certainly, the policy's application and reasonableness were raised and most of the grounds, at least, relate to that. There are strong arguments concerning what the policy's coverage is and whether, in all or any of its purported scope, it is reasonable.

44 Even if that were not so, this point might still be arguable on appeal if the point raised could not have been defeated by new evidence, as would seem to be the case (see *FCU v George Moss Limited* 70 WAIG 3040 (FB) and *O'Brien and Others v Komesaroff* [1982] 150 CLR 310 at 318-319).

45 As to Ground 5, it was submitted that the Senior Commissioner did not take account of the fact that Mr Kilmartin was on strike at the time that the carpark incident occurred in a public place outside work hours, that there was no attempt to hinder the bus leaving, that there was no evidence from the occupants of the bus that they felt intimidated or harassed.

46 The Senior Commissioner did consider that Mr Kilmartin did not approach the employees afterwards, that there were strong feelings in the community and the workplace about the workplace agreement issues, and that Mr Kilmartin had a 23 year unblemished working record and that he was not alone in his conduct and another employee had been treated more leniently for more serious conduct in the carpark.

47 In my opinion, because of those considerations, the penalty imposed could not be attacked for consideration of insufficient relevant factors.

48 There was a question raised before the Full Bench, however, as to whether the whole question of disciplinary penalty was foreclosed on at first instance. Mr Power, counsel for BHP, took us to the transcript and Mr Young's address (see page 171(AB)), where Mr Young submitted—

> "So the written warning we say is both excessive in the circumstances in that it is a final written warning .... that covers all and it is a final written warning that has no life span, it appears to be open ended."

49 At page 161(AB), however, Mr Young said this in his final address—

> "Sir, the applicant's position in this is that the written warning or the final written warning as it currently stands should be withdrawn, however, as is so often the case, there's our preferred position and then there's our more realistic position."
>
> "I suspect that at the end of the day the Commission will be more inclined to a middle of the road position, ... and that perhaps the final outcome would be best that there is a warning, perhaps a written warning then placed on Mr Kilmartin's file with regard to the two incidents."

50 That is, of course, what occurred. That, in my opinion, constitutes a bar to this appeal because the Senior Commissioner did "water down" substantially the warning in line with what Mr Young put to him. It follows that the CEPU was therefore bound by that aspect of the case and that that would be a bar to a successfully argued appeal (see *Metwally v University of Wollongong* (1985) 60 ALR 68 (HC). Further, what was said was unequivocal enough to amount to a concession by the CEPU, through its agent, and by which it was bound (see s.31(3) of the Act).

51 Overall, therefore, I am not persuaded that there is a strong case that the appeal would succeed.

THE JUSTICE OF THE APPLICATION

52 If that is wrong, then, as Mr Power argued, on its own concession, the detriment to the applicant is very slight. In other words, as I understand his submission, to refuse the application would only result in the appellant being prevented from overturning a decision which it anticipated and accepted. I would agree.

53 There would be detriment and therefore injustice to BHP in allowing an extension of time within which to appeal from a decision which the CEPU had, in anticipation of such a decision being given, accepted.

THE DELAY

54 As to the delay, the delay was almost negligible, was forewarned to the respondent, and brought about no detriment by being late, of itself. It also arose because of explicable and credible difficulties.

FINALLY

55 For all of those reasons, the applicant has not established that the Full Bench should grant an extension of time on either application. Having regard to s.26(1)(a) of the Act and the interests of the parties and Mr Kilmartin pursuant to s.26(1)(c) of the Act, as I have referred to them above, I would therefore dismiss the applications.

CHIEF COMMISSIONER W S COLEMAN—

56 I have read the reasons for decision of His Honour the President. I agree with those reasons and have nothing to add.

COMMISSIONER P E SCOTT—

57 I have read the reasons for decision of His Honour the President. I agree with those reasons and have nothing to add.

THE PRESIDENT—

58 Therefore, the appeal is incompetent and will be dismissed.

Order accordingly

2001 WAIRC 02286

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	COMMUNICATIONS, ELECTRICAL, ELECTRONIC, ENERGY, INFORMATION, POSTAL, PLUMBING, AND ALLIED WORKERS UNION OF AUSTRALIA, ENGIN & ELECT DIV, WA BRANCH, APPELLANT *v.* BHP IRON ORE PTY LTD, RESPONDENT
CORAM	FULL BENCH HIS HONOUR THE PRESIDENT P J SHARKEY CHIEF COMMISSIONER W S COLEMAN COMMISSIONER P E SCOTT
DELIVERED	WEDNESDAY, 14 MARCH 2001
FILE NO/S	FBA 52 OF 2000
CITATION NO.	2001 WAIRC 02286

Decision	Applications dismissed.
Appearances	
Appellant	Mr C Young
Respondent	Mr A J Power (of Counsel), by leave, and with him Mr H M Downes

Order.

This matter having come on for hearing before the Full Bench on the 6th day of March 2001, and having heard Mr C Young on behalf of the appellant and Mr A J Power (of Counsel), by leave, and with him Mr H M Downes on behalf of the respondent, and the Full Bench having reserved its decision on the matter and reasons for decision being delivered on the 14th day of March 2001, it is this day, the 14th day of March 2001, ordered that the applications filed herein to extend time to file appeal No. FBA 52 of 2000 out of time be and are hereby dismissed.

By the Full Bench

(Sgd.) P.J. SHARKEY,
[L.S.] President.

2001 WAIRC 02365

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	COMMUNICATIONS, ELECTRICAL, ELECTRONIC, ENERGY, INFORMATION, POSTAL, PLUMBING, AND ALLIED WORKERS UNION OF AUSTRALIA, ENGIN & ELECT DIV, WA BRANCH, APPELLANT
	v.
	BHP IRON ORE PTY LTD, RESPONDENT
CORAM	FULL BENCH
	HIS HONOUR THE PRESIDENT P J SHARKEY
	CHIEF COMMISSIONER W S COLEMAN
	COMMISSIONER P E SCOTT
DELIVERED	FRIDAY, 16 MARCH 2001
FILE NO/S	FBA 52 OF 2000
CITATION NO.	2001 WAIRC 02365

Decision	Appeal discontinued by consent.
Appearances	
Appellant	Mr C Young
Respondent	Mr A J Power (of Counsel), by leave, and with him Mr H M Downes

Order.

This matter having come on for hearing before the Full Bench on the 6th day of March 2001, and the Full Bench having issued its reasons for decision on the 14th day of March 2001 wherein it ordered that the applications filed herein to extend time to file appeal No. FBA 52 of 2000 out of time be dismissed, and the parties having been requested to advise the Full Bench of their positions, and the abovenamed appellant, on the 15th day of March 2001, having filed a Notice of Discontinuance of the said appeal in the Commission, and the abovenamed respondent, on the 15th day of March 2000, having advised the Commission, in writing, that the respondent did not oppose the filing of the Notice of Discontinuance by the appellant, it is this day, the 16th day of March 2001, ordered, by consent, that the Full Bench refrain and does hereby refrain from hearing the said appeal further.

By the Full Bench

(Sgd.) P.J. SHARKEY,
[L.S.] President.

2001 WAIRC 02495

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	LAWRENCE KEVIN FAHY, APPELLANT
	v.
	LMS PROPERTY GROUP PTY LTD, RESPONDENT
CORAM	FULL BENCH
	HIS HONOUR THE PRESIDENT P J SHARKEY
	COMMISSIONER J F GREGOR
	COMMISSIONER A R BEECH
DELIVERED	MONDAY, 2 APRIL 2001
FILE NO/S	FBA 24 OF 2000
CITATION NO.	2001 WAIRC 02495

Decision	Appeal discontinued by consent.

Order.

The Notice of Appeal herein, having been filed in the Registry of the Commission on the 20th day of April 2000, and having been served upon the respondent on the 26th day of April 2000 and a Declaration of Service having been filed in the Registry of the Commission on the 31st day of August 2000, and the agent for the abovenamed appellant, on the 28th day of February 2001, having filed a Notice of Discontinuance in the Registry of the Commission, and the abovenamed respondent, on the 29th day of March 2001, having advised the Commission, in writing, that the respondent consented to the appeal being discontinued by the appellant, and the Full Bench having decided that the consent to the discontinuance of the appeal constituted special circumstances so as to exempt the parties and each of them from further compliance with Regulation 29 of the *Industrial Relations Commission Regulations* 1985 and having so exempted them, it is this day, the 2nd day of April 2001, ordered, by consent, as follows—

(1) THAT there be leave granted and leave is hereby granted for appeal No FBA 24 of 2000 to be discontinued.

(2) THAT the Full Bench refrain from hearing the said appeal further.

By the Full Bench

(Sgd.) P.J. SHARKEY,
[L.S.] President.

2001 WAIRC 02518

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	THE AUSTRALIAN LIQUOR, HOSPITALITY AND MISCELLANEOUS WORKERS UNION, MISCELLANEOUS WORKERS DIVISION, WESTERN AUSTRALIAN BRANCH, APPELLANT
	v.
	BURSWOOD RESORT (MANAGEMENT) LTD, RESPONDENT
CORAM	FULL BENCH
	HIS HONOUR THE PRESIDENT P J SHARKEY
	SENIOR COMMISSIONER G L FIELDING
	COMMISSIONER P E SCOTT
DELIVERED	FRIDAY, 6 APRIL 2001
FILE NO/S	FBA 4 OF 1999
CITATION NO.	2001 WAIRC 02518

Decision	Appeal discontinued by consent

Order.

The appeal having been adjourned sine die by the Full Bench by Order on the 1st day of October 2000, and having been listed for hearing on the 5th day of April 2001 and the parties herein, on the 3rd day of April 2001, having filed a Minute of Consent in the Registry of the Commission to discontinue the appeal by leave, and the parties herein having consented to waive the requirements of s.35 of the Industrial Relations Act 1979 (as amended), it is this day, the 6th day of April 2001, ordered, by consent, as follows—

(1) THAT there be leave granted and leave is hereby granted for appeal No FBA 4 of 1999 to be discontinued.

(2) THAT the Full Bench refrain from hearing the said appeal further.

By the Full Bench

(Sgd.) P.J. SHARKEY,
[L.S.] President.

2001 WAIRC 02420

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	NICHOLAS RICHARD LYNAM, APPELLANT
	v.
	LATAGA PTY LTD, RESPONDENT
CORAM	FULL BENCH
	HIS HONOUR THE PRESIDENT P J SHARKEY
	CHIEF COMMISSIONER W S COLEMAN
	COMMISSIONER S J KENNER
DELIVERED	THURSDAY, 29 MARCH 2001
FILE NO/S	FBA 53 OF 2000
CITATION NO.	2001 WAIRC 02420

Decision	Appeal upheld.
Appearances	
Appellant	Mr G McCorry, as agent
Respondent	Mr A J Prentice (of Counsel), by leave

Reasons for Decision.

THE PRESIDENT—

INTRODUCTION

1 These are the unanimous reasons for decision of the Full Bench.

2 This is an appeal brought by the abovenamed appellant, Mr Nicholas Richard Lynam, against the decision of the Commission, constituted by a single Commissioner, contained in an order made on 7 December 2000 and deposited in the office of the Registrar on 7 December 2000.

3 The decision in this matter was made on an application by Mr Lynam in which he claimed that he was harshly, oppressively and unfairly dismissed, and was denied contractual benefits to which he was entitled. He made application pursuant to s.29(1)(b)(i) and (ii) of the *Industrial Relations Act* 1979 (as amended) (hereinafter referred to as "the Act").

4 The order, formal parts omitted, was made in the following terms—

"(2) ORDERS that the said respondent do hereby pay within seven days of the date of this order, as and by way of compensation, the amount of $3,510.00 to Nicholas Richard Lynam, less any taxation that may be payable to the Commissioner of Taxation.

(3) ORDERS that the said respondent do hereby pay within seven days of the date of this order, as and by way of denied contractual benefits, the amount of $1,579.50 to Nicholas Richard Lynam, less any taxation that may be payable to the Commissioner of Taxation."

GROUNDS OF APPEAL

5 It is against that decision and part of it only, that Mr Lynam now appeals on the following grounds—

"1) The Commission erred in fact and in law in finding that the appropriate measure of compensation for the harsh, oppressive and unfair dismissal of the Appellant was four week's remuneration, in that—

a) The quantum of four week's remuneration was assessed on the basis that it was more probable than not that the Appellant's employment could and would have been fairly terminated by the giving of four week's notice or payment in lieu, when there was no evidence adduced by the Respondent or derivable from the evidence to show that a termination with such notice would have been likely to occur or could or would have been fair if it had occurred;

b) The dismissal of the Appellant was found to have been substantively rather than merely procedurally unfair and the measure of loss and injury was demonstrated to be greater than 4 weeks remuneration;

c) The Commission failed to assess the loss and injury suffered by the Appellant by reason of the dismissal in the face of uncontested evidence of the Appellant's quantifiable loss and injury;

d) The Commission wrongly found that there was no injury to the Appellant and that the Appellant was aggrieved prior to the termination of his employment when the uncontested evidence of the Appellant was that he was injured by the dismissal.

2) It is in the public interest and consistent with sections 26(l) and 23 of the Act for a decision of the Commission to be overturned if it is wrong in law and provides incentives for an employer to act unfairly in the manner in which an employee is dismissed.

ORDERS SOUGHT

1. That the appeal be upheld.
2. That the decision of the Commission that the Respondent pay to the Appellant compensation of four week's wages ($3,510) be set aside and in lieu thereof, the Respondent be ordered to pay to the Appellant compensation of $17,500."

6 This appeal is against the quantum of compensation ordered to be paid, only, and against no other part of the order. The was no cross appeal.

BACKGROUND

7 At all material times, Mr Lynam was an employee of the respondent company at its record selling store, "Wesley CD Megastore" in the city of Perth in this State. In fact, he was employed from 13 December 1999 until 27 March 2000 by the respondent who had bought the business from the previous owner who had also employed Mr Lynam since October 1995.

8 Mr Lynam gave evidence that he was, at the time of the respondent's purchase of the business, Stores Manager and Sales Manager. This position included the following duties: opening and closing the store, staff supervision, general shopkeeping and retail operations.

9 It was common ground that, when the new owner, the respondent, took over from the administrator of the business on 13 December 1999, that it agreed to pay Mr Lynam on the same terms and conditions as he had enjoyed with the previous employer.

10 On 27 March 2000, when Mr Lynam arrived for work, he was dismissed and he said that he was unfairly dismissed. It was common ground that there was, prior to this event, an ongoing dispute about the contract of employment insofar as it related to overtime.

11 It was the evidence of both parties that Mr Lynam was then paid his salary and overtime for the additional hours worked.

12 The respondent submitted and there was evidence from Mr Peter Wilkinson, a Director of the respondent, that Mr Lynam claimed and was wrongly paid overtime which he should not have received. The respondent also alleged that Mr Lynam should have continued, on the transfer of

the business, with his salary of $667.00 per week and no overtime. Mr Lynam, on the other hand, said that he was to continue on $667.00 per week but that he was paid overtime, queried it, and was told that the respondent intended to pay him overtime.

13 The Commissioner found that Mr Lynam was asked to and, in fact, did work six days a week from late January 2000. He also found that Mr Lynam had conversations with Mr Wilkinson where they agreed that Mr Lynam would be paid overtime for all hours worked in excess of 38 hours. That overtime was found to be paid initially at the rate of time and a half and later at the single time rate (see page 4 of the appeal book (hereinafter referred to as "AB")).

14 After the respondent purchased the business, Mr Lynam gradually lost duties to others, with Ms Sonya Kuhari commencing as Promotions Manager and subsequently as General Manager which, effectively, was a demotion of him. He raised a pay issue on behalf of another staff member, Mr Adrian Mansfield, and this resulted in his being presented with a letter, signed by Mr Wilkinson, dated 15 March 2000 advising him that his salary was to be reduced. He was asked to sign that letter, but refused. He was then asked to take a week off and return his keys to the store and leave without speaking to other members of the staff, which he did.

15 Over the ensuing weekend, Mr Lynam prepared a letter in which he asserted that the week off work should not be deducted as leave. When he delivered it to Ms Kuhari on the Monday following that weekend, he was told to leave the store and that he was not allowed to be in it.

16 The following Monday, 27 March 2000, Mr Lynam returned to the store. There, he met Mr Wilkinson who had with him the Warehouse Manager, Mr Wayne Sheldon. Mr Wilkinson told him that he was not to enter the store any more and that, if he attempted to, Mr Wilkinson would have the police remove him. Mr Wilkinson gave Mr Lynam one week's notice pursuant to the contract of employment and told him to contact Mr Wilkinson to sort out a redundancy and termination package (see pages 23-25(AB)). As to the further details of dismissal in his evidence, see pages 28-29(AB)). Mr Lynam did contact Mr Wilkinson and received a letter in reply dated 31 March 2000 (see page 126(AB)), which contained allegations and assertions of fact which he denied.

17 The Commissioner found that Mr Wilkinson denied that Mr Lynam had any entitlement to overtime, that Mr Lynam's contract provided for him to work whatever hours were required for the efficient running of the store for 6 days per week. Further, the Commissioner found that it was clear from the evidence of Mr Wilkinson that, at the time of dismissal, Mr Lynam did not want to work under a revised and reduced contract. This was made clear to Mr Lynam that day, 27 March 2000.

18 There was also evidence in relation to denial of contractual benefits which, since it does not relate to the issues raised upon appeal, it is not necessary to consider in these reasons.

19 In the end, the Commissioner accepted Mr Lynam's account of the events as more reliable, and found that Mr Lynam was harshly, oppressively or unfairly dismissed on that basis that, whilst his performance was not in question, he received no warning or indication that his employment was in jeopardy, that there was no evidence to suggest that any discussion occurred as to why he had been receiving a higher rate of pay, and why the unilateral change was warranted.

20 The Commissioner also found that there was no prospect whatsoever that an employment relationship could be re-established between the parties, since they both expressed strongly adverse views of the other, which the Commissioner considered were not capable of being redressed.

21 The Commissioner made a finding that Mr Lynam had been unfairly dismissed from his employment and then went on the make findings as to compensation, which we will deal with hereinafter.

22 Mr Lynam gave evidence that he had suffered stress following the dismissal. He was out of work for eight weeks (and living on savings) during which time he attempted to find other employment, eventually obtaining employment as the Assistant Manager of a bookshop at a lesser wage (see page 32(AB)). That evidence was not challenged or, in any way, eroded.

FINDINGS—COMPENSATION

23 In relation to the question of compensation, the Commissioner found as follows—

1. Mr Lynam's evidence, which was unchallenged and supported by exhibit NL5, was that he had actively sought employment since his dismissal.
2. Mr Lynam found work some 7 weeks and 2 days after dismissal and has been earning less than his former position.
3. Mr Lynam calculated his lost income on the basis of an income of $667.00 per week on the basis that the employer could have given him reasonable notice of a change to work five days per week.
4. The Commissioner calculated Mr Lynam's loss as $4,932.00 for the period up until he gained employment and $6,409.00 for an ongoing loss over a twelve month period.
5. The Commissioner also found that, at the time of dismissal, Mr Lynam did not want to work under a revised and reduced contract put forward by the respondent, even though this had been his contract on the initial engagement on 13 December 1999.
6. Mr Wilkinson handed Mr Lynam a letter on 20 March 2000 (exhibit NL2) which sought to reduce his weekly rate of pay. In those circumstances, the Commissioner found that Mr Wilkinson should have provided Mr Lynam with reasonable notice of change. However, the Commissioner was convinced and found that the employment relationship was bound to terminate.
7. The Commissioner also found that, in all of the circumstances of the dismissal, and given Mr Lynam's age, and that he had previously been a manager in the store and had worked there for over four years (although only for a short period for the respondent), he should have been granted four weeks' notice of the change. This was a total of $3,510.00 by way of compensation.
8. The Commissioner held that he would not award Mr Lynam any money for injury. This was because Mr Lynam's evidence was that he was aggrieved prior to the date of termination and the Commissioner considered that this was due largely to him no longer managing the store.

ISSUES AND CONCLUSIONS

24 That part of the decision appealed against, namely the finding as to quantum of compensation and, indeed, the decision as a whole, was a discretionary decision, as it is defined in *Norbis v Norbis* (1986) 161 CLR 513. Since the decision was a discretionary decision, the Full Bench may not interfere with it unless the appellant establishes that, by application of the principles in *House v The King* [1936] 55 CLR 499 and *Gromark Packaging v FMWU* 73 WAIG 220 (IAC), there was a miscarriage of the exercise of discretion.

25 The law relating to findings of loss and injury and the assessment of compensation is well and clearly settled in this Commission (see *Manning v Huntingdale Veterinary Clinic* 78 WAIG 1107 (FB); *Bogunovich v Bayside Western Australia Pty Ltd* 79 WAIG 8 (FB); *Capewell v Cadbury Schweppes Australia Ltd* 78 WAIG 299 (FB); and *Gilmore and Another v Cecil Bros and Others* 78 WAIG 1099 (IAC)).

THE GROUNDS OF APPEAL

Loss

26 There was a complaint in Ground 1 that—

27 The Commissioner's findings were inconsistent and in error because, having found that Mr Lynam's evidence

was to be preferred to that of Mr Wilkinson, the Commissioner then made findings which relied on Mr Wilkinson's account of events being accepted. From those findings, the Commissioner then made findings about the likely future employment of Mr Lynam with the respondent, which was not open on the evidence, so the submission for Mr Lynam went.

28 It was submitted that the Commissioner purported to accept the respondent's account of the events of 27 March 2000, when he had earlier said that he accepted the evidence of Mr Lynam; then he accepted Mr Wilkinson's account of the events of that day, namely that, on that date, there was a discussion of what terms of employment would apply to overtime when Mr Lynam returned to work and, therefore, when no agreement could be reached on that point, Mr Lynam was lawfully dismissed.

29 This in turn, so the submission went, led to an erroneous finding as to the loss or injury suffered. It was submitted that, having erroneously accepted the respondent's account of events on the date of termination, the Commissioner found that, in such circumstances, it would have been fair to terminate Mr Lynam's employment by the giving of four weeks' notice of the change in his employment conditions.

30 It was also submitted that the Commissioner erred in so finding and, further, erred in failing to find what was the loss and injury suffered by Mr Lynam by reason of the dismissal.

31 The first ground of the appeal was based on an allegation, supported by submissions, that the Commissioner's findings were inconsistent and in error. The basis of that submission was that, having found that Mr Lynam's evidence was to be preferred to that of Mr Wilkinson, the Commissioner then made findings which relied on Mr Wilkinson's account of events being accepted. Put shortly, his finding that four weeks' notice and, therefore, an amount equal to four weeks' salary as a compensation for the failure to give notice, was made in error.

32 There was, it was submitted, no evidence adduced by the respondent derivable from the evidence to support a finding that Mr Lynam's employment was bound to terminate. As the Commissioner found, having accepted Mr Lynam's evidence, Mr Lynam was presented with a proposal to vary the contract. He was put off for a week without pay and, when he would not agree to the variation of his contract, he was dismissed on one week's notice.

33 In our opinion, once the Commissioner accepted Mr Lynam's evidence, which he did and which a fair reading of the transcript reveals it was open to him to do (not the least because it was unchallenged in cross-examination), the Commissioner was bound to accept Mr Lynam's version of the events of the day of dismissal and, indeed, did so. No reason was offered for the Commissioner purporting to accept Mr Wilkinson's version of what occurred on 27 March 2000 and there is no reason discernible on a reading of the evidence.

34 The Commissioner found that Mr Wilkinson's evidence of the events of 27 March 2000 "aligned with that of the applicant" (see paragraph 13, page 5(AB)) but, in fact, the evidence of Mr Lynam was quite detailed as to the events of the day and his exclusion from the premises and went beyond and was in conflict with some of Mr Wilkinson's evidence. Mr Sheldon was not called to give evidence.

35 It was submitted that the Commissioner, having erroneously accepted the respondent's account of events on the date of termination, then went on to find that, in such circumstances, it would have been fair to terminate Mr Lynam's employment by giving four week's notice of change in his employment conditions.

36 As against that, it was submitted for the respondent that it was based on the undisputed evidence of the parties that Mr Lynam did not wish to work for reduced pay under the new contract presented to him. It was therefore submitted that the employment relationship was correctly found as being bound to terminate and that there was ample evidence to find that four weeks' notice would have been fair, taking into account the circumstances of the dismissal, Mr Lynam's age, his position in the store and the length of his employment.

37 Of course, Mr Lynam, through his agent's submissions, accepted four weeks' notice as reasonable notice. What is submitted was that there was an ongoing loss of wages for twelve months which impliedly derives from and was caused by the dismissal. That is an amount calculated on the difference between what Mr Lynam lost in his employment and what he earned when he obtained new employment seven weeks after his dismissal as Assistant Manager of a bookstore.

38 The reason for the dismissal was plainly the refusal of Mr Lynam to accept a new contract of employment. It was open to so find, on the evidence of both Mr Lynam and Mr Wilkinson, that the reason for the dismissal was the refusal of Mr Lynam to accept a new contract in lieu of his existing contract with reduced pay.

39 It was open to find and it should have been found that the events of 27 March 2000 occurred as Mr Lynam described them in evidence. In any event, they fit more consistently a line of conduct which the evidence clearly reveals as follows.

40 Mr Lynam was paid overtime, which he was entitled to be paid, and the Commissioner did not accept the disavowal of the payment by Mr Wilkinson.

41 Mr Lynam's previously accepted contract of service as Store and Sales Manager was unilaterally varied by the unconsented to transfer of duties to Ms Kuhari. That evidence was not denied. It was Mr Mansfield's evidence, too. Then, Mr Lynam was unilaterally required to agree to a variation of this contract of service which reduced his wages. When he did not agree to the variation, he was sent home for a week and not allowed back, even when he attempted to respond by letter.

42 It is far more credible that, when he attempted to return without agreeing to the terms sought to be imposed on him, he was excluded from the premises as he had been before and dismissed, as his version related. That is what the Commissioner should have found occurred.

43 The question, on the evidence, was whether it was more probable than not that Mr Lynam would have and/or could have been dismissed fairly in any event and, if so, when. The Commissioner was required to assess the degree of probability that that event would occur and make a finding as to loss to reflect the degree of probability, assessing damages accordingly (see *Bogunovich v Bayside Western Australia Pty Ltd* (FB)(op cit) at page 9 where *Malec v J C Hutton Pty Ltd* 92 ALR 545 (HC) is cited).

44 In this case, it would be open to find that irrespective of the notice given, a dismissal as a sanction against Mr Lynam for failing to agree to the termination of the contract of employment and its replacement by a contract on less favourable terms, would not be fair at any time.

45 It was open to find and the Commissioner should have found that a fair dismissal with four weeks' notice for good reason would not have occurred within twelve months or, if it might, then the respondent had not discharged its evidentiary burden to so establish it. There was no evidence that a dismissal was contemplated or would have occurred but for the fact that the respondent wished to force a variation in contract on Mr Lynam against his will. There was no evidence either that Mr Lynam did not wish to continue in his employment.

46 It is, however, not more probable than not that, but for that event, the employment would and could have continued for at least twelve months. It will be clear that the Commissioner, for those reasons, erred and should have made a finding of loss based on the difference between wages earned and wages lost subsequent to the dismissal in the sum of $6,409.00, a figure which is not in dispute.

47 We would add that no claim was made when it might have been made for loss of security of employment or, put by way of synonym, loss of an asset.

48 The dismissal was found and found correctly to have been substantially unfair. Grounds of Appeal 1(a), (b) and (c), insofar as they apply, as to loss have been made out.

Injury

49 We now turn to Ground 1(d), which deals with the question of injury.

50 The Commissioner found that he would not award Mr Lynam any monies for injury and expressed his reason for so finding as follows—

> "His evidence is that he was aggrieved prior to the date of termination and I consider that this was due largely to him no longer managing the store."

(See paragraph 31, page 7(AB).)

51 He was, of course, so aggrieved, but there was ample evidence that he was aggrieved after the dismissal, which the Commissioner accepted, because he expressly said that he accepted Mr Lynam's evidence.

52 The manner of the dismissal is best described in Mr Lynam's evidence at pages 28-29(AB). We quote a portion of his evidence at page 29(AB))—

> "I was told that I was no longer able to be in the store, that if I went in the store the police would be called and I would be thrown out. I was given one week's notice, and told to contact Peter with what I believed to be owing and sort out a redundancy or a termination package, and his words were, "Whatever you want to call it"."

53 The locking of him out of the premises and the threat to call the police to throw him out, on their own or coupled with the earlier events, were unnecessary, humiliating and hurtful.

54 That, of course, followed on his being sent home a few days earlier on 17 March 2000 after he refused to agree to a reduction of his wages (his duties having already been unilaterally eroded), with a direction not to talk to other staff members, with his being excluded from the premises during the week when he delivered a letter about the matter, and the non-payment to him of wages during the week. This conduct was directed clearly to him because he would not agree to enter a new contract on less favourable terms than that which he had. We would also add that he had, previous to that, been effectively demoted from Store and Sales Manager to Sales Manager, it was open to find.

55 There was a course of conduct which, it was open to find, was directed to pressuring Mr Lynam and, at very least, to be contrary to the implied obligation of the employer not to conduct itself without reasonable cause in a manner likely to damage or destroy the relationship of confidence and trust. That plainly occurred here, but is more a matter, in the circumstances of this case, directed to unfairness than the question of injury (see *Burazin v Blacktown City Guardian Pty Ltd* 142 ALR 144 at 151-152 (FCFC), and the approval by the Full Court of the dicta of Lee J in *Aitken v CMETSWU* (1995) 63 IR 1 at 9).

56 As was said by the Full Court of the IRCA in *Burazin v Blacktown City Guardian Pty Ltd* (op cit), there is an element of distress in every dismissal and restraint is required. There must be evidence that the dismissed employee has sustained damage of the kind claimed.

57 There was ample evidence of the stress occasioned to Mr Lynam (see page 33(AB)). Mr Lynam has been under stress and has been grinding his teeth at night. He has never been dismissed before. He feels very hard done by. He was upset at being dealt with in an underhanded way, but he was not losing control (see page 34(AB)).

58 This was a callous, oppressive and humiliating course of conduct culminating in a dismissal and injurious to Mr Lynam. (Matters such as this are discussed in *Bogunovich v Bayside Western Australia Pty Ltd* (FB)(op cit) at pages 10-11. See also *Burazin v Blacktown City Guardian Pty Ltd* (op cit) and *Whelan v Waitaki Meats Ltd* [1991] 2 NZLR 74.)

59 An injury is constituted, inter alia, by humiliation, injury to feelings, the result of callous treatment, loss of reputation, nervous shock.

60 S.23 of the Act has the characteristics of a statutory fact. It was open to find, as in *Burazin v Blacktown City Guardian Pty Ltd* (op cit), that Mr Lynam was shocked, stressed and, indeed, by the nature of the treatment meted out to him, he was humiliated and suffered injury.

61 In our opinion, a fair award for injury would be $4,500.00, but Mr McCorry told us that his client would be content with less, namely $3,500.00.

62 For the Full Bench, the question of whether awards of compensation for injury such as this remains an open question.

63 For those reasons, we would find that the exercise of the discretion at first instance miscarried. We would agree to substitute the exercise of discretion of the Full Bench for that exercised at first instance. We would make the findings which we have said above should have been made at first instance to support that exercise of discretion.

64 As the respondent recognizes in its submissions, the law is well settled in the Commission in the cases to which we have referred. What the Commissioner was required to do was to make a finding as to whether there was loss or injury as established by Mr Lynam on the balance of probabilities. That was clearly so established as was the extent of the loss and injury. The manner of assessing compensation is as prescribed in those cases. The loss and injury established are indubitably causally linked to the dismissal in this case.

Ground 2

65 Ground 2 is not a ground of appeal but a submission and not a relevant one.

CONCLUSIONS

66 It was open to find as follows, on the evidence, that—

(a) Between the date of the dismissal and the obtaining of other employment, seven weeks elapsed during which Mr Lynam was without income. Had he remained in employment, he would have earned $667.00 per week. That element of the loss, therefore, can be found to be $4,669.00.

(b) The next item is the ongoing loss of wages, being the difference between what Mr Lynam received in his new employment compared with the wages which he received in his old employment for a period of at least one year. That amount is $6,409.00.

(c) There was also the loss of pay in lieu of reasonable notice, which was conceded to be four weeks. That amount is $2,668.00.

(d) For injury, the amount is $3,500.00.

67 There is no evidence of any event which might affect, adversely or otherwise, the loss. There is nothing in the evidence which might lead to a conclusion that the vicissitudes and contingencies of life would affect, adversely or otherwise, the finding as to loss, insofar as the vicissitudes and contingencies of life are applicable.

68 Any allowance for the fact that the compensation is paid in a lump sum is properly offset in this case by the period of time in which the losses and injury have gone uncompensated. To that, one must add a figure for "grossing up" and we accept the appellant's calculation in that respect, although the question of reduction of compensation for a lump sum payment and the use of "grossing up" are questions which remain open as far as we are concerned.

69 We would uphold the appeal and vary the order made at first instance to order compensation to be paid as follows—

Loss to date of hearing and future loss

(a)	From dismissal until the obtaining of a new job—7 weeks @ $667.00 per week	$4,669.00
(b)	Ongoing loss of wages being the difference in wages earned in new employment and the wage paid by the respondent for twelve months	$6,409.00
(c)	Loss of reasonable notice—four weeks	$2,668.00
(d)	Compensation for injury	$3,500.00
Total		$17,246.00

70 We would order accordingly.

2001 WAIRC 02465

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	NICHOLAS RICHARD LYNAM, APPELLANT
	v.
	LATAGA PTY LTD, RESPONDENT
CORAM	FULL BENCH
	HIS HONOUR THE PRESIDENT P J SHARKEY
	CHIEF COMMISSIONER W S COLEMAN
	COMMISSIONER S J KENNER
DELIVERED	THURSDAY, 29 MARCH 2001
FILE NO/S	FBA 53 OF 2000
CITATION NO.	2001 WAIRC 02465

Decision	Appeal upheld.
Representation	
Appellant	Mr G McCorry, as agent
Respondent	Mr A J Prentice (of Counsel), by leave

Order.

This matter having come on for hearing before the Full Bench on the 28th day of February 2001, and having heard Mr G McCorry, as agent, on behalf of the appellant and Mr A J Prentice (of Counsel), by leave, on behalf of the respondent, and the Full Bench having reserved its decision on the matter, and reasons for decision having been delivered on the 29th day of March 2001 wherein it was found that the appeal should be upheld, it is this day, the 29th day of March 2001 2000, ordered as follows—

(1) THAT appeal No FBA 53 of 2000 be and is hereby upheld.

(2) THAT the decision of the Commission in matter No. 555 of 2000 made on the 7th day of December 2000 be and is hereby varied by deleting the amount of "$3,510.00" in order (2) and by substituting therefor the amount of "$17,246.00".

By the Full Bench,

(Sgd.) P.J. SHARKEY,
[L.S.] President.

2001 WAIRC 02473

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	SKILL HIRE PTY LTD, APPELLANT
	v.
	GARRY EDMUND MARSHAL BOARDLEY, RESPONDENT
CORAM	FULL BENCH
	HIS HONOUR THE PRESIDENT P J SHARKEY
	COMMISSIONER J H SMITH
	COMMISSIONER S WOOD
DELIVERED	WEDNESDAY, 28 MARCH 2001
FILE NO/S	FBA 49 OF 2000
CITATION NO.	2001 WAIRC 02473

Decision	Appeal discontinued by consent.

Order.

The Notice of Appeal herein, having been filed in the Registry of the Commission on the 27th day of October 2000, and Counsel for the abovenamed appellant, on the 19th day of March 2001, having filed a Notice of Discontinuance in the Commission, and Counsel for the abovenamed respondent, on the 20th day of March 2001, having advised the Commission, in writing, that the respondent consented to the appeal being discontinued by the appellant, and the Full Bench having decided that the consent to the discontinuance of the appeal constituted special circumstances so as to exempt the parties and each of them from further compliance with Regulation 29 of the *Industrial Relations Commission Regulations* 1985 and having so exempted them, it is this day, the 28th day of March 2001, ordered, by consent, as follows—

(1) THAT there be leave granted and leave is hereby granted for appeal No FBA 49 of 2000 to be discontinued.

(2) THAT the Full Bench refrain from hearing the said appeal further.

By the Full Bench,

(Sgd.) P.J. SHARKEY,
[L.S.] President.

2001 WAIRC 02456

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	MARK ANTHONY TRANFIELD, APPELLANT
	v.
	RAY DOUGLAS PARKER, RESPONDENT
CORAM	FULL BENCH
	HIS HONOUR THE PRESIDENT P J SHARKEY
	COMMISSIONER A R BEECH
	COMMISSIONER J H SMITH
DELIVERED	TUESDAY, 3 APRIL 2001
FILE NO/S	FBA 46 OF 2000
CITATION NO.	2001 WAIRC 02456

Decision	Appeal upheld and the decision at first instance varied.
Appearances	
Appellant	Mr D H Schapper (of Counsel), by leave
Respondent	Mr L A Tsaknis (of Counsel), by leave, and with him
	Mr H M Downes

Reasons for Decision.

THE PRESIDENT—

1 These are the unanimous reasons for decision of the Full Bench.

2 This is an appeal brought under s.49 of the *Industrial Relations Act* 1979 (as amended) (hereinafter referred to as "the Act") against a decision of a single Commissioner given on 29 August 2000 in application No 23 of 2000.

3 The decision appealed against is an order that the application by the abovenamed appellant, Mr Mark Anthony Tranfield, be dismissed.

GROUNDS OF APPEAL

4 Mr Tranfield appeals on the following grounds—

> "The Commission erred in holding that it did not have jurisdiction to hear and determine the appellant's claim"

BACKGROUND

5 Mr Tranfield had made application to the Commission at first instance by an application filed on 7 January 2000 pursuant to s.29 of the Act alleging that he had been unfairly dismissed by the respondent, claiming relief in respect of that dismissal and claiming contractual benefits.

6 The respondent is a single individual (not a firm) who conducts business under a name registered under the *Business Names Act* 1962 (the proprietor of the business was, at all material times, the respondent, Mr Ray Douglas Parker) and carried on the business of the survey and commissioning of marine vessels. In particular, the respondent provided, at all material times, surveying and commissioning services to the offshore oil industry worldwide. The firm had an office in Houston, Texas in the United States of America, but its head office and principal place of business is and was, at all material times, 49 Lockwood Crescent, Bunbury in the State of Western Australia.

7 Mr Tranfield was employed by the respondent from on or about 18 September 1998 until on or about 14 December 1999 as an oil rig surveyor and, more particularly, as a mechanic/surveyor. He came to be employed by the respondent after answering an advertisement published in the "West Australian" newspaper in approximately mid 1998 which advertised positions for oil rig surveyors, including a rig mechanic.

8 He was interviewed for the position in Bunbury by Mr Parker, and subsequently offered employment which he accepted. He was employed under the terms of a written contract entered into this State. It was a term of Mr Tranfield's contract of employment that his "point of origin" was in Perth, Western Australia, from which he was to travel to the assignments, which would be provided by the respondent.

9 It was also a term of the contract that the respondent would reimburse Mr Tranfield for "any costs associated with obtaining visas as required for any project". The respondent was to provide Mr Tranfield with living accommodation together with an accommodation allowance. The contract was terminable by either party giving "a minimum fourteen days' notice".

10 In the beginning, Mr Tranfield was sent to work in Singapore where he worked until the end of August 1999, when he was sent to work in France. There is no evidence that he ever worked in or was required to work in this State. There is no evidence of express prohibition upon his being required to work in this State and it was and is open to infer that he could, consistent with his employer's requirements, having been required to work in this State.

11 On or about 14 December 1999, whilst in France, Mr Tranfield was told by Mr Parker that he was being sent on leave. A short time later, Mr Parker's son told Mr Tranfield that he was to be dismissed. Mr Tranfield replied that, if he was to be dismissed, he would like to know before he went on leave. Nothing further was said about the matter and Mr Tranfield left to go on leave.

12 Mr Tranfield subsequently received from Mr Parker a letter dated 14 December 1999 advising him that his employment was terminated, allegedly for copying material owned by the respondent and breach of his contract of employment.

13 Mr Tranfield was, the Senior Commissioner found, dismissed from his employment without question and without notice for allegedly copying the respondent's "formats and procedures and the lay out of books one through nine with exactly the same information as MOSC layout".

14 Mr Tranfield denied copying the documents alleged to have been copied and denied that he was, in any other way, in breach of his contract of employment. He also asserted that he was given no opportunity to explain his actions, but was dismissed summarily.

15 Mr Tranfield alleged that his dismissal from the respondent's employment was harsh, oppressive or unfair and sought relief in the form of compensation for loss of employment in the sum of US$23,920.00, representing the income which he would have earned in the six months following the termination of the employment, after taking into account earnings from other employment in that time. In addition, Mr Tranfield claimed the sum of US$7,168.00 as remuneration for work performed in December 1999 immediately prior to his termination of employment.

16 The respondent did not file a Notice of Answer or Counterclaim, but wrote to the Commission challenging the jurisdiction to entertain the application and otherwise disputing the merits of the claim. Furthermore, the respondent did not appear and was not represented upon the hearing of the application, notwithstanding that a Notice of Hearing was sent to its principal place of business. The respondent was subsequently informed by the Senior Commissioner of the submissions made by counsel for the appellant at the hearing and was invited to comment on those submissions. Despite being given another opportunity to respond to those submissions, the respondent did not do so.

17 The Senior Commissioner, at first instance, having given the respondent every reasonable opportunity, both before and after the appellant closed its case, to respond to the application, decided to deal with the matter on the basis of the material advanced by the appellant and did so.

COMMISSION'S FINDINGS

18 A number of findings were made by the Senior Commissioner at first instance—

1. In *Maloney v Hoffman* (1980) AR NSW 318, for example, where relief was sought in proceedings before the New South Wales Industrial Commission under legislation relating to unfair, harsh or unconscionable contracts, the legislation was held not to apply to a contract made in that State by residents of that State because the contract related to work to be performed substantially out of the State.
2. There was no evidence in this case to suggest that Mr Tranfield, at any time, performed work in this State and, indeed, it was conceded on behalf of Mr Tranfield that all the work performed under his contract of employment "was, as a matter of fact, performed outside the jurisdiction". By his letter of appointment, Mr Tranfield was told that he was to be sent to Singapore. At all material times, the work performed under the contract was performed in either Singapore or France.
3. There was no evidence that Mr Tranfield may have been required to perform work within Western Australia should the respondent have obtained work in this State. The mere possibility of work being performed in this State was not sufficient for these purposes.
4. As was indicated in *Perrott v Xcellenet Australia Limited and Others* (1998) 84 IR 255, the mere fact that some work was done in this State might not be sufficient to say that the work was done in an industry with a sufficient connection to this State.
5. Mr Tranfield was dismissed from employment from an industry in France, even though he received notification of his employment termination whilst he was in Western Australia. It cannot be the case that, simply because a person who has never worked in Western Australia, receives notification in Western Australia that he is dismissed from his employment performed wholly "offshore", the Commission thereby has jurisdiction to entertain a claim of this kind. Were that the case, any migrant who came to live in this State could lodge a claim for relief in respect of employment in his or her native country as long as any statutory time limit for bringing such a claim was not a bar.
6. By virtue of the provisions of s.3 of the Act, the jurisdiction of the Commission is concerned with a dismissal from employment, if not in an industry carried on partly within this State, at least with a real and sufficient connection with this State.
7. A dismissal from employment in an industry in another place does not fall within the scope of the Act and the decision in *Greenhalgh v Buon Amici WA Pty Ltd* 80 WAIG 2719 is not authority to the contrary.

8. The same considerations apply with respect to the claim to recover the outstanding benefits due to Mr Tranfield under his contract of employment. If the contractual benefits are not an "industrial matter", as defined, the Commission is without jurisdiction to grant relief in respect of the denial of any such benefits.
9. The manner of the dismissal, in itself, was so defective as to render it unfair.
10. Reinstatement was impractical.
11. The Senior Commissioner accepted the loss of earnings established and found that Mr Tranfield would be entitled to compensation in the sum of US$23,970.00, together with US$7,000.00 by way of benefits. This, of course, would only be the case were there jurisdiction.

REASONS

Jurisdiction

19 The Senior Commissioner was not satisfied that there was jurisdiction to entertain the claim for the following reasons.

20 First, he accepted that there were factual differences between those which arose in *Harris v Brandrill Limited* 80 WAIG 629 per Fielding SC and 80 WAIG 2456 (FB) and in this case. The Senior Commissioner held that nothing was put by counsel for Mr Tranfield which led him to change his view expressed in *Harris v Brandrill Limited* (Fielding SC)(op cit) that the jurisdiction of the Commission with respect to claims for relief arising out of harsh, oppressive or unfair dismissal depends upon the existence of a dismissal from employment in an industry with a real and sufficient connection with Western Australia. He accepted or found, however, as follows—

1. That the contract of employment was made in Western Australia between residents of Western Australia.
2. The proper law of the contract is that of Western Australia.
3. The matter is not one of determining the proper law but a question of statutory interpretation as to whether the event in respect of which relief is sought falls within the scope of the relevant legislation.
4. Jurisdiction depends more on the location of the industry in which the aggrieved employee worked than the proper law of contract or the residence of the parties.
5. All work performed under the contract is performed outside the jurisdiction.
6. There was no evidence that Mr Tranfield may be required to perform work in Western Australia.
7. The mere possibility of work being performed within this State is not sufficient for these purposes.
8. Mr Tranfield was dismissed from employment in an industry in France, even though he received his notification from this State.
9. A dismissal from employment in an industry in another place does not fall within the scope of the Act.
10. The same considerations apply with respect to the claim to recover the outstanding benefits due to Mr Tranfield under his contract of employment.
11. The Senior Commissioner then went on to make findings of unfair dismissal of loss and of quantum of compensation.

ISSUES AND CONCLUSIONS

Principles

21 These matters have already been decided as matters of principle in *Harris v Brandrill Limited* (FB)(op cit) and in *Fitzgerald v Oil Drilling & Exploration (International) Pty Ltd* 80 WAIG 4981 (FB). Mr Schapper, who appeared for the appellant, sought to have the Full Bench overrule those cases as being in error if they were not distinguishable on the facts. We have already observed that, so as to avoid uncertainty, the Full Bench should not overrule a previous decision unless it has a conviction that that decision was wrong.

Precedent

22 A lower court (or tribunal), regardless of whether or not a majority ratio can be extracted from the decision of a higher court (or tribunal), is obliged to reach the same conclusion as to its ultimate judgment where the circumstances of the case before it are not reasonably distinguishable. The same principle will apply to a higher court (or tribunal) unless it is prepared to overrule its own previous decision (see MacAdam & Dyke "Judicial Reasoning and the Doctrine of Precedent in Australia", page 213).

23 There is much to be said for the Full Bench adopting a general practice, as the High Court for the most part has, whereby leave will be required to be granted by the Full Bench before it will allow argument to be presented that it should depart from an earlier decision of its own (see *Evda Nominees Pty Ltd v Victoria* (1984) 154 CLR 311.

24 Further, the Full Bench should not readily overrule previous decisions. It should do so only with great caution. "Continuity and coherence in the law demand that in [the Full Bench] the principle of stare decisis should ordinarily be applied" (see *Jones v Commonwealth of Australia* (1987) 71 ALR 497; see also *Re Tyler; Ex parte Foley* (1994) 181 CLR 18 at 38). That has, of course, been the practice of the Full Bench.

Jurisdiction and Territoriality

25 The question in this case is not whether the Western Australian Parliament has authority to legislate as it has in s.29 of the Act, but whether it has purported to exercise that authority in relation to a dismissal such as this, which was effected within this State in relation to an employee who did not work, at any time, within this State, but who, as a resident of this State, entered into a contract of employment with an employer, a resident of this State.

26 The Federal and State Parliaments, being sovereign legislatures, may make laws having effect beyond the boundaries of their respective territorial jurisdictions.

27 At common law, all legislation is, prima facie, territorial (see *The Merchant Service Guild of Australasia v The Commonwealth Steamship Owners Association and Others* [1913] 16 CLR 664). However, an industrial dispute within jurisdiction has been held to exist in relation to industrial services not to be performed within Australia, because the disputants were, for the most part, connected by residence or the like with Australia and the demands were made here with respect to employment for which the masters, officers and engineers were engaged in. In *R v Foster and Others; Ex parte Eastern and Australian Steamship Co Limited* [1959] 103 CLR 256 at 275 per Dixon CJ and at 289 per Taylor J, the question arose whether a dispute was connected with Australia.

(a) The power to make laws for the peace, order and good government of a State does not enable the State Parliament to impose, by reference to some act, matter or thing occurring outside the State, a liability upon a person unconnected with the State whether by domicil residence or otherwise. But, it is within the competence of the State legislature to make any fact, circumstance, occurrence or thing in or connected with the territory, the occasion of the imposition upon any person concerned therein, of a liability to taxation or any other liability.

It may be assumed, too, that the State Parliament has power to legislate on matters relating to the relationship between employer and employee.

(b) It is also within the competence of the legislature to base the imposition of liability on no more than the relation of the person to the territory.

(c) The relation may consist in presence within the territory, residence, domicile, carrying on business or even remoter connections.

(d) If a connection exists, it is for the legislature to decide how far to go in the exercise of its powers. There must be a real and substantial connection even though the work is done elsewhere (see *R v Foster and Others; Ex parte Eastern and Australian Steamship Co Limited* (HC)(op cit)).

(e) As in other matters of jurisdiction or authority, courts must be exact in distinguishing between ascertaining that the circumstances over which the power extends exist and examining the mode in which the power has been exercised.

(f) No doubt, there must be some relevance to the circumstances in the exercise of the power.

(g) It is of no importance, on the question of validity, that the liability imposed is or may be altogether disproportionate to the territorial connection or that it includes many cases that cannot be foreseen.

(h) Relevant factors in determining a connection with this State may include the terms of the contract, the place where it was entered into, the nature and extent of the benefits received thereunder, the place where the breach occurred, and the nature and extent of the work performed. That is not an exhaustive list of factors.

Construing the Act

28 The question is whether the application of the Act is limited to unfair dismissals, that is, industrial matters occurring in Western Australia.

29 It is quite clear, as we have observed in *Harris v Brandrill Limited* (FB)(op cit) and *Fitzgerald v Oil Drilling & Exploration (International) Pty Ltd* (FB)(op cit) that the jurisdiction of the Commission, qua dismissals from employment is concerned with a dismissal from employment in an industry carried on in this State which is an industrial matter (and/or perhaps, at least, one with a real connection to this State but pursuant to the Act itself).

30 The answer to the question of jurisdiction in this case must be found within the Act itself. To paraphrase the question posed in *Mynott and Others v Barnard* (1939) 62 CLR 68 (a case followed by the Full Court of this State in *Speldewinde v W D Scott & Co Pty Ltd* [1982] WAR 341; in that case, the Full Court held that, on its proper construction, the *Workers Compensation Act* 1912-1978 (WA) did not apply to injuries resulting from accidents happening outside the State).

31 This Commission has cognisance of and authority to enquire into any "industrial matter". For the purposes of construing what an "industrial matter" is, s.7 of the Act defines "employee", "employer" and "industry" as follows—

> **"employee"** means, subject to section 7B —
>
> (a) any person employed by an employer to do work for hire or reward including an apprentice or industrial trainee;
>
> (b) any person whose usual status is that of an employee;
>
> (c) any person employed as a canvasser whose services are remunerated wholly or partly by commission or percentage reward; or
>
> (d) any person who is the lessee of any tools or other implements of production or of any vehicle used in the delivery of goods or who is the owner, whether wholly or partly, of any vehicle used in the transport of goods or passengers if he is in all other respects an employee,
>
> but does not include any person engaged in domestic service in a private home unless —
>
> (e) more than 6 boarders or lodgers are therein received for pay or reward; or
>
> (f) the person so engaged is employed by an employer, who is not the owner or occupier of the private home, but who provides that owner or occupier with the services of the person so engaged;
>
> **"employer"** includes, subject to section 7B —
>
> (a) persons, firms, companies and corporations; and
>
> (b) the Crown and any Minister of the Crown, or any public authority,
>
> employing one or more employees;"
>
> " **"industry"** includes each of the following—
>
> (a) any business, trade, manufacture, undertaking, or calling of employers;
>
> (b) the exercise and performance of the functions, powers, and duties of the Crown and any Minister of the Crown, or any public authority;
>
> (c) any calling, service, employment, handicraft, or occupation or vocation of employees,
>
> whether or not, apart from this Act, it is, or is considered to be, industry or of an industrial nature, and also includes —
>
> (d) a branch of an industry or a group of industries;"

32 The definition of "industrial matter" expressly includes "the dismissal of any person" in an "industry", as defined. Further, by virtue of s.7 of the Act, a dismissal of any person in an industry, as defined, is quite clearly and indisputably an industrial matter. It is, therefore, a matter of which the Commission has cognisance by virtue of s.23 of the Act. It is also an industrial matter which may be referred to the Commission by persons prescribed by s.29 of the Act, including by an employee. That was what occurred in this case.

33 The question is whether what was before the Commission was an "industrial matter", as defined. If it were, then the matter was within jurisdiction.

34 First, it was not in issue that Mr Tranfield was an employee and the respondent was an employer, which they were, within the definitions (a) and (b) of "employee", and (a) of "employer" in s.7 of the Act.

35 The question is whether the employee was employed in an industry as defined in the Act and, if he were employed in an industry, as defined, dismissed whilst employed in that industry.

36 The facts are quite clear. Mr Tranfield entered into a written contract of employment in Western Australia. Clause (1) of the written contract describes the "Point of Origin" in Western Australia (see exhibit 5 (page 43-48 of the appeal book (hereinafter referred to as "AB"))). At the time, Mr Tranfield resided in Western Australia and continued to do so until the time of his dismissal, at least, and so did the respondent.

37 At all material times, the respondent's head office of his business was situated in Bunbury in this State, although it had a branch office in Houston, Texas in the United States of America. The address is described as the principal place of business in the extract from the Business Names Register (see exhibit 1, pages 30-33(AB)). The nature of the respondent's business was a worldwide one involving providing services to the oil drilling industry (see the assertion in the advertisement for the position (exhibit 2, page 34(AB)) which is conducted in many parts of the world, a fact of some notoriety. The contract of employment was entered into in this State and within the jurisdiction of this Commission.

38 Mr Tranfield carried out his actual employment (i.e. performed his employment duties) in Singapore and France. He did not, at any time, carry out such duties in Western Australia, although he continued to reside here. He was paid here by the respondent and he was paid to travel overseas to work. Further, he was, and one assumes, placed in paid accommodation overseas and paid an accommodation allowance. At least, he was entitled to those benefits under the contract of employment. He was paid his wages in this State within the jurisdiction by the respondent from its head office, one infers. He also travelled backwards and forwards from Western Australia to Singapore and France respectively.

39 Notably, the written contract of employment called a "Letter of Understanding" (see exhibit 5, pages 43-48(AB)) contains no specific reference to work occurring in or off Western Australia, but there is no exclusion of such employment and Mr Schapper's submission that the employer could have deployed Mr Tranfield in Western Australia (including off the Western Australia coast) we accept.

40 The dismissal was effected by a letter (exhibit 6, page 49(AB)) dated 14 December 1999. Mr Tranfield received that letter at his home in this State. (The Senior Commissioner found that the notification of dismissal occurred in this State.) After the dismissal, he was paid about $US15,000.00, being wages owing. He said, however, that he was still owed $US7,168.00 for wages.

41 We should observe that, prima facie, a person within the jurisdiction is able validly to file an application under s.29 of the Act to serve upon a person within the jurisdiction which is what occurred in this case. However, one then may have to go further and determine whether the matter is within jurisdiction as an "industrial matter".

42 By the most apposite definition of "industry" ascertained in s.7 of the Act, the person dismissed is dismissed in an "industry", for the purposes of the definition, if he/she has been dismissed as an employee of an employer whose business, trade, manufacture, undertaking or calling is within the jurisdiction.

43 In the *Industrial Conciliation and Arbitration Act* 1912-1952, "industry" was defined in s.6 as follows—

> "Industry means any business, trade, manufacture, undertaking or employment in which workers are employed"

That is not significantly different from the definitions in the current legislation.

44 Burnside J, in *Metropolitan Shop Assistants' and Ware Employees' Industrial Union of Workers v Foy and Gibson Pty Ltd* (1912) 11 WAR 113, by reference to that definition in the 1912 Act, defined "industry" to mean "that branch of art where labour is employed for the production of wealth or value and in which capital is employed."

45 "Industry", as defined, has also been held to mean the common object sought to be obtained by the combined efforts of the employer and the worker (see also the identification of an industry in the definition by reference to the vocation or calling of employee) (see *Parker and Son v Amalgamated Society of Engineers* (1926) 29 WAR 90).

46 Whilst "undertaking" is a word of variable meaning, basically it conveys the idea of a "business" or "enterprise" and is frequently used where it can be interchanged with the word "business" or "enterprise" (see reference under *Electricity Commission (Balmain Electric Light Co Purchase) Act* 1950 [1957] SR(NSW) 100 at 128 per Sugerman J and see *Top of the Cross Pty Ltd v Federal Commissioner of Taxation* (1980) 50 FLR 19 at 36 per Woodward J.

47 A business is a word of "large and indefinite import", but its evident and reasonable meaning is "something which is followed and which occupies time and attention and labour for profit" (see per Osler JA in *Rideau Club v Corp of City of Ottawa* (1907) 15 OLR 118 at 122, citing *Smith v Anderson* (1880) 15 Ch D 247 at 258).

48 "Business" often includes "trade and a stated occupation or trade" (see *Cooney v Council of Municipality of Kuring-gai* [1963] 114 CLR 582 at 602 per Menzies J). Business does not, of course, have to be carried on for profit (see *South-West Suburban Water Co v St Marylebone Guardians* [1904] 2 KB 174 at 180) to be accounted a "business", as defined.

49 To carry on a "business" which is, by definition, an "industry" (see s.7 of the Act), a person may be financially interested, but he/she must give attention or perform work for the maintenance or furtherance of the undertaking and devote time to the accomplishment of its objects. That activity, we would observe, is clearly what a head office engages itself in and the activity is conducted there by the employer, his/her or its officers and/or employees. There was no suggestion that the respondent did not involve himself in the business and there is, in fact, evidence that he did.

50 We refer, too, to s.24 of the *Business Names Act* 1962, which reads as follows—

> "24. A document purporting to be
>
> (a) a certificate of registration issued under this Act;
>
> (b) a copy of or extract from the register or a copy of or extract from a document forming part of the register issued under paragraph (a) of subsection (1) of section twenty-three;
>
> (c) a certificate issued under paragraph (b) of subsection (1) of section twenty-three; or
>
> (d) a combination of two or more of the certificates, copies or extracts referred to in paragraph (a), (b) or (c) of this section, is in all courts and before all person having authority to hear, receive and examine evidence prima facie evidence of any matter contained or set out therein."

51 That, in its terms, is significant. The certificate reveals that the address at Lockwood Crescent is the principal place of business.

52 The question was whether the employer's industry, being his business, trade, manufacture, undertaking or calling, as a marine commissioner and surveyor, was carried on within the jurisdiction. If it was, that is an end of the matter because Mr Tranfield was then an employee dismissed within the jurisdiction by an employer in an industry within the jurisdiction.

53 The Senior Commissioner found that the respondent carried on a business. That finding was not challenged. The evidence was that the respondent carried on the business, undertaking, trade or calling of the survey and the commissioning of marine vessels. There was ample evidence that that was the business carried on and, equally, what it did could be described as an undertaking, a trade and the calling of the employer within the definition of these words and the authorities relating thereto to which we have referred above. That that business, through the activities of the head office, was carried on in Western Australia is undisputed and perfectly clear.

54 The carrying on of a business, calling or undertaking by oneself or through labour cannot be restricted to the doing of the actual activities which that calling or that business requires to be done. In other words, a business constituting an industry is not carried on by being restricted to the doing of the actual work of marine commissioning and surveying only. The business or undertaking is carried on or conducted, too, by management, administration, financial control and activity, marketing and advertising, canvassing prospective customers, personnel management and other activities.

55 The head office was, by implication and in fact, the centre of this, at least insofar as Mr Tranfield was concerned.

56 Indeed, there is authority for the proposition that business can only be said to be carried on where it is managed. A man can carry on business in different places but, in general, the place of business must be the place where the general superintendence and management take place (see *Brown v London & North Western Railway Co* (1863) 32 LJQB 318 at 321 per Blackburn J; see also *Nelson v Evans* [1923] St R Qd 158 at 161). That place is notoriously primarily, but no solely, a head office.

57 That Mr Tranfield was therefore engaged in an industry, as defined, and that the respondent was an employer employing an employee or employees in the industry was clear. That the respondent was engaged in activities in connection with the industry overseas and out of the jurisdiction was clear. That the activities in which this employee was involved were all conducted outside the jurisdiction was clear, for those reasons.

58 Hence, it is clear that the industry, being a business, an undertaking and a calling, was carried out in part at the head office in Bunbury because "head office" connotes

the final superintendence and management office. The office of the respondent was registered, too, under the *Business Names Act* 1962 as the principal office and its importance was not disputed. In this case, it was certainly the major place of superintendence and management and the business residence of the respondent within the jurisdiction.

59 The job was advertised in this State, the interview was conducted in this State, the contract was entered into, the termination emanated from within and was effected in this State, Mr Tranfield was paid in this State and from head office, and he was employed in and dismissed in an industry, in part, conducted in this State. It was therefore geographically within this jurisdiction. That it was not denied that he could have been directed to carry out his actual work in this State or within this jurisdiction confirms such a conclusion. It is not to the point that this was a possibility only.

60 This dismissal was a dismissal within the definition of "industrial matter" in s.7 of the Act, and therefore within jurisdiction. There was jurisdiction in the Commission to hear and determine the matter and the Senior Commissioner at first instance erred in not so finding. Those facts support a finding that this was an "industrial matter", as defined, within the jurisdiction.

61 Further, because of the dismissal and/or the contract which was entered into within the jurisdiction, the matter was plainly a matter which affected the rights and obligations of employers and employees in an "industry", as defined. In addition, prima facie, Mr Tranfield, as a resident of the jurisdiction was entitled, prima facie, to issue the application and serve it upon the respondent who resided, for business purposes at least, within the jurisdiction.

62 Insofar as a connection, as referred to above, is necessary or material, then we should make the following further observations. Many of the authorities referred to are not, on reflection, because they do not refer to an "industrial matter", relevant, in our opinion.

63 The workers compensation authorities *Mynott and Others v Barnard* (HC)(op cit) and *Speldewinde v W D Scott & Co Pty Ltd* (op cit) refer to accidents which occur elsewhere than in the jurisdiction where the contract of service was entered into. (Factually, even if those authorities were relevant, this case is distinguishable any way, because the dismissal itself, if that is equitable to the accident in *Mynott and Others v Barnard* (HC)(op cit) and *Speldewinde v W D Scott & Co Pty Ltd* (op cit), occurred within the jurisdiction.) They involve the construction of entirely different acts. We adopt what Lee J said in *Jeffries v William Adams & Co* [1982] 1 IR 273 at 274—

> "The agent for the employer argued that the magistrate was correct in having regard to the locality of the employment and referred to the judgment of Latham CJ in *Mynott v Barnard* (1939) 62 CLR 68. In my view, a sufficient answer to that contention appears in a passage from the judgment of Beattie J in the NSW Industrial Commission in *Tod & Tod v Reiher and Bemrose* [1960] AR (NSW) 64. The learned judge was concerned with the application of an industrial award of a State tribunal to employees crossing State borders in the course of their work and said at p.67: "... The matter must be determined on first principles as one of construction of the Industrial Arbitration Act and of the relevant award. *Mynott v Barnard* was a decision on the construction of a particular Act, and one dealing with workers' compensation. I do not regard it as decisive of the present point of law, which involves the interpretation of a different statute dealing with a different field of law. The judgments of the learned members of the Court are, of course, helpful as a guide to the approach to be made in considering the territorial application of a statute, but the decision itself does not help Mr Dillon's case, nor can it be said that the 'locality of employment' test, which Mr Jeffrey has sought to apply in the present case, had the approval of a majority of the bench.""

64 We are assisted, too, in the context of "connection" between the jurisdiction and an extra-territorial event, by the judgment of Lee J in *Jeffries v William Adams & Co* (op cit), where His Honour quoted from the dictum of Dixon J, as he then was, in *Broken Hill South Ltd v Commissioner of Taxation (NSW)* (1937) 56 CLR 337 at 375, where His Honour said—

> "The power to make laws for the peace, order and good government of a State does not enable the State Parliament to impose by reference to some act, matter of(sic) thing occurring outside the State a liability upon a person unconnected with the State whether by domicil, residence or otherwise. But it is within the competence of the State legislature to make any fact, circumstance, occurrence or thing in or connected with the territory the occasion of the imposition upon any person concerned therein of a liability to taxation or of any other liability. It is also within the competence of the legislature to base the imposition of liability on no more than the relation of the person to the territory. The relation may consist in presence within the territory, residence, domicile, carrying on business there, or even remoter connections. If a connection exists, it is for the legislature to decide how far it should go in the exercise of its powers. As in other matters of jurisdiction or authority courts must be exact in distinguishing between ascertaining that the circumstances over which the power extends exist and examining the mode in which the power has been exercised. No doubt there must be some relevance to the circumstances in the exercise of the power. But it is of no importance upon the question of validity that the liability imposed is, or may be, altogether disproportionate to the territorial connection or that it includes many cases that cannot have been foreseen."

65 Insofar as the facts supporting a finding of the necessary connection (insofar as such a finding is necessary) might be different from the facts which have to be found to support a finding that there is an "industrial matter" within the jurisdiction of the Commission, then we would observe that there are a number of relevant factors which include—

(a) the terms of the contract;
(b) the place where it was entered into;
(c) the nature and extent of the benefits received thereunder;
(d) the place where the dismissal occurred;
(e) the nature and extent of the work performed outside the jurisdiction;
(f) the extent of the conduct of its business, trade, undertaking or calling, potential or actual, of the employer within the jurisdiction; and
(g) whether there were variations to the original contract.

66 The list is not exhaustive. In this case, as the Commissioner found, the contract was entered into in the jurisdiction, the wages and other benefits, save and except accommodation, were paid and payable within the jurisdiction, the dismissal was effected within the jurisdiction, the extent of the conduct of the head office of the business was significant. The actual work was performed outside the jurisdiction, but it was performed by an employee in an industry within the jurisdiction.

67 Many of those facts will be relevant, too, to a finding whether the matter is an "industrial matter" within a proper construction of the Act, and findings of fact within the consequent interpretation. It is, of course, not necessarily fatal to a finding of jurisdiction that work is performed by the employee outside the jurisdiction, if there are other countervailing factors, as there were here. The location of the work, whilst not always the most important factor, may well be. In this case, it was open to find that the contract could encompass work within Western Australia. However, the extent of the work done outside the jurisdiction may not be fatal, in some cases, to a finding that the matter was an "industrial matter", as

defined, and/or that there was the requisite territorial connection with this jurisdiction.

68 In *Harris v Brandrill Limited* (FB)(op cit), there was a clear intention that the employee would be employed in the South African mining industry. In *Fitzgerald v Oil Drilling & Exploration (International) Pty Ltd* (FB)(op cit), the employer did not have a head office here, although that fact will not necessarily be fatal to a finding of jurisdiction in this Commission.

69 Our observations above are sufficient to demonstrate that the claim for contractual benefits was also within jurisdiction and should have been found to be, for the same reasons.

70 For those reasons, the Senior Commissioner erred in failing to find jurisdiction and the appeal is made out, in our opinion.

ORDERS SOUGHT

71 It was submitted for the respondent that, if the appeal were upheld, then the question of liability of damage should be remitted back to the Commission to hear and determine. The Senior Commissioner made findings that there was an unfair dismissal and, as to loss, assessed compensation.

72 Mr Schapper reminded the Full Bench that it was not uncommon in personal injury actions, even where the action was dismissed on the liability question, for courts to make findings as to damages. That is, of course, so. Such a course is taken to avoid unnecessary expense and delay.

73 In this case, the respondent declined every opportunity afforded him, at first instance, to be heard, and it was open to and correct that the Senior Commissioner made the findings which he did.

74 The respondent should not now be permitted to put Mr Tranfield at a disadvantage by re-opening matters, in relation to which, if he had attended the hearing at first instance, he would have had every opportunity to be heard.

FINALLY

75 We have considered all of the evidence, submissions and material. We would uphold the appeal. We would make the same findings and vary the order made at first instance to record a finding that Mr Tranfield had been unfairly dismissed and order that the respondent pay to Mr Tranfield within seven days the sum of $US23,920.00 by way of compensation and $US7,168.00 by way of outstanding contractual benefits, being a total of $US31,088.00. We would, of course, delete the order dismissing the application. We would issue a minute to reflect that order.

———

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	MARK ANTHONY TRANFIELD, APPELLANT
	v.
	RAY DOUGLAS PARKER, RESPONDENT
CORAM	FULL BENCH
	HIS HONOUR THE PRESIDENT P J SHARKEY
	COMMISSIONER A R BEECH
	COMMISSIONER J H SMITH
DELIVERED	TUESDAY, 3 APRIL 2001
FILE NO/S	FBA 46 OF 2000
CITATION NO.	2001 WAIRC 02462

Decision	Application to adjourn granted.
Appearances	
Appellant	Mr D H Schapper (of Counsel), by leave
Respondent	Mr R D Parker on his own behalf on 2 February 2001
	Mr L A Tsaknis (of Counsel), by leave, and with him
	Mr H M Downes

Supplementary Reasons for Decision.

THE PRESIDENT AND COMMISSIONER J H SMITH—
APPLICATION TO ADJOURN

1 These are the joint reasons for decision of the President and Commissioner Smith.

2 When this appeal first came on for hearing before the Full Bench on 2 February 2001, the appellant was represented by Counsel and the respondent appeared in person. Mr Parker, the respondent, advised that he had come from Texas, in the United States of America, to the hearing and that he had been overseas for some time.

3 The respondent, at first, made no application but, in the course of discussion of matters by the Full Bench with Counsel for the appellant and with the respondent, the respondent made application to the Full Bench that he wished to adjourn the matter to seek legal advice.

4 This application was opposed by Mr Schapper, Counsel for the appellant. His submission included reference, correctly, to the facts that, at no time, had the respondent sought to be heard in the matter, except by correspondence, and that this was a last minute application.

5 The principles in *Myers v Myers* [1969] WAR 19 at 21 per Jackson J (as he then was) apply—

> "To grant or refuse an adjournment is a matter for the discretion of the court to whom the application is made. But where the refusal of an adjournment would result in serious injustice to one party, an adjournment should be granted unless in turn this would mean serious injustice to the other party."

6 We agreed to grant the application for an adjournment because, if the adjournment were granted, the short delay in hearing the appeal, which might be detrimental to the appellant, would still not cause a serious injustice. On the other hand, to require the respondent, as a lay person, to argue a complex and serious issue of jurisdiction might be the cause of a serious injustice, which risk would be eliminated by a short adjournment. For those reasons, we agreed to grant the application for adjournment.

7 We were therefore of the opinion that, since this was a matter of some legal complexity, notwithstanding that there was a delay which was not the fault of the appellant, the merit of the application and the proper exercise of discretion required that an adjournment be granted to allow legal advice to be taken.

8 We would also observe, and it is not and cannot be relevant to the exercise of the discretion to do so, that, in the end, the delay was not substantial and the matter was competently argued by Counsel for both parties. Without disrespect to Mr Parker, we observe that Counsel who appeared for the respondent was able to put to the Full Bench helpful submissions, and indeed submissions which it is doubtful that a lay person would have been able to put.

COMMISSIONER A R BEECH—

9 My reasons for dissenting from the majority view that the adjournment ought be granted arises from the history of the application at first instance. The fact that Mr Parker had not filed a Notice of Answer and Counter Proposal to the Notice of Application filed in the Commission, that Mr Parker had not appeared at the hearing of the matter despite a Notice of Hearing being sent to his principal place of business, and further that he did not respond to the opportunity presented to him to respond when the transcript of the hearing was sent to him should not lightly be put aside.

10 Mr Parker has, apparently, now made a particular effort to arrange his affairs so that he could travel from overseas in order to attend the appeal before the Full Bench. It is evident that he did so with the express intention of representing himself in these proceedings. He is, of course, perfectly entitled to do so. Mr Parker can be taken to have decided to represent himself in the knowledge of the ground upon which the Appeal is to be argued.

11 While I appreciate that the ground upon which the Appeal is to be argued is an issue of law rather than of merit, it is not immediately apparent why that was not already known to Mr Parker at the time he decided to represent himself. For those reasons, I was not persuaded to grant the request made shortly after the commencement of the proceedings for an adjournment.

THE PRESIDENT—

12 For those reasons, the application was granted.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	MARK ANTHONY TRANFIELD, APPELLANT
	v.
	RAY DOUGLAS PARKER, RESPONDENT
CORAM	FULL BENCH
	HIS HONOUR THE PRESIDENT P J SHARKEY
	COMMISSIONER A R BEECH
	COMMISSIONER J H SMITH
DELIVERED	FRIDAY, 2 FEBRUARY 2001
FILE NO/S	FBA 46 OF 2000
CITATION NO.	2001 WAIRC 01982

Decision	Appeal adjourned.
Appearances	
Appellant	Mr D H Schapper (of Counsel), by leave
Respondent	Mr R D Parker on his own behalf

Order.

This matter having come on for hearing before the Full Bench on the 2nd day of February 2001, and having heard Mr D H Schapper (of Counsel), by leave, on behalf of the appellant and Mr R D Parker on his own behalf as respondent, and the abovenamed respondent on the 2nd day of February 2001, having made an oral application for an adjournment of the hearing, and the Full Bench having decided to grant the application and reasons for decision will issue at a future date, it is this day, the 2nd day of February 2001, ordered as follows—

(1) THAT the applications filed herein to extend time to file and serve the appeal books in appeal No. FBA 46 of 2000 are granted.

(2) THAT the hearing and determination of the appeal herein be and is hereby adjourned to a date to be fixed.

(3) THAT the application on behalf of the appellant for costs pursuant to s.27(1)(c) of the Industrial Relations Act, 1979 (as amended) be and is hereby granted.

(4) THAT the respondent pay to Mr D H Schapper the sum of $10.00 by way of costs of the adjournment within seven days of the date of this order.

(Sgd.) P.J. SHARKEY,
[L.S.] President.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	MARK ANTHONY TRANFIELD, APPELLANT
	v.
	RAY DOUGLAS PARKER, RESPONDENT
CORAM	FULL BENCH
	HIS HONOUR THE PRESIDENT P J SHARKEY
	COMMISSIONER A R BEECH
	COMMISSIONER J H SMITH
DELIVERED	TUESDAY, 3 APRIL 2001
FILE NO/S	FBA 46 OF 2000
CITATION NO.	2001 WAIRC 02497

Decision	Appeal upheld and the decision at first instance varied.
Appearances	
Appellant	Mr D H Schapper (of Counsel), by leave
Respondent	Mr L A Tsaknis (of Counsel), by leave, and with him Mr H M Downes

Order.

This matter having come on for hearing before the Full Bench on the 9th day of March 2001, and having heard Mr D H Schapper (of Counsel), by leave, on behalf of the appellant and Mr L A Tsaknis (of Counsel), by leave, and with him Mr H M Downes on behalf of the respondent, and the Full Bench having reserved its decision on the matter, and reasons for decision having been delivered on the 3rd day of April 2001 wherein it was found that the appeal should be upheld, it is this day, the 3rd day of April 2001, ordered as follows—

(1) THAT appeal No FBA 46 of 2000 be and is hereby upheld.

(2) THAT the decision of the Commission in matter No. 23 of 2000 made on the 29th day of August 2000 be and is hereby varied by deleting the order made dismissing the application, and substituting therefor a declaration and order in the following terms—

(a) THAT the applicant, Mark Anthony Tranfield, was harshly, oppressively or unfairly dismissed by the respondent, Ray Douglas Parker.

(b) THAT the respondent, Ray Douglas Parker do hereby pay within seven days, as and by way of compensation, the amount of $US23,920.00 to Mark Anthony Tranfield.

(c) THAT the respondent, Ray Douglas Parker do hereby pay within seven days, as and by way of denied contractual benefits, the amount of $US7,168.00 to Mark Anthony Tranfield

(Sgd.) P.J. SHARKEY,
[L.S.] President.

PRESIDENT—
Matters dealt with—

2001 WAIRC 02513

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	BGC (AUSTRALIA) PTY LTD, APPLICANT
	v.
	IAN PHIPPARD, RESPONDENT
CORAM	HIS HONOUR THE PRESIDENT P J SHARKEY
DELIVERED	THURSDAY, 5 APRIL 2001
FILE NO/S	PRES 7 OF 2001
CITATION NO.	2001 WAIRC 02513

Decision	Application to stay Order 2 at first instance stayed by consent.
Appearances	
Applicant	Ms P J Giles (of Counsel), by leave, and with her, Ms R L Amey (of Counsel), by leave
Respondent	Mr C H Edwards (of Counsel), by leave

Order.

This matter, having come on for hearing before me on the 30th day of March 2001 and the 4th day of April 2001, and having heard Ms P J Giles (of Counsel), by leave, and with her, Ms R L Amey (of Counsel), by leave on behalf of the applicant and Mr C H Edwards (of Counsel), by leave on behalf of the respondent, and the parties herein having filed a Minute of Consent Order, it is this day, the 5th day of April 2001, ordered and declared by consent as follows—

(1) THAT the applicant has a sufficient interest as required by s.49(11) of the *Industrial Relations Act* 1979 (as amended) (hereinafter referred to as "the Act") and was therefore entitled to apply for orders which appear hereunder.

(2) THAT appeal No FBA 7 of 2001 has been instituted within the meaning of s.49(11) of the Act.

(3) THAT the operation of Order numbered 2 of the Commission made on the 28th day of February 2001 in application No 1958 of 1999 be and is hereby stayed, pending the hearing and determination of this appeal or further order.

(4) THAT the applicant place the sum of $93,507.60 ("the sum awarded") into an interest bearing trust account ("the trust account"), to be operated by the joint signatures of the respective solicitors for the parties, or in the event that they are acting in person, by the parties themselves, pending the hearing and determination of this appeal, by close of business on the 9th day of April 2001.

(5) THAT within 21 days of the determination of this appeal, the parties make disbursement of the sum awarded in accordance with the decision of the Commission in its determination of this appeal.

(6) THAT on disbursement of the sum awarded to a party pursuant to paragraph 5 of these orders, any interest earned on the trust account shall be paid to the party to whom the money is disbursed in proportion to the amount due to each party.

(7) THAT in the event of the parties being unable to agree concerning the disbursement of the sum awarded on determination of this appeal, there be liberty to each party to apply to the Commission for orders as to the disbursement of the sum awarded on the provision of seven days' notice to the other party.

(8) THAT there be liberty to apply generally in relation to this order.

By the Full Bench,

(Sgd.) P.J. SHARKEY,
[L.S.] President.

2001 WAIRC 02342

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	CABLE SANDS (WA) PTY LTD, APPLICANT *v.* ROBERT SULLIVAN AND OTHERS, RESPONDENTS
CORAM	HIS HONOUR THE PRESIDENT P J SHARKEY
DELIVERED	MONDAY, 19 MARCH 2001
FILE NO/S	PRES 5 OF 2001
CITATION NO.	2001 WAIRC 02342

Decision	Application dismissed.
Appearances	
Applicant	Mr N D Ellery (of Counsel), by leave
Respondent	Mr D H Schapper (of Counsel), by leave

Reasons for Decision.

INTRODUCTION

1 This is an application pursuant to s.49(11) of the *Industrial Relations Act* 1979 (as amended) (hereinafter referred to as "the Act") whereby the applicant employer, Cable Sands (WA) Pty Ltd (hereinafter referred to as "Cable Sands"), applies for a stay of the operation of a direction of the Commission, constituted by a single Commissioner, given on 1 March 2001 in matters Nos 1693, 1710, 1711, 1712 and 1713 of 2000, until the hearing and determination of an appeal against the direction.

2 The grounds on which the application is made is that it would defeat the purpose of the appeal if such an order were not made; there is a serious issue to be tried and the balance of convenience lies with the applicant.

3 The "direction" appealed against was made on 1 March 2001 and deposited in the office of the Registrar, and therefore perfected, on 1 March 2001. Formal parts omitted, the order reads as follows—

"(1) THAT in respect of the selection for redundancy of employees in the categories of employee of the respondent, to which each of the applicants belongs, the respondent provide to the applicants the following—

(a) All documents brought into existence in formulating the criteria and weightings to be attached to the selection process for redundancy;

(b) All documents relating to advice received by the respondent in respect of the selection process for redundancy;

(c) That where in material provided to the applicants, the respondent has identified employees by reference to letters of the alphabet, the names of the employees so identified;

(d) In relation to the criterion of absenteeism, a list of the dates in the year 2000 of all absences for each of the employees considered for redundancy and whether those absences related to workers compensation or not;

(e) In relation to the criterion of discipline, a list of the dates of all counsellings for each employee and whether such counsellings were written or verbal; and

(f) Performance appraisals for each of the employees for the last two years.

(2) That documents referred to above shall be provided to the applicants' solicitor by the 20th day of March 2001.

(3) That information provided to the applicants in accordance with these directions shall remain confidential to the applicants and their solicitor and shall be used only for the purpose of the hearing of these applications."

4 The order or decision is expressed to be in the form of a direction. It is not clear that such a direction is valid within the terms of s.34(1) of the Act which provides as follows—

> "The decision of the Commission shall be in the form of an award, order, or declaration and shall in every case be signed and delivered by the Commissioner constituting the Commission that heard the matter to which the decision relates or, in the case of a decision of the Commission in Court Session, shall be signed and delivered by the Senior Commissioner among the Commissioners constituting the Commission in Court Session."

5 Accordingly, a decision is not a decision unless it is in the form of an award, order or declaration. Secondly, an interesting question arises as to whether such an order can be made, having regard to the terms of s.27 of the Act, in s.32 proceedings. That question was not before me in these proceedings.

6 A question arises as to whether the decision, which was headed "direction", was a "decision" which could be appealed against, since it was not "in the form of an award, order or declaration" within the meaning of s.34(1) of the Act. However, it was not submitted to me that the decision was statutorily invalid as not complying with s.34(1) of the Act so that it is unnecessary for me to deal with that question.

7 What was common ground, at least for the purposes of this application, was that the "decision" appealed against was a "finding", as that is defined in the Act. A "finding" is defined in s.7 as follows—

> "**"finding"** means a decision, determination or ruling made in the course of proceedings that does not finally decide, determine or dispose of the matter to which the proceedings relate;"

8 Since the order appealed against was an order for discovery, it was clearly, as defined, a decision, determination or ruling made in the course of proceedings (if it were made in the course of proceedings) that does not finally decide, determine or dispose of the matter to which the proceedings relate, and therefore, a finding, as defined.

9 Accordingly, by virtue of s.49(2a) of the Act, the appeal could not lie unless, in the opinion of the Full Bench, the matter is of such importance that, in the public interest, an appeal should lie.

10 The appeal was filed in the Commission on 8 March 2001 and purports to be instituted pursuant to s.49 of the Act. It is convenient, for a proper consideration of the matter, to note that the grounds of appeal are as follows—

> "4 That the Commission in the exercise of its discretion failed to give proper weight and consideration to the following matters in determining to issue determinations 1(a) and 1(b)—
>
> (a) That it is not in the public interest to order the discovery of confidential communications between employers and their industrial relations advisers.
>
> (b) That such documents are not and cannot be relevant to the matters at issue in the substantive case.
>
> (c) That the applicant was merely pursuing a "fishing expedition", requesting documents in the hope that they would reveal information that was relevant and advantageous to the applicant's case, when the applicant had not, and did not assert any reasonable or genuine basis to believe that such information would in fact be disclosed.
>
> 5 That the Commission in the exercise of its discretion failed to give proper weight and consideration to the following matters in determining to issue determination 1(f)—
>
> (a) The respondent had stated on record that the performance appraisals of all of the relevant employees were not in any way considered or assessed in determining the identity of those employees who were made redundant or who were not made redundant.
>
> (b) Such performance appraisals contain detailed, sensitive and confidential information regarding various employees, including comment on matters such as personal or family related difficulties or problems that the employees may have been experiencing which were effecting their work performance, drug and alcohol related problems, interpersonal problems between employees and other fellow employees or supervisors at the workplace, employees aspirations and goals, and other highly sensitive and personal matters.
>
> (c) The respondent requires employees to commit to keeping matters between employer and employee strictly confidential. The employer is under a reciprocal implied obligation to keep employee matters confidential, and at all times acts to uphold and honour this obligation. Disclosing the performance appraisals breaches this obligation and damages the relationship of trust and confidence between the respondent and its employees.
>
> (d) That the applicant was merely pursuing a "fishing expedition", requesting documents in the hope that they would reveal information that was relevant and advantageous to the applicant's case, when the applicant had not, and did not assert any reasonable or genuine basis to believe that such information would in fact be disclosed.
>
> (e) Given these facts, the Commission should not have ordered the disclosure of these appraisals unless compelling reasons existed to do so. Such compelling reasons were not in existence and were not presented by the applicant.
>
> 6 The Commission failed generally to give due weight and consideration to the growing recognition in the wider community of the need to respect the privacy of individuals. This recognition is evidenced by the enactment of the Privacy Amendment (Private Sector) Act 2000 (Cth). This Act will have application in relation to employee records throughout Australia as of 22 December 2001, and is intended to restrict and control the distribution of private information regarding employers and employees."

PRINCIPLES

11 The principles applicable to applications for a stay are well settled and I quote from the reasons for decision in *AWU v BHP Iron Ore Ltd* 81 WAIG 406 at 407-408, where I expressed those principles—

> "These principles have been laid down in a number of cases, including *Gawooleng Dawang Inc v Lupton and Others* 72 WAIG 1310, *Director General of the Ministry for Culture and the Arts v CSA and Others* 79 WAIG 670 and *City of Geraldton v Cooling* 80 WAIG 1751.
>
> It is for the applicant to establish that the stay should be granted. It is, of course, an underlying principle that the successful party is entitled to the fruits of her/his/its order, award or declaration.
>
> For the applicant to succeed, it must be established that there is a serious issue to be tried, that the balance of convenience favours the applicant and that other factors consistent with the application of s.26(1)(a), s.26(1)(b) and/or s.26(1)(c) of the Act, if they exist, require that the application be granted.
>
> If these ingredients exist, then exceptional circumstances exist which warrant the granting of the application as a matter of equity, good conscience and the substantial merits of the case. (I say that to further explain the principles.)"

12 I should add that those principles may not be applicable if a short term order for a stay is sought, for example, until the application for a stay is heard and determined.

BACKGROUND

13 The respondents made application to the Commission pursuant to s.29 of the Act, claiming that they had been unfairly dismissed from their employment by Cable Sands and claiming relief pursuant to that section.

14 It was alleged that they were dismissed as at 5 October 2000 and that the form of dismissal was a redundancy

which was the result of an unfair selection. Implicit in that, of course, is an allegation that other persons should have been selected and/or that the redundancy was not a true redundancy, but a dismissal for reasons other than redundancy or that the dismissal was otherwise unfair.

15 Cable Sands, the applicant in these proceedings, opposed the application at first instance and filed notices of answer and counter-proposal to that effect. Paraphrased, the notices of answer and counter-proposal contain allegations that the respondents were employees who were genuinely rendered redundant due to the closure of Cable Sands' Magnetic Plant, a processing plant at Bunbury.

16 The following allegation as to the selection process is contained in the answer and counter-proposals—

> "The decision as to which operators, including the applicant, were to be selected for redundancy, was made on the basis of the performance as a whole of all processing plant operators at Bunbury, as it was the case that all operators were multi-skilled and were not engaged exclusive to the Magnetic Plant. Such a selection process had been advised to employees generally at Bunbury in January 2000.
>
> The selection process was a detailed one, based upon a number of criteria, and was undertaken in an objective manner. It is denied that such process was unfair in any respect."

(See, for example the Notice of Answer and Counter Proposal filed on 21 November 2000 in application No 1710 of 2000.)

17 There are also allegations that the redundancies are unfair by virtue of the payment of inadequate redundancy payments.

18 The matter is listed for hearing for four days, I was told, commencing on 17 April 2001 and that listing was effected before the conference purported to be held pursuant to s.32 of the Act, arising out of which the directions appealed against were made.

19 A number of documents have been discovered relating to the performance and conduct of employees and identifying them by name. However, documents relating to the formulation of a selection formula and the process which applied the same have not been provided, I was informed.

20 Direction 1(c) was not appealed against.

21 I heard submissions from counsel for both parties in relation to this application, including the question whether there was a serious issue to be tried and the question concerning with whom the balance of convenience lay. I considered all of the submissions. No reasons as to why the direction was made were available.

SERIOUS ISSUE TO BE TRIED

22 The decision appealed against is a discretionary decision, as that is defined in *Norbis v Norbis* (1986) 161 CLR 513. To succeed on appeal, the appellant would have to establish that the exercise of the discretion at first instance miscarried in accordance with the principles in *House v The King* [1936] 55 CLR 499.

23 All of the orders appealed against relate, on a fair reading, to the documents which evidence the formulation of criteria and weightings used by the selection process, as well as documents containing advice to Cable Sands. Other documents ordered to be discovered relate to criteria applied in the selection process, including absenteeism, discipline and disciplinary action taken, as well as performance appraisals. Those documents, it was submitted, were entirely relevant to the questions at issue.

24 Indeed, the fairness of the selection process is raised and put in issue as an express ground in the answer (see my quoting of the relevant parts above). Accordingly, the order does not enable a "fishing expedition" but goes quite clearly to the issues raised. The documents, on the face of it, would seem to me, for those reasons, to be entirely relevant as going to the fairness of the process of redundancy, the genuineness of the reason for dismissal and, inter alia, the somewhat central question of whether other persons than the respondents could or should have been made redundant instead of the respondents.

25 As to the question of whether the discovery of confidential communications between employers and their industrial advisers is in the public interest, it is quite clear to me that there is no principle of confidentiality at law which would apply. (If there is, no authority to that effect was cited.)

26 Further, the order imposes very strict confidentiality in relation to the manner in which those documents and all of the documents to be discovered are to be treated. In addition, the documents containing advice and any other observations by the industrial advisers are relevant to a central issue in the proceedings at first instance.

27 Next, I am not persuaded that, for the purposes of this application, if there is any public interest which might apply to the discovery of such "confidential" communications, that it comes down on the side of imposing some de facto privilege in a case where the documents containing the advice identified is entirely relevant to the central issue of fairness of selection.

28 As to the question of the moral obligation of the employer not to reveal the sort of sensitive matters referred to in the submissions, such as work performance, drug and alcohol related problems, etc., and other sensitive and personal matters, those sensitivities are protected by the direction as to confidentiality attaching to the discovery.

29 I am not able to understand or accept at all the submission that Cable Sands, if no stay was ordered, would be in breach of its implied contractual obligation of trust and confidence to its employees. Cable Sands would not be at all in breach of any contractual obligation when it was complying with an order of the Commission. (As to the question of whether the employees should have been heard and ought to be heard before the order was made, that is another issue and it was not before me in these proceedings.) Further, the documents are not, as was submitted, being "released into the public domain".

30 As to Ground 5, I have already dealt with that ground in my observations above. I would, however, observe that it is not to the point that the performance appraisals were said on the record on behalf of Cable Sands, to have not been considered or assessed in determining the employees to be made redundant. Performance appraisals, it might be argued in any event, depending on their contents, should have been considered or assessed, or they might be relevant to evidentiary and/or credit issues concerning the process of selection for redundancy.

31 Further, I have difficulty in understanding how it can be said that the employer/employee relationship might be destroyed because these documents are revealed on a restricted discovered basis pursuant to the order of this Commission, which is a court and a tribunal. Cable Sands, as I have said has an obligation, enforceable under the Act, to comply with that order.

32 As to Ground 6, the *Privacy Amendment (Private Sector) Act* 2000 (Cth) is not in operation and is not the law and was not required to be considered. It is an entirely irrelevant consideration that there might be, if that is indeed the case (and there was not evidence of it) a growing recognition in the community of the need to respect the privacy of the individual.

33 What occurred here was that the Commission, within its jurisdiction and power (or at least it was not contended otherwise), made orders for discovery of a not unusual type.

34 Further and alternatively, in any event, there are no reasons (whether they were required or not is another matter) upon which I can say that the discretion miscarried.

35 For those reasons, I find that the applicant has not established that there is a serious issue to be tried.

BALANCE OF CONVENIENCE

36 For the respondents, it was submitted that, to stay the operation of the order might have the effect of delaying the final hearing and determination of the matter, a delay

which could not be compensated for in money, even if the respondents were successful, because of the decision in *City of Geraldton v Cooling* 80 WAIG 5341 (IAC). I agree that that is so; and that the balance of convenience in that respect lies with the respondents.

37 For the applicant, it was submitted that Cable Sands' relationship of trust and confidence with its employees will be destroyed if the order is not stayed. I have already answered that above in another context. There is no evidence that the relationship will be destroyed, but a mere assertion.

38 In any event, the order is a necessary order by a court and tribunal to enable the Commission to justly and expeditiously deal with the matter. The equity, good conscience and the substantial merits of the case, for the reasons which I have expressed, lie with the making of the order in the interests of the respondents. Further, for that reason and because the order maintains a strict confidentiality in relation to the documents, the order is properly made, having regard to the interests of the parties and the other employees (see s.26(1)(a) and s.26(1)(c) of the Act.)

39 Further and alternatively, nothing was said to persuade me that this was a matter of such importance that, in the public interest, an appeal should lie insofar as it is permissible for me to consider the strength of the appellant's case in the context of s.49(2a) of the Act. This appeal does not reach so far outside the affairs of the parties nor is it so unusual an issue that s.49(2a) would, in my opinion, permit an appeal to lie (see *RRIA v AMWSU and Others* 69 WAIG 1873 at 1878-1879 (FB); see also *Hamersley Iron Pty Ltd v AMWSU* 69 WAIG 1024 (FB)).

40 Further, an appellate court will exercise particular caution in undertaking to review a decision on a matter of practice or procedure (see *Contender I Ltd v LEP International Pty Ltd* (1988) 63 ALJR 26). The direction here related to a matter of practice and procedure.

41 It has not been established to my satisfaction that this is a matter, for those reasons, which is of importance. (It involves a not unusual interlocutory order.) It has not been established either, for those reasons, that, in the public interest, an appeal should lie.

42 It follows that it is not established that there should be interference by the President with an interlocutory order such as this; nor therefore, for that reason, too, does the balance of convenience lie with Cable Sands.

FINALLY

43 For all of those reasons, there are no exceptional circumstances established and no sufficient reason otherwise established to justify the making of an order depriving the respondents of the "fruits" of their direction. It has not been established that the equity, good conscience and the substantial merits of the case lie with Cable Sands. It has not been established, for those reasons, that the interests of Cable Sands or any other interested person or the community should supervene those of the respondents (see s.26(1)(c) and (d) of the Act).

44 For those reasons, I dismiss the application.

Order accordingly

2001 WAIRC 02343

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	CABLE SANDS (WA) PTY LTD, APPLICANT *v.* ROBERT SULLIVAN AND OTHERS, RESPONDENTS
CORAM	HIS HONOUR THE PRESIDENT P J SHARKEY
DELIVERED	MONDAY, 19 MARCH 2001
FILE NO/S	PRES 5 OF 2001
CITATION NO.	2001 WAIRC 02343

Decision	Application dismissed.
Appearances	
Applicant	Mr N D Ellery (of Counsel), by leave
Respondent	Mr D H Schapper (of Counsel), by leave

Order.

This matter having come on for hearing before me on the 16th day of March 2001, and having heard Mr N D Ellery (of Counsel), by leave, on behalf of the applicant and Mr D H Schapper (of Counsel), by leave, on behalf of the respondents, and I having reserved my decision on the matter, and reasons for decision being delivered on the 19th day of March 2001 wherein I found that the application should be dismissed, it is this day, the 19th day of March 2001, ordered that application No PRES 5 of 2001 be and is hereby dismissed.

(Sgd.) P. J. SHARKEY,
[L.S.] President.

PUBLIC SERVICE ARBITRATOR— Award/Agreements— Variation of—

GOVERNMENT OFFICERS SALARIES ALLOWANCES AND CONDITIONS AWARD 1989.

No. PSA A 3 of 1989.

2001 WAIRC 02536

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	CONSERVATION COMMISSION, APPLICANT CHAMBER OF COMMERCE AND INDUSTRY OF WESTERN AUSTRALIA (INC), AUSTRALIAN MINES AND METALS ASSOCIATION (INCOPRORATED), TRADES AND LABOR COUNCIL OF WESTERN AUSTRALIA (UNIONSWA), HON. MINISTER FOR LABOUR RELATIONS, CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED, RESPONDENTS
CORAM	SENIOR COMMISSIONER G L FIELDING
DELIVERED	FRIDAY, 6 APRIL 2001
FILE NO/S	P 5 OF 2001
CITATION NO.	2001 WAIRC 02536

Result	Award varied
Representation	
Applicant	Mr GA Wibrow as agent
Respondents	Mr M Finnegan as agent on behalf of the Civil Service Association of Western Australia Incorporated, no appearances on behalf of the other Respondents

Order.

HAVING heard Mr GA Wibrow on behalf of the Conservation Commission, Mr M Finnegan as agent on behalf of the Civil Service Association of Western Australia Incorporated and there being no appearance on behalf of other Respondents, the Commission, having satisfied itself that the terms of the General Order of the Commission No. 654 of 2000 dated 17 July 2000 , have been complied with, pursuant to the powers

conferred on it under the Industrial Relations Act 1979, and by consent, hereby orders—

THAT Schedule A—List of Respondents to the Government Officers Salaries, Allowances and Conditions Award 1989 be varied by—

Inserting "Conservation Commission".

(Sgd.) G.L. FIELDING,
[L.S.] Senior Commissioner.

AWARDS/AGREEMENTS— Application for variation of— No variation resulting—

ARTWORKERS AWARD.

No. A 30 of 1987.

2001 WAIRC 02515

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	TOWN OF NARROGIN, APPLICANT
	v.
	THE WESTERN AUSTRALIAN BUILDERS' LABOURERS, PAINTERS & PLASTERERS UNION OF WORKERS, RESPONDENT
CORAM	COMMISSIONER J F GREGOR
DELIVERED	FRIDAY, 6 APRIL 2001
FILE NO	APPLICATION 1412 OF 2000
CITATION NO.	2001 WAIRC 02515

Result	Dismissed
Representation	
Applicant	Mr J. Phillips and with him Ms G. Martelli on behalf of the applicant
Respondent	Ms J. Harrison on behalf of the respondent

Reasons for Decision.

(Extempore)

1 This is an application filed on 8th September 2000 by the Town of Narrogin. The application prays for an order for removal of the Town of Narrogin as a respondent to the Artworkers Award No. 30 of 1987 on the grounds that the town no longer has any employees employed under the award and no expectation of employing any artworkers.

2 On the face of it the application may be an application under s.40 of the Industrial Relations Act, 1979 (the Act), but more likely it is an application under s.47. I accept it as that and would not dismiss the application because of that technicality. I regard it as being made under s.47 to the extent that one needs to.

3 S.47 of the Act is provision of long standing. It was amended by Nos 94 of 1984, 15 of 1993 and 1 of 1995. Those various amendments crystallise the duty of the Commission concerning the cancellation of defunct awards and its duties concerning the deletion of employers from awards in certain cases. Even though the head note refers to 'in certain cases', maybe in a legally enigmatic way, the intention of the clauses is clear. Subclause (1) provides that, subject to subsections (3), (4) and (5), where in the opinion of the Commission there is no employee to whom an award or industrial agreement applies, the Commission may on its own motion by order cancel that award or agreement. By subsection (2) the Commission may—

> "*Subject to subsections (3), (4) and (5), where the Commission is of the opinion that a party to an award who is named as an employer is no longer carrying on business as an employer in the industry to which the award applies, or is for any other reason not bound by the award the Commission may on its own motion make order, by order, strike out that party as a named party to the award.*"

The conditions precedent for the exercise of the power conferred by sections are—

- There has to be no employee to whom the award applies. That means no employee anywhere; and
- Any employer named is no longer carrying on business as an employer in the industry to which the award applies.

There has been no suggestion put that the respondent who seeks deletion is in that circumstance. It is said that for the time being it does not not employ any employee covered by the award nor does it intend to in the future. The key though is whether it is no longer carrying on business. And it is clearly in business.

4 When the Commission deals with applications by unions under the section it publishes its decisions in the form of awards, orders or declarations, they are signed and delivered according to s.34(1). By the issue of such instruments the Commission lays down the future conditions of employment in any industry, usually in the form of an award. An award is not a law, but merely a determination of the tribunal when taken in conjunction with the Act has the force of law.

5 The implication of the award, or what it does in practice and the extent of the power of the Commission in making awards is described in s.37 of the Act. That section provides that an award has effect according to its terms and unless and to the extent that those terms expressly provide otherwise, the award becomes a common rule. Unless an award specifically says it is not, it is a common rule and in that sense it is different to awards of the Australian Industrial Relations Commission which by the Constitution of the Commonwealth is unable to be made a common rule unless it has to have application in a Territory (Section 52 (v).

6 Because awards of this Commission are, by their very existence, a common rule unless stated otherwise, that means they extend to and bind all employees employed in any calling mentioned in the award in the industries to which the award applies and all employers who employ those employees. In Section 7(1), the definitions section, "calling" means: "*Any trade, craft, occupation or classification of employee" and "industry*" is also given a wide meaning.

7 Common rule operates in conjunction with the scope clause of the award so that the various terms of a scope clause can have effect on a common rule, a rule which does not limit the award to the original parties to the application for the award. That an award is not limited to the original parties is the essence of common rule.

8 This is important for enforcement. For the purpose of enforcement the industry must be identified. The identification of the industry to which an award applies has been dealt with in historical cases of this Commission in *Parker and Son v Amalgamated Society of Engineers (1926) 29 WALR 90* (Parker's Case) and *R J Donovan and Associates Pty Ltd v Federated Clerks Union of Australia Industrial Union of Workers, W.A. Branch (1977) 57 WAIG 1317* (Donovan's Case) which establish various tests to identify the industry covered by an award (See also *WA Carpenters and Joiners, Bricklayers and Stoneworkers Industrial Union of Workers v Terry Glover Pty Ltd (1970) 50 WAIG 704* (Glovers Case).

9 In Parker's Case it was called the common object test. In Glover's Case the test involves a finding of fact as to the industry carried on by respondents set out in a schedule to the award. The reason that parties are named in the schedule to respondents is to provide the mechanism by which the intent of the scope clause can be translated into effective coverage.

10 The statutory declaration of Ms D. McAtee, (Exhibit H1) shows that in local government over the last 10 years in a

selection of councils for instance Port Hedland, Kwinana, Gosnells City, Town of Vincent, Albany Council, Subiaco City Council, Geraldton Council and Fremantle Council, have all engaged employees who have been employed in classifications covered by the award.

11 The danger for the operation of the award if the application is granted is that the identification of the industry would be blurred and the meaning of the original scope clause and its intention as handed down could be changed so that in the towns where on the evidence before me employees have been engaged in classifications covered by the award, it may not have operation. That is a substantial change that would effect the operation and coverage of the award. That the Town of Narrogin does not employ employees under this award at the moment is not the point. It is capable of employing such an employee and a change of policy may happen overnight so that it does again.

12 The Act empowers me to cancel the award if it is defunct. This award is not defunct. There has been no evidence before me that it is defunct or that there is no longer any employer carrying on business as an employer in the industry covered by the award and by that reason the Town of Narrogin should not be bound to the award.

13 The powers are exercised in two circumstances. When there are no employees left anywhere, or where an employer is no longer carrying on business in an industry to which the award applies.

14 The two tests are not met in this case and the application will be dismissed.

2001 WAIRC 02514

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	TOWN OF NARROGIN, APPLICANT *v.* THE WESTERN AUSTRALIAN BUILDERS' LABOURERS, PAINTERS & PLASTERERS UNION OF WORKERS, RESPONDENT
CORAM	COMMISSIONER J F GREGOR
DELIVERED	FRIDAY, 6 APRIL 2001
FILE NO	APPLICATION 1412 OF 2000
CITATION NO.	2001 WAIRC 02514

Result Dismissed

Order.

HAVING heard Mr J. Phillips and with him Ms G. Martelli on behalf of the Applicant and Ms J. Harrison on behalf of the Respondent, the Commission pursuant to the powers conferred on it under the *Industrial Relations Act, 1979*, hereby orders—

THAT the application be and is hereby dismissed

(Sgd.) J.F. GREGOR,
[L.S.] Commissioner.

NOTICES—
Award/Agreement matters

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Application No. A 2 of 2001

APPLICATION FOR AN AWARD
ENTITLED "BHP IRON ORE AWARD 2001"

NOTICE is given that an application has been made to the Commission by The Automotive, Food, Metals, Engineering, Printing & Kindred Industries Union of Workers, Western Australian Branch and others under the Industrial Relations Act 1979 for the above Award.

As far as relevant, those parts of the proposed variation that relate to area of operation or scope are published hereunder.

3. APPLICATION

This Award applies to and binds—

1. employees of BHP Iron Ore Pty Ltd ("BHP") in the callings howsoever called and previously covered by the Iron Ore Production and Processing (Mt Newman Mining BHP Pty Ltd) Award Number A29 of 1984 and any subsequent agreements; and
2. BHP and no other employer; and
3. The Automotive, Food, Metals, Engineering, Printing & Kindred Industries Union of Workers, Western Australian Branch; The Australian Workers' Union, West Australian Branch, Industrial Union of Workers; Construction, Mining, Energy, Timberyards, Sawmills and Woodworkers Union of Australia (WA Branch); The Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Workers Union of Australia, Engineering and Electrical Division, WA Branch and the Transport Workers Union of Australia, Industrial Union of Workers, Western Australian Branch ("the unions")

A copy of the proposed variation may be inspected at my office at the AXA Centre, 111 St George's Terrace, Perth.

J.A. SPURLING,
26 April 2001 Registrar.

COCKBURN CEMENT LIMITED AWARD 1991.

No. A14 of 1991.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

Application No 462 of 2001

APPLICATION FOR VARIATION OF AWARD
ENTITLED "COCKBURN CEMENT LIMITED AWARD 1991 AWARD NO A 14 OF 1991"

NOTICE is given that an application has been made to the Commission by the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Workers' Union of Australia, Engineering and Electrical Division, W.A. Branch under the Industrial Relations Act 1979 for a variation of the above Award.

As far as relevant, those parts of the proposed variation that relate to area of operation or scope are published hereunder.

Clause 3.—Area and Scope—

Delete subclause 1 and insert thereof the following—

(1) This award shall apply to Cockburn Cement Limited, the employees employed in the classifications contained in Clause 6.—Wages of this award at the Main Works in Russell Road and Woodmans Point, Dongara and the following unions—

The Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers—Western Australian Branch;

The Australian Workers' Union, Western Australian Branch, Industrial Union of Workers;

Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia, Engineering and Electrical Division (Western Australian Branch)

Construction, Mining, Energy, Timberyards, Sawmills and Woodworkers' Union of Australia, Western Australian Branch; Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied

Merchant Service Guild of Australia, Western Australian Branch, Union of Workers;

Transport Workers' Union of Australia, Industrial Union of Workers, Western Australian Branch;

A copy of the proposed variation may be inspected at my office at the AXA Centre, 111 St George's Terrace, Perth.

J. A. SPURLING,
Registrar.

26 April 2001.

PUBLIC SERVICE ARBITRATOR— Matters Dealt With—

2001 WAIRC 02285

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED, APPLICANT
	v.
	CHIEF EXECUTIVE OFFICER, AGRICULTURE WESTERN AUSTRALIA, RESPONDENT
CORAM	SENIOR COMMISSIONER G L FIELDING
DELIVERED	WEDNESDAY, 14 MARCH 2001
FILE NO/S	PSACR 2 OF 2000
CITATION NO.	2001 WAIRC 02285

Result	Application granted
Representation	
Applicant	Mr B G Cusack as agent
Respondent	Mr K Vijeyan as agent

Reasons for Decision.

1. The Respondent operates a quarantine inspection facility approximately 43 kilometres from Kununurra near the Northern Territory border on the highway between Kununurra and Katherine. The facility or checkpoint functions 24 hours a day seven days a week. It is staffed by persons employed by the Respondent as Quarantine Inspectors. Primarily their employment is governed by the provisions of the *Public Service Award 1992* and the *Agriculture Western Australia Enterprise Agreement 1998*.
2. The Quarantine Inspectors live in and around Kununurra. It is common ground that there are no residential facilities close to the checkpoint. The Inspectors travel to and from the checkpoint in motor vehicles provided and maintained by the Respondent. Until in or about 1997 these vehicles were housed in a central compound within the Kununurra townsite from where they were collected and returned each working day by the Inspectors. In or about 1997 the Inspectors expressed concerns about their personal safety when collecting and returning the vehicles, particularly at night, and about the security of their own motor vehicles left at the compound whilst they were working at the checkpoint. As a consequence, and seemingly with the knowledge and consent of the Respondent, that arrangement came to an end in or about 1997 after which time the Inspectors housed the vehicles at their private residences, a practice which still exists.
3. The checkpoint currently operates on the basis of three eight hour shifts per day. It is thus not possible for the Inspectors to travel to and from the checkpoint in the time allocated to the normal shift if the checkpoint it to be adequately staffed. As a consequence they leave home in the vehicles provided by the Respondent half an hour before they are due to start at the checkpoint and arrive home half an hour after the shift has finished. Until 11 November 1999 the Inspectors were paid for the extra hour involved in travelling to and from the checkpoint. This practice, as is common ground, was in place when the vehicles provided by the Respondent were housed in a central compound and well before the practice whereby the vehicles were housed at the private residences of the Inspectors. In the case of Inspectors employed permanently they were paid one hours overtime each day they worked at the checkpoint. In the case of Inspectors employed on a casual basis they were paid for an extra hours work on each such occasion.
4. In mid-1999 the Respondent's Director of Quarantine and Protection Services, Mr Mercy, who for the present purposes can be said to have ultimate responsibility for the operations of the Kununurra and other quarantine checkpoints operated by the Respondent, learnt of this practice for the first time. He immediately questioned the justification for the practice and called for an explanation from the relevant supervisors. He was concerned that no other persons employed by the Respondent enjoyed such a benefit and considered it to be inequitable to the others. In particular, he considered it inequitable to those persons employed by the Respondent at its Kununurra office which is approximately 12 kilometres from Kununurra. Those persons many of whom live in Kununurra are not recompensed for travel between their workplace and Kununurra. Likewise other Quarantine Inspectors based at Eucla who perform similar inspectorial functions to these now in question, are required to travel at their own expense and in their own time to a checkpoint, which is some distance from Eucla. As a consequence of these concerns, the Respondent ceased the practice on 11 November 1999 after first giving 14 days notice of the change to each of the Inspectors. It is common ground that since that date all new Inspectors employed to staff the Kununurra checkpoint have been employed expressly on the basis that they make their own way to the checkpoint in their own time if not also at their own expense.
5. The Applicant represents the Inspectors employed at the Kununurra checkpoint. It contends that the "changes represent a significant alteration to the working conditions" of the Inspectors and submits that those changes "should not be instituted unilaterally." All attempts to resolve the matter by conciliation have failed. Consequently and in accordance with the appropriate dispute settling procedure, the Applicant now seeks a declaration that those Quarantine Inspectors employed by the Respondent on 11 November 1999 to staff the Kununurra checkpoint and in its employ now have a contractual entitlement to be paid for an additional hour each day that they worked a full shift at the checkpoint and a declaration that the Respondent acted unlawfully in removing that entitlement. The Applicant's case is that it was either an express or an implied term of the contract of the Quarantine Inspectors in question that the Respondent would pay them on the basis that their work started and finished in Kununurra, notwithstanding that they were rostered only to work at the checkpoint. Alternatively, the Applicant argues that the Respondent by its conduct should be estopped from now denying that the Inspectors had any contractual right to the additional payment subject of these proceedings.
6. The Respondent, for its part, denies that the Inspectors in question have a contractual entitlement to the additional payment. Rather, the Respondent asserts that the practice of making the payment for the additional hour was simply an informal practice unauthorised by the Respondent. In any event, the Respondent contends that there is now no longer any rational justification for the practice. The Respondent contends that the arrangement whereby the employees started and finished work at Kununurra originated when the Respondent had its office in the Kununurra townsite which is no longer the case.

Furthermore, now that the vehicles used by the Inspectors to travel to and from the checkpoint are no longer housed in a central compound the basis for the argument that the Inspectors commenced and finished their work at the Respondents compound no longer exists. The Respondent argues that the Quarantine Inspectors, as with other employees, should find their own way to work in their own time in accordance with the established principle of industrial law to that effect. Any arrangement to the contrary was one entered into locally by persons without any authority to bind the Respondent and accordingly the Respondent is under no obligation to honour the arrangement any longer. In particular, the Respondent refers to and relies upon the fact that a number of Inspectors who were originally employed as casuals have since, but prior to 11 November 1999, been employed on the basis of a written contract for a fixed term which makes no reference to there being an entitlement to claim the additional payment.

7. There is little or no conflict in the evidence adduced in this matter. Indeed, it is refreshing to see so many witnesses admit without equivocation that which should have been admitted even when it went against their case. The Inspectors called by the Applicant were all consistent in their evidence. They testified that when originally interviewed for employment as a Quarantine Inspector at the Kununurra checkpoint they were clearly informed that for the purposes of time keeping they were to start and finish work in Kununurra although only rostered to work at the checkpoint and that accordingly they were to claim payment for one hours additional time for travelling to and from the checkpoint. Moreover, in the case of permanent employees they were told that they were to claim the extra one hour at overtime rate in effect in accordance with the *Public Service Award 1992*. I unreservedly accept their testimony as being reliable. Indeed their testimony in this regard was not seriously challenged.

8. In my assessment representations made to the Inspectors regarding their entitlement to the additional payment were made in such circumstances as to constitute a term of their respective contracts of employment. In almost all cases the Inspectors were informed of this benefit at the interview which led to their employment. Furthermore, in at least two cases the representation that they were to start and finish in Kununurra and be paid for an additional hour was a material inducement to those persons taking up the job. In any event, a representation regarding the hours of work and the quantum of remuneration is a vital ingredient to any contract of employment. In the circumstances I have no difficulty in concluding that the representations on this occasion formed the basis of the contracts of employment. I do not accept that the Respondent can be heard to say that the persons who made the representations had no authority to make the representations or that the representations were otherwise not binding on the Respondent. In all cases the representations were made by a person in ostensible if not actual authority. In many cases the representations were made by the then supervising inspector at Kununurra. The unchallenged evidence is that the supervising inspector was in effect the local person responsible for the management of the checkpoint and moreover, was authorised to engage inspectors on a casual basis. I would have thought anything that person said in relation to terms and conditions of employment when interviewing persons for such employment should bind the Respondent. A former supervising inspector, Mr Thompson, was responsible for initially engaging a number of the Inspectors the subject of these proceedings. He testified that before he engaged those Inspectors he checked with his superiors in Perth to ensure that the practice now in question was to apply to the Quarantine Inspectors he engaged, as indeed had been the case for their predecessors. As already indicated I unreservedly accept his testimony in this and other respects. In other cases the Inspectors were informed by the then Inspector-In-Charge for the State, Mr Williams, or by the current Project Manager for interstate quarantine, Mr van Schagen, both of whom were senior officers located in Perth, that they were entitled to the benefit of this practice. As the agent for the Applicant submitted, the practice in question was not one made up by Mr Thompson but a longstanding one which has been endorsed by senior officers of the Respondent based at its administrative headquarters in the metropolitan area.

9. The Respondent made much of the fact, and I accept it to be a fact, that in some cases where the Inspectors who had been employed initially on a casual basis were employed subsequently on a permanent basis, albeit for a limited time, following a further job application and interview, no mention was made at the interview which led to that permanent employment of an entitlement to be paid for the additional hour. I accept it to be a fact also that as a general proposition there was no discussion about the conditions of employment at those subsequent interviews. That is perhaps not surprising given that in most instances the casual Inspectors at the time of the interview had worked for the Respondent for some time and, as I find, well knew the terms and conditions of employment for Quarantine Inspectors at Kununurra. There is ample evidence to suggest that the terms and conditions of employment, including those relating to the payment for travelling time, were well known by both permanent and casual employees who worked at the checkpoint. I accept the position to be that the practice of paying casuals for the extra hour simply "rolled over" or "flowed on" to permanent Inspectors, except that the extra hour was to be paid at the overtime rates as the Public Service Award requires. Moreover, I accept that it was the intention of the parties that this should occur. Indeed, it is not without significance that the payments did in fact continue to be made after the casual employees were appointed to a permanent position, the only change being that the payments were made at overtime rather than ordinary time rates. Furthermore, I accept the position to be that it was a well-known and long-standing practice. There was thus no reason for the supervisor to raise the matter or for the employees to question that it would not continue. Having regard to the history of the payments I would have thought if the arrangement was not to continue the letters of appointment would have contained an express statement to that effect or the Inspectors told of the change at the interview. Clearly this did not happen. In any event, payment for the additional hour is not inconsistent with the letters of appointment upon which the Respondent relies. Those letters merely make mention of the industrial instruments which were to regulate the employment one of which was the *Public Service Award 1992*. That Award clearly allows for the payment for work beyond the normal shift times. It might be argued, as did the agent for the Respondent on this occasion, that the Quarantine Inspectors were not at "work" until they got to the checkpoint. However, if, as I accept to be the case, the Inspectors were expressly told by an agent for the Respondent that for the purposes of time keeping their work started and finished at Kununurra and that they were to include an extra hour as part of their work the position is, of course, entirely different. Moreover, the Respondent having continued to pay the Inspectors as if they were entitled to payment for the additional hour ought not now be heard to say that the Inspectors had no such entitlement. The Inspectors did nothing to hide from the Respondent what was being claimed by them in this respect. The timesheets they submitted clearly show as a separate item the additional hour, albeit that there was no mention of what the hour represented. The credible evidence strongly suggests that the claim for the additional hour was endorsed by the relevant paymaster at the Respondent's office in Perth in the full knowledge of what the payment was for, and I so find.

10. The Respondent, to its credit, acknowledges that it had in place an arrangement for payment for the additional hour when the motor vehicles provided by it to transport the Inspectors to the checkpoint were held in a central compound but contends that the arrangement ended when the vehicles ceased to be held in such a compound. There is absolutely no evidence to support that proposition.

Certainly there is no evidence to suggest that there was either a formal or informal termination by the Respondent of the arrangement. Indeed, there is no evidence of the arrangement whereby the vehicles were housed in a central compound being terminated formally. Such evidence, as there is, suggests that the arrangement of housing the vehicles in a central compound came to an end by evolution. Furthermore, such evidence as there is suggests that the practice of housing the vehicles at the residences of the Inspectors might more aptly be treated as if the residences were defacto compounds. The Respondent properly conceded that the current practice in this regard cannot be equated with the concept of "home garaging" as that concept is currently understood in the public sector. The evidence indicates that at least in the case of some Inspectors the "home garaging" is an annoyance and they would prefer not to hold the motor vehicles at home but return them to a central compound. In any event, the Respondent having continued to honour the claims for payment of the additional hour long after the arrangement of housing the motor vehicles in a central compound had come to an end ought not now be heard to say that the entitlement came to an end with the closure of the central compound.

11. There may be good reasons for the Respondent wishing to alter the practice now in question, as the Respondent's Director of Quarantine and Protection Services suggests. It is undoubtedly the case that ordinarily employees are expected to make their own way to the work place in their own time but, in this instance, it cannot be ignored that the Respondents represented to the Inspectors before they commenced work that a different arrangement would apply in their cases. Those representations, as I find, being a term of the contract of employment for the Inspectors in question cannot be removed or varied unilaterally, even on notice by the Respondent. Being, as I find, a term of the contract, the practice can only be removed by agreement of the Inspectors or by termination of the contract. Though each case must be decided on its own facts, a somewhat similar, but not identical, arrangement was held to be incapable of removal even on six months notice in *Local Government Engineers' Association of New South Wales v Wollongong City Council* (1995) 58 IR 245. It cannot be said that the Inspectors in question have ever accepted the change imposed upon them. Soon after the change was imposed the matter was the subject of discussion in accordance with the relevant dispute settling procedure and then referred to the Commission for determination.

12. It follows, for the forgoing reasons, that the Applicant is entitled to a declaration that the practice of paying Quarantine Inspectors for an additional hour for each full day worked at the Kununurra checkpoint was a term of employment of those Inspectors in the employment of the Respondent on the 11 November 1999, notwithstanding the formal written notice from the Respondent to the contrary.

13. This conclusion is not to say that the practice should continue indefinitely. The arguments advanced by the Director of Quarantine and Protection Services for altering or removing the practice are not without merit. However, the question of what if any alternative arrangements should be put in place for the Inspectors in question was deliberately not a matter before the Commission on this occasion. Nonetheless, it is clearly a matter which the parties must address as a matter of urgency.

2001 WAIRC 02334

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED, APPLICANT *v.* CHIEF EXECUTIVE OFFICER, AGRICULTURE WESTERN AUSTRALIA, RESPONDENT
CORAM	SENIOR COMMISSIONER G L FIELDING
DELIVERED	WEDNESDAY, 14 MARCH 2001
FILE NO/S	PSACR 2 OF 2000
CITATION NO.	2001 WAIRC 02334

Result	Application granted
Representation	
Applicant	Mr B G Cusack as agent
Respondent	Mr K Vijeyan as agent

Declaration.

HAVING heard Mr B G Cusack on behalf of the Civil Service Association of Western Australia Incorporated and Mr K Vijeyan on behalf of Agriculture Western Australia, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act 1979, hereby declares—

THAT the Quarantine Inspectors employed by the Respondent to staff the Kununurra Quarantine Checkpoint and in the employ of the Respondent on 11 November 1999 are entitled as a condition of their employment to payment for an hour each day they work at the checkpoint, in addition to the time worked at the checkpoint.

(Sgd.) G. L. FIELDING,
[L.S.] Senior Commissioner.

INDUSTRIAL MAGISTRATE—Complaints before—

IN THE INDUSTRIAL MAGISTRATE'S
COURT OF WESTERN AUSTRALIA
HELD AT PERTH

Complaint No. 216 of 1999

Date Heard: 5, 6, 13 & 14 July and
18 & 19 October 2000

Submissions Received: 3 November 2000

Date Decision Delivered: 7 December 2000

BEFORE: G. Cicchini I.M.

Between—

Peter John Moss

Complainant

and

Serenity Lodge Inc.

Defendant

Appearances—

Mr K. Trainer of *Industrial Relations and Advocacy Services* appeared as agent for the Complainant.

Mr N. Irvine of *Workplace Negotiations (WA)* appeared as agent for the Defendant.

Reasons for Decision.

THE COMPLAINT

By his complaint made 6 October 1999 Peter John Moss alleges that on 29 September 1999 his employer, namely, Serenity Lodge Inc., unfairly harshly or oppressively dismissed him from his employment contrary to section 18 of the *Workplace Agreements Act 1993* (the Act).

The complainant seeks orders pursuant to section 57 (1)(d)(i) or section 57 (1)(d)(ii) of the Act and further seeks an order pursuant to section 57 (1)(a). In addition the complainant seeks that penalties be imposed upon the complainant. He also seeks to recover costs.

THE WORKPLACE AGREEMENTS ACT 1993

Section 18 of the Act provides—

"Implied provision as to unfair dismissal

18 (1) There is implied in every workplace agreement a provision that the employer must not unfairly, harshly or oppressively dismiss from employment any employee who is a party to the agreement.

(2) The provision described in subsection (1) is enforceable under section 51 of this Act or under section 7 G of the ***Industrial Relations Act 1979****, as the case may be, and not otherwise.*

(3) A workplace agreement must not exclude the operation of subsection (1) and to the extent that it purports to do so it is of no effect."

Section 51 of the Act provides the mechanism by which the complainant's claim is made. It states—

*"**Unfair dismissal***

***51**. (1) Where—*

(a) a person who was a party to a workplace agreement as an employee claims that he or she has been unfairly dismissed from employment in breach of the provision implied in the agreement by section 18; and

(b) section 7G (1)(b) of the ***Industrial Relations Act 1979*** *does not apply,*

the person dismissed may bring an action in an industrial magistrate's court against the employer for relief in respect of that dismissal."

The orders that can be made by this Court are to be found in section 57 of the Act, which provides—

*"**Orders that can be made***

***57.** (1) In any proceedings under this Division the court may—*

(a) order the payment of any amount payable under the workplace agreement;

(b) where section 52 applies, order the payment to a person of any amount he or she is entitled to recover;

(c) subject to section 58, order the payment of an amount for compensation for loss or injury caused by—

(i) breach of the workplace agreement; or

(ii) where section 50 (2) applies, breach of an under taking under section 11;

(d) where an employee has been dismissed unfairly, or in breach of the workplace agreement, order the employer—

(i) to re-instate or re-employ the employee; or

(ii) subject to subsection (2) and section 58, to pay compensation to the employee for loss or injury caused by the unfair dismissal or the breach;

(e) make any ancillary or incidental order that the court thinks necessary for giving effect to any order made under this subsection.

(2) The court is not to make an order under subsection (1)(d)(ii) unless—

(a) it is satisfied that reinstatement or re-employment of the claimant is impracticable; or

(b) the employer has agreed to pay the compensation instead of reinstating or re-employing the claimant.

(2a) For avoidance of doubt, an order under subsection (1)(d)(ii) may permit the employer concerned to pay the compensation required in installments specified in the order.

(3) An order under subsection (1) may require that it be complied with within a specified time.

(4) If an employer fails to comply with an order under subsection (1)(d)(i) the court may, upon further application, revoke that order and, subject to section 58, make an order for the payment of compensation for loss or injury caused by the breach of the workplace agreement or by the unfair dismissal, as the case may be."

Furthermore there is a monetary limit provided for with respect to orders made under section 57 (1)(c) or (1)(d) or (3). I set out the relevant provision—

"***Monetary limit on jurisdiction***

***58.** (1) The court does not have jurisdiction under section 57 (1)(c) or (d) or (3) to order that there be paid—*

(a) to an employee who has been unfairly dismissed, any amount exceeding 6 months' loss of earnings of the employee; and

(b) in any other case, any amount exceeding the prescribed amount.

(2) For the purposes of subsection (1)(a) the court may calculate the amount on the basis of an average rate received during any relevant period of employment.

(3) In subsection (1)(b) 'the prescribed amount' is $5000 or some Other amount fixed by the regulations."

It will be seen from the review of the relevant provisions of the Act that there is no power within Part 5 which would enable this Court to impose penalties in addition to any compensation awarded for loss or injury caused by the unfair dismissal. As to the issue of costs it is clear the Act is silent with respect to the same. However in the recent decision of ***Grace Hosana Pty Ltd t/as The Cheese Cake Shop v. de Blank [2000] WADC 239*** delivered 29 September 2000 His Honour Nisbet DCJ said at page 13 of the decision—

"***Ground 5***

In this ground the appellant complains that—

'The learned Magistrate erred in law in ordering that the appellant meet the respondent's costs of representation by legal practitioner as s 53 does not provide for costs orders.'

Section 53 of the ***Workplace Agreements Act 1993*** *makes provision for representation of an employer or employee in person, by an agent, or by a legal practitioner. No part of that section indicates whether costs may or may not be awarded in consequence of representation by a legal practitioner. Section 57 of the* ***Workplace Agreements Act 1993*** *describes the orders that can be made. In its terms that section does not provide that orders for costs of legal representation may be made. Section 57 (1)(e) gives power to 'make any ancillary or incidental order that the Court thinks necessary for giving effect to any order made under this subsection.' In my opinion however this provision does not enable the making of a costs order. A costs order would not be ancillary or incidental to giving effect to an order for compensation.*

The general jurisdiction of Industrial Magistrates to award costs is to be found in s 81 CA of the ***Industrial Relations Act 1979*** *as amended. In that Act, by s 81 CA (2) it is provided—*

'Except as otherwise prescribed by or under this Act or another law—

(a) The powers of an Industrial Magistrates Court;

(b) The practice and procedure to be observed by an Industrial Magistrates Court when exercising general jurisdiction are those provided for by the ***Local Courts Act 1904*** *as if the proceedings were an action within the meaning of that Act.'*

Of course the ***Local Courts Act*** *gives the power to award costs.*

Section 83 of the ***Industrial Relations Act 1979*** *deals with the enforcement of awards and orders of the commission and enables designated parties to an award, industrial agreement or order to apply to an Industrial Magistrates Court for the enforcement of that award, industrial agreement or order. By s 83(2) of the Industrial Magistrates Court may by order if the breach is proved*

impose a penalty or dismiss the application and, subject to subsection 3, with or without costs. Section 83 (3) provides—

> *'In proceedings under this section costs shall not be given to any party to the proceedings for the services of any legal practitioner or agent of that party unless in the opinion of the Industrial Magistrates Court, the proceedings have been frivolously or vexatiously instituted or defended, as the case requires, by the other party.'*

That restriction does not apply to an application in respect of an individual workplace agreement because an individual workplace agreement is not an award industrial agreement or order.

Because the 'general jurisdiction' of the Industrial Magistrates Court is defined in s 81CA (1) to mean (inter alia) the jurisdiction of an Industrial Magistrates Court under division 1 of part 5 of the ***Workplace Agreements Act 1993****, the power to award costs if any must be found in s 81CA (2) of the* ***Industrial Relations Act 1979****. The unfair dismissal provisions of the* ***Workplace Agreements Act 1993*** *are to be found in division 1 of part 5 of that Act and accordingly the words 'accept as otherwise prescribed by or under this Act or another law' must be seen to direct one's attention to an express legislative provision or an otherwise clear expression of legislative intent to limit the powers and the practice and procedure to be observed by an Industrial Magistrates Court in such a way that the provisions of the* ***Local Courts Act 1904*** *can be seen not to apply.*

An examination of division 1 of part 5 of the ***Workplace Agreements Act 1993*** *reveals that apart from defining the limits of the remedies for unfair dismissal there is no attempt to define the powers or the practice and procedure to be observed in an Industrial Magistrates Court exercising jurisdiction under that division. The legislature has left all of this to be dealt with as if it was an action within the meaning of the* ***Local Courts Act 1904****. This means for example that if one wants to refer to the powers of an Industrial Magistrate exercising jurisdiction under division 1 part 5 of the* ***Workplace Agreements Act 1993*** *with respect to the order of particulars of claim, of discovery or interrogatories one looks to the* ***Local Courts Act*** *and rules to ascertain the power to order and the practice and procedure in respect of each. Why then would there be no power to award costs which are clearly provided for by s 81 of the* ***Local Courts Act 1904****?*

There seems to me to be no reason of construction why the powers and practice and procedure of an Industrial Magistrate in respect of particulars, discovery or interrogatories should be in any different category to the powers, practice and procedure in respect of costs in exercising the general jurisdiction of the Industrial Magistrates Court.

Further, it seems to me that the general legislative intent behind the ***Workplace Agreements Act 1993*** *is to encourage workers to leave Award regulated employment. So much, I think, is abundantly clear. A legislative scheme which prohibits costs orders in Award enforcement procedures but does not prohibit costs orders in proceedings to enforce individual workplace agreements seems to me to advance that general legislative intent.*"

Although the power to award costs exists it is nevertheless clear that costs can only be awarded for the services of Legal Practitioners. In the matter of Lopdell v. Kulin Industries Pty Ltd (2000) 80WAIG 3287 I held that costs were not allowable to a successful party with respect to his or her representation by an Industrial Agent in this Court. I held that costs are however allowable for the services of Legal Practitioners with respect to proceedings in this Court brought under Division 1 of Part 5 of the Act. I do not at this stage intend to repeat my reasons in Lopdell. Accordingly subject to what either Mr Trainer or Mr Irvine may submit on the issue of costs which may persuade me otherwise it appears that costs are not recoverable by the successful party in this matter given that both parties are represented by Industrial Agents.

EMPLOYMENT RELATIONSHIP

Background

The complainant is a qualified social worker who commenced employment with the defendant in April 1992. The defendant has been up until recently engaged in the provision of a residential treatment program for those addicted to alcohol. In more recent times the defendant has also provided non-residential treatment programs to those addicted to other substances.

The complainant initially worked for the defendant for two and a half days per week. His hours of work increased over time to the extent that immediately prior to termination he was employed working four days per week. At the time of termination the complainant was engaged to work seven and a half hours per day four days each week.

The workplace agreement

The parties were at all material time subject to a *workplace agreement* entered into on 20 October 1998. The *Commissioner of Workplace Agreements*, on 7 December 1998, registered the agreement, which was for a period of three years. The agreement provides at clause 13 (1)(e)(sic)—

> *"(e) This agreement will be subject to termination by an employer by summary dismissal in writing if the employee shall have committed any serious misconduct or repeated or continued (after warning) any material breach of the duties and obligations of the employee under this Agreement or shall have been guilty of conduct tending to bring the employee or the employer into disrepute."*

Clause 13 (3) outlines the disciplinary procedures that may be carried out in the event of unsatisfactory work and/or conduct. The clause provides—

> *"(3)* ***Discipline Procedures***
>
> *(a) Except in the case of serious misconduct or grounds referred to in subclause (1)(e) of this clause where employment may be terminated immediately, the following disciplinary procedures for unsatisfactory work and conduct shall be as follows—*
>
> *(the employee may instigate the grievance procedure at this point)*
>
> *(i) Verbal Warning: The Manager of the Service shall explain to the Employee the reasons for instituting disciplinary procedures and discuss plans for overcoming the problem. A verbal warning shall be given and the discussion and plans are to be recorded in writing and a reasonable time for review determined.*
>
> *(ii) First Written Warning: If the employee's performance is still unsatisfactory at the time of the review, there shall be a further discussion with the Employee. A written warning shall be given and the discussion and the plans for improvement will be recorded in writing and a copy given to the employee clearly stating that the lack of improvement by a given time may result in termination or a final written warning.*
>
> *(iii) Final Written Warning: In the event that the employer decides not to terminate at this point, the Employee shall be given a final written warning.*
>
> *(iv) Dismissal: If satisfactory progress is not made within a reasonable time of the final warning, dismissal of the employee may be effected by the employer.*
>
> *(v) In any dispute concerning these procedures or any employee's discipline, the grievance procedures in Clause 14 of the Agreement may be invoked, including representation on behalf of the employee.*"

Clause 14 of the *workplace agreement* enabled the complainant to instigate a grievance procedure in the event of a dispute or grievance arising out of his employment or relating to the application of the agreement. I set out the grievance procedure—

"14.—GRIEVANCE PROCEDURE

Where the employee has a dispute or grievance arising out of his or her employment or relating to the application of this Agreement, the dispute shall be dealt with in the following manner—

(a) in the first instance the employee shall attempt to resolve the grievance with his or her Manager.

(b) if any such attempt at settlement fails or where the circumstances of the dispute or claim are of such nature that a direct discussion between the employee and the Manager could not reasonably be expected to resolve the matter then in any such case the employee may request a meeting with representatives of the Board to resolve the matter.

(c) Where the employee is of the view that the issue is of such a nature as to require the assistance of mediator or arbitrator, the employee, or another person appointed by the employee to be his/her agent has the right to seek the assistance of mediator appointed under the Employee Assistance Program or an arbitrator appointed by the aggrieved person and the employer. [In the event of there being no agreement as to the appointment of a mediator or arbitrator, a Justice of the Peace shall be requested to nominate an arbitrator, who, on accepting the appointment, shall be accepted by the Parties.] Having agreed to arbitration of the issue the parties shall be bound by the decision of the arbitrator.

(d) Sensible time limits shall be set by the parties in proceeding through the steps of dispute resolution.

(e) While the dispute settlement steps are in progress no industrial action shall be taken and no action prejudicial to any party shall be taken pending resolution of the matter.

(f) The provisions of (a) to (e) of this clause shall also be applicable, where relevant, to disputes or grievances involving a group of employees or all staff, [or to a disputed provision raised by the Employer and referred for resolution under these procedures. For this purpose the Employer may seek the involvement of a mediator or arbitrator.]

(g) By mutual agreement of the parties directly involved in a dispute or grievance, one or more steps in this procedure may be bypasses (sic) in the interests of a fair or expedited resolution of the dispute.

(h) Except where the Employer is of the view, on reasonable grounds, that a grievance is frivolous, trivial or has no merit, or where a mediator or arbitrator is of the same view, the Employer shall meet the costs associated with the hiring of a mediator for the purposes of this clause."

Issues arising out of the application of the workplace agreement

The complainant contends that the defendant did not carry out the disciplinary procedures provided for in the agreement, and says in any event that the purported invocation of those procedures was without foundation. He says that his dismissal, which occurred on 29 September 1999, was one of summary dismissal, which was without foundation. For its part the defendant contends *inter alia* that the complainant worked against the defendant's Director and against the interest of the defendant by disregarding grievance procedures resulting in workplace conflict, disfunction and disharmony. The defendant says that the performance and conduct of the complainant constituted serious breaches of his contract of employment, which justified his dismissal. The defendant says that the complainant refused counselling and disregarded directions given to him to rectify problems within the workplace. It contends that the complainant was given verbal warnings but despite those warnings his conduct and behaviour did not change. The defendant says that the complainant was warned that if his conduct did not change it would lead to dismissal. The defendant contends that all possible due process was exhausted before the decision to dismiss the complainant was reluctantly taken.

Witnesses

The complainant testified and called six other witnesses. They were Gary Williams the defendant's former Director and partner of Elizabeth Sabella, Robert Rose a former Board member of the defendant and friend of the complainant, Ivan Prakash Menon, Urban Allstrand, Elizabeth Sabella all former employees of the defendant and work colleagues of the complainant, and Geoffrey Glance the former Acting Chairman of the defendant's Board of Management (the Board).

The defendant for its part relies upon the testimony of Sharon McNeill, the defendant's office administrator, Roslyn Linda Howett an employee of the defendant, Malcolm Taylor the defendant's Director, Geoff McCann a consultant to the defendant and the Board's Chairman, Carol Armstrong a counsellor employed by the defendant and Board member and Allan Hill a Justice of the Peace.

Structure of the defendant's organisation and relationship between the parties and witnesses

In order to gain an appropriate perspective of the events that occurred leading up to the complainant's dismissal it is important in my view to review albeit in a brief fashion the structure of the defendant's organization and the relationship between the parties and witnesses.

The defendant is an organization set up to provide residential treatment for those addicted to alcohol. It was set up some years ago by Ken Ashton. It is an organization that primarily subsists on government funding and like many similar organizations is always under financial pressures. It has on occasions only been able to continue as a result of donations made to it by benefactors. There is evidence before the Court that the organization has on occasions only been able to continue as a result of donations made to it by a Chairman of it's Board.

The organisation is one, which is governed by a Board of Management. The Board is comprised of those persons who have an interest in the pursuits of the defendant. It appears that prospective Board members with talents in various fields and whom have interest in the aims of the organization are asked to join the Board as and when vacancies occur. Board Members and indeed particular officers of the Board are elected to their positions at Annual General Meetings.

Mr Moss, the complainant, was at the material time (September 1999) the long-standing staff representative on the Board. Mr Taylor the defendant's Acting Director was an ex-officio member of the Board by virtue of his position with the defendant. The Director had and has the role of administering the day to day functions of the defendant and reporting back to the Board at its monthly meetings. Some members of the Board were and are employees of the defendant.

Leading up to Mr Moss' dismissal Mr Glance had been Acting Chairman of the Board. On the 21 September 1999 Mr Geoff McCann was installed into the position of Chairman. Mr Williams who was called by the complainant to testify in these proceedings had been the defendant's Director up to 1 June 1999. Thereafter Mr Taylor, who had been a Board member for about 5 years following his introduction to the organisation by Mr Williams, became its Acting Director. His position as Director was only confirmed at a tumultuous Board meeting that took place on the evening of 21 September 1999. Mr Taylor's role was to direct the operations of the defendant both with respect to its clinical and administrative functions. The complainant, Mr Menon and Ms Sabella worked within the defendant's clinical division. Ms McNeill worked in the defendant's administrative section.

EVENTS LEADING TO DISMISSAL

Setting up in competition

In about March, April and/or May of 1999 the complainant and Mr Menon made preliminary inquiries with respect to

setting up a business engaged in providing general counselling services within the Rockingham area. The Rockingham area is the area within which the defendant operates. It is apparent from the testimony given and the documentary evidence before the Court that there was no impediment for them to engage in such work provided that it did not conflict with the defendant's operations or work against the defendant. Mr Williams, who was the defendant's Director at the material time, testified that he knew of Mr Moss' and Mr Menon's intention to create a business, which was to provide general counselling. Indeed the actions of Mr Moss and Mr Menon in making inquiries and initiating process by which their prospective business could operate was not only well known to Mr Williams but was made with his express approval and consent. On the evidence before me it is possible to conclude and I do conclude that both Mr Menon and Mr Moss acted in a honest, open and frank way with respect to the formation of their prospective counselling business. There was nothing done by them in regard to the setting up of the business, which could be regarded as secretive, surreptitious or underhanded.

Indeed the evidence of Mr Williams dictates conclusively that the complainant's acts and those of Mr Menon with respect to the forming of a general counselling service were totally above board. Their acts were within Mr Williams' knowledge and consent. Furthermore it is obvious given the uncontradicted evidence of Mr Menon, Mr Moss and Mr Williams that the proposed business would not operate against or in competition with the defendant. The evidence does not support any contention that it would run in competition with the defendant. Mr Taylor's view that the complainant and Mr Menon surreptitiously involved themselves in the set up of a business which was to operate against the defendant appears to be either a incorrect conclusion resulting from insufficient inquiry or alternatively an intended gross distortion of the truth which would reflect poorly upon the perpetrator of that view.

Mr Taylor in reporting to the Board of Management on 21 September 1999 said (see exhibit 4)—

> "*Without prejudice, I place before you information received from an outside source (two persons, both willing to substantiate the information set out herein).*
>
> *It may be deemed that P. Moss and P. Menon acting jointly or severally in this matter, caused there to be a serious material breach of respective duties and obligations to their employer Serenity Lodge Incorporated, when at a time earlier this year their employer Serenity Lodge Incorporated was endeavoring to develop for its own purposes (in so doing including the services of P. Moss and P. Menon) a four week Non-Residential Illicit Drug Dependency Treatment Service. Having engaged in certain sub committee meetings which were concerned with the above development, the staff referred to herein were invited to engage, at an appropriate remuneration, in delivering on behalf of their employer this specific service. The staff referred to all declined.*
>
> *Independent parties indicate however, that P. Moss purposefully sought premises and or services on behalf of himself and P. Menon through the offices of 'Sound Personnel', at a time when both these parties had information regarding Serenity Lodges intent to deliver this service within the City of Rockingham. The premises sought formed part of Sound Personnel's premises in Rockingham, and were sought expressly for the purpose of delivering a Non-Residential Illicit Substance Treatment Consultancy Service, to be operated by P. Moss and P. Menon <u>on their own behalf</u>. To their credit, the responsible parties at Sound Personnel advised P. Moss that as they had no business plan, they would need more than premises to operate a consultancy. Sound Personnel recommended the services of a local professional development agent to assist with a business plan, if the parties involved were certain of their desire to proceed. This conduct is in direct contravention of item 'M' of Schedule 'A' (Code of Ethical Conduct) to the Serenity Lodge Incorporated Workplace Agreement. Which states that—*
>
> > *Recognition of referral as a therapeutic tool (point C) shall not be used by staff of Serenity Lodge to canvass business or refer clients of Serenity Lodge to their own private consultancy service or to any person with whom they have a personal or commercial/business relationship, without express permission of the Board of Serenity Lodge.*"

There was no substantiation put to the Board on the 21 September 1999 of Mr Taylor's claims. Furthermore and most importantly there has been an astonishing failure on the part of the defendant to call witnesses before this Court to substantiate Mr Taylor's claims in order to discharge its evidentiary burden concerning the issue. There is not one scintilla of evidence before this Court that supports Mr Taylor's contention that the premises sought by Mr Moss and Mr Menon were so sought—

> "*expressly for the purpose of delivering a Non-Residential Illicit Substance Treatment Consultancy Service, to be operated by P Moss and P Menon <u>on their own behalf</u>.*"

It is clear that throughout the process the complainant and Mr Menon were merely looking at the possibility of setting up a general counselling program. The evidence dictates that the concept did not develop and indeed faded to the extent that by May 1999 they had abandoned their idea.

By alternative argument the defendant also suggests that the proposed counselling service sought to be provided by the complainant included "family counselling" which in itself is the type of service provided by the defendant in its Non-Residential Program. It is suggested that is the reason why Mr Moss rejected a request from Mr Taylor to work in that program. In my view the defendant's contention has no force. Although family counselling may be a subsidiary element of the Non-Residential Program, it is obvious that the program is primarily focused on substance abuse issues. The counselling service considered by the complainant and Mr Menon was not aimed at such but rather at relationship issues. Furthermore the evidence dictates that Mr Moss actively involved himself in the creation of the Non-Residential Program by sitting on a sub-committee and by becoming involved in the selection process for the staffing of the program. It is not in issue that Mr Moss declined to work within that program. He was asked but declined. He was never directed to work within the program. He was never informed that if he declined to do so he would be at risk of termination. Indeed all that happened was that Mr Moss was made an offer (see Exhibit 11) to work within the program but declined. He was quite entitled to do that. He was not contractually bound to become involved in the Non-Residential Program and simply exercised his right in that regard. Mr Taylor's contention to the contrary is simply unacceptable. Accordingly there was never a disobedience of any directive because there was never a directive given.

Any suggestion on the part of Mr Taylor that Mr Moss did not work in the best interests of the defendant is not supported by the evidence and is unacceptable. Indeed the weight of the evidence overwhelmingly dictates that Mr Moss was strongly committed to the defendant and that he at all times worked to advance its interests. I fear that this issue was raised by Mr Taylor with the Board in order to support his efforts to remove the complainant and Mr Menon whom I conclude were perceived by him to be a risk to his appointment and tenure as Director and an impediment to his style of management.

Staff conflict

Mr Taylor testified that upon taking up the position of Acting Director he had been informed by his predecessor that there was an undercurrent of conflict between Ms Sabella and Ms McNeill.

On 17 June 1999 Mr Taylor met with Ms McNeill, Ms Sabella and Mr Menon in order to discuss conflicts between Ms Sabella and Ms McNeill. Mr Menon was there in his capacity as Ms Sabella's supervisor. The meeting did not resolve any issues. Mr Taylor asked the protagonists to go away and attempt to resolve their dispute. Mr Moss was at that stage neither involved in the dispute nor the process. His involvement began when he called a staff meeting to discuss operational matters. It is clear that one of the issues that he raised to be addressed at that meeting was that of the conflict between staff members. He raised the issue only by virtue of representations made to him in his capacity as staff representative. The meeting, which was called for 18 August 1999 to discuss the issue and other matters, was aborted given the

non-attendance of Mr Taylor and Ms McNeill. The meeting was rescheduled for 25 August 1999. Mr Moss chaired the meeting. He raised the issue of staff conflict under the designation "teamwork" in the agenda. During the course of the meeting Mr Moss addressed Ms McNeill personally and inquired with her as to what the problem was. Ms McNeill took umbrage at Mr Moss' inquiry and accused him of making a personal attack upon her. She became distressed and left the meeting in tears. Under cross-examination Ms McNeill conceded that she left the meeting in the manner described because she was uncomfortable with the process and did not agree with what was going on. Upon Ms McNeill's departure from the meeting Mr Taylor told all those present—

"*You're a mob of fuckwits!*"

He then went on to say to all those present that he was amazed and disgusted that educated people behaved like children in a playground and could not resolve such an issue. Mr Taylor berated all those present. They were all stunned at his outburst. The meeting soon thereafter ended.

Another meeting was called to discuss the issue. There is some divergence in the evidence as to when it was that the second meeting was held. The actual date of the meeting is not crucial to my considerations. It appears that the second meeting may have been held on 1 September 1999. The issue of "team work" was again revisited on that day. At the meeting Mr Taylor was asked to withdraw his comments made on 25 August 1999, but declined to do so in so far as the comments related to the complainant, Mr Menon and Ms Sabella. He told those present that if the issues could not be resolved his preference was "to re-staff the place".

Mr Moss subsequently met with Mr Taylor on two separate occasions following the meeting on 1 September 1999. There is also a dispute as to the dates upon which those meetings took place between Mr Taylor and Mr Moss. Again the actual dates of the meeting are not crucial. It suffices to say that on or about 9 September 1999 Mr Taylor became aware of a meeting held on or about 6 September 1999 between Mr Glance, the then Acting Chairman of the Board, Mr Moss, Mr Menon and Ms Sabella. That meeting discussed the general malaise within the working environment. There can be no doubt that Mr Taylor saw the meeting as clandestine and subversive. He believed it was aimed at undermining his position. There also can be no doubt that he felt threatened by the fact that the meeting had taken place and that he was not privy to the discussions. He was concerned at the security of his own position. As a consequence Mr Taylor took an aggressive stance. The evidence supports the conclusion that Mr Taylor considered that attack was the best form of defence and embarked upon a process which resulted in the removal of those by whom he felt threatened in his position. In that regard I accept Mr Moss' testimony that on about 15th September 1999 when he met with Mr Taylor he was told by Mr Taylor that he could be "ruthless". I also accept that Mr Taylor told him—

"*You're in your corner and fighting to the death and I'll be in my corner to fight to the death*."

The events that followed flowed from Mr Taylor's insecurity.

The defendant's position on the other hand is that the complainant received verbal directions on 24 August and on 1,8, 13 and 15 September 1999 (See paragraph 16 of the defendant's submissions) to resolve the staff conflict. However there is a fallacy in that argument in that there was no conflict between Mr Moss and other staff members in particular Ms McNeill. The conflict then existing was purely between Ms McNeill and Ms Sabella and between Ms McNeill and Mr Menon. Indeed Ms McNeill conceded during the course of cross-examination that there was no conflict between her and Mr Moss. The conflict between Ms McNeill and Ms Sabella related to issues of Ms Sabella's dress and alleged late arrival. The issues of conflict relating to Mr Menon related to issues of alleged mismanagement of the program and inaccurate record keeping. Accordingly Mr Moss was taken to be, and seen by Mr Taylor, as being one of those involved in conflict with Ms McNeill when in reality he was not. There was nothing for him to resolve with her. Any directive given to him in that regard was totally misguided. In any event the directive given was totally useless. How could those in conflict even attempt to achieve resolution unless their employer facilitate it. In that regard Mr Taylor offered no assistance, counselling or other form of mediation or dispute resolution mechanism. All he did was to demand that the issue be resolved. Such a demand in the light of the history was totally useless and doomed to failure. Furthermore his demand was one sided. It was aimed solely at Mr Moss, Mr Menon and Ms Sabella. Mr Taylor should have equally addressed Ms McNeill. Her act of tempestuously leaving the meeting on 25 August 1999 was clearly unprofessional. Any instruction given by Mr Taylor to Mr Moss regarding staff conflict was not apposite in any event. He was not in conflict with Ms McNeill. His remark to her at the meeting was quite innocuous and inquisitorial in nature. Regrettably Ms McNeill took the inquiry as a personal attack. Even if the directives could be said to be relevant they clearly did not constitute a form of warning contemplated by clause 13 (3)(a)(i) of the *workplace agreement*.

Meeting with Mr Glance

On or about 6 September 1999 Mr Moss attended a meeting with Mr Glance the then Acting Chairman of the defendant's Board. He accompanied Ms Sabella and Mr Menon to the meeting. The meeting took place as a result of a chance encounter between Mr Glance and Ms Sabella in which Mr Glance recognised she was under stress due to her work situation. He offered her an opportunity to discuss those matters. The meeting was not held in the context of a grievance resolution procedure. Mr Moss only attended the meeting upon being assured by Mr Glance that his attendance was within protocol. The meeting was initiated by Mr Glance and not by Mr Moss or the other attendees. The meeting in that context cannot be said to be objectionable. There is no bar to employees attending such a meeting initiated by a member of the Board.

The defendant in submissions says that the meeting canvassed the removal of Mr Taylor from his office or alternatively the institution of some type of joint directorship of the defendant. It suffices to say that the evidence does not support that contention. Indeed there is not one scintilla of evidence which supports the same. There is no evidence that Mr Moss himself addressed such issues. Furthermore the evidence does not support the contention on the part of the defendant that Mr Moss was part of a conspiratorial group seeking to undermine Mr Taylor. The evidence of all of those at the meeting contra-indicates the defendant's stance. It is possible to infer that upon becoming aware that his outburst on 25 August 1999 was the subject of discussion with Mr Glance, Mr Taylor became concerned and insecure leading to further antagonism towards the three. His antagonism is reflected in his address to the Board (see Exhibit 9) and also in his diary notes.

Mr Taylor's actions

On or about the 9 September 1999 Mr Taylor met with Mr Glance. He sought and was given a mandate to manage. Clearly the meeting was used to shore up his position. Having received such a mandate he proceeded to embark upon a course of action which would lead to the removal of the three whom he clearly perceived to be a threat to his position. Without further recourse to Mr Moss he, on 13 September 1999, prepared a verbal warning reduced to writing as part of his strategy. He called Mr Moss into his office and gave him a verbal warning reduced to writing. The warning (Exhibit 3) related solely to his and his colleague's meeting with Mr Glance on 6 September 1999.

There can be no doubt that the process of warning adopted by Mr Taylor was not in accordance with the *workplace agreement*. Mr Taylor gave Mr Moss a verbal and written warning as part of the same process. Clauses 14 (3)(a)(i) and (ii) of the agreement do certainly not contemplate that. Indeed the agreement provides for a verbal warning explaining the reasons for institution of the disciplinary procedures and a plan, together with the enunciation of a reasonable time to review. Then and only if the employee's performance is still unsatisfactory is a written warning to be given. There is no procedure for a written or verbal warning to be given contemporaneously, or almost contemporaneously, as was the case in this instance. The defendant has clearly failed to abide by the terms of the *workplace agreement* in that regard. Furthermore the time frame for review was simply inadequate. It appears that the time frame was structured in such a way that by 21 September 1999 (being the date of the Board meeting) the process of dismissal would be complete so as to enable ratification by the Board that Mr Moss be dismissed.

Mr Moss met with Mr Taylor on 15 September 1999 in regards to the warning. At that time Mr Taylor became aware that Mr Moss would raise the issue with the Board. I accept that much of the meeting between Mr Moss and Mr Taylor on that day concerned the interpretation of the *workplace agreement*. I reject Mr Taylor's version of what was discussed at that meeting. In consequence of his knowledge that the matter would be raised with the Board, Mr Taylor set about preparing his submission to the Board, which was ultimately delivered on 21 September1999. The submission was prepared to achieve a variety of ends. They were to secure his permanent appointment, to secure a mandate to manage and to secure the removal of Mr Moss and the others whom he perceived to be a threat and impediment to his position. Both the submission to the Board itself and the diary notes support such a construction.

Mr Taylor's intention is also self-evident by the manner in which he proceeded at the Board meeting. His disclosure of the "further disturbing revelations" and his further disclosure of his intention to seek the resignation or dismissal of Mr Moss and Mr Menon were withheld and only made known to the Board after his appointment had been confirmed (see Exhibit 4). Of course it transpired that Mr Taylor's call for immediate dismissal of Mr Moss and Mr Menon was not supported by the Board. Indeed the Board determined that each should be suspended on full pay pending further investigation of the allegation of setting up in competition. The Board also called for mediation. Notwithstanding the Board's call for mediation it is obvious that Mr Taylor's position was entrenched. His attitude towards Mr Moss was not conciliatory at all nor was it capable of mediation. That is indicated by the way in which he ordered Mr Moss from the defendant's premises following the Board meeting on 21 September 1999. Indeed Mr Taylor was always a reluctant participant in what was to follow and which the Board forced upon him. If he could have had his way Mr Moss would have been terminated there and then. Accordingly what followed must be seen in that light.

Mediation or Arbitration

By letter dated 24 September 1999 Mr Taylor wrote to the complainant setting out the breaches of the *workplace agreement* allegedly committed by Mr Moss. The letter went on to state,

> "*You are directed to attend a meeting with the Director and Councilor (Mediator) Alan Hill (JP) from Rockingham City Council on Wednesday 29th September 1999 in the Board Room of Serenity Lodge at 9.00 am.*
>
> *This forum has been arranged to allow you to respond to the above violations in the presence of an independent person.*
>
> *Failure to follow this directive will be deemed as gross misconduct and will result in summary dismissal as described in Section 13 (1)(e) of the said Serenity Lodge Inc. Workplace Agreement no 98/14762*."
>
> (Exhibit 5)

The referral of the dispute to mediation (or arbitration) was purportedly made pursuant to clause 14(f) of the *workplace agreement*. In my view that provision does not confer the right upon the employer to instigate mediation or arbitration proceedings in matters such as this. It seems to me that the employer is only able to invoke the involvement of an arbitrator or mediator in relation to a "*disputed provision raised by the Employer*". There was no such "*disputed provision"* in this case. In any event even if that interpretation is said to be too stringent and a mediation or arbitration process was available to the defendant it is clear that the process adopted by the defendant in achieving the same was fundamentally flawed. Clause 14(c) of the *workplace agreement* provides the right for the other party to be consulted with respect to the appointment of arbitrator or mediator. Mr Taylor totally ignored that provision.

The Board had directed mediation take place and although Mr Moss was advised that mediation was to take place on 29 September 1999, in reality what occurred so far as Mr Taylor and Mr Hill (the arbitrator) were concerned was the process of arbitration (see Exhibit 6 page 6). It seems that upon advice received from a third party Mr Taylor decided quite unilaterally that arbitration ought to take place. Accordingly the defendant took the view as is reflected in the Further and Better Particulars of Defence filed 8 March 2000 that the proceedings on 29 September 2000 was that of arbitration. That gave rise to the defendant's submission which has subsequently been withdrawn that I lacked jurisdiction to hear the matter given that Mr Hill had given an arbitrated decision.

In my view the whole of the proceedings on 29 September 1999 was fundamentally flawed both as to inception and process. Mr Hill, the Justice of the Peace who conducted the arbitration, took a subservient role. It was Mr Taylor who controlled the process and set the agenda by stating that the explanations were to be to his satisfaction (see Exhibit 6 page 1). Mr Hill regrettably allowed himself to be used as a vehicle for Mr Taylor's agenda. Disturbingly Mr Hill told the Court that he had not viewed the *workplace agreement*. He was never therefore in a position to determine what his proper function was, nor was he able to determine whether or not the proper procedures had been followed. Accordingly his comment at page 12 of the transcript of proceedings (Exhibit 6) that—

> "*…to the best of my knowledge the correct procedures have been followed.*"

was totally without foundation. Another aspect of concern arising from the process, which undermines it, is Mr Hills' private consultation with Carol Armstrong. Carol Armstrong was at the material time a Board member of the defendant. She was accordingly an interested party. Any secret communication with her immediately prior to Mr Hill's enunciation of the outcome was inappropriate, disconcerting and is open to attack.

In submissions the defendant has reverted back to the stance that the process embarked upon was that of mediation. The defendant suggests that given Mr Moss' stance that he would not discuss the issues the mediation process was doomed to failure. It is said that the defendant did all that it could to resolve the issues but was frustrated by the complainant's obfuscation. The defendant says that after reiterating a number of times that there needed to be a resolution Mr Taylor warned Mr Moss that he left himself exposed to dismissal by virtue of his failure to participate. It followed that Mr Moss failed to take part in the process. That resulted in an invitation that he resign. He rejected the offer to resign and was accordingly dismissed.

In my view Mr Moss was well within his rights to object to the process which was fundamentally flawed. It was flawed in its institution. It was unclear as to its purpose whether it be arbitration or mediation. Mr Taylor dominated the process. It was presided over by an impassive Mr Hill who accepted Mr Taylor's account without recourse to the *workplace agreement*. It was open to attack on the basis of ostensible bias. Transparently the process was solely aimed at an outcome that met Mr Taylor's agenda.

Termination

It is obvious that once Mr Hill had expressed the view that proper processes had been followed and that the outcome be left to Mr Taylor, that Mr Taylor took it as having been given the all clear to implement the termination. Given that the issues had not been resolved to his satisfaction and given that Mr Moss had refused to resign Mr Taylor proceeded to terminate Mr Moss with immediate effect requiring him to leave the premises forthwith (see page 13 Exhibit 6). On 1 October 1999 the defendant wrote to the complainant confirming his dismissal and enclosing payment of monies paid on an ex gratia basis.

Summary dismissal amounts to an acceptance by the employer that the actions of the employee amount to a repudiation of the contract of employment. In that regard the defendant says the dismissal occurred only after copious warnings were given, and following the complainant's failure to discuss the issues and after his failure to become involved in mediation. The complainant was reluctantly dismissed only after communication had irretrievably broken down notwithstanding the defendant's best endeavours to resolve the problems.

I do not accept the defendant's submissions. In my view it is apparent that Mr Taylor put into effect the termination so soon as he perceived he was given the all clear to do so. His intention to terminate Mr Moss' employment is abundantly clear. It arose prior to the Board meeting on 21 September 1999 (see Exhibit 4). He was forced into the process of

mediation. Throughout the course of mediation/arbitration he threatened dismissal. It is clear that his objective was the removal of Mr Moss. His intent can also be gleaned from what followed. Mr Taylor had no intention of replacing Mr Moss and his colleagues but rather moved as soon as practicable thereafter to restructure the defendant resulting in the elimination of positions held by Mr Moss and his colleagues. Accordingly the complainant could never return to his position with the defendant.

The defendant contends that it was within its rights to dismiss Mr Moss because *inter alia* he breached his contract of employment by failing to disclose and /or discuss with Mr Taylor the events of the meeting on 6 September 1999 held with Mr Glance. The defendant argues that the decision in ***Ludwig Stephan Miskiewizc v. City of Belmont (No. 1192 of 1994)(75 WAIG 1811)*** in which His Honour the President of the Full Bench approved the decision in ***Associated Dominion Assurance Society Pty Ltd v. Andrew and Another [1949] 49 SR (NSW) 351*** supports its view that Mr Moss was bound to disclose the meeting to Mr Taylor. In that regard the defendant takes the view that its interests and that of Mr Taylor are synonymous. That is not necessarily so. The aforementioned decisions are distinguishable. They relate to a failure to disclose to the employer rather than an individual officer of the employer. In this case there was no failure on the part of Mr Moss to disclose anything. The defendant through its Acting Chairman Mr Glance knew of the meeting and what was said. The fact that he failed to inform Mr Taylor of those matters until 9 September 1999 cannot be used against Mr Moss. Accordingly there was no basis for the warning which related to that issue. There was disclosure to the defendant, albeit not to Mr Taylor.

The defendant contends also that Mr Moss breached his *workplace agreement* when he refused to resolve his differences with Ms McNeill. However the evidence in that regard establishes that there was no issue between him and Ms McNeill. Further it is suggested that Mr Moss refused to obey a directive that he distance himself from the conflict between Ms Sabella, Mr Menon and Ms McNeill. In that regard the terms of the directive (if any) are unclear. It is also suggested that Mr Moss failed to comply with the grievance procedure as set out in clause 14 of the *workplace agreement*. However it must be noted that Mr Moss himself did not have a grievance with his employer. Accordingly he could not invoke the provisions of clause 14 of the agreement. With respect it seems to me that the defendant fails to appreciate that Mr Moss was never in conflict or in dispute with his employer at all leading up to his warning on or about 13 September 1999. Ultimately Mr Taylor created a situation of conflict with Mr Moss when there was no basis for one. It arose out of Mr Taylor's insecurity and concerns that Mr Moss in acting as Mr Menon and Ms Sabella's representative was subverting and undermining him.

Finally the contention on the part of the defendant that the conduct of Mr Moss at the meeting on 29 September 1999 in refusing to discuss the issues amounted to a repudiation of his contract of employment simply does not stand up. As stated previously the whole process was fundamentally flawed. Mr Moss was well within his rights to take the stance that he did. Indeed his stance was quite appropriate in all the circumstances.

In conclusion there was no foundation for the termination of the complainant's employment.

PROCEDURAL FAIRNESS

The defendant argues that it acted with procedural fairness at all times. The nature of the allegations of staff conflict together with other issues were made well known to the complainant as is reflected in the defendant's letter to the complainant dated 24 September 1999 (Exhibit 5). It says the complainant was given an opportunity to respond to the allegation within reasonable time frames but refused to accept those opportunities. I do not accept the defendant's contention. In my view the process embarked upon by the defendant demonstrates a wide range of procedural deficiencies.

Warnings must be clear in their terms and must be clear as to whom the warnings are directed. The so-called warnings delivered on the 25 August 1999 and on 1 and 8 September 1999 cannot be characterized as warnings in the industrial sense. They were warnings made at large. Furthermore even if it could be said that the threats to replace Mr Moss and others amounted to warnings, then the same were unfair in any event because Mr Moss was never given the opportunity to provide an explanation prior to the conclusion reached on the part of Mr Taylor that the warning in each instance was appropriate.

The verbal warning given on 13 September 1999 was demonstrably procedurally unfair because it was issued without any attempt to invite an explanation from Mr Moss as to the allegations. Additionally the verbal warning reduced to writing was given to Mr Moss in the form of a written warning only a very short time after the verbal warning (14 September 1999—see exhibit 4). The process of giving the written warning was almost contemporaneous with the giving of the verbal warning and did not allow Mr Moss sufficient time to address the issues raised by the verbal warning.

At the Board meeting on 21 September 1999 Mr Taylor introduced further allegations of setting up in competition. The allegations which were clearly of a serious nature were made to the Board without Mr Taylor first having asked Mr Moss for an explanation with respect thereto. The allegations were presented to the Board as a matter of fact. That was done notwithstanding that there had not been any or any proper inquiry and without producing any supporting evidence. On the strength of his concluded views Mr Taylor recommended to the Board that the defendant be dismissed. That was patently unfair. His position was at that stage entrenched. Mr Taylor's view on Mr Moss' dismissal had been concluded at the very least from the time that he commenced to prepare his notes for his submission to the Board. Mr Taylor's continued involvement in the process, which followed, was ostensibly biased and unfair given his concluded position.

ASSESSMENT OF WITNESSES—CREDIBILITY

Mr Moss' evidence as to the events, which occurred, is supported by a number of other witnesses including the defendant's former Director, Mr Williams, its former Acting Chairman, Mr Glance, and other staff members including Ms McNeill who was called by the defendant. Furthermore Mr Rose's evidence reinforces Mr Moss' contention that the arbitration/mediation process was demonstrably unfair.

Mr Moss was in my view a credible, forthright witness who was generally consistent and stood up well when subjected to cross-examination. Indeed his testimony was consistent with admissions made by Mr Taylor concerning various issues including the discussion on 15 September 1999. Furthermore it was consistent with what Ms McNeill conceded under cross-examination, being that there was no conflict between them. Additionally the exhibits before the Court also support Mr Moss' testimony. The evidence of Mr Menon also wholly corroborates that of Mr Moss in so far as he was privy to the same.

Mr Taylor on the other hand was in my view both evasive and inconsistent. The following examples (which are by no means exhaustive) demonstrate the same—

- His reluctance to accept that on 15 September 1999 the procedures contained within the *workplace agreement* had been discussed and further that at that time Mr Moss disputed his interpretation of the provisions.
- His failure to recall receiving the fax from "Relationships Australia". The fax which was ultimately produced (Exhibit 14) undermined Mr Taylor's evidence concerning advice received from that organisation. It was that alleged advice that he said he relied upon to institute arbitration rather than mediation proceedings.
- His failure to acknowledge Mr Moss' involvement in the development of the Non-Residential Course and his dismissive approach to the congratulatory remarks made within his own report to the Board.
- His failure to expressly state the exact nature of the directive given to Mr Moss on the Non-Residential Course.
- His evidence concerning the restructure and his reluctance to concede a link between the removal of Mr Moss, Mr Menon and Ms Sabella and to pay increases to himself and others.

- His responses concerning the appointment of Mr McCann the current Chairman of the Board to act as a consultant in place of Mr Moss.
- His evidence on the issue that the complainant attempted to set up a business in competition with the defendant.
- His reticence in disclosing the full details of enquiries made by the English employment agency as the consequences of Mr Moss' employment application.

As to other witnesses I only intend to comment on the evidence of Ms Sabella, Mr McCann and Ms Armstrong. In each instance both with respect to demeanor and mode of delivery I formed the view that they lost objectivity. I accept that the lack of objectivity may have resulted from a subconscious process rather any wilful distortion. It nevertheless left me with the firm impression that their evidence was delivered in such a way as to assist either the complainant or the defendant as the case may be. Furthermore I found Mr Taylor's winking and slight nods of approval during the course of Ms Armstrong's evidence to be most disconcerting and inappropriate.

CONCLUSION ON THE SUBSTANTIVE MERITS

In considering this matter there are three issues to be determined. They are—

1. Whether the allegations against the complainant have substance.
2. If there is substance to the allegations are they of such significance that they would justify termination of the complainant.
3. Was the complainant afforded procedural fairness.

The allegations against the complainant comprised—

1. The alleged conflict with Ms McNeill, which the defendant says, Mr Moss did not deal with contrary to directives.
2. His alleged failure to participate in an additional course offered by the defendant namely the non-residential illicit drug program.
3. His attendance at a meeting with Acting Chairman Mr Glance as part of an alleged conspiratorial attempt aimed at achieving changes in the administrative structure of the defendant so as to undermine Mr Taylor's position.
4. Mr Moss' attempt with Mr Menon to establish an illicit drug counselling service in competition with the defendant.

As previously enunciated I find there is simply no force to the allegations, which give rise to the defendant's dismissal of the complainant. The allegations in each instance are without foundation. It is clear to me that Mr Moss was never in conflict with Ms McNeill. Furthermore he was never given a warning or directive in any proper or comprehensible form relating to the same. On the issue of his alleged failure to participate in the Non-Residential Program I am satisfied that he was never directed to participate in the same. He was asked to participate and declined, as was his right. With respect to his attendance at the meeting with Mr Glance it is obvious that he himself did not attend the meeting to express any grievance. Furthermore there is no evidence to support the contention that Mr Moss was part of a conspiratorial plot to undermine Mr Taylor. Mr Moss was not in any way prohibited from speaking to Mr Glance and had no obligation to inform Mr Taylor of such a meeting. Lastly on the issue of Mr Moss's establishment of an illicit drug counselling service in competition with the defendant it suffices to say that such allegation is wholly unsupported by the evidence. Indeed it is a gross distortion of the known facts. Mr Taylor's report to the Board in those terms reflects poorly upon his credibility.

There was never any substance to any of the allegations that would have legitimately given rise to the dismissal of Mr Moss. Even if there had been some basis for dismissal (which there is not) the whole process of dismissal was tainted and was procedurally unfair.

The test to be applied in matters such as this is that found in ***Miles and Others trading as The Undercliffe Nursing Home v. The FMWU 65 WAIG 385*** which I cited with approval in ***Catherina de Blank v. Grace Hosana Pty Ltd T/A The Cheesecake Shop Victoria Park 79 WAIG 3411 at 3413*** in which I said—

> "*…I am to assess the industrial fairness of the decision of the employer based on the quality of the conduct involved and an assessment of what is just and equitable upon the substantive merits of this matter.*"

Applying that test in the light of the findings of fact that I have made I conclude on the balance of probabilities that Mr Moss was unfairly dismissed. The dismissal resulted from Mr Taylor's insecurity causing him to remove Mr Moss whom he perceived to be a threat to his authority and ability to manage.

FURTHER SUBMISSIONS

I appreciate that the complainant's agent wants to make further submissions following the determination of the substantive issue. As all issues were addressed in evidence and in written submissions I intended to address the following matters subject to any further oral submission that may be made.

REMEDY

The primary remedy provided for by the *Workplace Agreement*s Act *1993* is that of reinstatement or re-employment. Indeed section 57 (2) requires the Court not to make an order for compensation unless satisfied that reinstatement or re-employment is impracticable or the employer has agreed to pay compensation instead of reinstating or re-employing the complainant.

Reinstatement Impracticable

The evidence before me overwhelmingly dictates that reinstatement is impracticable. It is the case that the structure of the defendant has changed since his departure from the defendant's employment. The position he once occupied is no longer in existence. More importantly the degree of antagonism towards him and the degree of mistrust of him by Mr Taylor militates against his reinstatement. Reinstatement in those circumstances would be a recipe for disaster and quite frankly doomed to fail. Reinstatement is not a realistic option.

Compensation

I accept that the complainant has not been able to find work despite his best endeavors to find work both in Australia and overseas. He has now been unemployed for over 12 months and realistically his position looks bleak. I accept that it is not easy for a man of mature years in his circumstances to find appropriate alternate employment. I am satisfied that the loss of his employment has caused Mr Moss a significant degree of distress leading to depression. I reject the defendant's contention that Mr Moss failed to fully mitigate his loss. His taking of holidays to England and Bali are in my view inconsequential. It could not be seriously suggested that Mr Moss be required to remain house bound pending the determination of this matter. In any event I am satisfied that he used the opportunity in England to attempt to find alternate employment.

Quantum of Compensation

Section 58 (1)(a) of the *Workplace Agreements Act 1993* limits the amount payable to the complainant by way of compensation. There is in fact a ceiling of six months' loss of earnings payable. Mr Moss is entitled to recover his loss which is at the very least 6 months lost earnings. I will invite the parties to calculate and agree the quantum, failing which I will determine the same.

STATUTORY DECLARATION

Finally the defendant contends that the certificate in the form of the Statutory Declaration made by Mr Moss on 6 October 1999 is false and therefore I cannot make an order in his favour under section 57 of the Act. The evidence does not support that the certificate is false.

G. Cicchini

Industrial Magistrate

UNFAIR DISMISSAL/ CONTRACTUAL ENTITLEMENTS—

2001 WAIRC 02426

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	JOHN FRANCIS BOOTH, APPLICANT
	v.
	BROWNBUILT PTY LTD (A.C.N. 002 558 894) T/AS BROWNBUILT METALUX INDUSTRIES, RESPONDENT
CORAM	COMMISSIONER S WOOD
DELIVERED	TUESDAY, 27 MARCH 2001
FILE NO	APPLICATION 24 OF 2000
CITATION NO.	2001 WAIRC 02426

Result	Application dismissed
Representation	
Applicant	Mr T Lyons of Counsel
Respondent	Mr D Sproule

Reasons for Decision.

1 This is an application pursuant to section 29(1)(b)(i) of the *Industrial Relations Act, 1979* (the Act). The applicant, Mr John Francis Booth says he was employed by Brownbuilt Metalux Industries (BMI) as the State Manager from 1 July 1997 to 22 December 1999. He says that he was employed on a salary package of $127,754 per annum which included salary, car, superannuation, telephone allowance and private fuel expenses. The applicant says that reinstatement is impracticable and claims as a remedy six months compensation less his earnings as a consultant of $5,685. The total claimed is $58,192.

2 The applicant alleges that the manner in which the dismissal was carried out was harsh, oppressive and unfair as he was not consulted about being made redundant, nor were alternatives considered. The applicant claims that the respondent has not fulfilled the requirements of the *Minimum Conditions of Employment Act 1993*. The applicant was given a written notice of termination on 22 November 1999 advising him that his position had been made redundant. He says that there had been no genuine discussion or consultation prior to that time even though the applicant sought to be consulted. He says also that there were a number of alternatives which the company could have considered and refused to do so; in particular other sales positions. Additionally, the applicant says that the dismissal was carried out over the telephone with another employee present who was previously the applicant's subordinate. Lastly, the applicant says that the termination was harsh, oppressive and unfair because there was no assistance offered by way of counselling or outplacement services for a senior executive employee.

3 The respondent says that the applicant was properly made redundant and paid out accordingly. It is uncontested that the applicant was given notice of one month and worked out this notice. The applicant was also paid severance pay of three weeks for every year of service and all accrued annual and sick leave. The respondent says that alternatives were discussed with Mr Booth but that there were no viable alternative or continuing employment opportunities.

4 Mr Booth was employed as the State Manager of BMI from 1 July 1999. The applicant says that he continued in that role until his termination on 22 December 1999. This matter is disputed by the respondent who says that due to various circumstances Mr Booth was the Sales and Administration Manager at the time his employment ended with BMI. He was employed by Mr Robert Terpening the then General Manager of Brownbuilt Pty Ltd. BMI operated a sheetmetal fabrication facility at Osborne Park which manufactured steel office furniture. In his capacity as State Manager he was responsible for all aspects of the business in this State, including manufacturing, accounting and sales. Brownbuilt was at that time owned by Email and was according to Mr Booth running at a non-profitable position in this State.

5 In December 1998 Brownbuilt was purchased by John Shearer (Holdings) Pty Ltd, as part of the Arrowcrest Group. On 5 May 1999 Mr Terpening, as a result of discussions he had with union officials over some strike action, removed the manufacturing operations of BMI from Mr Booth's direct responsibilities and supervision. These responsibilities were taken over by Mr Doug Went, the Department Head of Process, who then reported to Mr Robert Smith, the National Manufacturing Manager, in Sydney. The respondent says that Mr Booth then became the Sales and Administration Manager still reporting directly to Mr Terpening. Mr Booth says that he remained the State Manager and was responsible for sales, administration and accounting [Exhibit JB3] and he says he continued a de facto relationship with manufacturing behind the scenes to report back to Mr Robert Smith on matters of interest.

6 Mr Terpening resigned from the company on 6 September 1999 and the applicant says that he then reported to Mr Cheng Hong, the Managing Director of the Arrowcrest Group which in turn owned BMI.

7 At the beginning of September 1999 the respondent says that Mr Cheng Hong sent Mr Bob Briggs, Acting General Manager of BMI, to investigate the West Australian operation due to concerns expressed by the Board about the performance of that division. On the evidence of Mr Briggs, what he found was that the Company was in worse shape than the Board expected. He sought immediately to introduce some cost reduction strategies and strategies to increase sales. Mr Briggs says that he considered the management structure of the Company too top heavy and that there had been inadequate stock control.

8 This led to discussions between Mr Booth and Mr Briggs about Mr Booth's future with the company. There are key differences in the evidence of both men about these discussions, particularly a discussion on 28 September 1999 when Mr Briggs says that Mr Booth indicated that he wished to leave the company and be paid out a redundancy. Mr Booth was formally given notice on 22 November 1999 [Exhibit JB17] that his position had been made redundant and he was given notice of termination of one month. There then followed a series of correspondence and discussions leading to his departure from BMI on 22 December 1999.

9 Mr Booth says that Mr Terpening and he in May 1999 undertook a cost based review of BMI's operations and agreed on a number of positions which were to be made redundant [Exhibit JB4]. He says that Mr Smith also agreed to these positions. The results of this were forwarded to Mr Cheng Hong but no action was taken. In all of this Mr Booth says his future was never discussed.

10 Mr Booth says that he first met Mr Briggs when he travelled to Perth on 20 September 1999. He says that Mr Briggs stayed until 28 September and inspected the factory. They had several discussions and Mr Briggs was mostly interested in ways of reducing costs and increasing profitability. He says that Mr Briggs was not terribly friendly towards him.

11 Mr Booth took Mr Briggs to the airport on 28 September 1999 and he says the only discussion they had about the BMI operations was that Mr Briggs asked Mr Booth who he thought was the best sales representative, Mr Wishart or Mr Mannon. [Exhibit JB6] is Mr Booth's record of his discussions with Mr Briggs during that week which he says he compiled at the end of that week.

12 He says that Mr Briggs telephoned him the next day, ie 29 September 1999, and asked him whether he wanted to resign and take leave that evening. He says that he was dismayed and asked Mr Briggs to put it in writing and that he would consider it. They agreed that Mr Booth would respond by 3pm Western Australian time, but Mr

Booth says that he wanted Mr Briggs' request in writing. This led to an exchange of correspondence as follows [Exhibit JB7 & JB8]—

> "Bob,
>
> In response to your telephone request this morning at approximately 11 AM for me to tender my resignation, I advise I am not prepared to tender my resignation.
>
> As advised, I intend to seek legal advice over the next couple of days and I undertake to enter into discussions with the company following this legal advice.
>
> Regards
>
> John Booth"
>
> "RE: YOUR FAX OF 29/9/99
>
> I was surprised at your reaction yesterday, given that as late as last Tuesday when you drove me to the Airport, you reconfirmed your advice to me that you acknowledged that Brownbuilt Metalux had not performed satisfactorily under your management, that your input of late in the position of Sales Manager has been negligible and of little benefit to the business and that it is your intention to resign and leave the company. My approach to you yesterday was as a direct follow up on your advice to me and your opinions in regard to the restructuring of the business that is required.
>
> I concur with your opinion, that for the Brownbuilt Metalux business to survive and return to profitability that it needs to be restructured and that you do not foresee yourself as being part of the restructured business.
>
> You have made it clear to myself and others that you intend to resign, and for us to successfully restructure this business efficiently we need to know when you intend to tender your resignation. In the interim I suggest that you take the necessary leave to consider your position and we would like you to take leave starting from the 18/10/99 to the 12/11/99 inclusive.
>
> Regards
>
> Bob Briggs
>
> General Manager"

13 Mr Booth says that he was not the Sales Manager, rejects the suggestion that he hadn't performed satisfactorily and denies having ever suggested to Mr Briggs that he would resign. He says that he saw all of this as part of the frustration process designed to get him to leave. Instead he maintains that he said he would consider his options (Transcript p. 26). He denies also that he ever said to Mr Smith that he would resign, as opposed to consider his options.

14 There followed several discussions and correspondence about whether Mr Booth would take annual leave, clarification of who he reported to, a direction for him to focus more on the selling function and to relocate his office to be with the sales staff. Mr Booth found the relocation of his office difficult to accept and viewed it as part of a frustration process, however, he says that he fully cooperated with all directions.

15 Mr Booth went on leave on 18 October 1999 and next spoke to Mr Briggs on his return, ie 16 November 1999 about various work issues [Exhibit JB16]. The next discussion he says was on 22 November 1999 when he was asked by Doug Went to come into Gordon O'Neil's office (ie the Accountant) as it had a speaker telephone and Mr Briggs wanted to talk to him. Mr Booth said that he was again asked to resign. He was told that his position had been made redundant and was asked to take leave at once. Mr Booth says that he asked for it in writing and didn't want to discuss it with Mr Briggs at that time.

16 There followed a range of correspondence and discussions about alternative employment opportunities for Mr Booth and the alleged mishandling by Mr Booth of some obsolete stock. Mr Booth's evidence is that he raised the prospect of being kept on as a salesman. He says that Mr Briggs indicated that they had enough sales staff and that he was happy with those that he had, particularly as they had good relationships with customers. The essence of this part of Mr Booth's evidence is—

> "The whole content of the letter essentially is justification, in my view, for a decision which had already been made, and he was simply there going through a number of areas to simply justify the decision which had already been made, and it was quite clear that he didn't want to enter into any other discussion about consideration of other alternatives; quite clearly they wanted to bring the case to a close." (Transcript p. 51)

17 Mr Booth references his separation certificate which indicates that the position held at time of termination was State Manager—WA. The position description for this he says was confirmed with Mr Terpening as late as 16 August 1999.

18 He says that his skills and experience were superior to the other salesmen and that this should have been considered by Mr Briggs. His description of some of his subordinates was less than flattering.

19 He says that at no time did he seek to clarify with Mr Cheng Hong the reporting relationships he was supposed to operate under (Transcript p.129). He says that he cooperated with all Mr Briggs requests as he has been through a number of business restructures and the first rule is not to reject any requests that are made. He says that he would have considered an offer of a salary reduction but no offer was ever made. Mr Booth says that at no time until a letter from Mr Cheng Hong of 15 October 1999, was he advised of whom he should report to. Specifically he says it was not clear that he was to report to Mr Briggs.

20 It is clear from Mr Booth's evidence under cross-examination that he was expecting to leave the company. He says that he was looking for jobs in November 1999 whilst on leave and that this was part of the reason Mr Briggs had given for requiring Mr Booth to take leave. It is also clear from Mr Booth's evidence under cross-examination that the respondent placed increasing controls on his activities in that he transferred offices and he had to advise Mr Went of his whereabouts.

21 Mr Briggs says that he was appointed acting General Manager of BMI in mid-August 1999, amongst his other roles. He says that he reported directly to Mr Cheng Hong the Managing Director of John Shearer Holdings. He says that Mr Smith told him in early September 1999 in discussions about key personnel in BMI that Mr Booth had told him that he intended to leave BMI. He first visited the company on 20 September 1999 and found that it was in far worse financial shape than had been believed and so he had to implement immediate loss control strategies, which in particular involved reducing stock levels, making staff take accrued leave entitlements and discounting products to boost sales.

22 He says that Mr Booth advised him on 28 September 1999 when he was driving Mr Briggs to the airport that he was not happy at BMI, he thought the company needed restructuring, that he was leaving the company and he wanted a redundancy payment, a "sweetener". Mr Briggs said that he agreed with Mr Booth's assessment, told him there would not be a position for him in the company but wanted time to think and that he would get back to Mr Booth.

23 Mr Briggs says that both Mr Smith and he told Mr Booth that Mr Briggs was taking over responsibility for BMI. Hence there was no doubt in his view as to whom Mr Booth was to report.

24 He says that he reached the decision to make Mr Booth's position redundant in consultation with Mr Cheng Hong. This decision was taken as part of the cost cutting for the company. However, Mr Briggs says the decision was reached "because the position of sales and administration manager, I was doing that and I intended to continue to do it, those functions. I didn't need a sales and administration manager, that was to become part of my job."

25 Mr Briggs say that Mr Booth continually stated that he sought discussion on alternative positions but that he couldn't think of any even though he spent a lot of time looking at it. He says that he didn't foresee a position for Mr Booth in sales as the other salesmen had good relationships with the customers. He says that he did not look at the performance appraisals of the other salesmen. He was critical of Mr Booth for the idea of needing to prepare a sales kit and for not being able to provide a precise summary of key customers.

26 Mr Smith gave evidence that he was told by Mr Booth in May and June that he was going to leave the company. He advised Mr Briggs and Mr Cheng Hong about this in their briefings on personnel in early September 1999. He says that Mr Booth advised him that when he was employed by Mr Terpening he was led to believe that the company was bigger than it actually was. The suggestion being Mr Booth thought that his skills and abilities were better than the company required. I have no difficulty accepting the evidence and the credibility of Mr Smith.

27 Mr Campbell gave evidence to support the skills of Mr Booth vis-à-vis the other salesmen. I have no difficulty accepting this evidence and the credibility of Mr Campbell.

28 Mr Went, the then Factory Supervisor for BMI, gave evidence as to the various changes that had occurred in the Company. He also gave evidence that he did not have any recall as to the discussion by teleconference on 22 November 1999. This evidence strains credibility greatly. Mr Went was previously Mr Booth's subordinate and he would wish the Commission to believe that he has no recall of a discussion where his previous manager was made redundant. This is a discussion when he was asked to be witness to what was said.

29 I have no doubt that the respondent has discharged his onus as to whether a proper redundancy had occurred. Clearly on the evidence of Mr Briggs, which I accept, the company had to institute urgent cost reduction strategies. These strategies have seen a turnaround in profit from September 1999 to the present, albeit not an increase in sales activity. It is clear from the evidence that the position of State Manager, in a practical sense, was abolished in May 1999 and the position of Sales and Administration Manager was abolished later that year. Mr Booth did retain the title but not the functions of a State Manager.

30 The applicant made much play of confusion as to what his role was and who he was to report to. His evidence is simply not credible. Mr Booth was clearly not pleased regarding his demotion by Mr Terpening in May 1999. His own markings on [Exhibit JB3] show the greatly diminished role he played after that date by ceasing to manage a large section of BMI's operations. In contrast to this he references the position description he signed off with Mr Terpening in August 1999 [Exhibit JB11]. This position description refers to him as State Manager—WA and then refers to his functions as, "To control and direct the Division's Western Sales and Administration Operation to ensure the achievement of budget objectives". His supervision responsibilities are limited to this. In other words he kept the title of State Manager but not the job. His job was clearly, on all the evidence that of a Sales and Administration Manager. The only slight conflict in that regard is that he says he kept some oversight of the manufacturing to report to Mr Terpening. This is not supported by the Position Description or the evidence of Mr Smith which was very direct and straightforward and which I prefer.

31 The general management of the operations and the management of sales were eventually assumed within Mr Briggs' responsibilities on his evidence, which I accept.

32 What is of more relevance and which I consider is beyond belief is Mr Booth's evidence that he did not appreciate that Mr Briggs had taken over the operation when he arrived in September 1999. Mr Booth readily followed the instructions of Mr Briggs. If he had any doubt as to who was in control, as a Senior Manager, it was open for him to pick up the phone and speak to Mr Smith or Mr Cheng Hong. He was challenged on this point in cross-examination and could provide no valid explanation. Instead he provided evasive and unconvincing excuses. This aspect of Mr Booth's evidence affects adversely his credibility.

33 The applicant says that the crux of the matter is the manner of the dismissal and the failure to properly consult as required by legislation. The applicant says that the respondent decided to terminate the applicant on 29 September 1999 if not earlier. The applicant says that the Company failed to consult Mr Booth regarding the restructure and about alternatives to him being made redundant.

34 Mr Briggs was consistent in his evidence and did not vary under cross-examination. He clearly had it in his mind that Mr Booth intended to leave the company. This he says arose from discussions with Mr Smith. He says that he waited for Mr Booth to raise the issue and that he did so on the way to the airport on 28 September 1999. He says that Mr Booth also thought that BMI needed restructuring and sought a sweetener by way of a redundancy package. This is a crucial discussion in the events which occurred between Mr Booth and Mr Briggs and having heard their evidence I believe the account provided by Mr Briggs. I consider him to be a credible witness and his evidence to be a more probable account of the events.

35 The evidence of Mr Briggs is supported in my view by [Exhibit JB8] of 30 September 1999 and is not contradicted, as perhaps the applicant would have it, by the respondent's notice of answer and counterproposal. The facsimile from Mr Briggs to Mr Booth of 30 September 1999 refers to Mr Booth's intention to resign, his lack of performance and his view that BMI needed restructuring. These are serious claims, if they are just claims. Mr Booth did not rebut these claims immediately. He had the day previous stated clearly that he was not prepared to resign in response to a telephone conversation with Mr Briggs. Mr Booth next corresponded with Mr Briggs on 8 October 1999 [Exhibit JB9] by facsimile headed "Annual Leave Request". He queries to whom he is to report, challenges the direction to take leave and says that he will soon respond formally to Mr Briggs' facsimile of 30 September 1999. Albeit Mr Booth challenges in evidence that he ever resigned or sought a redundancy, there was no exchange of correspondence at the time denying the essential points made in Mr Briggs' letter. His rebuttal came on 11 October 1999 [Exhibit JB12]. Albeit I consider Mr Briggs' evidence to have been designed to portray his actions as more straightforward and nicer than perhaps they were perceived, I do not consider Mr Briggs' evidence broken down in cross-examination and I consider it to be more credible and a more probable account of the discussion on 28 September 1999, consistent with the flow of correspondence between the parties.

36 I would refer also to one other part of the evidence of Mr Booth where he refers to misinterpretation of communications. This evidence accords in my view with what I have just covered and leaves me with the impression that Mr Booth had raised the issue of his resignation. At page 158 of the transcript he in answer to Mr Sproule's questioning says—

> "But they were just acting on your previous advice to Robert Smith and to Mr Briggs that you intended to resign?—I didn't intend to resign
>
> And as far as you were concerned the company was not big enough for you, and you were too good, and you were looking elsewhere; you were going to go elsewhere?—Irrespective of any communication that occurred with any employee and whatever deductions have been made by a number of employees, I reconfirmed on a particular date that I did not intend to resign. That was stated.
>
> All right- -?—Now we can go back through the records and we can find that, as to what particular day—- that occurred well before the 22nd. I didn't intend to resign despite the communications and

despite correspondence or communications between any employees, and misinterpretation. It's—- I didn't intend to resign".

37 Mr Lyons for the applicant refers to paragraph 10.16 of the respondent's Notice of Answer and Counterproposal. That is that Mr Briggs confirmed with Mr Booth that 29 September 1999 was the date on which Mr Booth's position would be made redundant. The applicant says this is the date that the decision was taken to make Mr Booth redundant. I do not consider this to be so. As indicated, I consider that the actions of Mr Briggs around that time were in response to Mr Booth's suggestion that he would leave and his request for a redundancy sweetener. I find that the decision to make Mr Booth redundant was taken on about 22 November 1999 when Mr Booth was formally advised that his position was to be made redundant. If the intention of Mr Briggs was really to make Mr Booth's position redundant as of 29 September 1999 he could have just done so. He didn't need to correspond and discuss with Mr Booth the issue of taking leave. This could simply have been paid out.

38 The applicant complains that the respondent alleged that performance was a significant issue in deciding that Mr Booth had to go rather than one of the salesmen, yet he was not put on notice concerning his performance and his employment, the alternatives were not really explored and Mr Booth could perform better than the other sales staff. This being said, the issue is whether the manner of dismissal and the level of consultation was adequate. It is clear from the evidence that Mr Booth mostly sought a comparison of himself with other sales staff. Suggestions concerning other positions, including Mr Briggs' position, were not seriously pursued. The comparison was essentially with the sales staff. It is also clear from the evidence that Mr Briggs simply did not consider this a viable option. This is not to say that he did not consider the option. It was raised and reasons were given for dismissing the option. The prime reason given was that the sales staff had good and established relationships with customers. The respondent was also obviously guided by the comparatively larger salary Mr Booth received as opposed to the sales staff, and I would suggest the difficulties they had encountered in dealing with him. I consider Mr Briggs had lost faith in Mr Booth by that stage. This arose from the state he found the company in and also from discussions he had with Mr Booth. Clearly the role of managing sales had been assumed by Mr Briggs. Mr Booth at that stage was undertaking a sales role and there is no evidence to suggest that the company offered to place him in the sales person's position for reduced remuneration. Notwithstanding this, having heard all the evidence, I doubt greatly whether this was an effective option for the respondent. I also doubt greatly that a lesser sales role and remuneration were acceptable to the applicant who by that time was applying for managerial positions outside the company. I find that the applicant has not proven his case that he should have been placed in the position of one of the other sales staff or some other alternative job. I accept entirely the evidence of the respondent that the performance of the company was such that extra sales staff were not required.

39 The actual manner of termination on 22 November 1999 was dealt with clumsily. Mr Booth had been successively downgraded in status and was being monitored. It was clear by that stage that his time with the Company was bound to end. To have engaged in a range of discussions between the two of them, that is Mr Briggs and Mr Booth, up until that time and then for Mr Briggs to call Mr Went in to get Mr Booth to a teleconference so he could be terminated lacked some sensitivity.

40 *Jacob Gilmore v Cecil Bros, FDR Pty Ltd and Cecil Bros Pty Ltd* 78 WAIG 1099 makes it clear that the respondent was obliged to discuss with Mr Booth the likely effects of the restructure and redundancy upon him and measures that may be taken to minimise the effects of these changes. Mr Lyons says on behalf of the applicant that the failure to consult Mr Booth was manifest in the requests he made of Mr Briggs [Exhibits JB12, 15, 20 and 30]. He says that the decision to terminate was taken on 1 or 2 September 1999 in Adelaide in meetings between Mr Briggs, Mr Smith and Mr Cheng Hong, and not on 22 November 1999 as stated by Mr Briggs.

41 There is no doubt in my mind that what really is at issue here is the process adopted to terminate Mr Booth's services. As indicated, Mr Booth was clearly made redundant and there is no justifiable argument that some other employee, be it Mr Briggs or a salesman, should have been made redundant instead. Mr Lyons on the applicant's behalf says that the crux of the matter is whether there has been any genuine consultation on the part of Mr Briggs with Mr Booth. He says that any consultation that might have occurred, happened after 22 November 1999 which is the date that the respondent alleges the decision was made to terminate Mr Booth's services.

42 As stated, I am not in any respect convinced that there was another position for Mr Booth to undertake. This certainly has not been proven by the applicant. I should say that I am not convinced that Mr Booth would have taken a lesser position in the organisation. His responsibilities had been progressively reduced, but his salary had not. He has only applied for senior positions since his termination. There is no criticism of him in that regard or suggestion that he has not attempted to mitigate his loss. However, it does lead me to infer, along with two other points, that he would not have accepted lesser positions with BMI. The two other points are that throughout the hearing I gained an impression that Mr Booth was greatly offended by his diminished status arising from the successive reduction in his responsibilities. He clearly accepted the changes in practice but wished really to resume his role as State Manager. The respondent also references [Exhibit JB20] where Mr Booth states in part—

> "For me to obtain a similar position as the one from which I've now been removed, I understand it would take 3 to 6 months. It would be much easier for me to secure an appropriate alternative position outside the company whilst still employed in some capacity." (Transcript p. 401)

43 In other words quite understandably his mind was set at the time on executive positions and not reducing to less senior sales roles.

44 Section 41 of the *Minimum Conditions of Employment Act 1993* reads—

> "**41. Employee to be informed**
>
> (1) Where an employer has decided to—
>
> (a) take action that is likely to have a significant effect on an employee; or
>
> (b) make an employee redundant,
>
> the employee is entitled to be informed by the employer, as soon as reasonably practicable after the decision has been made, of the action or the redundancy, as the case may be, and discuss with the employer the matters mentioned in subsection (2).
>
> (2) The matters to be discussed are—
>
> (a) the likely effects of the action or the redundancy in respect of the employee; and
>
> (b) measures that may be taken by the employee or the employer to avoid or minimize a significant effect,
>
> as the case requires."

45 The obligation arising from this Act falls on the employer to undertake the discussion after the decision has been taken. There was considerable discussion leading up to the telephone conversation of 22 November 1999. Correspondence was exchanged and a meeting occurred on 11 October 1999 where Mr Briggs says that he went through with Mr Booth every part of the letter which is [Exhibit JB9]. Following the 22 November discussion there are various exchanges of correspondence followed by a meeting between Mr Briggs and Mr Booth on 2 December 1999.

"Bob stated with respect to sales duties he's advised 'We have already two sales reps and Matt, sales supervisor in this area. We have an over-supply, we need to bring this matter to conclusion. We've acted on your previous advice that you intended to seek alternative employment.'" (Transcript p. 410)

46 I do not consider that there was a lack of consultation concerning alternatives. The alternatives were simply not appropriate. In all the circumstances I would not disagree with Mr Briggs' judgement on this point. I consider that the applicant has not proven his case that the dismissal was harsh, oppressive or unfair and I would dismiss the application.

2001 WAIRC 02424

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	JOHN FRANCIS BOOTH, APPLICANT *v.* BROWNBUILT PTY LTD (A.C.N. 002 558 894) T/AS BROWNBUILT METALUX INDUSTRIES, RESPONDENT
CORAM	COMMISSIONER S WOOD
DELIVERED	TUESDAY, 27 MARCH 2001
FILE NO/S	APPLICATION 24 OF 2000
CITATION NO.	2001 WAIRC 02424

Result	Application dismissed
Representation	
Applicant	Mr T Lyons of Counsel
Respondent	Mr D Sproule

Order.

HAVING heard Mr T Lyons of counsel on behalf of the applicant and Mr D Sproule on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders—

THAT the application be and is hereby dismissed.

(Sgd.) S. WOOD,
[L.S.] Commissioner.

2001 WAIRC 02255

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	BRENTON SMITH, APPLICANT *v.* HIGH QUALITY BRICKWORK, RESPONDENT
CORAM	CHIEF COMMISSIONER W S COLEMAN
DELIVERED	THURSDAY, 8 MARCH 2001
FILE NO/S	APPLICATION 1425 OF 2000
CITATION NO.	2001 WAIRC 02255

Result	Unfair dismissal claim upheld; Contractual entitlement claim dismissed.
Representation	
Applicant	Mr B Smith
Respondent	no appearance

Reasons for Decision.

1. The application by Mr Brenton Smith was lodged on the 11th September 2000.
2. Despite a number of telephone contacts with Mr Barry Shardlow, the Commission has not been able to engage the respondent in conciliation proceedings. The applicant's claim alleging unfair dismissal and outstanding contractual benefits was listed, then adjourned to enable Mr Shardlow to attend the hearing. Notice of the proceedings on the 2nd March 2001 was forwarded to him by express post. Mr Shardlow did not attend.
3. At the time of the termination of his employment, Mr Smith was a second year apprentice bricklayer. He was 16 years old. It is Mr Smith's evidence that on the 15th July 2000 he injured his hand in the course of his employment. The injury was sustained while working on an unguarded cement mixer. According to Mr Smith he was taken to a doctor's surgery but as that was unattended he was taken home by the respondent. There, Mr Shardlow dressed the wound and told Mr Smith to have a few days off. Mr Smith subsequently attended Sir Charles Gairdner Hospital for medical treatment. He was provided with a medical certificate stating that he was unfit for work for a period of four weeks.
4. After a short period off Mr Smith states that he was told by Mr Shardlow to return to work. It was Mr Smith's evidence that Mr Shardlow told him that if he "didn't come to work tomorrow he wouldn't have a job".
5. Owing to his injury and incapacity Mr Smith did not return to work. He understood that his services had been terminated. These are the circumstances which give rise to the claim for unfair dismissal.
6. In the absence of any evidence to contradict or put the situation in a different light, it appears that the applicant, a 16 year old apprentice bricklayer, was not given a fair go. To be dismissed while incapacitated and under the threat that he had to return to work, is harsh and oppressive. The fact that the respondent subsequently paid the applicant four weeks wages does not mitigate the unfairness of the dismissal.
7. The loss claimed by Mr Smith goes from the period of unemployment until he secured another position as an apprentice bricklayer on the 6th December 2000, a period of approximately 20 weeks. During this period Mr Smith states that he sought employment at Centrelink. He registered with the Building Group Training Scheme. A resumption of his bricklaying apprenticeship was his priority. Mr Smith claimed that he mitigated his loss by endeavouring to get other work. On occasions he worked in the building industry. His income from these jobs was estimated to be $490.00. His only other income was the payment of a youth allowance for 5 or 6 weeks.
8. Allowing for the payment received by the applicant from the respondent when he was injured and the income derived from casual employment, I assess the loss to be equivalent to 15 weeks wages. This accommodates the loss of earnings and of his apprenticeship at that time. The Minutes of the Proposed Order gives effect to this assessment of compensation.
9. It is clear that reinstatement or re-employment is impractical. The applicant has secured a new position under an apprenticeship scheme; that employment should not be disrupted.
10. All other claims made under of section 29(1)(b)(ii) of the Act are conceded to be based on award entitlements. These do not come within the Commission's jurisdiction and are therefore dismissed.

2001 WAIRC 02351

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	BRENTON SMITH, APPLICANT *v.* HIGH QUALITY BRICKWORK, RESPONDENT
CORAM	CHIEF COMMISSIONER W S COLEMAN

DELIVERED	MONDAY 19 MARCH 2001
FILE NO/S	APPLICATION 1425 OF 2000
CITATION NO.	2001 WAIRC 02351

Result	Order issued
Representation	
Applicant	Mr B Smith
Respondent	no appearance

Order.

HAVING heard Mr B Smith, the applicant and there being no appearance on behalf of the respondent, and having found that the applicant was unfairly dismissed;

NOW the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders—

1. THAT the Respondent do pay to the applicant the sum of $4612.50 being 15 weeks salary and tool allowance, calculated as follows—
   (a) Salary of $293.50 per week
   (b) Tool Allowance of $14.00 per week
2. THAT the amount in Item 1 be paid within 21 days of the date of this Order.
3. THAT the claim pursuant to section 29 (1)(b)(ii) is dismissed.

(Sgd.) W. S. COLEMAN,
[L.S.] Chief Commissioner.

2001 WAIRC 02376

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	IAN WILLIAM CANNON, APPLICANT
	v.
	LINFOX TRANSPORT (AUSTRALIA) PTY LTD (ACN 004 718 647), RESPONDENT
CORAM	COMMISSIONER J H SMITH
DELIVERED	WEDNESDAY, 21 MARCH 2001
FILE NO	APPLICATION 1813 OF 1999
CITATION NO.	2001 WAIRC 02376

Result	Application dismissed
Representation	
Applicant	Mr G McCorry as agent
Respondent	Mr P V Ryan as agent

Reasons for Decision.

1 Ian William Cannon ("the Applicant") made an application under s.29(1)(b)(i) of the Industrial Relations Act 1979 ("the Act") on 30 November 1999 claiming that he was harshly, oppressively and unfairly dismissed by Linfox Transport (Australia) Pty Ltd ("the Respondent") on 10 November 1999.

2 He also made a claim under s.29(1)(b)(ii) of the Act, that he had been denied a benefit to which he was entitled under his contract of employment (not being a benefit under an award or order), in that he was entitled to be paid a sum of money as payment in lieu of reasonable notice.

3 The Respondent is a national large scale logistics transport company. The Applicant was engaged to work as a Regional Manager for Western Australia to manage the Coca-Cola Business Stream of the Respondent from 3 August 1998. On 5 August 1998 the Respondent lost the Coca-Cola contract in Western Australia. Following discussions between the Applicant and the Respondent's Managing Director, Mr Michael Brockhoff, the Applicant took up the position of Business Development Manager a few days later. The Applicant worked as a Business Development Manager until his employment was terminated on 10 November 1999.

4 The Applicant claims—

(a) The Respondent harshly oppressively and unfairly terminated the Applicant's employment in that the employment was terminated without there being any valid reason connected with the capacity or conduct of the Applicant or the operational requirements of the employer's business.

(b) In the alternative, if the Respondent had concerns about the conduct or the capacity of the Applicant, it failed to raise these concerns with the Applicant or take any positive steps to ensure that the Applicant was aware of those concerns and the implications of not taking appropriate action to address those concerns.

(c) Further or in the alternative, the Respondent, failed to discuss with the Applicant the significant effect the termination of employment would have upon him and measures that might be taken to minimize that significant effect, contrary to section 41 of the Minimum Conditions of Employment Act 1993, the failure to do so making the termination of the Applicant's employment harsh, oppressive and unfair.

(d) Further or in the alternative, the Respondent failed to give the Applicant reasonable notice or pay in lieu of notice having regard to the Applicant's position, remuneration, age, the nature of his recruitment, his future employment prospects and contemporary human resource management practices, the failure to do so making the termination harsh, oppressive and unfair.

(e) Further, the Applicant was entitled by way of an implied term in his contract of employment, to reasonable notice or pay in lieu of notice, which in all the circumstances would have been 6 months; the terms of the contract of employment entered into on 20 July 1998 lapsing on or about 3 August 1998 when the Respondent lost the Coca-Cola contract and a new contract then being offered and accepted by the Applicant, or in the alternative, if the contract of employment of the 20 July 1998 was merely varied by the circumstances arising out of the loss of the Coca-Cola contract, the express term therein was void and severable by operation of section 170CM of the Workplace Relations Act 1996.

(f) The Applicant claims against the Respondent an order that—

(i) The Respondent harshly oppressively and unfairly dismissed the Applicant from his employment;

(ii) It is not practicable for the Applicant to be reinstated or re-employed by the Respondent;

(iii) The Respondent pay to the Applicant by way of compensation for the harsh, oppressive and unfair dismissal, an amount equal to 6 months remuneration calculated on the basis of the Applicant's total salary package of $105,000; and

(iv) The Respondent pay to the Applicant by way of pay in lieu of notice, an amount equal to 6 months remuneration calculated on the basis of the Applicant's total salary package of $105,000.

Background

5 At the time of the hearing the Applicant was 54 years of age and had extensive experience in the transport industry. Between 1981 and 1990 he was employed by TNT Australia as the WA State Manager for the Kwikasair Group of Companies. Whilst working in the transport industry the Applicant became acquainted with Mr John Dixon who is the Respondent's Chief Operations Officer.

The Applicant and Mr Dixon worked together when the Applicant was employed by TNT Australia. From 1990 to 1996 the Applicant and his wife ran a wholesaling business. He sold that business in 1997 and took up a position of Sales Manager of K & S Express Transport.

6 After the Applicant sold his wholesaling business he contacted Mr Dixon (sometime in 1997) and informed him that he was looking to return to the transport industry. In May 1998 whilst working for K & S Express Transport Mr Dixon telephoned the Applicant and told him the Respondent was looking for a senior person to manage the Coca-Cola transport contract in Western Australia. The manager's position was vacant as the previous manager had left the company. Mr Dixon came to Perth in early July 1998 to make a presentation to Coca-Cola to re-tender for the contract. The Applicant met Mr Dixon and other senior employees of the Respondent. Mr Dixon informed the Applicant that the Respondent was confident of winning the tender for the Coca-Cola work.

7 Mr Dixon testified that the Applicant asked whether his employment would continue if the Coca-Cola contract was lost and he informed him (the Applicant) that if the Respondent lost the Coca-Cola contract he would be employed in a similar capacity on the same proposed terms and conditions.

8 A formal offer of employment was made to the Applicant on 15 July 1998 which was accepted by him on 20 July 1998. The material terms of the contract are as follows—

> "It is with pleasure that I confirm the offer to employ you in the position of Regional Manager, Western Australia with the Coca-Cola Business Stream of Linfox Transport (Aust) Pty Ltd A.C.N. 004 718 647 ('Linfox') commencing 3 August, 1998. Initially you will be based at the Linfox State Office at Kewdale and report directly to the National Manager of the Coca-Cola Business Stream.
>
> The terms and conditions for this offer of employment are set out below. If you accept this offer, these terms will continue to apply to your employment except to the extent that they are varied, replaced or cancelled by agreement in writing signed by both parties. Linfox may at its reasonable discretion change your work location, duties, title or reporting relationships at any time to meet its business needs.
>
> SALARY
>
> Linfox will pay you a salary at an annual rate of $75,000. Annual leave loading is included in the salary and a separate allowance will not be paid at the time leave is taken. Salaries are usually reviewed annually in June of each year at the discretion of Linfox. The next planned review relevant to you will be in June 1999.
>
> …
>
> LEAVING LINFOX
>
> Your employment with Linfox may be terminated at any time by either party giving to the other.
>
> - one month's notice in writing; or
> - if at the time of termination you have more than five years continuous service with Linfox, two month's notice in writing.
>
> Linfox may at its option commute any period of notice of termination by payment in lieu to you of the salary which would otherwise be payable for the balance of the notice period.
>
> Linfox may terminate your employment without notice or payment in lieu of notice for serious misconduct, including commission of a criminal offence, or if you are precluded by law from performing the duties of your position.
>
> Your rights to compensation or benefits from Linfox relating to the cessation of your employment are restricted to those expressly set out in this letter.
>
> SEVERABILITY
>
> Part or all of any provision of this letter that is illegal or unenforceable will be severed from this letter and the remaining provisions will continue in force.
>
> WAIVER
>
> The failure of Linfox at any time to insist on performance of any provision of this letter is not a waiver of its right at any later time to insist on performance of that or any other provision of this letter.
>
> GOVERNING LAW
>
> This letter is governed by the law applicable in the State in which you are employed and you irrevocably and unconditionally submit to the exclusive jurisdiction of the courts of that State.
>
> ENTIRE UNDERSTANDING
>
> This letter sets out the entire understanding and agreement between the parties with respect to the terms and conditions of the employment offered with Linfox. No collateral agreement will be of any force or effect unless it is in writing and signed by both parties. All negotiations, representations, warranties or commitments in relation to your employment are superseded by this document and will be of no force or effect whatever.
>
> The terms and conditions of your employment with Linfox as set out in this letter may subsequently be varied only by an agreement in writing signed by both parties."

9 The Applicant commenced work in Perth after the Coca-Cola contract was lost. His role was to develop business opportunities for the Respondent.

10 The Applicant was informed that he was to report to Mr Paul Bennett who at that time was the General Manager of the Industrial Business Stream. Mr Bennett is located in Victoria.

11 The Respondent's office in Western Australia did not have a large number of staff. The Applicant worked with Mr Stephen Cain who was the Regional Manager and State Representative for Western Australia. He also worked with Mr Kipling Sandercock, a Regional Manager who is also a business analyst and computer specialist. The Applicant gave uncontradicted evidence that when he first commenced work in the Perth office morale was very low. He said many of the contracts were losing money and sales revenue was down by almost 50% on the previous year.

12 During the course of his employment the Applicant had a comfortable, open and frank relationship with Mr Bennett. Mr Bennett did not set a budget for the Applicant to reach. He testified that Linfox was looking to develop substantial business relationships with particular customers and not small accounts. Mr Bennett said he advised the Applicant that he may spend a year on developing one proposal or he might need to develop half a dozen concepts. When asked what success rate he expected from the Applicant, Mr Bennett said that he would expect a success rate of something like 30% of proposals submitted to prospective clients who were serious in their dealings with the Respondent.

13 Whilst there is a dispute as to whether the Applicant was given sufficient guidance, direction and training to perform the role of Business Development Manager, it is common ground that no issue arose in respect of the Applicant's performance until June 1999.

14 From August 1998 until mid 1999 the Applicant pursued a number of prospective business proposals without much success. The only account the Applicant won whilst employed by the Respondent was a small account with Arlec which was worth about $1,000 per week. Until a tender presentation for a contract with BHP was made on 4 June 1999, Mr Bennett was not dissatisfied with the Applicant's efforts to generate new business.

The BHP tender

15 The Respondent won a contract to transport materials for BHP in July 1999. The Applicant testified that he was responsible for generating this business opportunity by introducing the client. He said Mr Dixon sent him a facsimile of an advertisement from a press clipping service for expressions of interest for provision of logistic services to BHP in Western Australia. He then sent a very short

letter to the Logistics Manager in New South Wales on 15 March 1999 asking for Linfox to be considered as a prospective tenderer.

16 Although it is not a dispute that the Applicant sent the letter to BHP, Mr Bennett testified that he knew three Sydney based BHP logistics and transport employees. One of those persons had worked for Mr Bennett at Linfox and that person approached him with a request that Linfox submit a tender for transport logistics work in Brisbane and Perth.

17 The Applicant was asked to do most of the preparation and development for the Western Australian BHP tender. Mr Bennett says he was required to look at existing operations and procedures, to see what improvements could be introduced, to consider what concepts could be developed and to calculate possibilities for improved services and synergies.

18 Prior to the tender presentation on 4 June 1999, the Applicant spent about two months working on the BHP tender proposal. He visited seven BHP sites together with the other transport logistic operators who had expressed an interest in tendering for the work. Each of the BHP sites required transportation of different products. These included building products, reinforcing steel, sheet or plate, and pipe. Each one of the sites had their own systems of management and transport distribution. Mr Cannon testified that if each of the seven sites were blended together and managed as a whole, substantial savings in distribution costs could be achieved. He said however, that it was difficult to obtain relevant information. He said the reception at each of the sites was openly hostile as the transport employees at each site were about to lose their autonomy and control of their distribution operations. Further he said the only data he recorded, was the number of trucks that he observed at each of the individual sites.

19 A couple of days before the presentation was to be made to BHP in Perth, Mr Tony Mullen the Queensland Regional Manager of the Industrial Division came to Perth to assist with the Western Australian BHP tender. The Queensland branch had recently won the tender to provide logistic transport services to BHP in Queensland. He arrived in Perth on Tuesday, 1 June 1999 and spent Wednesday visiting sites with the Applicant. On Thursday, 3 June 1999 Mr Michael Brown (the National Business Development Manager) and Mr Bennett arrived in Perth for the presentation.

20 The Applicant testified that they were given two or three weeks advance notice of the presentation. The technical work of preparing the quote from the BHP tender documents and Linfox's operational cost figures was prepared by Mr Sandercock. The day before the presentation Mr Mullen concluded that the operational data collected by the Applicant was flawed. The Linfox proposal had been costed on the incorrect assumption that vehicles did not need to carry 12 metre lengths of the customer's product. Further the estimated type and quantity of vehicles was wrong in that there was a requirement to use more island cabs than semi-trailers. Changes were then made to the presentation.

21 Prior to Mr Mullen examining the data, the quotes and the information gathered by Mr Cannon had been examined by the then Industrial Division Commercial Manager who had found the calculations to be sound. However, it was Mr Mullen's experience in transporting BHP products in Queensland which resulted in the Applicant's assumptions being changed for the presentation.

22 The Applicant testified that the reception to the Linfox bid by the BHP representatives on 4 June 1999 was cautious and chilly. He said his role was not that of an expert presenter, it was more as an introducer. He said that Mr Sandercock did the technical presentation of the overheads and Mr Brown, Mr Bennett and Mr Mullen answered specific questions. In particular he testified that he and Mr Sandercock were not asked any questions by anyone.

23 Mr Bennett gave contradictory evidence. He said the Applicant was the major speaker at the BHP presentation and his performance was very poor. Whilst he agreed that the presentation was poorly received, he said that the Applicant seemed to have a superficial understanding of the business. Further that although Mr Mullen and Mr Brown had identified some flaws in the data and the concept developed by the Applicant, more errors were identified by the BHP representatives at the presentation. Mr Bennett says when difficulties in the Applicant's presentation emerged, other Linfox representatives had to field the questions that the Applicant was unable to answer.

24 As a result of the performance of the Applicant at a BHP presentation Mr Bennett spoke to the Applicant about his performance and voiced his concerns. He testified that he asked—

" 'Do you understand what you should have done on this work?'

He said: 'Look Paul, I simply cannot be expected to do the sort of work that Kip Sandercock does. As Kip was doing other things at the time I was not able to complete the BHP presentation.'

I said: 'You are expected to develop business concepts and to obtain the prospective customer's agreement with the proposals being developed and then to put them into a formal proposal. You are responsible for providing concepts and data.'

He said: 'I understand that.'

I said: 'Well, you need to do better. The data you did provide was a mess.' "

25 After this conversation Mr Bennett decided to put his concerns in writing and sent a letter to the Applicant on 8 June 1999 stating—

"The following is a confirmation of our discussions on Thursday 3rd June regarding your role as Business Development Manager for the Linfox Western Australian operations.

The role involves—

- Locating new business prospects.
- Determining their suitability as potential clients of Linfox.
- Developing a business concept to present to them.
- Presenting the concept.
- Building a relationship with the prospective customer.
- Closing the sale.
- Controlling the proposed business implementation.
- Assisting in the establishment of permanent management processes.
- Being involved thereafter on a monitoring basis, possibly through the BOR process, of any new contract as it continues with Linfox.

It is my understanding that your role as Business Development Manager, particularly the need to gain new business in order to sustain the viability of your position, was discussed with John Dixon in a telephone discussion that took place on April 30th.

I was concerned that the presentation to BHP in Perth on Friday 4th June, demonstrated that you have not yet come to grips with the full requirements of your position.

In this instance the presentation was poorly developed as late as Thursday afternoon and required substantial input by Michael Brown and Tony Mullen to bring it to a satisfactory level.

Even with this assistance the presentation to BHP showed some flaws in rate calculation and assimilation of their data into our presentation.

> Additionally it appeared that the operational understanding of the subject BHP business was lacking, compared to the standard usually expected in such matters.
>
> In our discussion you referred to the need for additional support in the development of your role. Please be assured that these concerns will be dealt with. It is however not our intention to do so by employing additional administrative support. It is required that you will develop an understanding of the cost model and business development utilities that are used throughout the Linfox operations to enable the development of new business propositions.
>
> Kip Sandercock, Stephen Cain and Michael Brown are resources that can be used to develop your understanding of these utilities and their uses.
>
> In summary, please ensure that you understand your role as a Business Development Manager and that the future viability of your position is dependant upon the successful utilisation of the tools and procedures used by Linfox for business development, resulting in the acquisition of new contracts in the Perth/Western Australian area of operation.
>
> I hope to see positive indications of the required business development procedures by yourself that will result in the acquisitions of the new business contracts in the near future."

26 Despite the poor reception at the presentation on 4 June 1999 the Respondent was invited by BHP to submit a final presentation in July 1999. After the initial presentation a number of transport logistic contractors were short listed for the contract and Linfox was one of those on the short list. Mr Bennett had planned (that if the BHP contract was won) the Applicant would implement and run the contract. However, Mr Bennett received feed back from BHP management that they did not have confidence in the Applicant. Consequently, he handed the preparation of the second presentation to Mr Cain. Prior to that time Mr Cain had not had any involvement in the BHP proposal. Mr Cain took over the development of the BHP proposal and prepared the final presentation. One of the managers of the BHP sites, Mr Beaman from BHP Sheet and Coil advised Mr Cain that he did not want the Applicant back on his site and wanted nothing further to do with him. As a result of this complaint Mr Cain quarantined the Applicant from any further involvement in the Sheet and Coil part of the tender. At the final presentation to BHP representatives on 4 July 1999, the Applicant attended the presentation and was directed not to say anything or take part in the presentation.

27 The Applicant testified that he thought the comments made by Mr Bennett about the BHP presentation were unjustified. He said that the presentation may have been poorly developed but this was because Mr Sandercock was not available until the last minute to do the number crunching. He said that he did not respond to the letter as he did not consider it to be anything other than a clarification of what Mr Bennett saw as the role of Business Development Manager and the need for him (the Applicant) to develop computer skills.

28 Mr Sandercock gave evidence that in his view the Applicant did not take steps to verify the fleet assumptions that he (the Applicant) made. When asked what he would have done if he had collected data at a site, he said he would have spoken to the BHP site manager, the drivers and the schedulers about the fleet configuration that Linfox intended to do the work, to see if they were "happy" that the proposed fleet could do the work.

29 Mr Bennett testified that the Applicant was not required to develop computer skills but only develop an understanding of computer cost modelling and supply chain optimisation tools and inventory management software used by Linfox. Mr Bennett testified that he himself cannot operate any of those programs but he understands how those programs can be used to develop logistic transport concepts. He said that he came from a similar background to the Applicant that he himself had worked for Kwikasair and worked for TNT and had no trouble making the transition from those transport organisations to working for Linfox.

30 The Applicant testified that it was his view that the company expected him to become a computer whiz. He said he was willing to learn and attended two courses. One was a word processing package and the other a basic Excel spreadsheet course. He said these two courses were not adequate to be able to operate Linfox programs. He said that Mr Sandercock, Mr Cain and Mr Brown were not available when he needed them. They were all busy. Further, Mr Brown was located in Melbourne and that whilst Mr Sandercock and Mr Cain were confident computer whizzes, they were not very good at being teachers.

31 Mr Sandercock testified that he was always available to assist the Applicant, although the Applicant was reluctant to ask for assistance. In particular he assisted him to—

- Source and install "Mavis Beacon Teaches Typing" on his PC;
- How to use "Lotus Notes" email system;
- How to use the auto memo-filenote-fax templates in MS Word;
- The use of a hard copy of the Linfox business qualification guide; and
- Providing numerous new business assessment guides.

32 Whilst much was made at the hearing whether the Applicant was required to obtain computer skills, the Applicant testified that his lack of knowledge and understanding of computer programs was not a significant problem because most of his work had nothing to do with calculations and using computer programs. He conceded that Mr Bennett had informed him on a number of occasions that he was not required to have computer skills. Further, the Applicant conceded that it was possible the major problem with the initial presentation to BHP was that the material and data he had collected in respect to vehicles and tonnage was incorrect. However, he would not concede that he was responsible for problems with the data. He said there was flaws in the data pack provided by BHP and it was difficult to obtain information from BHP site employees.

33 The Applicant testified that in the middle of 1999 it was apparent from each of the weekly national telephone conferences that the Respondent's Industrial Division was going to close down, as the Industrial Division was barely breaking even. Mr Bennett however testified that the Applicant was not exclusively part of the Industrial Division. He said his role was to develop business for the Western Australian operation which was across all the divisions of Linfox. Further that the Industrial Division in Western Australia was doing better than other parts of the Industrial Division in other States.

34 After the BHP bid the Applicant testified that he pursued a number of potential clients on the part of Linfox but that when he put forward proposals to national management he was informed that the management was not interested in, or did not act on the leads obtained by him.

The Woolworths Tender

35 In July 1999 the Applicant was asked and agreed to assist the Respondents' Retail Division to submit a tender to Woolworths to distribute goods to stores in Western Australia. On 20 July 1999 Mr Cain sent the Applicant an email setting out a number of points in relation to data that he should collect to prepare for a submission to Woolworths. The email stated—

> "There is much that could be got on with in prep for this tender. Being proactive would be of assistance to all parties.
>
> I have thought this through briefly and suggest the following is a start
>
> Store locations—including country centres that would apply in this contract
>
> Open/Close delivery windows

Number and types of pans currently used—pallet spaces, single/tandem axle

Fleet costing for equipment for above from Ross Blain.

How quickly could we get trailing equipment

What would be available in Linfox for older equipment—for the peak transport requirement

Are there any sanitisation requirements?

Number of subbies, rates

Are there any routes permanently subcontracted to other carriers—eg Bunbury, Kalgoorlie

DC times—for metro operation

Are there any DC shut down days

Does the DC send stock to stores 5, 6 or 7 days

What do Skippers do for back up transport—pans and prime movers (how do they cope with peaks?)

Are there weekly peaks (which days?)

Vehicle routes—can you get the current routes

Store access problems—some will not take semi's

How many managers are required? What are their functions? What are the Skippers managers like?

Discuss with Tony Mullen re QLD operation—

vehicle capacity utilisation per load—weight and m^3

average vehicle load/unload times

averaged travel time (kph)

what % of loads are on a fixed weekly schedule—loads per store and number per week that is fixed

% of adhoc orders (this takes into account seasonality)

do they have computerised vehicle routing?

You may have already started on this list, this is all I could think of until we get the data pack. However, from experience with these people you don't get long to massage the data. Therefore we need a good background now."

36 The value of the Woolworths tender to the Respondent was a significant contract worth approximately $2.5M per annum.

37 Mr Cain gave uncontradicted evidence that from 21 July 1999 until 24 September 1999 the Applicant was asked at each of the management weekly co-ordination meetings as to how he was progressing with collecting and preparing information for the Woolworths tender. Mr Cain said that at each one of these meetings the Applicant's only response was to say that he was working on it. He also testified that at that time this contract was the only major contract the Applicant had to work on and that opportunities to tender for this type of work are infrequent.

38 By 21 September 1999 Mr Cain concluded that it was clear that the Applicant had not undertaken any work in relation to the Woolworths tender and held a meeting with the Applicant. He testified that the following conversation took place—

"I said: 'I am very disappointed with your lack of proactiveness. The reason I created the list of points in my email was so we can get off to a proper start on this project. Your previous problems with the BHP exercise should have told you how critical it was to get good data.'

He said: 'I didn't want to waste my time chasing this, all of the data should be in the tender.'

I said: 'You saw how much information was in the BHP data pack. Much of it was scant. The whole idea of gathering our own data is so that we have a good base to work from. We can't build Logix models or complete the costing packages without this.'

He said: 'Couldn't we get some of the data for the Brisbane operation?'

I said: 'I have said yes to that and I have already suggested you contact Tony Mullen.'

The conversation finished with me saying—

I said: 'It's very important that you get on with the task and are seen to be pro-active. If you don't then you are putting your job at risk. Do you understand the seriousness of this.'

He said: 'Okay, I'll make a start.'

The meeting concluded amicable and he shook my hand as he left."

39 Mr Cain said the Woolworths formal request to submit tenders was issued on 1 October 1999.

40 The email was not received very well by the Applicant. The Applicant testified that he regarded the email by Mr Cain as a pedantic instruction to follow vehicles which was a very basic and time consuming task. He said he regarded the tasks unnecessary because he was of the view that a large amount of the data that Mr Cain suggested should be collected would be available in the Woolworths data pack. Further he was of the view that he was not responsible to Mr Cain. The Applicant said his employment package was about $105,000 a year and it was a waste of resources to pay someone such as him to do the task. He also said that it was his view that Linfox was unlikely to win the Woolworths contract because the Woolworths senior decision maker who had the responsibility of Western Australian matters was related by marriage to the family who owned the transport company that had held the Woolworths contract for sometime. He said however that he made routine contact with Woolworths to establish contact and rapport with the local manager. He also testified that he obtained some of the information referred to in the email.

41 On 1 October 1999 Mr Bennett came to Perth for a meeting with BHP site managers on Saturday, 2 October 1999. Mr Bennett testified that on 1 October 1999 he had the following conversation with the Applicant—

"He said: 'The ideas put forward by Stephen Cain are useless. He wants me to go and look at store locations. There is no point in that.'

I said: 'You need to understand what Stephen is trying to get you to achieve. The ideas expressed by Stephen are designed to help you to understand in detail the operation of the contract at a basic level. By obtaining this degree of understanding you will first be able to work out the operational requirements of the contract and then you will have a chance of developing new and innovative concepts to appeal to the customer. At the very least it will enable you to understand the ramifications of the tender document itself.'

He said: 'I do not think there is any merit in these ideas. Stephen Cain is simply out to assert his authority. Management staff does not like Stephen and do not have any regard for him. Personally I dislike him and have no time for him. I do not trust him.'

I said: 'In my view Stephen Cain is an excellent Regional Manager and it is wise for you to mend your fences with him as he could be of considerable assistance to you.' "

42 At the BHP transport site managers meeting the Applicant was required to talk to the site managers about the role of business development. Mr Bennett testified that it was important for each site manager to understand the business development role and how they could co-operate with the Applicant to develop existing and future business. Mr Bennett said that after listening to the Applicant at the meeting it was his view that the Applicant did not have a sufficient understanding of, or commitment to the role of Business Development Manager. He decided he should raise his concerns with the Applicant in writing. In a memorandum dated 4 October 1999 he advised the Applicant—

"Further to our discussions last Friday (1/10/99), I have decided to put my concerns in writing despite my original intention not to do so. I take this step after reflecting upon our discussion on Friday and

as a result of the Site Managers conference on Saturday and our telephone discussions on the subject since that time. You will recall that we had a similar exchange in June and I wrote to you regarding this matter on June 8th, 1999.

Our discussions on Friday indicated to me that insufficient progress had been made in acquiring the necessary skills to enable you to undertake the business development role in a satisfactory manner.

In the Site Manager's conference session that was conducted by yourself relating to business development, you displayed an insufficient understanding of and/or commitment to the role of Business Development Manager. My conclusion is that you either do not wish to undertake the role assigned to you or that you do not understand how to do so. As we discussed in our meeting, the only way in which the skills necessary to do this job will be developed is by doing the job and allowing the training that you have undertaken to date to take effect.

I was particularly concerned that you had not been more pro-active and vigorous in preparing for the Woolworths tender. This aspect of the work did not require any computer related skills but required only the exercise of some basic transport understanding, which with your considerable past experience in this industry you would have been well able to do.

In short, for many months now I have had significant and increasing concerns about your lack of achievement, and apparent lack of energy and commitment. As a result, I am strongly inclined to bring your employment relationship with Linfox to an immediate end. However, lest there exist some mitigating circumstance of which I am not presently fully aware, I am prepared to delay my final decision and afford you an opportunity to bring such considerations to my attention. Needless to say, any submission on your part should set out the full particulars of any claims and explanations you may seek to rely upon.

Please take the time to consider my concerns and respond to me in writing as soon, as is possible. If you wish you may contact me by phone to discuss these issues prior to your written response."

43 After Mr Bennett sent the Applicant the memorandum, he spoke to the Applicant and asked for a response. He testified that he had a lot of faith in the Applicant. He (Mr Bennett) thought that he was a "good guy," but he wanted him to understand that if he did not start to get some results he was in danger of losing his job. Mr Bennett strongly disagreed with the Applicant's evidence that the Respondent was unlikely to win the Woolworths tender. He stated that all tenders were submitted to the Sydney office of Woolworths.

44 On 5 October 1999 Mr Cain instructed the Applicant to prepare a tender plan by 8 October 1999. On 7 October 1999 Mr Cain spoke again with the Applicant and was informed by him (the Applicant) that he had been working on the tender. On 8 October 1999 Mr Cain asked the Applicant for his plan. He testified that the Applicant informed him that he had the details worked out in his head and that he would not be giving him anything in writing until he resolved some issues with Mr Bennett.

45 The Applicant testified that when he received the memorandum dated 4 October 1999 from Mr Bennett he knew that Mr Bennett was unhappy with his performance and his job was in jeopardy. The Applicant responded to Mr Bennett's memorandum on 8 October 1999 as follows—

"1. Towards the end of May 1997 John Dixon phoned me to advise of the vacancy which existed at Linfox Perth, in which I may be interested. At that time I was comfortably employed by K and S Express in Perth. I ultimately accepted the offer with Linfox of Regional Manager WA—Coca-Cola, being a position for which I was well experienced.

2. As you know I joined Linfox on 3 August 1997. On Wednesday, 5 August we were advised that the Coca-Cola contract had not been retained.

3. My job description was subsequently informally altered and I was asked to report to you.

4. From that time until 3 June this year, I was unaware of any dissatisfaction regarding my performance.

5. In those early months we established a number of potential clients including Arnott's, Kerry Mauri, Lever Rexona etc.

6. Linfox had provided no assistance in my professional development whatsoever. I have recently commenced formal tuition to improve my skills in the processing of raw data. Such processing skills were never discussed with me nor a requirement of the position for which I was employed.

7. With regard to the BHP presentation in early June, any lateness in-concluding development of the presentation was because Kip was involved elsewhere and not able to meet to discuss it with Tony Mullen, Michael Brown and myself until the last minute. It was most certainly not through any lack of commitment or energy on my part.

8. With regards to your comment that I lacked preparation for the Woolworths tender—you have not given me any detail of your expectations nor how you expected me to be more active or vigorous in preparation for that tender. You know that we received the data pack on Monday, 4 October and we are not able to undertake any active preparation before that time. I must disagree with your comment about any perceived lack of achievement or lack of energy and commitment on my part. At all times since I joined Linfox I believe I have approached the position with the energy and commitment expected to meet the role of Development Manager.

9. I have both the understanding and commitment required to effectively carry out the role of Business Development Manager. You would not expect me to agree with your comments about potential termination and of course I do not.

Paul, in spite of these communications, it is my hope and expectation that we can redress this position. Consequently, if convenient to you, I hope to talk to you by telephone today to discuss these matters further."

46 Mr Bennett testified that after he received the Applicant's response he had two conversations with him. He said he told him not to be obsessed with various computer activities and he did not want this raised as an excuse again. He also said he told him to get on and show what he could do with the Woolworths tender. Further that he told him he was prepared to assist him with the tender preparation. The Applicant agreed that Mr Bennett told him to get on with the preparation for the Woolworths tender plan, but that he did not receive any support to prepare the plan. Further he testified that he had no experience in preparation of tender plans.

47 Mr Bennett said towards the end of October 1999 he spoke to Mr Cain and Mr Michael Gilsenan (who is in charge of the Retail Division) and was informed that the Applicant was not getting very far with the Woolworths tender.

48 On 10 November 1999 Mr Bennett came to Perth and spoke to the Applicant. After speaking to him for about 15-20 minutes, Mr Bennett said to the Applicant—

" 'If we cannot come up with a solution to our problem then your employment will be in jeopardy,'

He said: 'I do not believe that I can change. I do not have a sufficient relationship with the other personnel in Perth. I cannot see that there is a prospect of me doing the job in the manner that you have outlined given the lack of support from others who I believe cannot be trusted.' "

49 Mr Bennett said that it was clear from the Applicant's response that he continued to blame his lack of success on other Linfox personnel. He said, he then formed the view that the Applicant's employment should be terminated and told him: "Your responses are not satisfactory, Ian. I think we are going to have to part company."

50 The Applicant and Mr Bennett then had a conversation about the terms of termination. Mr Bennett then telephoned Mr Altoff, the Respondent's General Manager of Human Resources in Melbourne. After speaking to Mr Altoff, Mr Bennett arranged for a termination letter to be typed and made arrangements for the Applicant to be paid one months' salary in lieu of notice.

The Applicant's submissions

51 Mr McCorry on behalf of the Applicant submitted that the Applicant was given a job which he was not capable of carrying out. Further there was no attempt to ascertain whether he possessed the skills or abilities to carry out the duties of a Business Development Manager. Further there were no performance measures for him to be assessed against and no preset performance goals. He had no time frame to meet. Mr McCorry submitted that to the contrary, he was repeatedly told that immediate results were not expected and that it would take time for him to develop business opportunities.

52 As the Respondent points out, it is well established that the Applicant bares the onus of proof on the balance of probabilities to demonstrate there has been an abuse of the employer's right to dismiss an employee such that the dismissal is harsh, oppressive or unfair (*Ronald David Miles, Norma Shirley Miles and Lee Gavin Miles and Rose & Crown Hiring Service trading as The Undercliffe Nursing Home v The Federated Miscellaneous Workers' Union of Australia, Hospital, Service and Miscellaneous, WA Branch* (1985) 65 WAIG 385). The Respondent submits that Kenner C in *Scott v Consolidated Paper Industries (WA) Pty Ltd* (1998) 78 WAIG 4940 made a clear statement of the law in respect of industrial fairness where poor performance of an employee is raised. In *Scott v Consolidated Paper Industries (WA) Pty Ltd* Kenner C observed at 4943:

> "… that it is not for the Commission to assume the role of the manager in considering whether the dismissal is or is not unfair. The test is an objective one in accordance with the Commission's duty pursuant to s.26(1)(a) and (c) of the Act.
>
> Moreover, contemporary standards of industrial fairness require in my view, that before an employee is dismissed, the employee be given some fair warning that his or her employment is at risk if his of her performance or conduct does not improve as required by the employer. This requires more than a mere exhortation to improve and should place the employee in the position of being in no doubt that their employment may be terminated, unless they take appropriate remedial steps: *Bogunovich v Bayside Western Australia Pty Ltd* (1998) 78 WAIG 3635. It should be emphasised that whether an employee is afforded procedural fairness is but one factor for the Commission to consider, however it may be a most important factor, depending upon the circumstances of the particular case: *Shire of Esperance v Mouritz* (1991) 71 WAIG 891. It follows however, that a dismissal will not necessarily be unfair in the event of procedural unfairness alone, as all the circumstances need to be considered."

53 The Respondent says that the Applicant was formally warned about his performance on 8 June 1999 and again on 4 October 1999. Further the evidence given by Mr Bennett and Mr Cain established that the Applicant was also verbally warned on a number of occasions that he was required to improve his performance.

54 It is clear from the evidence that the Applicant was aware his performance was regarded as unsatisfactory from 3 June 1999 and that after he received the memorandum of 4 October 1999 he knew his job was at risk. Despite the first formal warning on 8 June 1999 that the BHP data was inadequate, the Applicant did not take substantive steps to gather detailed information for the Woolworths contract. Further he misled Mr Cain in relation to that contract. It is conceded on behalf of the Applicant that he informed Mr Cain on a number of occasions between the end of July and 24 September 1999 that he was working on obtaining the information sought by Mr Cain in relation to the Woolworths tender. Although the Applicant testified that he had obtained some of the information referred to in the email it is clear from paragraph 8 of his memorandum to Mr Bennett on 8 October 1999 that he in fact had done little, if any, work. Further it is apparent that he did not learn from the BHP tender process that a contractor's data pack cannot always be relied upon.

55 In my view, the circumstances of this case are such that the Applicant has not made out a case that the Respondent abused its right to terminate his employment on grounds of poor performance.

Reasonable Notice

56 Mr McCorry contended on behalf of the Applicant that if the Commission finds that the Applicant's performance was such that his employment should be terminated, his contract of employment was not terminated lawfully and justifiably by the giving of one months' pay in lieu of notice.

57 It is contended on behalf of the Applicant that the express period of notice to terminate contained in the contract signed by the Applicant on 20 July 1998 ceased to apply to the Applicant's employment when the Coca-Cola contract was lost. Alternatively it is argued on behalf of the Applicant that the notice period in the contract was void and servable by operation of s.170CM of the Workplace Relations Act 1996.

58 Whether an original contract of employment has been varied or has come to an end by mutual consent is usually raised in the context of whether a change of duties constitutes a termination of an employment relationship. In *Robowash Pty Ltd v Hart* (1998) 78 WAIG 2325 Sharkey J observed at 2328—

> "It is a question of fact as to whether a change of duties amounts to a termination of the contract of employment or, alternatively whether it amounts to a variation of the original contract (see *Real Estate Institute of Western Australian Inc v The Federated Clerks' Union of Australian Industrial Union of Workers, WA Branch* (op cit), *Kenny v Elmerside Pty Ltd* (op cit) and *Quinn v Jack Chia (Australia) Ltd* [1992] 1 VR 567 at 576-579.
>
> Certainly, where an employer and employee agree to an alteration in the employee's duties and responsibilities which is profound, a court should be more ready to hold (unless the original contract provided for that contingency) that a new contract has replaced the old, or at least that the old contract, as named, contained terms objectively appropriate to the new relationship created."

59 In my view the clause in the employment contract that provides "Linfox may at its reasonable discretion change your work location, duties, title or reporting relationships at any time to meet its business needs", gave the Respondent the right to the services of the Applicant in any capacity it chose to direct from time to time. It is notable that this clause did not authorise the Respondent to change the Applicant's annual rate of salary or other benefits. Whilst initially the Applicant was provided with a car and not paid a car allowance in accordance with the terms of the contract, this was rectified prior to the date of termination of the employment contract. Otherwise the terms of the written contract of employment were adhered to.

60 In relation to the argument that the notice period in the contract of employment is rendered void and severable by operation of s.170CM of the Workplace Relations Act it is argued that s.170CM gives effect to or incorporates article 11 of the Convention Concerning Termination of Employment at the Initiative of the Employer ("the Termination of Employment Convention"). Section

170CM(1) and (2) of the Workplace Relations Act provides—

"(1) Subject to subsection (8), an employer must not terminate an employee's employment unless—

(a) the employee has been given the required period of notice (see subsections (2) and (3)); or

(b) the employee has been paid the required amount of compensation instead of notice (see subsections (4) and (5));or

(c) the employee is guilty of serious misconduct, that is, misconduct of such a nature that it would be unreasonable to require the employer to continue the employment of the employee concerned during the required period of notice (see subsection (7)).

(2) The required period of notice is to be worked out as follows—

(f) first work out the period of notice using the table at the end of this subsection; and

(g) then increase the period of notice by 1 week if the employee—

(i) is over 45 years old; and

(ii) has completed at least 2 years of continuous service with the employer.

Employee's period of continuous service with the employer	**Period of notice**
Not more that 1 year	At least 1 week
More than 1 year but not more than 3 years	At least 2 weeks
More than 3 year but not more than 5 years	At least 3 weeks
More than 5 years	At least 4 weeks

61 A copy of the Termination of Employment Convention is set out in schedule 10 of the Workplace Relations Act. Article 11 provides—

"A worker whose employment is to be terminated shall be entitled to a reasonable period of notice or compensation in lieu thereof, unless he is guilty of serious misconduct, that is, misconduct of such a nature that it would be unreasonable to require the employer to continue his employment during the notice period."

62 It is conceded on behalf of the Applicant that the notice provided for in the contract is in excess of the requirements of s.170CM(2).

63 The construction of s.170CM(2) of the Workplace Relations Act contended on behalf of the Applicant, is in my view misconceived and wrong at law. Section 170CM(2) of the Workplace Relations Act is contained within Division 3 of the Workplace Relations Act. Further s.170CM is contained within Subdivision C of Division 3 of the Workplace Relations Act. Section 170CB(3) provides that Subdivision C applies in relation to the termination of employment of an employee. In addition s.170CB(5) provides that Subdivision C applies in relation to the termination of employment of an employee for the purpose of "assisting in giving effect to the Termination of Employment Convention".

64 Conventions entered into by the Federal Government do not form part of Australian domestic law unless they have been incorporated by way of statute (*Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 per Mason CJ and Deane J at 286-287 and the cases cited therein). It is clear that article 11 of the Termination of Employment Convention has not been incorporated into the provisions of the Workplace Relations Act. Consequently there is no scope for implying a term into the contract of employment that the Applicant's employment could only be terminated by way of reasonable notice, as to do so would contradict an express term of the contract (see *BP Refinery (Westernport) Pty Ltd v Shire of Hastings* (1977) 180 CLR 266 per the Privy Council at 283; applied by Mason J in *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales* (1982) 149 CLR 337 at 347).

65 I do not accept that s.41 of the Minimum Conditions of Employment Act 1993 applies to the Applicant's termination. Section 41 only applies when the employer has decided to take action that is likely to have a significant effect on an employee, or to make an employee redundant. It was conceded at the conclusion of the hearing that the Applicant was not made redundant by the Respondent. Further, it is apparent from the definition of conduct which defined to have "a significant effect on an employee" in s.40(2) of the Minimum Conditions of Employment Act, (in particular the criteria set out in s.40(2)(a)-(f)), does not apply to the termination of an employee's employment on grounds of poor performance.

66 The application will be dismissed.

2001 WAIRC 02372

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	IAN WILLIAM CANNON, APPLICANT *v.* LINFOX TRANSPORT (AUSTRALIA) PTY LTD (ACN 004 718 647), RESPONDENT
CORAM	COMMISSIONER J H SMITH
DELIVERED	WEDNESDAY, 21 MARCH 2001
FILE NO	APPLICATION 1813 OF 1999
CITATION NO.	2001 WAIRC 02372

Result	Application dismissed
Representation	
Applicant	Mr G McCorry as agent
Respondent	Mr P V Ryan as agent

Order.

Having heard Mr G McCorry as agent on behalf of the applicant and Mr P V Ryan as agent on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders—

THAT the application be and is hereby dismissed.

(Sgd.) J. H. SMITH,
[L.S.] Commissioner.

2001 WAIRC 02357

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	PAULINE WILHELMINA DE BOER, APPLICANT *v.* THIRD AVENUE SURGERY, RESPONDENT
CORAM	COMMISSIONER J F GREGOR
DELIVERED	TUESDAY, 20 MARCH 2001
FILE NO	APPLICATION 829 OF 2000
CITATION NO.	2001 WAIRC 02357

Result	Application granted. Respondent to pay $17,877.35
Representation	
Applicant	Mr D. Schapper (of Counsel) on behalf of the applicant
Respondent	Mr T. Rettalack (of Counsel) on behalf of the respondent

Reasons for Decision.

1 On 29th May 2000 Pauline Wilhelmina De Boer (the applicant) applied to the Commission for orders pursuant to the *Industrial Relations Act, 1979* (the Act) on the grounds that she was entitled to benefits under a contract of employment with the Third Avenue Surgery (the practice) which had not been paid to her at the completion of an engagement.

2 The Particulars of Claim describe the dispute. The applicant, a medical practitioner, was employed by the respondent from October 1990 until 27th January 2000 when she resigned. By an oral agreement she was to be paid remuneration equal to 50% of her gross takings. Upon the introduction of compulsory superannuation the practice commenced to pay superannuation calculated on the statutory percentage applied to the gross earnings. Later the practice unilaterally commenced deducting the required percentage from the applicant's earnings.

3 The applicant claims that she was thereafter under paid by the respondent because the amount should have been calculated on and paid in excess of to the 50% of her gross takings whereas it was deducted from the takings.

4 The applicant told the Commission that she commenced work in October 1990 with the practice as a general practitioner, she was paid on a verbal arrangement either $40 an hour or 50% of her billings, whichever was the greater. When she commenced in 1990 there were no payments made by the respondent in respect of superannuation. There was no discussions when compulsory superannuation was introduced. At the time the practice manager told the applicant that she would be receiving a cheque for superannuation each quarter, and she was responsible to organise a superannuation account, which she did.

5 Thereafter the applicant received quarterly cheques for superannuation which she paid into her nominated superannuation fund. From 1990 until late in 1999 there was no change to that arrangement. In the second half of 1999 while talking with a colleague the issue of superannuation was raised between them, as a result she thought it prudent to check her superannuation payments. When she did she was informed by the practice manager that the superannuation was taken out of her pay, the applicant immediately disputed that as being incorrect.

6 The applicant says she assumed that superannuation would continue to be paid to her under the same arrangements as had been when it commenced, but she did not know when superannuation payments began to be deducted of her 50% billings.

7 After the applicant had discussed the matter with the practice manager she took the matter up with the Principals. This happened in November 1999, there was a meeting between herself, Dr Torvaldsen, Dr Papaelias and the practice manager Ms Adrianne Tutierrez, at which the applicant expressed her concerns about what was going on. The response she received was that the Principals thought that it was unfair for the Government to impose compulsory superannuation on employers. They felt that the applicant was in a better position to pay it than they were. This upset her, she says that Dr Papaelias apologised to her acknowledging that the matter should have been discussed prior to the change to the calculation regime. In response the applicant told him that from then on she expected her superannuation paid on top of the salary as was her entitlement. In reply the Principals said that they would have a contract drawn up so that such misunderstandings did not occur again. The applicant agreed to this. Prior to this time there had never been any meetings with the practice about superannuation.

8 A few days later the applicant was given a draft contract which she took away to read. There was another meeting with the principals at which she was asked if she had signed. She told them that she had not because the wording of the document, particularly in paragraph (c), was unacceptable to her. The applicant thought the wording purported to change the original arrangements by having her acknowledge that the terms and conditions in respect of remuneration, tax and superannuation were as described in the contract and not as had existed as a matter of fact. Because this was untrue she would not sign the document. She says that during a conversation with Dr Papaelias he had asked her to sign the contract so that she would not sue the practice. In response she told him she had no such intention. All she wanted was to have superannuation paid in accordance with her entitlement. On the basis that it would be reviewed in 12 months she was urged to sign the contact but she was not happy to do so and did not.

9 These events caused the applicant to review her ongoing employment at the practice. In due course she decided to look at other work.

10 In January 2000 she submitted her resignation. There was another discussion with Dr Papaelias who told her that the practice wanted her to stay. Though unhappy with the situation the practice was prepared to pay superannuation on top of the salary earnings as she had asked. By this time the applicant was in negotiations with a new employer. She told Dr Papaelias that she was unable to accept his entreaties to stay with the practice as negotiations had proceeded to a position where she thought it would be improper of her not to continue with the arrangement.

11 The respondent's position is that upon the introduction of compulsory superannuation contributions it was agreed that the respondent would pay the compulsory superannuation percentage on top of the 50% billing. It claims that after May 1995 a review led to a decision that payment on top of the 50% was outside the original agreement. After May 1995 the practice began deducting superannuation contributions from the gross billings achieved by the applicant. It says that it did so because of the requirements for the calculation of the practice's liability for group tax. Because of the way the practice deducted the superannuation component before tax the amount should be properly treated as employer contribution. It is argued that the real issue to be determined is whether or not the change in May 1995 was a unilateral change. The practice says it was not, it was initiated by the practice but the applicant accepted the change.

12 The Commission heard evidence on behalf of the respondent from Dr Lewis Papaelias. He confirmed that there was a period of time during the applicant's engagement that the compulsory superannuation was paid on top of the 50%. In May 1995 Dr Papaelias had a discussion with the other principals about the method of calculation. While initially the superannuation deduction had been a small amount it was thought that as the percentage increased employees of the practice would end up making more money than the principals. It was decided to change how the deduction had been calculated in the past.

13 There was a discussion between Dr Papaelias and the other principals of the practice and it fell to him to tell the applicant that the change would be made. Dr Papaelias remembers discussing the matter with her. He told her there would be a change to the arrangement so that superannuation would be deducted from the 50% and not added on to it. The evidence of Dr Papaelias is that he did not recall any major response from the applicant; there was no verbal objection from her.

14 Dr Papaelias recalled that the meeting took place in the back office at the surgery. Dr Simon Torvaldsen was present. It was an informal meeting of very short duration. He recalled saying words to the effect that "*we [the practice is] are going to change the way superannuation is deducted"*. After that meeting he advised the practice manager that the applicant was aware of the situation and instructed that the change be made. There was never any other discussions with the applicant about the issue.

15 According to Dr Papaelias' memory of events leading to the offer of the new contract, there had been a problem relating to a previous employee who made a claim against the practice relating to superannuation deductions. It was decided that the practice needed to make sure its legal agreements were properly executed or, according to Dr Papaelias, at least clarified what was happening at the practice. A proposed contract was presented to the applicant to sign but she was not happy to do so. There

was another meeting with the applicant who was still unhappy about the situation. The next Dr Papaelias knew about the applicant's intentions was when she was going to move to a different practice. As far as the practice was concerned the agreement was merely to confirm what happened in the past. The principals were surprised that the applicant did not want to sign it, Dr Papaelias conceded that the applicant never said she was going to sue the respondent, what she wanted was a reasonable amount of superannuation for her efforts. There was a debate between the applicant and the practice about a payment of a money out of a scheme that the Government had conferred upon general practice to improve facilities. The applicant wanted her share of those and was angry about the practice's attitude.

16 The Commission also heard from Dr Simon Torvaldsen who is a principal of the respondent. He recalled that initially the payment of the superannuation on top of the 50% billings was a relatively small amount that he did not consider to be terribly significant at the time. However if the amount increased by a large degree he was concerned about the potential financial effect on the practice. These issues were discussed by the practice and the agreed outcome was that there should be a discussion with the applicant to convince her that the original agreement under which she was employed was going to cause problems in the future, so they wanted to reduce their obligation to the 50% of the total payment. He confirmed that it was agreed that Dr Papaelias would bring up the issue with the applicant.

17 Dr Torvaldsen recalled a meeting in the back office where Dr Papaelias had broached the issue. It was in the spirit and intention of the agreement that superannuation was to be paid in addition to salary when it was a small amount. It was not relatively important then but if the percentage raised to 10% would constitute a significant wage rise. It is recalled by Dr Torvaldsen that when told this the applicant did not look happy about it. To the best of his recollection she said "okay". He also said she may have shrugged her shoulders. She had given a fairly brief response to indicate that she had heard what had been said but not was necessarily happy with it but he thought that she had accepted the arrangement. He opined that she did not say that she was not happy and that she should not work under the changed arrangement. He thought the conversation took between 5 and 10 minutes. Knowing the applicant he thought that if she had disagreed she would have spoken up because she certainly did so in the past when other issues were raised concerning her pay.

18 It was the recollection of Dr Torvaldsen that the issues concerning the payment of superannuation came up during November 1999 when the practice wanted to document the arrangement. He confirmed that the applicant's main problem was the reference to previous arrangements relating to superannuation. He says that the applicant acknowledged that the payments had been deducted from gross earnings but she did not want to continue with the arrangement. There were discussions about negotiating a resolution to the problem, but at the time the practice finances were not in the best state and it was not the right time to be talking about enhancing of packages.

19 The proceeding is sufficient summary of the chronology of events in this matter. As submitted by Mr Schapper, of Counsel who appeared for the applicant the issue is simply one of what were the terms of the agreement. To determine this I am required to make findings about the credit of the evidence given to the Commission because it is upon this evidence that the whole issue turns.

20 The Commission had the opportunity of seeing each of the witnesses give their evidence. My impression of the applicant is that she is an honest and forthright person, she told her story without embellishment and I have no reason to conclude that she did not fully believe that her version of events was exactly how they occurred. I also formed the opinion that she is a positive person and would express her views strongly if she thought that necessary.

21 The Commission also heard from three witnesses from the respondent. The first was the practice manager Ms Adrianne Gutierrez, I have no reason to disbelieve her evidence, however none of what she said reflected upon the credit of the applicant. Dr Papaelias seemed somewhat equivocal in that part of his evidence that might have reflected upon his friendship with the applicant as a working colleague. Generally he did not impress me that he had a positive memory of the events. As for the evidence of Dr Torvaldsen I would not come to the conclusion that his evidence to the Commission was in any way designed to mislead it, however there are differences between his responses in examination in chief and the cross examination so that some the more positive statements he made in examination in chief were diminished to some extent by the answers he gave in cross examination. There were no outright contradictions but the differences were enough to cause me concern in making a fine judgement about whose story is most likely, on the balance of probabilities, to be correct.

22 For the reasons described in the previous paragraphs I have concluded that the balance of credit must lie with the applicant. I do so in the main because her memory is the more positive. I am assisted in reaching that conclusion by the General Practitioners Agreement (Exhibit S1) which was put to the applicant to sign. In my respectful opinion that agreement in the clause headed Intention tries to re-write the history of the relationship. This would not have been necessary if there was any doubt about the true relationship. It is proof of the practice taking positive steps to vary a contract position that they admit existed. It is an indicator that at least someone thought that the respondents were on shaky ground in their contractual dealings with the applicant and assists me in deciding that where the evidence of the applicant differs from the evidence of the respondent I accept the evidence of the applicant.

23 In matters such as this the Commission is to act judicially. It must discover the terms of the agreement and give effect to those terms if they have not been implemented, by issuing orders [*Simmons v Business Computers International Pty Ltd (1985) 65 WAIG 2039]*.

24 It is common ground between the parties that the practice paid superannuation contributions at the statutory percentage in addition to 50% of the applicant's earnings. On or about May 1999 the principals of the practice resolved that their superannuation contributions ought to be included in the 50% earnings and they instructed the practice manager to make this so. I accept that the two principals of the respondent decided that they would have a meeting with the applicant, but I find that she could be forgiven for not recalling this meeting. They did tell her that they wanted to discuss superannuation. Instead when they raised the issue with her she was doing some administrative work. I think the issue if it was raised with her it was not raised in such a positive way so that she knew that it was the intention of the practice to change the agreement. On my finding of the type of person she is there is no doubt that she would have responded far more forcefully than raising her eyebrows even if that could be said to be a sign of acquiesce as Dr Torvaldsen seems to think. I am fortified in this conclusion because the evidence of Ms Gutierrez is quite powerful concerning the applicant's attention to details of her earnings. If she was so careful about what she was paid, it would be completely out of character for her not to immediately deal with a major change to her contract of employment in a forceful manner.

25 If there was a meeting in May 1999 the applicant never regarded it as a formal meeting to discuss superannuation deductions and there was never any formal arrangement to vary the contract of employment. The applicant continued to think that the arrangements remained the same. There was no indications because after all the same process was used for the payments. The applicant still received a cheque which she deposited in her trust. It was not till she had her attention drawn to matter by a colleague to the requirements of superannuation legislation that she checked her superannuation deductions. It was then she discovered that the arrangements had been changed. This was followed by the meetings which led her being presented with a general practice practitioners agreement to sign.

26 I accept the applicant's version of why the agreement was presented for her signature in preference to that suggested by the respondent. As I said previously the document is an important. It is said by the practice that they needed to formalise the practice employment arrangements because of a problem with another employee and therefore that the clause Intention of Agreement in paragraph C should be viewed in that context. That is convenient for them, but in my view even if it was related to another employee the same issue was at point with the applicant. The intention of the proposed agreement is clearly to re-write the history of the contractual relationship. The paragraph is as follows—

> *In relation to any period of engagement of the practitioner at the practice prior to the date of this agreement, it is acknowledged, intended and agree that the terms and conditions of this agreement in respect of remuneration, tax and superannuation provide written confirmation of the terms and conditions previously agreed and applied between the parties.*

(Exhibit S1)

27 In the context of the debate between the parties at that time the clear wording of this clause is nothing but a naked attempt to change the way a contract was to viewed ab inito, even though in these proceedings the practice recognised and agreed that when the contract of employment with the applicant commenced superannuation was paid on top of the billings. In my view the proper interpretation of what happened is that the same superannuation arrangements were made with all of the employees. Most likely when financial concerns arose in the practice it became apparent that there needed to be a review of cash flow and the situation with superannuation payments was highlighted. Some of the principals had a philosophical objections; in short they thought it was wrong that they had to pay superannuation contributions. They tried to off load their obligation and unilaterally changed the contract without obtaining consent from the applicant. I find that the contract was never changed at law and the applicant was always entitled to have her superannuation assessed on top of the 50% billings. She is entitled to the benefit of that contract now, the parties agree that the sum of money in dispute is $17,877.35 and the Commission will order that the practice pay the applicant that sum of money.

2001 WAIRC 02387

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	PAULINE WILHELMINA DE BOER, APPLICANT *v.* THIRD AVENUE SURGERY, RESPONDENT
CORAM	COMMISSIONER J F GREGOR
DELIVERED	THURSDAY, 22 MARCH 2001
FILE NO	APPLICATION 829 OF 2000
CITATION NO.	2001 WAIRC 02387

Result	Upheld

Order.

HAVING heard Mr D. Schapper (of Counsel) on behalf of the applicant and Mr T. Rettalack (of Counsel) on behalf of the respondent, the Commission pursuant to the powers conferred on it under the *Industrial Relations Act, 1979*, hereby orders—

THAT Third Avenue Surgery pay Pauline Wilhelmina De Boer the sum of $17,877.35.

(Sgd.) J. F. GREGOR,
[L.S.] Commissioner.

2001 WAIRC 02283

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	PETER HAMMOND, APPLICANT *v.* GOLDFIELDS SCAFFOLDING PTY LTD, RESPONDENT
CORAM	COMMISSIONER A R BEECH
DELIVERED	THURSDAY, 15 MARCH 2001
FILE NO	APPLICATION 419 OF 2000
CITATION NO.	2001 WAIRC 02283

Result	Application alleging unfair dismissal and denied contractual entitlements struck out for want of prosecution.
Representation	
Applicant	Mr R. Carthew (of counsel) on behalf of the applicant.
Respondent	Mr M. Clement on behalf of the respondent.

Reasons for Decision.

1 This application was listed For Mention Only by the Commission and the applicant has been asked to show cause why the application should not be struck out for want of prosecution.

2 The facts of the matter can be shortly stated. The respondent is a scaffolding contractor. The applicant was employed by the respondent, according to his Notice of Application, as a supervisor. The Notice of Application claiming that the applicant was unfairly dismissed, and that he has not been paid a bonus due to him under his contract of employment, was lodged in the Commission on 22 March 2000. On 23 March 2000, his legal representatives requested that the matter be listed for hearing. On 18 April 2000 the respondent filed a Notice of Answer which objected to both claims and gave details of the objection. On 3 May 2000 the applicant's legal representatives contacted the Commission requesting advice of the date set for a conference. The conference was held in Kalgoorlie on 16 May 2000. The applicant himself did not attend, but he was represented at the conference. No agreement was able to be reached and the Commission adjourned the conference on the understanding that the applicant was to provide further information on certain matters. On 30 May 2000 the applicant's legal representatives provided some further information and raised the issue of discovery, with a request for a second conference to be held.

3 On 8 June 2000 the Commission wrote to the parties indicating that in its view a second conference would not be worthwhile until either a copy of any written contract of employment could be provided which could substantiate the applicant's claim for a contractual benefit and the applicant himself had clarified a number of matters regarding his claim. The Commission itself then contacted the respondent to request a copy of any written contract of employment.

4 On 14 June 2000 the respondent advised the Commission, and the Commission in turn advised the parties, that there was no written contract of employment at all. The Commission informed the parties that the application would remain adjourned until the applicant provided the necessary particulars which might form the basis for discussion at a further conference.

5 There was then no contact from the applicant for a period of over six months. During that time, on 3 October 2000, the Commission wrote to the parties requesting the applicant to advise it of the status of the matter. There was no reply. When nothing further had been heard by January 2001 the Commission listed the matter For Mention Only in Perth on 29 January 2001. On that occasion, the applicant's legal representatives attended. The Commission had previously advised the respondent, who is in Kalgoorlie, that there was no need for him to attend the hearing.

6 The Commission has considered the submissions made on behalf of the applicant on 29 January 2001. It is well settled that applications before the Commission, particularly claims of unfair dismissal, but also claims for denied contractual entitlements, are to be proceeded with promptly (see *Culverhouse v John Septimus Roe Anglican Community School* (1995) 75 WAIG 1960 and the references cited therein). This is in part a recognition of the fact that in claims of unfair dismissal, applicants must lodge the claim in the Commission within 28 days of the date of the termination. It allows the Commission to deal promptly with issues that come before it while the events in question are still fresh in the parties' minds. Applications have been dismissed before in this Commission when there has been an unwarranted delay occasioned by an applicant (*Kangatheran v Boans Limited* (1987) 67 WAIG 1112; and see also *Lewicki and Others v HB Brady and Co* (1990) 70 WAIG 4143).

7 In this matter, there has indeed been an unwarranted, and in the Commission's view an inexplicable, delay of over seven months from effectively the applicant's last communication with the Commission on 30 May 2000. During that time the applicant himself took no steps whatever to proceed with his application. The Commission notes the explanation proffered by the applicant's legal representatives that he is engaged in an industry where he has to travel frequently, that he has moved home and that the applicant's own legal representatives lost contact with him for the duration of that period of time.

8 The Commission observes, however, that the industry in which the applicant is employed is by no means unique to this State and it is not suggested that the need to relocate in an endeavour to find or secure alternative employment has previously been recognised as a justifiable reason for an applicant not to have kept in contact with the Commission, or his own legal representatives. The Commission, or the applicant's own legal representatives, are no more than a phone call away and are nevertheless contactable by letter. Indeed, the Commission has the strong suspicion that the only reason why the applicant informed the Commission of his status on 29 January 2001 is that his legal representatives had at last been able to find him because the matter was listed by the Commission for that date. If the Commission had not listed this matter, it appears quite likely, from the record, that it would have been some time, perhaps if at all, before the applicant made further contact with the Commission.

9 I add that the record indicates that the applicant's legal representatives have been quite diligent on his behalf. The correspondence from them on the record indicates that they have attended to his interests in a most appropriate manner. It is the applicant himself who has for whatever reason chosen not to keep in contact with his own legal representatives, or the Commission, in relation to this matter.

10 The applicant's failure to actively pursue the claim is a significant factor.

11 At the conclusion of the hearing, the Commission indicated that it would forward the transcript to the respondent and give it an opportunity to comment. Mr Clement, the Managing Director, wrote to the Commission in reply. He writes that he has been under a lot of pressure at work and at home wondering what was happening. Prior to receiving the transcript, he had "thought it must have been all over" and he recommended the applicant for a supervisor's position with his own current employer. This was successful and the applicant now works under Mr Clement. Mr Clement advises that the applicant had not informed him of his intentions in relation to this application and Mr Clement now feels in a difficult situation "not knowing what to do at work". He believes that either he should take unpaid time off work until "this is sorted out" or his employer should decide whether he or the applicant "should leave" and he does not want it to come to that.

12 Mr Clement also disputes any suggestion that the applicant had not been contactable after 30 May because of factors within his own knowledge. I note however that Mr Clement's comments seem to apply only to the period shortly after 30 May 2000 and do not extend to cover all of the period of time from then to 29 January 2001. However, for the reasons he has given, he does not believe that the applicant's claims should continue.

13 Before turning to consider what is to happen in this matter it is also important to note that the fact that the applicant is not in Perth, although his legal representatives are located in Perth, and the fact that Mr Clement is in Kalgoorlie has meant that the Commission does not have sworn evidence before it. It has the documents lodged by the parties, the transcript of the proceedings of 29 January, correspondence from the applicant's legal representatives of 21 February and the letter from Mr Clement previously referred to.

14 The Commission is able to inform its mind in any way it considers just and I consider there is sufficient material fairly before the Commission to enable this issue to be properly assessed. The Commission is not in any sense determining credibility or deciding the merits of the matter. It merely notes the facts revealed and the submissions of both parties.

15 Section 27(1) of the Act permits the Commission to dismiss a matter or refrain from further hearing or determining a matter if it is satisfied (relevantly) that further proceedings are not necessary or desirable in the public interest or that for any other reason a matter should be dismissed or the hearing thereof discontinued. It is a discretionary decision. In exercising that discretion I consider the following factors to be relevant.

16 First, the length of the delay, a period of at least 6 months without any contact whatsoever from the applicant to the Commission, and apparently to the respondent either notwithstanding the apparent interaction between the applicant and Mr Clement, is inordinate.

17 Second, the explanation proffered for it is unsatisfactory. There is no suggestion that the applicant has been out of the country, or even out of the State.

18 Third, the applicant suffers an obvious prejudice by the dismissal of his application. His application consists of two claims. The claim that he was unfairly dismissed on 25 February 2000 is a claim subject to a time restriction. The applicant will be statute barred from making a further claim. The claim that he has been denied a bonus payment is not a claim that is statute barred but any new application made by him will be considered in the context of this application having previously been made which he did not actively pursue.

19 Fourth, there is a prejudice to the respondent if this application is allowed to proceed. Mr Clement is for these purposes, the respondent. It appears from the subject matter of the Notice of Application that the respondent ceased to operate and Mr Clement, as its Managing Director, has been obliged to seek work. He now is the immediate supervisor of the applicant, apparently in part following Mr Clement's action in promoting the applicant. Mr Clement states that he is in that position because he assumed from the applicant's disinterest in the application that it was "all over". I infer that Mr Clement would not be in his current uncomfortable position if he had thought otherwise. Mr Clement has effectively altered his position to his prejudice based, I think reasonably, upon the lack of action by the applicant. Mr Clement considers that his position might become untenable if the application is allowed to proceed.

20 Fifth, I consider the respondent's conduct overall in this application to have been quite satisfactory. I note at once that the respondent was not represented legally at any stage and that Mr Clement, I infer, is himself working, however he has attended the conference called by the Commission and responded promptly whenever the Commission has requested any assistance from him. I attach little weight to the fact that Mr Clement has himself not initiated any move to have the application discontinued.

21 Balancing these factors leads me to the conclusion that the applicant's lack of interest in his application for a period of at least 6 months cannot be passed over

especially given Mr Clement's current position. While there may be some reason on the authorities to differentiate between claims of unfair dismissal and claims for denied contractual entitlements particularly as a claim for a denied contractual entitlement is not subject to the 28 day time limitation imposed upon an applicant claiming unfair dismissal, I am unable to differentiate between these two claims for this purpose. I acknowledge, as was submitted on his behalf, that the sum of money claimed in the denied contractual benefits claim is not insignificant. However, that is as much a reason for an applicant to vigorously pursue the claim as anything else and the size of the amount claimed is an added reason why I have concluded that the applicant, for whatever reason, was merely not interested for an unwarranted period of time in pursuing it .

22 I do note that the applicant's legal representatives have, since the hearing on 29 January 2001, lodged in the Commission further detailed particulars of the applicant's claims and indicate that he is ready to proceed. Nevertheless, for the reasons I have outlined, I regard the fact that Mr Clement advises that he had reached the conclusion that the claim was no longer in existence, and may even have done things as a result which he otherwise might not have done, as being a valid consideration. The respondent has as much of an interest in the fate of an application against it as does an applicant and the respondent's interests are not merely to be ignored now that the applicant has, after the Commission itself listed his application For Mention Only, decided that he now wishes to proceed.

23 For all of those reasons I have reached the conclusion that an Order now issue that the application be struck out for want of prosecution.

2001 WAIRC 02282

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	PETER HAMMOND, APPLICANT
	v.
	GOLDFIELDS SCAFFOLDING PTY LTD, RESPONDENT
CORAM	COMMISSIONER A R BEECH
DELIVERED	THURSDAY, 15 MARCH 2001
FILE NO	APPLICATION 419 OF 2000
CITATION NO.	

Result	Application alleging unfair dismissal and denied contractual entitlements struck out for want of prosecution.
Representation	
Applicant	Mr R. Carthew (of counsel) on behalf of the applicant.
Respondent	Mr M. Clement on behalf of the respondent.

Order.

HAVING HEARD Mr R. Carthew (of counsel) on behalf of the applicant and Mr M. Clement on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders—

THAT the application be struck out for want of prosecution.

(Sgd.) A. R. BEECH,
[L.S.] Commissioner.

2001 WAIRC 02419

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	CHRISTINE DAVID JOSEPH, APPLICANT
	v.
	CHELSEA'S FOR HAIR AND BEAUTY, RESPONDENT
CORAM	COMMISSIONER P E SCOTT
DELIVERED	TUESDAY, 27 MARCH 2001
FILE NO	APPLICATION 1853 OF 2000
CITATION NO.	2001 WAIRC 02419

Result	Application alleging unfair dismissal upheld and order issued for compensation.
Representation	
Applicant	Appeared on her own behalf
Respondent	Mr R Grigoroff

Reasons for Decision.

1 The applicant claims that she has been unfairly dismissed from her employment and she seeks compensation for that unfair dismissal.

2 The Commission has heard evidence from the applicant, from the applicant's husband David Kakkassery Joseph, and from the owners of the business, Julie Ann Lovell and Neil William Tears.

3 The applicant's evidence was that she commenced employment with the respondent as a senior hairdresser on 27 October 1997, working 29 hours per week being 8 hours Tuesday, Thursday and Friday and 5 hours on Saturday. She was paid $493.00 per week (ie $17.00 per hour). Her employment terminated on 2 November 2000, without warning and without any reason being given to her. The applicant says that there were never any complaints about her work, she was never warned that her employment was in jeopardy, that she was reasonably sure that she would be employed into the future, she had no disagreements with her employer and she has given evidence as to the effects upon her of the termination. The applicant seeks compensation of 26 weeks pay at the rate of $493.00 per week plus 8 per cent superannuation, less 21 hours pay given to her at the time of termination. She does not know the basis of the 21 hours payment. The total amount claimed is $13,486.44. Since termination, the applicant has sought to mitigate her loss and she says that she has worked through another salon and has earned $1,436.18 after expenses. She denies allegations put to her of failing to keep proper records, of not finishing off clients but delegating that to others.

4 It is clear from exhibit 1 that the applicant's own handwriting in the appointment book was not ideal. She says that it was not very legible but that she kept records that she could understand. The applicant acknowledges that she made numerous telephone calls to her stockbroker whenever she had the time and says that she was not told not do so. She says that she was not the only person who made private calls. She also made notations within the appointment book of stock market results and says she was never told not to do so. She says that Ms Lovell told her once that her husband was not to use the salon as a thoroughfare to the toilet or to leave brochures for his travel agency business which was next door, in the salon. The applicant denies that she was responsible for the till and for shortfalls in the balance. She does not recall an amount of money being found in the till or near it or being spoken to about that.

5 The respondent says that in hindsight it ought to have advised the applicant of the reasons for dismissal but did not do so because of the potential for conflict that that would bring.

6 The respondent has provided evidence that the applicant was unable to listen to instructions and had to be told many times to do or not to do certain things. Ms Lovell

has given evidence that on several occasions she had to speak to the applicant about delegating her duties to others including balancing the till. She also spoke to the applicant about keeping the back door locked for security reasons, and about others finishing off her clients for her. There was evidence that in the beginning of the year 2000, the applicant's attitude changed and she became uncooperative and disrespectful, and was not the same as she had been previously. There is evidence of her becoming unhappy and that she had said that she would look for other work.

7 Mr Tears has given evidence that the applicant's motivation changed and she became distracted, and that there were reports by staff that she had become preoccupied with money. The respondent saw its telephone bills rising and an assessment of the telephone accounts showed that a lot of numbers called from the business telephone were not work related. Mr Tears discovered that a large number of calls were being made by the applicant to her stockbroker. Mr Tears says that all employees were specifically told on a number of occasions not to use the telephone for other than salon business.

8 It is quite clear from the applicant's own evidence and from Exhibit 2 that the applicant made numerous private telephone calls, and the respondent's telephone accounts show that on some days the applicant rang her stock broker on no less than 5 occasions (for example 16 March 2000 and 29 June 2000). There are also many other telephone calls of a non-work related nature. There are also in Exhibit 1 (an extract from the appointments book) notations made by the applicant of share price changes.

9 The respondent had a number of complaints about the applicant which were not put to her however, other complaints about her conduct were clearly put to the applicant on a number of occasions.

10 I have observed the witnesses as they gave their evidences. From my observation of the applicant, I find that Ms Lovell's comment that the applicant was unable to listen to instructions and had to be told things many times was more likely than not to be true. The applicant did not listen to things put to her during the course of her evidence but was intent upon her own course of action.

11 In all of the circumstances I conclude that the respondent had good cause to terminate the applicant's employment. I am satisfied that her motivation had significantly diminished in the more recent part of her employment, that she did not perform her duties as required, she delegated a number of them to others. She spent considerable time and the respondent's resources using the telephone for private purposes and I am satisfied that she had been told, on a number of occasions, as were other staff, not to do so. The relationship between the parties had come to a point where action needed to be taken. However, in terminating the applicant's employment without any warning, and in refusing to provide the applicant with reasons for dismissal, the respondent has unfairly treated the applicant. In this regard there has been a denial of procedural fairness. In the circumstances of this case, I find that the denial of procedural fairness constitutes unfairness in the dismissal. In that circumstance, I am obliged by the terms of s.23A of the Industrial Relations Act 1979 to consider whether reinstatement is practicable. In light of the clear breakdown in trust between the parties I find that reinstatement is impracticable.

12 Accordingly, there is to be consideration of compensation. I note the decisions of the Full Bench in *Smith v CDM Australia 1998* 78 WAIG 307 at 312, in *Lindsaff International v Roberts (1996)* 67 IR 381 (at 393) and in *Capewell v Cadbury Schweppes Australia Ltd (1998)* 78 WAIG 299. Even though the dismissal was unfair for lack of proper procedure, I am not satisfied that the applicant being advised of the reasons for dismissal or having been given a formal warning would have made any significant difference to the applicant's attitude and performance. It was clear to me that the applicant had her own very firm views of what was acceptable and what constituted her responsibilities. I conclude that even if a formal warning had been issued the applicant would not have continued in employment for any significant period beyond the point at which she was dismissed. I am satisfied that a period of no more than two weeks would have enabled the respondent to have formally warned the applicant and given her ample opportunity to have remedied the defects in her performance. However, I conclude that in the circumstances, it is highly unlikely that the applicant would have remedied the defects so that her employment would have continued beyond the two weeks which I have indicated might have been a reasonable period for her to have been given an opportunity to correct those defects. The applicant has already been paid 21 hours, which the respondent described as a week's pay. In fact, the applicant's normal week's work was 29 hours. Therefore, one week's pay for her should have been 29 hours and she was underpaid eight hours if it was the respondent's intention to pay her a week's pay. In addition to this eight hours, the applicant might have earned a further 29 hours pay in the fortnight of the warning period. I assess the applicant's loss as being 37 hours pay. Accordingly, an order for payment of 37 hours pay shall issue.

2001 WAIRC 02523

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	CHRISTINE DAVID JOSEPH, APPLICANT *v.* CHELSEA'S FOR HAIR AND BEAUTY, RESPONDENT
CORAM	COMMISSIONER P E SCOTT
DELIVERED	FRIDAY, 6 APRIL 2001
FILE NO	APPLICATION 1853 OF 2000
CITATION NO.	2001 WAIRC 02523

Result	Application alleging unfair dismissal upheld and order issued for compensation.
Representation	
Applicant	Appeared on her own behalf
Respondent	Mr R Grigoroff

Order.

HAVING heard the applicant on her own behalf and Mr R Grigoroff on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act 1979, hereby—

1. DECLARES that the applicant was unfairly dismissed from her employment with the respondent.
2. ORDERS that the respondent shall pay to applicant the amount of $629.00 within 7 days of this order.

(Sgd.) P.E. SCOTT,
[L.S.] Commissioner.

2001 WAIRC 02356

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	EMMANUEL KAPSANIS, APPLICANT *v.* GOLDSPACE PTY LTD T/AS PARABURDOO INN, RESPONDENT
CORAM	COMMISSIONER J F GREGOR
DELIVERED	TUESDAY, 20 MARCH 2001
FILE NO	APPLICATION 1465 OF 1999
CITATION NO.	2001 WAIRC 02356

Result	Dismissed
Representation	
Applicant	Mr T. Mijatovic (of Counsel) on behalf of the applicant
Respondent	Ms M. Saraceni (of Counsel) on behalf of the respondent

Reasons for Decision.

1 On 21st September 1999 Emmanuel Kapsanis (the applicant) applied to the Commission for orders pursuant to the *Industrial Relations Act, 1979* (the Act) on the grounds that he had been unfairly dismissed from employment with Goldspace Pty Ltd t/a Paraburdoo Inn (the respondent).

2 The Paraburdoo Inn is located in the northwest of Western Australia, approximately 250km southeast of Karratha. The applicant says that he accepted a position of chef which had been offered to him by telephone on or about 1st September 1999. This happened after he had discussions by way of a telephone interview and had sent his resume and references to the respondent. The applicant claims that it was agreed between him and Mrs Olive Henwood, a Director of the respondent, the he would be employed for a period of six months without any probation being stated, inferred or implied.

3 As arranged he had departed from Perth on 10th September 1999 and arrived at the Paraburdoo Inn at around 8:00am on that day, he was allocated accommodation and immediately commenced duties of the chef. He claims that he familiarised himself with the kitchen environment in company with Mrs Henwood. He offered to assist in the preparation of meals and this offer was accepted. He worked until 2:00pm, he then returned to the kitchen in the evening and worked until 11:00pm.

4 During the evening he had proceeded to the designated smoking area on a couple of occasions. Following the clean up of the kitchen he returned to find that a customer had ordered a cheese platter which he prepared. He says that the preparation of this dish was abruptly interrupted by Mrs Henwood who took the platter and left the kitchen without explanation.

5 After discussions with Mrs Henwood concerning the starting time for the next morning he retired. When he arrived for work the next day no-one was at the kitchen so he returned to his quarters. He eventually went to the kitchen and an argument developed between him and Mrs Henwood. He believed her conduct was such that he was justified in withdrawing from the kitchen and he did so telling her that when she was prepared to deal with him in a proper manner he would return.

6 The applicant said there was no attempt made to contact him until around 3:00pm on 12th September 1999 when Mr Henwood came and asked him to vacate his room. He had asked why and was told that arrangements had been made for another chef to come from Perth to replace him.

7 The applicant said he understood this to mean that he was not required anymore because no-one had asked him to come into work. He had said to Mr Henwood words to the effect that he had no intention of going anywhere and that he [Mr Henwood] could tell Mrs Henwood that he would be staying where he was. His evidence to the Commission was that he knew no-one in the town.

8 The applicant says that on the following day when he went into the kitchen to find out what was going on he was told to pack his gear and go and stand on the crossroad and wait for a truck. As he had been told to vacate the room he concluded that he was sacked so he made arrangements to return to Perth. At his own expense he obtained an airline ticket and Mr Henwood gave him a lift to the airport. The applicant says his dismissal is unfair in all the circumstances, he went to Paraburdoo on the understanding that would have work for six months. There was no agreement for a probation period and his treatment generally by the respondent did not allow him a proper opportunity to fulfil his contract of employment.

9 The respondent accepts a number of the claims made by the applicant. It agrees that it was arranged to pay him an airfare so that he could fly to Paraburdoo on the understanding that the airfare and a return fare would be refunded to him if he worked for six months. His salary was to be $650 nett per week, accommodation and meals were included in the package. The respondent does not dispute the arrival times claimed by the applicant, however the majority of claims are rejected.

10 There was no contract of employment setting out a fixed term of six months. That is not an arrangement that has ever been entered into by the respondent, employment is offered to employees on an ongoing basis subject to successful completion of probation. This had been agreed with the applicant in the telephone conversations leading to his engagement. The condition of employment relating to probation was specifically explained to the applicant prior to him being engaged. He had responded by saying words to the effect that probation was mutual. That is he would decide after a week or so whether he wanted to stay with the respondent.

11 It is agreed that the applicant responded to an advertisement in the West Australian newspaper for a cook, however the advertisement required a person capable of a la carte and short order cooking. The discussions leading to the engagement of the applicant were conducted over the telephone by Mrs Olive Henwood. The final conversation which led to the offer of an engagement was witnessed by her husband and another employee.

12 The respondent contends that after the applicant arrived at Paraburdoo he was shown his accommodation and taken by Mrs Henwood for an overview of the kitchen. She described to him the location of various items of equipment and showed him documents which set out standard preparation techniques for menu items. It is the contention of the respondent that the applicant presented to the kitchen to observe on the first day that he arrived, he was not required to work. However he volunteered to work as a kitchen hand. This offer was accepted and he prepared several meals, however his skills did not reflect the competence claimed by him during interview. On three separate occasions he either burnt or presented a meal which was below the standard required by the respondent. He did not seem to adhere to the requirements of the smoking policy even though it was explained to him.

13 Clear instructions were given to the applicant concerning the time he was to commence shift in the morning for the breakfast meal. He was not at work at the appointed time and when he did present later on he was uncooperative and argumentative. When he was asked to commence his preparation work for the afternoon and evening meals, he took it upon himself to remove himself from the kitchen and did not ever report back to work.

14 During the afternoon the respondent sent an employee, Ms Rose Guerlain, to find out the applicant's intentions, she reported back that she was unable to get any response from him. She went to the applicant's room knocked loudly. Later she told Mrs Henwood that she thought someone was in the room but they were not answering. She was sent back to try again, she knocked and yelled loudly, there was no answer but she could hear the television. She again reported back to Mrs Henwood, she was instructed to go back again before dinner preparations were to start. For a third time at around about 5:00pm, she again went to the room. According to her evidence she saw the light was on, she knew someone was in the room but there was still no answer. The television was still going, she knocked very loudly on the door, called out "are you there" on a number of occasions and identified herself. She reported back to Mrs Henwood that she had again been unsuccessful. Ms Guerlain told the Commission that the applicant still did not present for work on the following Sunday morning. There was a discussion between Ms Guerlain and Mr and Mrs Henwood about the applicant's whereabouts and it was decided that Mr Henwood would go and speak to him. Mr Henwood returned to say that the applicant was in the room but that he is not answering the door. Eventually

Mr Henwood advised Mrs Henwood that he had spoken with the applicant and that arrangements were being made for him to return to Perth.

15 The Commission needs to make findings concerning witness creditability. I had the opportunity to see and hear the applicant give his evidence in an extended examination in chief and an equally extensive cross examination. It was particularly during the cross examination I was able to observe his demeanour when he was subject to questioning that he obviously did not like. His reaction was quite aggressive, his answers to Ms Saraceni (of Counsel) who appeared for the respondent on occasions bordered on the petulant. He presented as a person who if he did not get his own way, if things did not flow the way he wanted them to, would be capable of responding in his own defence in a extremely positive way. He seemed quite willing to shape the story he presented the Commission to suit the outcome that was most favourable to him. All in all he was not an impressive witness. I have made allowance that English may not be his first language, however even with that concession I think that there is no doubt that he understood communications between him and the employer. His responses to what was put to him during his evidence were measured to produce benefits to his position. The applicant did not present as a satisfactory witness at all.

16 The Commission heard from Mrs Olive Henwood her story was consistent under examination and cross examination I do not diminish the value of her evidence by the suggestions that Mr Majatovic (of Counsel) made in examining her that the documents which had been submitted to the Commission as part of the Answer and Counterproposal painted a slightly different picture to that presented by Mrs Henwood. This is not a court of pleadings and the best evidence available is the evidence on oath. There were adequate explanations from Mrs Henwood for the information filed and the quality of her evidence was not diminished thereby.

17 There is no reason for the Commission to draw any adverse conclusion about the quality of evidence from Ms Guerlain, she appeared to be an honest and forthright person. One can say the same about the evidence from Mr Bill Henwood who was also a Director of the respondent. His evidence in chief is not disturbed by vigorous cross examination by Mr Majatovic and I am satisfied that he told the Commission the chronology of events that occurred, honestly and without embellishment.

18 After considering the evidence and for the reasons set out above I find that where the evidence of the applicant differs from that of the respondent, I prefer the evidence presented on behalf of the respondent. There is another reason why I do so and that is because the evidence of the respondent enjoys corroboration. The primary evidence for the respondent came from Mrs Olive Henwood she is supported in her memory of events particularly relating the telephone calls by Ms Guerlain and by her husband. I think that gives added emphasis to the contention that the evidence that has been presented on behalf of the respondent is more likely to be the proper reflection of the events than that presented by the applicant.

19 There are some matters of law which were raised by the respondent to which I must give my attention.

20 An industrial matter may be referred to the Commission in the case of a claim by an employee that he has been harshly, oppressively or unfairly dismissed from his employment. It follows that for this right to be exercised there must have been an employment contract and an employee must have been dismissed from his employment. It is contended in this case that there was no employment contract, at the most there was an offer to commence an employment contract which was never brought to fruition. It is contended that the respondent did not terminate the applicant's employment, but he, by conduct, abandoned that employment by failing to work when asked to on the first day of the job and not advising the respondent of his decision. This means that the fundamental underpinning for the exercise of the right that an individual employee has to refer a matter to the Commission is missing, that is there was no employment contract. If it is concluded there is no dismissal then there is no jurisdiction for the Commission to deal with the claim. *Atherton v Cardlink Pty Ltd (1999) 79 WAIG 2231* is authority for this proposition. Whether or not there is a dismissal is question of fact as described in *Clark v PittWater RSL Club Ltd (1988) 84 IR 309* these issues have also been discussed in *Attorney General v WA Prisons Officers' Union (1995) 75 WAIG 3166* and *Robowash Pty Ltd v Hart (1998) 78 WAIG 2325.*

21 The Commission is bound to apply the rules set out in *Undercliffe Nursing Home v The Federated Miscellaneous Workers Union (1985) 65 WAIG 385* which establish that the question to be asked is whether in the exercise of its legal right to terminate the employee's employment an employer has acted so harshly and oppressively to an amount to an abuse of the right. Fundamentally what the Commission has to do is ensure that in reaching a decision to dismiss there has been a fair go all round, this means has there been a fair go to the employee and the employer? The assessment of fairness should be the product of an objective examination of what occurred between the parties, decided in the context of normal commercial dealings.

22 The Commission is to apply this case law to the facts of the matter and I now proceed with my analysis and findings.

23 On the balance of probabilities I find that the most likely course of events in this matter was that the applicant saw an advertisement for the position in the newspaper and made contact. There was a discussion between him and Mrs Olive Henwood which resulted in his resume and other employment information being sent by him to the Paraburdoo Inn. It is clear from the evidence of Mrs Henwood and Mr Henwood that filling of positions in hospitality industry in Paraburdoo is problematic. The experience of the respondents is that it is unusual that employees, particularly in the position of chef, will stay at the hotel for extended periods. That is a product, according to Mrs Henwood, of the remoteness of the location and the availability of work in the hospitality industry for skilled people.

24 Therefore making an arrangement with an applicant for employment over the telephone is something which was usual for the respondent because of the expenses incurred in recruiting otherwise. I find that it is more likely than not that in the telephone conversation between the applicant and Mrs Henwood, witnessed by Ms Guerlain and Mr Henwood, that it was arranged that the applicant would come to Paraburdoo. It was agreed that the respondent would fund his airfare to Paraburdoo but on the basis that he was to serve six months and at the completion of that time he would have a return airfare given to him. This is a notorious arrangement in the northwest of Western Australia. The applicant had worked in remote areas on many occasions and would have been fully aware that the arrangement was a usual one. It is open to find, and I do, that he raised the issue of the refund and this was agreed by the respondent.

25 This should not be taken to mean, and I find in this case was not taken to mean, that he had a fixed term of six months work at Paraburdoo. I accept the evidence of Mrs Henwood, corroborated by the other listeners to the telephone conversation, that it was made clear to the applicant that there was a probation period. I accept that it is more likely than not that the applicant said to Mrs Henwood words to the effect that he would come and he would have a look at the respondent's operations and the respondent could have a look at his skills and if they did not like each other after a week or two he would leave. I find that was the substance of the conversation and that conversation created a probation period. As to the precise length of that period there is no need to make a finding about that because the employment contract, if there was one, only lasted a short period.

26 The applicant arrived in Paraburdoo and was shown around the kitchen where he was to work by Mrs Henwood. It is the contention of the respondent that any

work done by the applicant on the first day was purely voluntary and that the contract of employment was to start the next morning. What occurred was when the applicant came in to work he may have done some duties at lunch time but more likely than not he did perform work in the evening. There is controversy between the parties about his standard of work in preparing a rack of lamb which was according to Mrs Henwood was burnt, some chicken which was also burnt and another dish which had to be thrown out. There was also controversy about how he went about preparing a cheese platter which according to Mrs Henwood was not presented in accordance with a way that the respondent required it to be prepared and on which it was necessary that Mrs Henwood do further work before it was served to the customer. When the applicant was doing these duties it is reasonable to conclude that the intention of the parties to enter a contract was brought to fruition by allowing him to do so. He took part in activities which provided the respondent with a commercial benefit, even though his efforts, according to the respondent, were substandard. For that reason I find that the respondent's submissions that there has been no dismissal in this case because the contract was never formed are wrong and are rejected.

27 A contract of employment was formed, however the night's activities can best be described as unsatisfactory from the respondent's point of view. The applicant was told to report for duty for preparation of breakfast the next morning. I am prepared to accept that he did go to the kitchen some fifteen minutes before the due time, he then went back to his accommodation but later he did not present when he should have. The respondent was entitled to draw the conclusion that he was late and this, on top of the respondent's concern about his performance the night before, created some tension. This tension led to a discussion between Mrs Henwood and the applicant which was heated and he withdrew himself from the workplace. By this time, as I have found, he was employed and he had no right at all to remove himself from the workplace. Notwithstanding his conduct the respondent took no precipitative action concerning the continuation of the contract of employment at that time. It made a series of attempts to find him and ask him to return for duty, on three occasions Ms Guerlain went to the applicant's accommodation. Ms Guerlain tried to make contact with him and even if he did not hear, which I doubt, he should have known that he had an obligation to be working during those periods and he did not do so. He must have realised that he was required to work across the whole of that day and he made no attempt to present himself for duty. His conduct in this respect is quite unfathomable but why he did not report is not important, that fact is that he did not present for duty when he was required. He abandoned his contract on that day. Eventually on the second occasion that Mr Henwood went to try and make contact with him, he only responded when Mr Henwood put the pass key in the door. Then he made it known that he was present in the facility. Even if he had been out of the accommodation for some reason during the time Ms Guerlain tried to contact him does not distract from the obligation that rested on him to present himself for work as required. The respondent had every reason to believe that the applicant was not going to perform his contract of service. It was entitled to conclude that the applicant had reached the conclusion that he did not wish to continue the contract as had been foreshadowed in his discussions with Mrs Henwood when he agreed that they would both have a look at each other and decide whether the contract would continue.

28 It is open to conclude and I do that this respondent took every reasonable action to allow the applicant to perform his contract of employment. For reasons best known to him and in this respect he is the architect of his own misfortune, he did not present himself to work as required. It was open to the respondent to conclude that he was never going to do so. His conduct by staying in the accommodation led them to conclude that the only way that he would be removed would be to terminate his contract of service and that is what occurred.

29 The question here is whether there has been a fair go all round. In particular whether the respondent has abused its right to terminate the contract of employment or in doing so brought the contract to an end in a harsh and unfair way. In the circumstances as I have described them there has been no breach by the respondent of its obligations to act fairly to the applicant. He did receive a fair go, his attempts to emotionalise the argument about claiming to be sent out on the crossroads in 40 degree temperature was no more than an attempt to colour the story to his benefit. There was never any intention to do any of those things to him and this is obvious from the fact that Mr Henwood provided transport to the airport at a time suitable to the applicant.

30 The application will be dismissed.

2001 WAIRC 02355

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	EMMANUEL KAPSANIS, APPLICANT *v.* GOLDSPACE PTY LTD T/AS PARABURDOO INN, RESPONDENT
CORAM	COMMISSIONER J F GREGOR
DELIVERED	TUESDAY, 20 MARCH 2001
FILE NO	APPLICATION 1465 OF 1999
CITATION NO.	2001 WAIRC 02355

Result	Dismissed

Order.

HAVING heard Mr T. Mijatovic (of Counsel) on behalf of the Applicant and Ms M. Saraceni (of Counsel) on behalf of the Respondent, the Commission pursuant to the powers conferred on it under the *Industrial Relations Act, 1979*, hereby orders—

THAT the application be, and is hereby, dismissed.

(Sgd.) J. F. GREGOR,
[L.S.] Commissioner.

2001 WAIRC 02324

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	RUSTON ANTHONY KELLAR, APPLICANT *v.* BDM MARKETING PTY LTD ACN 067 632 688, RESPONDENT
CORAM	COMMISSIONER S WOOD
DELIVERED	FRIDAY, 16 MARCH 2001
FILE NO	APPLICATION 481 OF 2000
CITATION NO.	2001 WAIRC 02324

Result	Application dismissed for want of jurisdiction
Representation	
Applicant	Mr T C Crossley as agent
Respondent	Mr O Moon as agent

Reasons for Decision—Preliminary hearing on jurisdiction

1 This is an application made pursuant to section 29(1)(b)(i) of the *Industrial Relations Act, 1979* (the Act). The applicant, Mr Ruston Anthony Kellar, says that he was dismissed without warning on 20 March 2000 from his position with the respondent, BDM Marketing Pty Ltd,

as Area Manager (with no authority to hire or fire). The applicant, in his application, says he was employed by the respondent on 20 February 2000 to follow up leads of telemarketers, visit potential and existing customers, sell advertising and do weekly sales reports. He says he performed these duties in Perth and country areas and was paid $600 per week. The applicant considers that reinstatement would be impracticable and seeks 12 weeks compensation for he says being harshly, oppressively and unfairly dismissed.

2 The respondent, whose main office is in Sydney, in their Notice of Answer and Counter Proposal challenges the validity of the claim and says that the applicant was never employed as an employee, but was engaged as a contractor. They reference the contract which states—

> "Congratulations on your Sales Contract with BDM Marketing Pty Limited. Your contractual period will commence on Monday, February 21st, 2000.
>
> Conditions covering your contract with BDM Marketing are as follows—
>
> - Retainer and petrol allowance ..... $120 per day
> - *If the conditions below are met on a weekly basis* ..... $160 per day

3 That $6,000 worth of advertising contracts have been sold, with signed contracts including signed art forms and signed periodical payment forms.

4 That all leads have been confirmed and followed up.

5 That the Area Manager was punctual and carried out his/her duties in an honest and reliable manner.

6 That the Daily Report Sheet of the previous day's leads was received by the office.

CONTRACT PAYMENTS

- All retainer payments are made on a weekly basis and must be invoiced
- Commissions are paid over a three month period; i.e. 40% of commission due at the end of the month the contract is sold (first month), and 30% paid in each of the following two months.
- Conditions 1-4 must be met.
- Commissions are paid only after the first $20,000 has been sold during that month, as stated below.

Per month:	Commission payable—
Nil —$20,000	Nil
$20,001—$30,000	5%
$30,001—$40,000	10%
$40,001—$50,000	15%
$50,000 up	20%
Sales through advertising agencies	5% flat rate
Head office sales over $5,000 in one contract	7.5%

Bonus on obtaining $40,000 in sales in one calendar month will be $400.00.

> All the above conditions are only in force while contracted by BDM Marketing Pty Limited.

If the above is agreeable, please sign below, and return one copy to the Perth office as soon as possible."

The signed contract was marked as [Exhibit RK1] at hearing.

3 The matter came on for a conciliation conference on 16 June 2000 at which time the respondent sent a representative who was not authorised to deal with the matter. The application was again listed in conciliation by teleconference on 15 September 2000. Mr Brian Murray, a Director of the company, attended to the teleconference. The matter did not settle and was referred for hearing, initially to deal with the jurisdictional issue of whether Mr Kellar was a contractor or an employee.

4 The respondent did not attend at hearing. Written submissions were filed and Mr Murray Aldridge, who originally engaged the applicant, and the applicant, gave evidence. At the conclusion of the hearing the Commission forwarded the transcript to the respondent and a copy of the Full Bench's decision in *The Western Australian Builders' Labourers Painters and Plasterers Union of Workers v. R B Exclusive Pools Pty Ltd trading as Florida Exclusive Pools* 77 WAIG 7 and gave the respondent the opportunity to make final submissions and for the applicant to reply. Mr Moon filed submissions for the respondent after having been granted an extension of time. Mr Moon also filed, with the submissions, an affidavit from Mr Brian Murray. This affidavit was not considered by the Commission as the time for dealing with such evidence was past and there was no opportunity for the applicant to test that evidence. Mr Moon also filed at a later date and out of time an invoice purporting to be an invoice from Mr Kellar as Ruston Kellar Agencies. This document was also not considered.

5 Mr Aldridge says that Mr Kellar was engaged not as an Area Manager but to call on prospective clients to sell advertising space and that the calls were set up by the company's telemarketing operation. The operation was run out of a house and involved two telemarketers, an office administrator and three or four salespeople. He says that he had known Mr Kellar for some years and interviewed him in February 2000. At that time he advised Mr Kellar that the financial arrangements would be $600 per week as a retainer and scaled commission based on performance. The contract as detailed previously is not in dispute and was signed by Mr Aldridge and the applicant on 21 February 2000.

6 Mr Aldridge says that the applicant was not required to produce company details or a taxation file number. He says he simply started work which involved taking the 10 to 12 leads a day and approaching these prospective customers to sell advertising space in carparks. The leads could be picked up, telephoned through or received by facsimile. He says that the applicant had to provide something each week to say how much he was to be paid for that week, ie retainer plus sales. He says that he does not know whether the applicant submitted any invoices or got paid, but he assumes that he did get paid otherwise Mr Aldridge would have expected to hear about that. Mr Aldridge says that he was paid in a similar manner to the applicant and that he left the respondent as he had lost confidence in the company because there were a lot of dramas with getting paid on time. Mr Aldridge says that he used his own car to make the sales and did not receive annual or sick leave and that the issue of leave was never discussed with the applicant.

7 Mr Crossley for the applicant says in his final submissions that Mr Aldridge indicated that he employed Mr Kellar, and the intention at the formation of the contract was to create an employer-employee relationship. However, his evidence at hearing and in his statement [Exhibit MA1] does not go that far. Instead his evidence is that he employed Mr Kellar and suggests that there may be an employer employee relationship. This is in answer to questions that go to the criteria for judging whether the relationship is one of employer and employee. Yet Mr Aldridge's evidence concerning his control of Mr Kellar is that if Mr Kellar had a problem he could have talked to him and that he expected Mr Kellar got paid as he did not hear from him on that issue.

8 Mr Kellar gave evidence in similar terms to Mr Aldridge concerning the initial interview, except that he says he was told that he was to be an employee of Media Marketing as a sales representative. He says that he was not required to pay his own taxation or superannuation and no expenses as a business were claimed on taxation. He says that he undertook one day of training initially on an unpaid basis. He says that he was not aware of any complaints about his performance except in relation to sales at the City West shopping centre.

9 It is clear from the evidence that Mr Kellar invoiced the respondent weekly for the amounts that he considered were due to him. The amounts, on Mr Kellar's evidence, were paid by direct credit into his account under his own name and not a business name. It is clear that Mr Kellar from his own evidence expected to pay his own taxation and did not expect to receive any leave, be that annual or sick

leave. These later points are not self evident from the transcript where Mr Kellar was somewhat hesitant or equivocal about these issues. However, I have no doubt from viewing Mr Kellar in giving his evidence that he knew what the contractual arrangement contained, knew that he did not receive leave and was responsible for his own taxation, and knew that he was simply contracted to sell advertising space and to be paid accordingly. Mr Kellar has many years of experience as a salesman and I consider that his evidence was disingenuous to have me believe that he was less than fully aware of the arrangements of his contract. This arrangement was different from other jobs he was employed to do, on his own evidence.

10 The Commission drew the attention of both parties to the *Florida Pools* case (supra) and the criteria laid out in that decision for assessing whether the relationship is one of contractor or employee. A central aspect to be considered is the control test. In that regard Mr Kellar on his own evidence and that of Mr Aldridge simply collected his contacts by telephone or in person from the administrator and then got on with the job of selling the carpark advertising space. He could talk to Mr Aldridge if he had a problem and he used his own vehicle and any other equipment to complete his work.

11 The agent for the applicant says that what happened with the contract was that two old work colleagues had an interview and very loosely agreed the arrangements between them. This is the evidence and I accept this submission. The applicant's agent calls this a contract of employment and I disagree. It can better and more accurately be characterised as a contract for service, albeit it was indeed an inappropriately loose contract.

12 I do not consider on the evidence of Mr Aldridge and Mr Kellar that there was much by way of control exercised by Mr Aldridge on behalf of the respondent, over Mr Kellar. It was a loose arrangement. Mr Kellar simply telephoned in mainly, got his contacts and attended to them. The fact that he had 10-12 leads a day to follow up, and hence did not have much time for other sales work, does not lead me to a view that there was any large measure of control placed on Mr Kellar. This was simply the fulfilment of his contract for selling.

13 The fact that Mr Kellar had relatively regular hours is in my view only indicative of how the bookings were made and does not add significantly to any aspect of control of Mr Kellar's work. It is said on the applicant's behalf that he did not have a business name or seek taxation deductions as a business. Next the applicant's agent says that Mr Kellar did not work for anyone else and had to attend sales meetings. These matters are all said to be supportive of the control test for Mr Kellar as an employee. I have to rely on Mr Kellar's uncontested evidence for this.

14 In addition to what I have already said, balanced against this view is that Mr Kellar did not have taxation deducted, he invoiced for his claimed payment each week, did not receive leave entitlements, and operated quite autonomously, to sell the advertising space.

15 I would say in conclusion having considered carefully all the submissions of the parties and the evidence that I am not convinced that Mr Kellar was an employee. I have had regard to the reasons in *Stevens v Brodribb Sawmilling Company Proprietary Limited (1985-86)* 160 CLR 16 and *The Western Australian Builders' Labourers Painters and Plasterers Union of Workers v. R B Exclusive Pools Pty Ltd t/a Florida Exclusive Pools* 77 WAIG 7. I am not directed one way or the other by the contract [Exhibit RK1]. Its terms appear to me to be capable of interpretation as either a contract for services or a contract of service. In deciding this matter I am cognisant of the evidence given by Mr Aldridge and Mr Kellar in particular. I do not consider that on balance that Mr Kellar has proven his case. The clear impression I have of the evidence is that Mr Kellar, an experienced salesman, knew that the loose arrangement he had struck with Mr Aldridge, on behalf of the respondent, was not that of an employee. He objects justifiably to the respondent's treatment of him, but this does not alter the nature of the contract he entered into.

16 The respondent relied greatly on the contract in defending this matter as if the contract was clear and spoke for itself. In my view it does not and, as indicated, the contract on its face could be taken to be the engagement of a contractor or the employment of an employee. It was not until the transcript and decision in *Florida Pools* (supra) was sent to the respondent for final submission, that a more serious attempt to explain the relationship was forthcoming. This step was taken to ensure procedural fairness but was also taken as, on hearing the evidence of Mr Kellar in particular, I formed serious doubts about his claim.

17 Mr Crossley, on behalf of the applicant, also argues that the respondent has attempted to contract out of the Commercial Travellers and Sales Representatives' Award. He says there is a convenient silence about Mr Kellar not being an employee in the contract. He says that there is a weakness in the document in that it does not have any reference to Mr Kellar being a contractor instead of an employee. I agree with this for the reasons stated; but as I have said I have formed a different view of what relationship Mr Kellar thought he was engaging in.

18 For all of the reasons expressed above I would find that Mr Kellar was engaged as a contractor by the respondent and hence I do not have jurisdiction to hear this application. The application is therefore dismissed.

2001 WAIRC 02310

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	RUSTON ANTHONY KELLAR, APPLICANT *v.* BDM MARKETING PTY LTD ACN 067 632 688, RESPONDENT
CORAM	COMMISSIONER S WOOD
DELIVERED	FRIDAY, 16 MARCH 2001
FILE NO	APPLICATION 481 OF 2000
CITATION NO.	2001 WAIRC 02310

Result	Application dismissed for want of jurisdiction
Representation	
Applicant	Mr T C Crossley as agent
Respondent	Mr O Moon as agent

Order.

HAVING heard Mr T C Crossley on behalf of the applicant and Mr O Moon on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders—

THAT the application be and is hereby dismissed for want of jurisdiction.

(Sgd.) S. WOOD,
[L.S.] Commissioner.

2001 WAIRC 02476

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	JOSEPH PATRICK LYNCH, NORMINGTON WINN, APPLICANT *v.* TWINSIDE RETAINING WALLS & FENCES, MOUNT WELD NOMINEES PTY LTD TRADING AS TWINSIDE, RESPONDENT
CORAM	COMMISSIONER J F GREGOR
DELIVERED	WEDNESDAY, 4 APRIL 2001

FILE NOS	APPLICATION 1477 OF 2000 AND APPLICATION 1483 OF 2000
CITATION NO.	2001 WAIRC 02476

Result	Dismissed
Representation	
Applicant	Mr C. Fayle appeared on behalf of the Applicant
Respondent	Mr O. Moon appeared on behalf of the Respondent

Reasons for Decision.

1 Joseph Patrick Lynch and Normington Winn (the applicants) were both employed by Mt Weld Nominees Pty Ltd t/a Twinside Retaining Walls and Fences (the Respondent) until 8th September 2000 when they were both dismissed.

2 Each of them received a notice of termination in the following form—

"We regret to inform you that the recent downturn in the building industry has resulted in a severe cash flow shortage. We are (and will be) unable to continue to pay your wages. Therefore, you will no longer be employed by Twinside after Friday the 8th of September 2000.

We wish you well for the future,

Yours Faithfully

L.K. Polmear"

(Exhibit F4)

3 Each of the Applicants say that the notice of termination was given to them without explanation by Mr Lyndsay Polmear (Mr Polmear senior), the Chairman, of the Respondent. Mr Joseph Lynch was engaged in April 1999 as Administrative and Internal Sales Manager by a predecessor to the Respondent. On or about 13th May 1999 he received a letter from the Managing Director of his then employer advising him that the business had been sold and the new owners would take over from 1st July 1999. All monies due to him on 30th June 1999 would be paid subject to him agreeing he would be engaged by the new owner. In the letter of offer, (Exhibit F1), the writer offered the opinion that he did not anticipate that the new owner would change the fundamental basis of the terms and conditions of employment.

4 That came to pass and the new owners took over with Mr Lynch continuing to work as an Internal Sales and Administration Manager. By letter dated 10th May the terms and conditions of the new contract of employment were specified. The offer was based on Mr Lynch accepting the position of General Manager Twinside Retaining Walls and Fences, it described the role as the day to day running of the operation, including 'company functions in a financially responsible manner'. In his evidence Mr Lynch disputed that he ever was able to do so. He says that he worked under John Polmear who was the Managing Director.

5 Mr Lynch said that he considered a Job Description Form that had been presented to him, (Exhibit F3) and decided that some changes were necessary to enhance the training position of the company. On his analysis a large sum of money was spent on advertising, he reduced this in both radio and print media, even though the print medium advertising was subject to contract. He also undertook staffing changes by instituting a different scheme of employment. In his evidence in chief he told the Commission that Mr Polmear senior, the father of John Polmear the Managing Director, came into the office on the Tuesday 8th September 1999 he had documents folded under his arm, he placed one on the other Applicant in this proceeding Mr Winn's desk, and came into Mr Lynch's office. He handed over the document with the words "*I'm sorry I am bearer of bad news*" and walked away.

6 Mr Lynch says he was totally shocked by the letter, he could not absorb what was said, he had been told on numerous occasions by Mr John Polmear that he was an asset to the company and that to receive a dismissal letter in the way he did was devastating to him. He asked Mr Polmear, senior for an opportunity to discuss the matter as he thought it may be a practical joke. Mr Polmear, senior assured him to the contrary, Mr Lynch made enquiries about whether other employees were being laid off and he was told that they were. These employees were named. As far as Mr Lynch was concerned he had the intention of serving the company for fifteen or so years until he was ready for retirement.

7 He was aware that the trading situation of the company was not good, on numerous occasions he had discussed the problem with the Accountant. He had spoken to Mr John and Mr Lyndsay Polmear together and individually; every time that he mentioned the financials he was told not to worry and that there was considerable asset backing for the respondent's operations.

8 After the dismissal Mr Lynch says that he suffered stress such that he attended a medical practitioner, (Exhibit F5), who prescribed him medication which he continues to take. He was paid one weeks pay and two weeks pay for notice, (Exhibit F6), he disputed that he had been paid any money for redundancy as is shown on Exhibit F7.

9 Later he had seen a relative of the respondent's owner working in the operation and the advertisements that he had stopped started to appear again in the West Magazine, (Exhibit F9). In the period since he was dismissed, apart from two jobs of four hours each duration, he has not been able to obtain work.

10 During his cross examination Mr Lynch was subjected to detailed questioning from Mr Moon, who appeared for the Respondent, concerning his involvement in the operations of the company. There is no need to summarise that evidence in this part of the Reasons except to say that when dealing with financial documents Mr Lynch claimed that he had on numerous occasions pointed out to the principals that they had to cut back but they continued to go behind his advice, give increases of pay to staff and massive discounts when the respondent was in no sound position to do so. There was also decisions taken to delay regular maintenance. On numerous occasions he also had drawn to the attention of Mr Polmear that there was an excessive interest load.

11 The thrust of the evidence of Mr Lynch was that notwithstanding that he raised the financial position with the respondent's principals they continued to incur expenses that he was not told about, this made his position as a General Manager extremely difficult. He says that he was reassured many times that there was no problem because of the asset backing. He admitted too that the production figures were not indicative of a healthy position, he was aware even though he was not shown the detailed financials that the Respondent was running at a loss through the year leading up to his termination. He had discussions with Mr John Polmear the Managing Director on a continuing basis about the need to reduce staff because of the build up of stock in store. When he tried to institute staff redundancies the staff would go behind his back and speak to either Mr Polmear senior or Mr John Polmear. He was however able to effect a reduction in the numbers of staff hired through the employment agent being used by the Respondent.

12 The evidence of Mr Nomington Winn is that he is a person of 40 years experience in the building industry, he obtained employment with the Respondent after being referred to it for a clerical job. After an interview on 12th January 2000 he was offered a position as Assistant Project Manager with an initial three month probationary period commencing on 12th January 2000 concluding on 11th April 2000. During that time the contract could be terminated by either party on a week's notice.

13 By 15th March 2000 he had been offered a promotion, (Exhibit F11), Mr John Polmear the Managing Director wrote that he was pleased to confirm, the appointment as Assistant Project Officer and formally offer the position of Senior Projects Manager, describing it as a newly created role. Mr Winn already performed many of the tasks but there were additional responsibilities which

included overall control of the project manager's responsibilities for the correct installation of work and as an arbitrator and coordinator of warranty claims. He also received a pay increase to $31,500.

14 Thereafter Mr Winn controlled installation quotations, building plans submitted from clients and supervised the Sales Project Manager and Installation Project Manager. There were many problems with pricing. When he took over the focus was mainly to relieve pressure on Mr John Polmear, who was also doing quotations.

15 Mr Winn gave evidence that Mr John Polmear had given him lists of prices which showed that some builders received discounts from between 10 and 35% of the recommended retail price which, in the opinion of Mr Winn, was already too low. He attempted to have the prices increased having made a schedule of new prices. Some prices were raised but this did not stop Mr John Polmear giving discounts. Mr Winn described this conduct as trying to achieve jobs regardless of cost. On many occasions he was over ruled on pricing by Mr John Polmear.

16 In the last week of July 2000, some five weeks before his dismissal, his remuneration was increased to $37,500. He related meetings he had with Mr Lynch after he became General Manager, these meetings were held in an attempt to turn around the trading situation. He acknowledged that in June and July there was a general downturn in the building industry which is normal for that time of the year. He had drawn attention of Mr John Polmear to the situation and shown him the installation board which some days was down to one day's work. He was never given any suggestion from senior management of the respondent that his position was in jeopardy. No director of the respondent made any complaint to him about the standard of his work. On the contrary Mr John Polmear had told him that he would like Mr Lynch and himself to take charge of the company and run it while he was in the Eastern States.

17 Mr Winn says that on the day he was dismissed Mr Polmear senior came into his office, he did not have his normal cheerful disposition. Mr Polmear senior handed Mr Winn a folded piece of paper and said "*I'm sorry*" he made no other explanation, the paper was a notice of dismissal (Exhibit F4). Later Mr Polmear senior told him that if there was a possible chance he could use him as a contractor he might be able to. The Applicant rang Mr John Polmear and requested a reference. On 18th September 2000 he received the following reference over the signature of John Polmear—

> *"I have the greatest pleasure in writing this letter regarding the integrity, work loyalty and personality of Norm Winn.*
>
> *At Twinside Retaining Walls and Fences, Norm was employed as Senior Project Manager. This is a position that relies on the incumbent being reliable, diligent and personable. I will address each of Norm's qualities,*
>
> > ***Reliable:*** *Norm was reliable in all elements of his work regime. He consistently produced an outstanding level of work, and I could always rely on him to go the extra distance when the situation required it.*
> >
> > ***Diligent:*** *Norm was not only diligent but also fastidious in ensuring all elements of his job were done correctly. If he discovered something was overlooked, he would not rest until he had resolved the problem.*
> >
> > ***Personable:*** *The Senior Project Manager must wear several hats; mediator, site supervisor, etc. In each role, Norm had no problems. He was well liked and he mediated exceptionally well, always ensuring Twinside's position was not compromised.*
>
> *Norm left Twinside Retaining Walls and Fences due to the downturn in the building industry after the implementation of GST. There is no doubt in my mind that Norm is a valuable employee for who ever he is employed by and I strongly recommend, if you have the opportunity to utilise his services, do so.*
>
> *Please do not hesitate to contact me if you wish to discuss anything about Norm. It would be my honour to speak with you about his qualities.*
>
> *Yours sincerely,*
>
> *John Polmear*
> *Managing Director"*
>
> *(Exhibit F13)*

It is relevant to record that a reference in exactly the same terms with a different identification was given to Mr Lynch by Mr John Polmear.

18 Later in his evidence Mr Winn told the Commission that he had seen that the Respondent had employed other people in work which he recognised as that which was previously done by himself. He also gave evidence of his attempts to achieve employment.

19 The preceding is a sufficient summary of the evidence presented on behalf of the Applicants in this matter.

20 The position of the Applicants is encapsulated in the schedule to its Notice of Answer and Counterproposal. In substance the answer forms the basis of the opposition to the claim as presented by Mr Moon.

21 The Respondent agrees that both the Applicants were employed, in the case of Mr Lynch between 1st July 2000 to 8th September 2000 and in the case of Mr Winn from 12th July 2000 to 8th September 2000. More likely than not the terminations took place on 8th September 2000. It is agreed that Mr Lynch was employed in the position of General Manager at the time of his employment and Mr Winn was Senior Projects Manager. It is claimed that the Respondent terminated the services of both of the men on 5th September 2000 for economic reasons.

22 It is submitted that following the introduction of the Goods and Services Tax on 1st July 2000 that the housing industry suffered a dramatic downturn in activity which severely impacted on the operations of the Respondent. Given the severity of the downturn and the level of activity in housing sector the Respondent's level of work was similarly affected and as a consequence it was forced due to the economic impact of the downturn to reduce its workforce. There was a reduction in the number of persons employed from about 23 in early 2000 to 11 by 27th September 2000.

23 The Respondent rejected the assertions of the Applicants that their duties have now been undertaken by members of the family of the respondent's Directors as it rejected the allegation of the Production Manager had assumed duties in the employer's office previously performed by Mr Lynch.

24 The Respondent contended that due to the pressing economic circumstances it was forced to down size its workforce. In doing so it reduced its office staff numbers with the work being allocated to the remaining staff. It has employed no one since the termination of each of the Applicants.

25 On behalf of the Respondent the Commission heard evidence from Mr Lyndsay Keith Polmear who is the principal of Mt Weld Nominees. He related how he had made a decision to in conjunction with other Directors, to acquire the Respondent's business on the assessment that it would become a viable asset. As originally structured his son Mr John Polmear was to run the business. Mr Polmear senior considered that with his military and business experience his son would be able to handle the position. Mr Polmear senior gave evidence that his son continued in that role until about four weeks after the termination of the Applicants when he was dismissed as the Managing Director for lack of performance. The lack of performance related to financial and a general management of the business. The lack of performance of Mr John Polmear coupled with a similar deficiency in senior management was sending the Respondent bankrupt. For the good of the other members of the Mt Weld Nominees Mr Polmear senior had to intervene and intervene rapidly to deal with the problem.

26 Mr Polmear senior gave evidence that since the changes have been made there have been new and skilled people involved to do the work previously done by the Applicants and his son. The structure of the company is quite different. It has continued to operate with an overall reduction of 11 people employed. However at one stage the factory was down to four or five key personnel.

27 Mr Polmear senior gave evidence that he decided to restructure the business and make employees redundant. He had allowed his son as much management latitude as possible but the position was reached where the operation was continuing to go down hill to an extent that on a particular day the bank would not cash cheques. He managed to deal with that situation at the time, but he realised after making enquiries at the bank that the Respondent had reached the bottom of the barrel, he had to do something. He agonised over it. Eventually he rang his son and told him to return from Queensland and that he was going to start laying people off. He says that two weeks before he had mentioned to Applicant Lynch that the operation was top heavy and inside staff would have to go. He says Mr Lynch objected to this but he did not tell Mr Lynch that he would be one of the persons who would be leaving. As far as Mr Polmear senior was concerned what he meant was the Applicants Lynch and Winn and anyone else whose work was not essential for the ongoing operations of the company would have to go. The situation was desperate, it was almost at the point of no return and he had to do something. There was no way that the operation could be kept going paying the wages and operating costs under the structure that it had. The banks would have most definitely foreclosed on the operations, if that had happened the very large mortgages against the family properties would have meant a forced sale, the breaking up of investments that he and his family had laboured for over forty years to build.

28 There were financial documents put to the Commission concerning the losses. Pursuant to the powers in s.33(3) of the Act as that information related to trade secrets and profits and financial position of the Respondent the Commission ordered that there be non disclosure. For that reason though those documents will not be summarised in these Reasons, however suffice to say that the evidence of Mr Polmear senior is that the figures show the restructuring was bearing fruit. All pricing had been revised, the discounts had been refused and everything concerning the finance had been revamped to replace what Mr Polmear senior assessed as a shambles.

29 The proceeding recitations are sufficient summary of the evidence for the purposes of these Reasons for Decision.

30 I have had the opportunity of seeing and hearing the witnesses give their evidence. I find no reason to disbelieve the story presented to the Commission by each of the Applicants nor have I any reason to not accept the version of events given to me by Mr Polmear senior who described the events leading to his interventions in a powerful and positive way. In assessing the evidence being put to the Commission in this case the creditability of the witnesses, apart from the reservation I express later, is not an issue; it is the emphasis on the events and the inferences that should be drawn from those events which will decide this matter.

31 It is said by the Respondent that the terminations occurred as a result of a restructure of the Respondent's operations that had been thrust upon it by the financial position. It is said at law that there it is a term implied into a contract of employment that where an employer decides to restructure a job or to make a person redundant he will be entitled to be informed as soon as reasonably practical after the decision has been made to restructure or it is decided that there will be a redundancy. It is also clear that individuals are entitled to discuss with the employer the likely effects of the restructure upon him or her and the likely effects of redundancy upon him or her and the measures that may be taken by the employer to award or minimise the effects of the restructure. These are requirements flow from the Minimum Conditions of Employment Act 1993 and have been discussed by the Industrial Appeal Court in *FDR Pty Ltd v Jacob Gilmore and Jacob Gilmore v Cecil Bros FDR Pty Ltd Cecil Bros Pty Ltd (1998) 78 WAIG 1099* where the Industrial Appeal Court considered the effect of a failure to follow the terms of that Act.

32 On the other hand there is a question here about whether reducing the number of employees in these circumstances constitutes a redundancy. According to the dicta of the Western Australian Industrial Appeal Court in *Gromac Packaging v Federated Miscellaneous Workers Union of Australia, WA Branch 73 WAIG 220 at 224* it does ie "*the workforce is reduced because there was labour in excess of that reasonably required to perform the work available to the employer*" hence in that circumstance the employer had a valid reason to terminate the services of employees because of the reasonable need to restructure. There was a reasonable need to restructure the work and the associated workforce and to reduce costs. The same court in *Amalgamated Metal Workers and Shipwrights Union of WA v Australian Ship Building Industries WA Pty Ltd (1997) 67 WAIG 733* held that the onus fell upon the Applicant to show that another person should have been dismissed rather than her/(him).

33 Ultimately what the Commission must decide whether there has been a fair go all round as described in *Federated Miscellaneous Workers Union v Undercliff Nursing Home (1995) 65 WAIG 371* and in making that assessment the Commission is not to adopt the position of manager nor to place itself in the position of the Respondent. It must objectively analyse what happened against a normal commercial background and decide whether what occurred was fair in the circumstances.

34 I turn to my analysis in this matter but first it must be said that the period of employment of Mr Lynch commenced with the offer made to him in May 10 2000 by Mr John Polmear the Managing Director of the Respondent. I am inclined to accept the story of Mr Lynch, based upon his commercial background that he would have been aware that the Respondent was operating in a manner where its financial standing was at risk. I am inclined to accept that he raised this issue with Mr John Polmear but never pursued it to a position where he forced Mr Polmear to confront the situation. He was prepared to raise the issue with Mr John Polmear and acquiesced with his answer. It is passing strange that he did not chose to pursue the issues with Mr Polmear senior who visited the operation from time to time and who Mr Lynch knew to be the Chairman of the Respondent's operating company. I doubt that he seriously ever raised the matter with Mr Polmear senior, even though his evidence is that he did. It may be that in the face of Mr Polmear senior's strong personality the Applicant was not prepared to push the matter. His timid demeanour in the witness box leads me to that supposition. In short he may have had concerns but he did not articulate them as strongly as a person in the position of General Manager should have. There is no substantive evidence that Mr Winn ever took any action to tell Mr Polmear senior about the problems he had raised with Mr John Polmear, who apparently did nothing about them.

35 The analysis of the matters I think is best approached from what Mr Polmear senior discovered and had to deal with in maintaining the operation of the Respondent. He discovered that the operations of the Respondent which he had placed in the hands of Mr John Polmear were at a disastrous financial ebb. I accept his evidence that the seriousness of the state of affairs crystallized in his mind when he was told by one of the accounting staff that an important account could not be paid. Mr Polmear senior arranged for the payment to be made and this galvanised him into making a thorough examination of the financials of the Respondent. He discovered that if it continued to operate in the existing financial mileau it would fail. Such a failure would cripple the whole of his family's financial affairs because the capital investment in the respondent was secured against other properties in the possession of the family that operated Mt Weld Nominees, the owner of the respondent.

36 Mt Polmear senior could not afford to let this happen and he moved quickly to deal with the problem. There is no

doubt that he decided that the Respondent had to be restructured and that its senior management team was responsible for allowing it to get into the situation that it had. In his eyes the senior management team included his son John Polmear, the General Manager Mr Lynch and the Senior Projects Manager Mr Winn. A fair interpretation of Mr Polmear senior's evidence is that the performance of these three had been so abysmal that it led to the situation where the Respondent's operations were in such financial jeopardy that if he did not move quickly all of his family's accumulated assets could be lost. He therefore had a valid reason to take the action which was necessary to preserve the financial viability of the operation. In the context of the performance of Mr Lynch and Mr Winn I am completely unconvinced that the glowing references provided to each of them by Mr John Polmear should be accorded any standing at all. It is beyond belief that each of the applicants had the same qualities that were describable in exactly the same language. I discount the references from giving any comfort to the applicants in these proceedings. In fact they are manifestly untrue.

37 Against this background it is wrong to say that the two employees the subject of these applications were made redundant, I think on the balance of probabilities that they were dismissed for performance failure. Mr Polmear senior says he brought the situation to the attention of Mr Lynch two weeks before he moved, however on his own evidence he did not specifically warn Mr Lynch that his own position was in jeopardy. Mr Winn received no warning. Even though I accept Mr Polmear senior's evidence that at the time it was in his mind that the senior staff in the office, as he described them "as generals without staff", would need to go. He was at fault in this respect and did not give either Mr Lynch or Mr Winn the opportunity to have anything to say about his assessment of their standard of work. In that sense they had no chance to correct any deficiency that there may have existed in their performance.

38 This conduct by Mr Polmear senior can only be seen on the case law to be procedurally unfair and I so find.

39 The question, is does this lack of procedural fairness taint the whole of dismissals such that on an overall assessment there was unfairness. As Kennedy J in *Shire of Esperance v Mouritz (1991) 71 WAIG 891* said that "*should an employer, in bringing about a dismissal, adopt the procedures which were unfair to the employee is an element in determining whether the dismissal was harsh or unjust*". In other words the failure to be procedurally fair is but one matter to be weighed in the balance.

40 Here is a situation where the Respondent's existence was threatened to a stage where its failure could bring down the whole of the assets of the owners. I accept the evidence of Mr Polmear senior that this was the correct description of the affect of a financial failure of the Respondent. The Respondent therefore had a valid reason to take action to protect its ongoing viability and the dismissal of the two Applicants in this case does not raise questions of redundancy in the normal sense. It is clear that the work which was done by them is still done by somebody. These therefore were two dismissals along with that Mr John Polmear which were taken in an effort to preserve the operations of the Respondent. The Respondent is entitled to take such action, whether it is unfair to the individuals in all of the circumstances is the matter of balance. As I have previously found the dismissals were procedurally unfair but after careful consideration of the balance in the whole of the circumstances of the terminations, given the commands upon the Commission that there be a fair go all round and not just to one party or the other, I find that there was not unfairness to the point where the Commission would find that the terminations were harsh or unfair. That the Commission may have done something else is not to the point.

41 This is a matter of fine balance, but on my assessment the weight of evidence falls to the Respondent in the matter and I so find.

42 I add that even if I am wrong in this finding, it is clear on the financial figures which were presented to the Commission, that if the action had not been taken when it was that the Respondent's business would have failed within a few weeks. If that be the case the potential for each of these Respondents for loss would be limited in my respectful view (see *Bogunovich v Bayside Holdings (1999) 79 WAIG 8)*. Both applications will be dismissed.

2001WAIRC 02474

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	JOSEPH PATRICK LYNCH, APPLICANT
	v.
	TWINSIDE RETAINING WALLS & FENCES, RESPONDENT
CORAM	COMMISSIONER J F GREGOR
DELIVERED	WEDNESDAY, 4 APRIL 2001
FILE NO	APPLICATION 1477 OF 2000
CITATION NO.	2001 WAIRC 02474

Result Dismissed

Order.

HAVING heard Mr C. Fayle on behalf of the applicant and Mr O. Moon on behalf of the respondent, the Commission pursuant to the powers conferred on it under the *Industrial Relations Act, 1979,* hereby orders—

THAT the application be, and is hereby, dismissed.

(Sgd.) J.F. GREGOR,
[L.S.] Commissioner .

2001WAIRC 02475

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	NORMINGTON WINN, APPLICANT
	v.
	MOUNT WELD NOMINEES PTY LTD ACN 005 284 980 TRADING AS TWINSIDE, RESPONDENT
CORAM	COMMISSIONER J F GREGOR
DELIVERED	WEDNESDAY, 4 APRIL 2001
FILE NO	APPLICATION 1483 OF 2000
CITATION NO.	2001 WAIRC 02475

Result Dismissed

Order.

HAVING heard Mr C. Fayle on behalf of the applicant and Mr O. Moon on behalf of the respondent, the Commission pursuant to the powers conferred on it under the *Industrial Relations Act, 1979,* hereby orders—

THAT the application be, and is hereby, dismissed.

(Sgd.) J.F. GREGOR,
[L.S.] Commissioner.

2001 WAIRC 02156

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	TOM MIJATOVIC, APPLICANT
	v.
	PETER TERRENCE HARE AND EVELYN LILLY TUBA T/AS E&S LEGAL GROUP, RESPONDENT
CORAM	COMMISSIONER J H SMITH
DELIVERED	FRIDAY, 23 FEBRUARY 2001
FILE NO	APPLICATION 1659 OF 2000
CITATION NO.	2001 WAIRC 02156

Result	Application to amend particulars of claim granted
Representation	
Applicant	Mr C Edwards of counsel
Respondent	Ms K Appleyard of counsel on behalf of Ms Tuba
	Mr P T Hare in person

Reasons for Decision.

1 The Applicant's solicitors filed an application on 19 October 2000 claiming that the Applicant was harshly, unfairly and oppressively dismissed by the Respondents. The Applicant was employed as a solicitor as head of the Respondent's litigation division. The application states the Applicant started work on 3 April 2000 and ceased on 11 October 2000.

2 Paragraph 20 of the application states—

"1. The Applicant was offered and accepted employment as associate of the Respondent on a fixed two year contract commencing on 3 April 2000, the terms of which are contained within a letter dated 10 March 2000 (Annexure "TM1").

2. The Applicant was thereafter summarily dismissed by the Respondent (Annexure "TM2"), contrary to the terms of the employment contract, on or about 21 September 2000."

3 In Annexure TM2 Mr Hare instructed the Applicant on 21 September 2000 as follows—

"Your refusal to allow me unrestricted access to the firm's files and your failure to issue accounts as instructed in respect of files of the firm leaves me no alternative but to advise that your employment with this firm is terminated.

I ask that you leave the premises forthwith. You may only take with you those items of personal property. All items of furniture and fittings that are the property of E & S Legal Group are to remain. This includes the computers and reference books under leases paid for by E & S Legal Group. You are entitled to those computer documents created by yourself and I suggest you take copies of these before leaving. All client files remain the property of E & S Legal Group and must remain until such time as those clients otherwise instruct us that they wish you to personally continue with the conduct of their matters.

Your claim yesterday to Josephine Landro, our office manager, that I do not have authority neither to direct you in the conduct of the matters of the firm's clients nor to ask you to leave the premises has caused me concern. I have sought guidance from the Legal Practice Board and Complaints Committee and they have now intervened, stating that they view this matter most seriously. They have advised that both you and I are, for the time being, to continue the conduct of the firm's business as before. A meeting of the Professional Affairs Committee is then to be convened next Thursday, 28 September 2000 at which a settlement of this matter will be determined.

I have been asked to prepare a report of my position in this matter to the Committee and I enclose a copy for your information. I have also been advised with respect to the trust funds held for your mother, R Mijatovic, that she is entitled to request payment to her and that Murie & Edward's claim against the firm is ill-conceived. I have, therefore, authorised the payment of the remaining trust funds to her and enclose a copy of my advice to Murie & Edward."

4 The Applicant seeks to amend his particulars of claim as follows—

"1. At all material times the Applicant was a solicitor admitted to practice in the state of Western Australia.

2. At all material times the Respondents were a partnership conducting a legal practice.

3. The Applicant was employed by the Respondent as an associate pursuant to a Contract of Employment dated 10 March 2000 ("the Contract"), the material terms of which were—

(a) the Applicant would receive a base salary of $55,000.00;

(b) the Applicant would receive an incentive of 30% of paid professional fees and internal disbursements exceeding three times his base salary on all files under his direct conduct or which were directly introduced by him to the firm;

(c) The Contract was for a duration of two years commencing from 3 April 2000;

(d) The duration may be extended or terminated by mutual agreement or by two weeks written notice in circumstances of professional misconduct.

4. Pursuant to the Contract the Applicant commenced employment on or about 3 April 2000.

5. The Applicant thereafter faithfully fulfilled all obligations required of him pursuant to the Contract.

6. At no time during the course of the Contract was the Applicant—

(a) counselled;

(b) provided with any warnings; or

(c) in any way warned that his employment was in jeopardy.

7. Contrary to the terms of the Contract the Applicant's employment was summarily terminated on or about 21 September 2000.

8. In the alternative, on or about 11 October 2000 the Respondents repudiated the Contract by unilaterally varying the terms of the Contract, which repudiation was accepted by the Applicant on 11 October 2000.

9. In the alternative, the Respondents on or about 11 October 2000 dismissed the Applicant by—

(a) failing to pay, or properly pay, the Applicant's salary;

(b) denying the Applicant access to his office;

(c) removing the Applicant's computer from his office;

(d) denying the Applicant access to secretarial support services;

(e) denying the Applicant access to client files."

5 The Respondents object to the Applicant's application to amend the claim to provide for a claim in the alternative as set out in paragraphs 8 and 9 above on grounds that paragraphs 8 and 9 raise a new cause of action. In the alternative it is argued that the Commission should refuse leave to amend the Applicant's claim on grounds that—

(a) The amendment is substantive and is not one of form.

(b) The Applicant through his conduct has abandoned any claim that he was dismissed by the Respondents on or about 11 October.

(c) The Respondents have incurred considerable costs in preparing submissions for a preliminary argument as to whether a dismissal occurred on 21 September 2000 and that if the amendment is allowed, the preliminary issue falls away.

6 Accordingly it is argued that the Respondents will be substantially prejudiced if the amendments sought in paragraphs 8 and 9 are allowed by the Commission.

Background

7 The Respondents filed a notice of answer and counterproposal in the Commission on 6 November 2000 ("the notice") and served the notice upon the Applicant in person on 7 November 2000.

8 The Commission convened a conciliation conference on 27 November 2000. At the conference the Applicant was represented by his solicitor Mr Edwards. The Applicant also attended the conference. Mr Hare appeared on his own behalf and Ms Tuba was represented by Mrs Hartley from Freehills. In a letter to Mr Edwards from the Associate to Commission Smith dated 30 November 2000 it is recorded that—

> "A conference was held by Commissioner Smith in respect of this matter. You appeared on behalf of the Applicant, Mr Mijatovic who also attended. Mr Hare appeared on his own behalf and Ms Tuba was represented by Mrs Hartley. Ms Tuba also attended.
>
> You advised Commissioner Smith that the Applicant was summarily dismissed on 21 September 2000 and that thereafter a new contract was entered into whereby following a repudiatory breach by Mr Hare the second contract came to an end on 11 October 2000. You also advised Commissioner Smith that the Applicant's claim that he was harshly, unfairly or oppressively dismissed only applies to the alleged termination that occurred on 21 September 2000.
>
> At the conclusion of the conference the matter was not resolved. Mrs Hartley advised Commissioner Smith that the issue whether the Applicant's employment was terminated on 21 September 2000 should be heard and determined as a preliminary issue.
>
> You advised Commissioner Smith that this application took you and your client by surprise. Accordingly Commissioner Smith directed the parties as follows—
>
> (a) Mrs Hartley, on behalf of Ms Tuba, and Mr Hare are to file written submissions as to why the forementioned issue can and should be dealt with as a preliminary issue.
>
> (b) You are to respond on behalf of the Applicant by close of business 8 December 2000.
>
> Commissioner Smith requested the parties to address the estimated length of a hearing in respect of the proposed preliminary issue and a hearing in respect of all issues, including number of witnesses and unavailable dates for January 2001."

9 In compliance with the informal directions of the Commission, the Respondent Mr Hare filed an outline of submissions in support of the application for a hearing in respect of a preliminary issue on 4 December 2000. Ms Tuba's solicitors filed an outline of submissions on her behalf by facsimile on 1 December 2000 and filed the original of those submissions in the Commission on 4 December 2000.

10 The Applicant's solicitors filed an outline of the Applicant's submissions in opposition to the application for a hearing of a preliminary issue together with the document set out in paragraph 4 of these reasons. Attached was a copy of a letter to Freehill Hollingdale and Page dated 8 December 2000 in which it is stated—

> "You will note that the particulars plead the timing and manner of our client's dismissal in the alternative. The alternative pleas are subsequent in time to 21 September 2000.
>
> It is our view that the particulars largely dispose of the contention that there should be a preliminary hearing. Notwithstanding, we would be amenable to the Respondents being provided with an opportunity to present any further submissions prior to the Commissioner making her ruling, provided those submissions were not unduly delayed."

11 The Respondents then filed further submissions opposing any amendment to the Applicant's particulars of claim.

12 In submissions filed on behalf of Ms Tuba it is stated—

> "6. The new claim is properly characterised as a fresh cause of action or claim not previously included in the claim dated 19 October 2000.
>
> 7. The new claim is statute barred pursuant to section 29(2) of the Industrial Relations Act 1979 ("the Act"). The claim is clearly outside the 28 day limit imposed by section 29(2) of the Act.
>
> 8. The powers of the Commission are derived from the terms of the Act itself. The Commission is not a superior court of record and has no inherent powers: *Robe River Iron Associates v Federated Engine Drivers and Firemen's Union of Workers of Western Australia* 1987 AILR 50*; Australian Glass Manufacturing Co Pty Ltd & Ors v Transport Workers Union of Australia, Western Australian Branch* 1992 AILR 285.
>
> 9. There is no power under the Act for the Commission to extend the 28 day limit: *E J Richardson v Cecil Bros Pty Ltd* (1994) 74 WAIG 1017, *Theresa Bates v Mountway Nominees Pty Ltd* [1998] WAIRComm 133. The new claim is filed out of time and must fail.
>
> 10. The Applicant's claim is therefore confined to the question whether he was dismissed by the Respondent on 21 September 2000."

Legal Principles

13 Section 29(1)(b)(i) and (ii) of the Act provides—

> "(1) An industrial matter may be referred to the Commission—
>
> (b) in the case of a claim by an employee—
>
> (i) that he has been harshly, oppressively or unfairly dismissed from his employment; or
>
> (ii) that he has not been allowed by his employer a benefit, not being a benefit under an award or order, to which he is entitled under his contract of service,
>
> by the employee."

14 Further s.29(2) of the Act provides—

> "(2) A referral by an employee under subsection (1)(b)(i) cannot be made more than 28 days after the day on which the employee's employment terminated."

15 The Applicant argues that the application was filed within 28 days of the date the Applicant's employment was terminated (irrespective of whether the Commission ultimately finds that date to be 21 September or 11 October 2000). Further it is argued that the claim in the alternative, does not raise a new cause of action, as the cause of action is that the Applicant has been harshly, oppressively or unfairly dismissed from his employment.

16 The Respondents argue that although the claims are expressed in the alternative, the claim that an Applicant has been summarily dismissed on one day and the Respondents repudiated the contract of employment on a later day raise separate causes of action because the factual circumstances are different.

17 Pursuant s.26(1)(a) of the Act, the Commission in exercising its jurisdiction is required to act in accordance with equity, good conscience and the substantial merits of the case without regard to technicalities or legal forms. Further under s.26(2) of the Act, in granting relief or redress the Commission is not restricted to the specific claim made or to the subject matter of the claim.

18 After having regard to the requirements of s.26(1) and (2) of the Act and to the fact that the application (whilst poorly drafted), claims in paragraph 20 that the grounds of harsh, oppressive or unfair dismissal are that the Applicant was summarily dismissed on or about 21 September 2000, and paragraph 14 claims the last date the Applicant worked was 11 October 2000, it is open to amend the particulars of claim to contend that the

Applicant's employment summarily came to an end on or about 21 September 2000, or alternatively came to an end by action constituting a constructive dismissal on 11 October 2000.

19 It is my view that the application to amend in this case is not to add a new cause of action. The Applicant merely seeks to amend the particulars to state the date and the basis on which it has said that the Applicant was harshly, oppressively or unfairly dismissed from his employment. Accordingly it is my view that the Commission has power to amend the Applicant's claim as set out in paragraphs 8 and 9 of the proposed particulars filed on 8 December 2000.

20 This matter is to be distinguished from the factual circumstances and issues considered by the Commission in *Bailey v Sidney David Pauga and Michelle Pauga trading as S & M Concepts Australia* [2000] WAIRC 311 at [44]; (2000) 80 WAIG 4412 at 4415. In that case the Applicant filed an application claiming that she was denied contractual benefits, not being benefits under an award or order, contrary to s.29(1)(b)(ii) of the Act. The application was lodged on 14 March 2000 and the Applicant's employment was terminated on 1 March 2000. The issue raised was whether it was open to amend the application to introduce a new action which was otherwise barred in time. The Commission held that despite the fact that the Applicant had made out a case that she was harshly, oppressively or unfairly dismissed, an employee may only refer such a claim within 28 days after the day on which her employment was terminated. Her application failed because she had not made an application to claim she was harshly, oppressively or unfairly dismissed within the period prescribed in s.29(2) of the Act.

21 The question then rises as to whether the Commission should exercise its discretion to allow the amendments to the particulars of claim given the representation made by the Applicant's counsel on 21 September 2000 that the Applicant did not intend to pursue any claim that he was harshly, unfairly or oppressively dismissed on 11 October 2000.

22 The Applicant says that the parties cannot be held to representations made at a conciliation conference because of the confidential nature of the conciliation process.

23 Whilst settlement offers made in conciliation conferences are usually made without prejudice, and any representation made in the course of making such an offer could usually be said to be without prejudice, the representation made on behalf of the Applicant at the conference on 21 September 2000 cannot be characterised as such. It is apparent from the letter from the Associate to Commissioner J H Smith to Mr Edwards that as a result of the representation, applications were made on behalf of each of the Respondents that the issue whether the Applicant's employment was terminated on 21 September 2000 should be heard and determined as a preliminary issue.

24 The submissions filed on behalf of the Respondents in support of the application for a hearing of the preliminary issue are based on the assumptions that the Applicant continued working for the Respondent until 11 October 2000 but that his contract of employment came to an end on 21 September 2000 and he was subsequently re-employed under a separate contract of employment until 11 October 2000.

25 It is clear from reading the submissions filed on behalf of each of the Respondents that if the amendment is allowed by the Commission that the work carried out on behalf of Respondents to prepare for the application for a hearing of a preliminary issue will be thrown away.

26 In exercising its discretion to allow an amendment the Commission should have regard to the competing interests of the parties as equity requires that there be a balancing of all of the competing interests associated with the matter (*Michael v Ridgeway* (1994) 74 WAIG 1726 at 1728).

27 If the application to amend is denied, the Applicant may be denied a successful outcome in light of fact that it is agreed that the Applicant's employment ceased on 11 October 2000, it may be difficult for the Applicant to make out a case that he was summarily dismissed on 21 September 2000.

28 A summary dismissal arises where an employer dismisses an employee instantly, that is without warning and without notice of pay in lieu of notice. In this matter the contents of the letter to the Applicant from Mr Hare (TM2) are said to constitute an act of summary dismissal. Whilst the first two paragraphs of the letter contain a clear statement that the Applicant's employment is terminated forthwith, the third paragraph states that the Legal Practice Board and Complaints Committee have advised that the Applicant and Mr Hare are to "continue the conduct of the firm's business as before."

29 After having regard to the competing interests of the parties, it is apparent that if the application to amend is not granted that the prejudice to the Applicant is greater than the prejudice to the Respondents. I will make an order granting leave to amend and if either of the Respondents wish to make an application for costs, I will hear and determine the application in due course.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	TOM MIJATOVIC, APPLICANT
	v.
	PETER TERRENCE HARE AND EVELYN LILLY TUBA T/AS E&S LEGAL GROUP, RESPONDENT
CORAM	COMMISSIONER J H SMITH
DELIVERED	WEDNESDAY, 28 FEBRUARY 2001
FILE NO	APPLICATION 1659 OF 2000
CITATION NO.	2001 WAIRC 02179

Result	Application to amend particulars of claim granted
Representation	
Applicant	Mr C Edwards of counsel
Respondent	Ms K Appleyard of counsel on behalf of Ms Tuba
	Mr P T Hare in person

Order.

HAVING heard Mr C Edwards of counsel on behalf of the applicant and Ms K Appleyard of counsel on behalf of the respondent and Mr P T Hare in person the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders—

1. That leave be and is hereby granted for the Applicant to amend his particulars of claim as set out in a document filed in the Commission on 8 December 2000 and titled "Applicants Particulars of Claim".
2. Leave be and is hereby granted to the Respondents to amend their Notice of Answer and Counter Proposal within 21 days of the date of this Order.

[L.S.] (Sgd.) J. H. SMITH,
Commissioner.

2001 WAIRC 02335

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	MARIE CLAIRE MOSS, APPLICANT
	v.
	JAM DESIGN STUDIO, RESPONDENT
CORAM	COMMISSIONER S WOOD
DELIVERED	TUESDAY, 13 MARCH 2001
FILE NO	APPLICATION 72 OF 2001
CITATION NO.	2001 WAIRC 02335

Result	Contractual entitlements awarded
Representation	
Applicant	Ms M Moss on her own behalf
Respondent	No appearance

Reasons for Decision.

(Given extemporaneously and subsequently edited by the Commissioner)

1 The application is an application pursuant to section 29(1)(b)(ii) of the *Industrial Relations Act, 1979* (the Act). The applicant, Ms Marie Claire Moss worked as an Account Manager for the respondent, Jam Design Studio from 17 July 2000 to 31 October 2000, when she resigned.

2 This matter was listed for conference on 27 February 2001 at which time the respondent did not attend. The matter was listed for hearing on 13 March 2001 and both parties were notified by letter on 28 February 2001. The respondent did not attend the hearing and the matter proceeded.

3 The applicant claims that the respondent owes her the following monies; holiday pay of $1035.96 gross and two full days of work, being $384.40 gross.

4 The applicant has tendered at hearing her contract [Exhibit MCM1] which clearly shows a salary of $50,000 per year and clearly shows an entitlement of 4 weeks annual leave. The applicant was full-time with the respondent, and did not take any annual leave whilst employed.

5 The applicant has also tendered at hearing [Exhibit MCM2] which is a wages record for her entire time with the respondent. The wages records clearly show payments up to and including 27 October 2000.

6 The applicant has read into the record her resignation which took effect from 31 October 2000. The applicant has proven her case and I so find and I would order the respondent pay to the applicant the amounts as claimed being a total of $1420.36 gross less normal taxation payments to the Commissioner of Taxation.

2001 WAIRC 02421

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	MARIE CLAIRE MOSS, APPLICANT
	v.
	JAM DESIGN STUDIO, RESPONDENT
CORAM	COMMISSIONER S WOOD
DELIVERED	TUESDAY, 27 MARCH 2001
FILE NO	APPLICATION 72 OF 2001
CITATION NO.	2001 WAIRC 02421

Result	Contractual entitlements awarded
Representation	
Applicant	Ms M Moss on her own behalf
Respondent	No appearance

Order.

WHEREAS this is an application pursuant to section 29(1)(b)(ii) of the Industrial Relations Act 1979; and

WHEREAS the Commission having heard the applicant finds that the amounts as claimed are owed;

NOW THEREFORE the Commission, pursuant to the powers conferred on it under the Industrial Relations Act 1979, hereby orders—

THAT the sum of $1420.36, less any taxation that may be payable to the Commissioner of Taxation, be paid to Marie Claire Moss within 7 days by the respondent Jam Design Studio.

(Sgd.) S. WOOD,
[L.S.] Commissioner .

2001 WAIRC 02433

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	MARIO PIETRACATELLA, APPLICANT
	v.
	W.A. ITALIAN CLUB INC, RESPONDENT
CORAM	COMMISSIONER J H SMITH
DELIVERED	WEDNESDAY, 28 MARCH 2001
FILE NO	APPLICATION 959 OF 2000
CITATION NO.	2001 WAIRC 02433

Result	Application dismissed as not being necessary or desirable in the public interest
Representation	
Applicant	Mr F F G Voon of counsel
Respondent	Mr C S Fayle as agent

Reasons for Decision.

1 Mario Pietracatella ("the Applicant") made an application under s.29(1)(b)(i) of the Industrial Relations Act 1979 ("the Act") on 23 June 2000 claiming that he was harshly, oppressively and unfairly dismissed by WA Italian Club Inc ("the Respondent").

2 An application was made by the Respondent that the Applicant's application be struck out. The application to strike out was heard on 23 March 2001. After hearing the parties I concluded that I would dismiss the Applicant's application pursuant to s.27(1)(a)(ii) of the Act, as I was satisfied that further proceedings are not necessary or desirable in the public interest. These are my reasons for that conclusion.

History of the Application

3 The Applicant in his application states that he was employed as a chef and started work on 8 May 2000 and his employment was terminated on 22 June 2000. However the Applicant also states under the heading "Why do you claim you were unfairly dismissed?" that, "Last Friday (16 June 2000) I was called in the office and told I was dismissed". Further in the application the Applicant states he is not seeking reinstatement and is seeking compensation of 4 to 6 weeks pay (= $3,325.00 to $4,988.50). The Respondent filed a notice of answer and counterproposal on 13 July 2000. In the particulars of the notice of answer and counterproposal it is stated that the Applicant was informed on 13 June 2000 by the Manager that his employment would be terminated and the Applicant was given one week's notice. Further it is stated that Applicant worked until 22 June 2000.

4 A meeting was held between the parties by Deputy Registrar Bastian on 22 August 2000. At that meeting an

offer was made to resolve the matter on behalf of the Respondent but the Applicant's claim was not resolved.

5 A conciliation conference was held before me on 17 October 2000. At the conclusion of the conference the matter was not resolved and the Applicant advised the Commission that he wished his application to be listed for trial. He also advised that he intended to brief Mr G Lacerenza to appear on his behalf.

6 The Commission file records that on 20 November 2000, after consulting the Applicant's solicitor about unavailable dates, the Commission listed the Applicant's application for hearing on 5 and 6 February 2001.

7 On 27 November 2000 the Respondent's agent made an application to the Commission for further and better particulars of claim. The Commission advised the Respondent's agent that prior to the application for particulars being considered by the Commission, the Respondent should write to the Applicant's solicitor and request further and better particulars.

8 On 4 December 2000 the Respondent's agent wrote to the Applicant's solicitor, Mr Lacerenza of G A Lacerenza and Associates, requesting further and better particulars of claim.

9 On 4 January 2001 the Respondent's agent wrote to the Commission advising that he had not received a response to his letter dated 4 December 2000. The letter also requested that the Commission deal with Respondent's application for particulars of claim and for consideration be given to vacating the hearing dates on the basis that in the absence of particulars, the Respondent may be caused unnecessary prejudice. The letter also advised that the Respondent's agent had been informed that Mr Lacerenza's office was closed until 15 January 2001.

10 The Commission listed the application for a conference on 17 January 2001. Mr Skivinis from G A Lacerenza and Associates attended the conference together with the Applicant. Mr Fayle and the Respondent's Secretary/ Manager, Mr Perroni, appeared on behalf of the Respondent. At the conciliation conference the parties agreed that the dates for hearing set for 5 and 6 February 2001 should be vacated and that—

(a) The Applicant provide further and better particulars of why it is alleged he was harshly and oppressively dismissed and in relation to his claim for four to six weeks' compensation;

(b) The Applicant's further and better particulars be provided to the Respondent and filed within 21 days;

(c) The Respondent to file and serve an amended Answer within 14 days of the receipt of the Applicant's further and better particulars;

(d) Mr Fayle and Mr Lacerenza to provide to Commissioner Smith's chambers unavailable dates for March and April by close of business 25 January 2001.

11 Following receipt of unavailable dates for hearing the Commission re-listed the Applicant's application for hearing on 2 and 3 April 2001.

12 The Commission file indicates that—

(a) The further and better particulars of the application were not filed by 7 February 2001;

(b) On 16 February 2001 Ms Kotsopoulos, a Chambers Liaison Officer, left a message with a person called Natalie at Mr Lacerenza's office inquiring whether the further and better particulars had been sent to the Respondent's agent; and

(c) On 7 March 2001 Mrs Edwards, an Associate, telephoned Mr Lacerenza's office inquiring whether the further and better particulars had been provided and filed.

13 On 20 March 2001 the Commission received an application by letter from the Respondent's agent requesting that the Applicant's application be dismissed pursuant to s.27(1)(a) of the Act. The application states—

"…

As of this date the Respondent has not received any correspondence from the Application re his Claim, and believes that the order of the 17th January has been ignored. The order was made in the first place because the Respondent was unable to understand what the claim was, and therefore unable to properly prepare its case. The situation is not only unchanged in this regard, it has now assumed a position whereby the Respondent faces significant prejudice if this matter is to go ahead on the dates set. Even if the Applicant complies with the Order today, the Respondent now has less than the allocated 14 days in which to prepare for a two-day hearing.

The Respondent therefore asks that the Commission exercises its powers under Section 27(1)(a) of the Industrial Relations Act 1979 and dismisses the Application. The inability of the Applicant and his Representative to supply any Further and Better Particulars of Claim clearly shows the triviality of his claim. Further, and in the alternative, it is submitted that it is not in the public interest to subject the Respondent, a non-profit organisation, to the inconvenience and expense of defending itself in a two-day hearing into mystery allegations. If there was any substance to anything we should have known by now."

14 The Commission listed the application to strike out on 21 March 2001 for hearing on 23 March 2001. On 22 March 2001, further and better particulars of claim were faxed to the Respondent's agent from the Applicant's solicitor and were filed in the Commission on the same day. Paragraphs 4 to 9 of the further and better particulars of claim state—

"4. The Applicants employment ceased on the 22nd day of June 2000 where the manager a Mr P Perroni for the Respondent informed the Applicant that the Central Committee had discussed his employment the evening of the 21st day of June 2000 and dismissed him from his employment.

5. No reasons were provided to the Applicant as to why he was dismissed and no opportunity was afforded to the Applicant to speak to the Committee in respect of his apparent dismissal.

6. Subsequently the Applicant was informed by individual members of the Committee that the issue of his dismissal was not discussed and did not form the agenda of its meeting the 21st day of June 2000.

7. The Applicant was unlawfully and unilaterally dismissed by the Secretary of the Club by falsely representing to the applicant that the termination of employment came from the committee when in fact that was not true.

8. Accordingly the Applicant left the employ of the Respondent under a false assumption that he had been dismissed when in fact it was the actions of the Secretary who acted without authority at all times.

9. In the premises the Applicant had suffered loss of face, and reputation in the eyes of the Club Membership."

Submissions made on 23 March 2001

15 In support of its application to strike out the Applicant's claim and for an order that the Applicant's claim be dismissed the Respondent made the following submissions—

(a) The further and better particulars raise a different case to that raised in the Applicant's application filed on 23 June 2000. In particular the Applicant claims that he was informed that he was to be dismissed on 16 June 2000 and then

worked for a week, whereas the further and better particulars of claim state that the Applicant was informed his employment was terminated on 22 June 2000. Accordingly the Applicant's claim has changed from termination of employment by the giving of notice to a claim that he was summarily dismissed.

(b) The particulars raise new issues in that it is claimed that the Respondent's Secretary/Manager did not have the authority of the individual members of the Respondent's Committee of Management to terminate the employment of the Applicant. Further it is claimed that the issue of the Applicant's dismissal was not discussed at the Committee meeting on 21 June 2000.

(c) In light of the allegations set out in the further and better particulars the Respondent would be prejudiced if the trial proceeds on 2 and 3 April 2001. Firstly because the Respondent needs to speak to its members of its Committee (who were members in June 2000) about an alleged meeting on 21 June 2000. Mr Fayle on behalf of the Respondent informed the Commission that the Respondent's Committee is dysfunctional and that it may be difficult to speak to those members. Secondly in light of the fact that the Respondent has been given notice for the first time that the Applicant was not informed his employment was terminated until 22 June 2000, the Respondent needs to locate an ex-employee of the Respondent who was employed to replace the Applicant and who commenced work in the Applicant's last week of employment.

16 Mr Voon on behalf of the Applicant advised the Commission that the reason why the particulars of claim were not attended to until 22 March 2001 was because of inadvertence by his firm. He said the firm of G A Lacerenza and Associates is a very small firm whose business closed from the middle of December 2000 to the middle of January 2001. He also said that the further and better particulars had been drafted prior to 22 March 2001 but not provided to the Respondent or filed in the Commission.

17 After pointing out to Mr Voon that the particulars of claim appeared to be inconsistent with the application in that the nature of the claim has changed from termination of the contract of employment by the giving of notice to summary dismissal, Mr Voon sought a short adjournment and took further instructions from the Applicant. After obtaining instructions Mr Voon informed the Commission that the Applicant recalled that there was some discussion about a week before he was terminated, however he was not given notice that his employment was terminated until 22 June 2000.

18 It was argued on behalf of the Applicant that the Commission should not exercise its discretion to dismiss the Applicant's application as the reason why the further and better particulars were not provided to the Respondent was because of an oversight by the Applicant's representatives and not through the fault of the Applicant himself. Further it was submitted that the Applicant would suffer an injustice if his claim is struck out. It was also submitted that the Applicant's claim is not trivial and that the Applicant is ready to proceed to hearing on 2 April 2001.

Conclusion

19 I concluded that further proceedings are not necessary or desirable in the public interest and that I would make an order pursuant to s.27(1)(a)(ii) of the Act to dismiss the Applicant's claim for the following reasons—

(a) I accept that the Applicant has not personally been responsible for the failure to attend to the request for further and better particulars in a timely way. Further I have had regard to the consequences to the Applicant of dismissing his claim and to quantum of his claim. However, in my view, the considerations set out below are matters in the public interest that outweigh the prejudice to the Applicant.

(b) All Applicants have a duty to prosecute their claims without any delay.

(c) In *Kangatheran v Boans Limited* (1987) 67 WAIG 1112 at 1113 the Full Bench approved of remarks made by a Commissioner at first instance "that the proceedings were expensive proceedings and that in the public interest there was a necessity for the Applicant to assiduously apply himself to the pursuit of his claim …".

(d) In this matter the failure to attend to the request for particulars in a timely way—

(i) Resulted in vacation of the dates set for hearing in February 2001; and

(ii) Would have necessitated the dates set for hearing in April 2001 be vacated.

(e) The consequence of the failure to provide further and better particulars is that costs are incurred to the Respondent, in that this Commission has no power to make any award for professional costs that the Respondent has incurred in getting up for an application for an adjournment of the hearing on 17 January 2001 and for the application to dismiss (*Brailey v Mendex Pty Ltd t/a Mair and Co Maylands* (1992) 73 WAIG 26).

(f) I am satisfied that the further and better particulars raise a different claim. Accordingly, I have had regard to the fact that it is not desirable in the public interest for a Respondent to be confronted with a different claim at a late stage of the proceedings which would necessitate a further adjournment of these proceedings.

(g) Further I have had regard to the fact that there is a cost to the public in vacating trial dates at a late stage of proceedings.

2001 WAIRC 02427

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	MARIO PIETRACATELLA, APPLICANT
	v.
	W.A. ITALIAN CLUB INC, RESPONDENT
CORAM	COMMISSIONER J H SMITH
DELIVERED	WEDNESDAY, 28 MARCH 2001
FILE NO	APPLICATION 959 OF 2000
CITATION NO.	2001 WAIRC 02427

Result	Applicant dismissed as not being necessary or desirable in the public interest
Representation	
Applicant	Mr F F G Voon of counsel
Respondent	Mr C S Fayle as agent

Order.

Having heard Mr F F G Voon of counsel on behalf of the applicant and Mr C S Fayle as agent on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders—

THAT the application be and is hereby dismissed.

(Sgd.) J. H. SMITH,
[L.S.] Commissioner.

2001 WAIRC 02494

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	KELLY JANE PRIEST, APPLICANT
	v.
	ANOVOY PTY LTD, RESPONDENT
CORAM	COMMISSIONER A R BEECH
DELIVERED	MONDAY, 2 APRIL 2001
FILE NO	APPLICATION 2139 OF 2000
CITATION NO.	2001 WAIRC 02494

Result	Application alleging denied contractual benefits granted.
Representation	
Applicant	Ms K.J. Priest appeared on her own behalf as the applicant.
Respondent	No appearance on behalf of the respondent.

Reasons for Decision.
(Extemporaneous)

1 The Commission has before it a claim by Kelly Jane Priest that she was employed by Anovoy Pty Ltd and that as at her termination she is owed a number of benefits to which she is entitled under her contract of employment.

2 I am satisfied from her evidence, which is supported by the payslips that became exhibits 1 and 2, that she was indeed employed by Anovoy Pty Ltd. I am also satisfied from those payslips that she was employed at a base rate of $480.00 gross. I am also satisfied from her evidence that she was dismissed by reason of retrenchment on 17 November 2000. There is no reason to disbelieve Ms Priest's evidence. It presents to me, with respect to her, as being credible although I acknowledge that Ms Priest has had some confusion perhaps as to the dates and I hope that I haven't contributed to those with some of the questions that I have asked.

3 I accept however from the evidence of Mr Kingham, who has through his own personal knowledge some information of the date of termination and Ms Priest's illness in the week, before her final week, that Ms Priest's evidence is correct and I should accept it.

4 On that basis then, I turn to the claims that are before the Commission. Ms Priest has amended the claim that she lodged in the Commission, but it does seem to me that the amendments that she seeks are mere amendments of detail and do not change the claim in a way that would require her to serve the amendment on Anovoy Pty Ltd so that it would be aware of any changes. The amendments that she seeks to make are matters of detail only and are within the scope of the claim as filed in the Commission.

5 The first claim is that Ms Priest has not been paid for the final week of her employment. Exhibit 2 shows a payslip dated 2 November 2000, which is a Thursday, and supports Ms Priest's evidence that she is paid from Thursday to Thursday and that she was paid up to and including 2 November 2000. Mr Priest's evidence is that she was ill for the period from 3 November 2000 for one week which takes it literally to the 10 November 2000 and I will return to that period of time subsequently. Ms Priest then says that she worked on Saturday, 11 November 2000 and she then worked from Tuesday, 14 November 2000 to Friday, 17 November 2000 inclusive and that not only has she worked on those days but she has not been paid for that time worked.

6 I am satisfied from her evidence that that is the case and accordingly, I find that Anovoy Pty Ltd owes Kelly Jane Priest one week's wages for work performed up to and including 17 November 2000. That being a sum of $480.00 gross.

7 Ms Priest's second claim is that for the period of time that she was ill between 3 November 2000 and 10 November 2000 that she had two and a half days' credit in her sick leave entitlement and that she should therefore be paid for two and a half days as being a sick leave entitlement. I am prepared generally to accept that Ms Priest had the conventional sick leave entitlement that would accrue on the basis of 10 days per year. I notice that in the pay slip of 2 November 2000 that she was paid a sick leave day and that it seems unlikely therefore that Ms Priest was paid a wage rate that incorporated sick leave or something of that nature. I am also satisfied from the medical certificate that Ms Priest was ill for that period of time and I am prepared to accept her evidence that she had a sick leave entitlement credit of two and half days. I also accept Ms Priest's evidence that she handed to Anovoy Pty Ltd the original of the sick leave certificate and that it was aware of her illness. I therefore find the claim made out. She has calculated two and a half days as $240.40 and I agree with that calculation and I therefore find that on the second claim Anovoy Pty Ltd is required to pay Ms Priest the sum of $240.40.

8 Ms Priest's next claim is that she should have been paid "two weeks' wages for retrenchment without notice". The task of the Commission is not to assess what would have been a fair payment for Ms Priest. The task of the Commission is to establish whether Ms Priest had an entitlement under her contract of employment to the claim that she makes. It is not apparent to me from anything that Ms Priest has said that she was entitled to any particular payment upon retrenchment. She would as a matter of law be entitled to a reasonable period of notice if her employment was terminated by her employer for reasons other than misconduct. I asked Ms Priest the circumstances of the termination of her employment and I accept her evidence that she was told that she was dismissed by reason of retrenchment.

9 It appears to me that Ms Priest is entitled to a period of reasonable notice upon the termination of her employment. She has claimed a payment in lieu of two weeks' notice and that is based upon her knowledge of the termination arrangements of other employees. It is her understanding that a minimum of two weeks' notice was applicable if employees wished to leave the respondent's employment and it seems to me as a matter of equity that a two week period would also apply in the ordinary event if the respondent wished to terminate an employee's employment for reasons other than misconduct and that is the circumstance in this case.

10 There is no suggestion that Ms Priest's employment was terminated for reasons other than retrenchment and accordingly I find that it was a benefit under her contract of employment that if the respondent had wished to terminate her employment it would do so by giving her either two weeks' notice or the payment of two weeks' wages in lieu of notice. I am also satisfied that that has not been paid to her and accordingly on this claim Anovoy Pty Ltd owes two weeks' wages to Ms Priest and that has been quantified by Ms Priest as $961.60. I agree with that calculation.

11 Ms Priest claims proportionate annual leave on termination. I am satisfied that Ms Priest was entitled to annual leave and was not party to some arrangement whereby payment for annual leave was built into her wage because exhibit 2 at least shows an accrual of annual leave hours. That being the case, I am prepared to accept as a general proposition that Ms Priest would be entitled to be paid pro-rata annual leave unless her employment was terminated for reasons of misconduct which occurred during the qualifying period. Referring to my earlier comments, it is clear that Ms Priest was not terminated for any reason other than retrenchment and accordingly pro-rata annual leave is due. Ms Priest has calculated her annual leave entitlement as being 2.3 weeks' leave and that is using a divisor of 38 hours per week. I tend to accept that the divisor should be 38 hours per week that being the number of hours per week that is ordinarily found in awards of this Commission for the employment of the nature that Ms Priest has described to me and in the absence of any other evidence it would seem to me that that is a reasonable divisor to use. I therefore agree with Ms Priest's calculation that the quantum of annual

leave owed pro-rata is $1,105.85 and I therefore find that that is owed to her by way of pro-rata annual leave.

12 Ms Priest's final claim is that she has not been paid her superannuation entitlement. In fact, the way she has written her claim is that it says "superannuation of 31 weeks' employment to be paid within the 2001 financial year". Ms Priest acknowledges that that is a claim that is not within the jurisdiction of the Commission and indeed I agree with her concession and on that basis that is not a claim that I would take any further.

13 Accordingly, I propose to issue an Order in the following form. An Order should issue firstly that Ms Priest is owed one week and 2.5 days' wages being entitlements due to her for work performed, for payment for sick leave and also wages in lieu of notice and that is an amount of $1,681.40 and secondly that Ms Priest is owed the sum of $1,105.85 by way of pro-rata annual leave.

14 Order Accordingly.

2001 WAIRC 02496

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	KELLY JANE PRIEST, APPLICANT
	v.
	ANOVOY PTY LTD, RESPONDENT
CORAM	COMMISSIONER A R BEECH
DELIVERED	THURSDAY, 5 APRIL 2001
FILE NO	APPLICATION 2139 OF 2000
CITATION NO.	2001 WAIRC 02496

Result	Application alleging denied contractual benefits granted.
Representation	
Applicant	Ms K.J. Priest appeared on her own behalf as the applicant.
Respondent	No appearance on behalf of the respondent.

Order.

HAVING HEARD Ms K.J. Priest on her own behalf as the applicant and there being no appearance on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders—

THAT Anovoy Pty Ltd forthwith pay Kelly Jane Priest the sum of $2,787.25 by way of benefits denied Ms Priest under her contract of employment.

(Sgd.) A.R. BEECH,
[L.S.] Commissioner.

2001 WAIRC 02268

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	DAVID SAAB, APPLICANT
	v.
	HOT COPPER AUSTRALIA LTD, RESPONDENT
CORAM	COMMISSIONER J F GREGOR
DELIVERED	MONDAY, 12 MARCH 2001
FILE NO	APPLICATION 774(A) OF 1999
CITATION NO.	2001 WAIRC 02268

Result	Commission has jurisdiction and power to deal with the claim. Leave to appeal granted.
Representation	
Applicant	Mr M. Odes QC and with him Mr A. Lucev (of counsel) appeared for the applicant
Respondent	Mr R. Le-Miere QC and with him Mr A. Smetana (of counsel) appeared for the respondent

Reasons for Decision.

1 On 15th June 2000 the Commission issued its decision in David Saab v Hotcopper Australia Ltd No. 774 of 1999 [(2000) 80 WAIG 3099] it ordered that David Saab (the Applicant) had been unfairly dismissed from employment with Hotcopper Australia Ltd (the Respondent) on or about 14th May 1999, and that he be reinstated in his former employment with effect on and from 6th June without loss of earnings and benefits as if he had not been dismissed. It further ordered that the proceedings be divided and granted liberty to the applicant to apply in respect of shares and options.

2 The comments it made at page 3106 of the Western Australian Industrial Gazette describe why liberty was granted—

> *On this matter I accept the submissions on behalf of the applicant. I agree with both Counsel for applicant and respondent that the Commission is unable to order that the shares and options provisions in the contract be issued. The applicant is entitled to the benefit of his contract, however nothing has been put which would enable me to assess what that benefit should be, nor have I received any argument about whether the Commission has power to make an award of damages if the specific terms of a contract cannot be ordered as in a case like this.*
>
> *An Order for reinstatement in the terms [previously] described will issue. In view of my comments concerning the shares and options the order will provide for liberty to apply in respect of that matter. The proceedings will be divided pursuant to the powers vested in the Commission under Section 27(s) of the Act, to enable the application to remain alive to deal with any application which might be made to exercise the liberty. The divided application will be identified as No. 774(A) of 1999.*

3 On 18th July 2000 solicitors for the applicant gave notice that he wished to exercise the liberty granted to him in relation to shares and options. On 3rd November 2000 the solicitors for the applicant filed Particulars of Claim. By those Particulars the applicant claimed a sum of money equal to the lost opportunity to him of entering into the market, exercising his options and realizing their value during the exercise period (from 9th March 1999 to 9th March 2003), further particulars of which would be provided by way of expert evidence prior to and at hearing of the matter. The applicant sought an order for the benefit denied to him namely a sum of money equal to the value of the shares and options as described in paragraphs 4 and 5 of the Particulars of Claim.

4 On 1st December 2000 the respondent filed a Notice of Answer and Counterproposal in which it asserted, inter alia, that the applicant's claim is not an industrial matter and hence was beyond jurisdiction. *The Industrial Relations Act (1979)* (The Act), by s.29(1)(b)(ii) or otherwise does not grant jurisdiction or power to enable the Commission to award the applicant a sum of money equal to the value of a benefit to the shares and options.

5 On 22nd December 2000 the solicitors for the applicant filed a further response to the Notice of Answer and Counterproposal of the respondent seeking strike out of most of the paragraphs contained in the schedule to the document filed on 1st December.

6 The Commission conducted a conference between the parties relating to procedural matters on 16 January 2001.

At the conference the intent of the decision of 15 June 2000 as it related to the issue of contractual benefits of shares and options was discussed and it was decided the matter would be listed for the parties to argue the jurisdiction and power of the Commission to award the type of remedy sought by the applicant and described in the Particulars of Claim.

7 It was argued on behalf of the applicant that the finding already made by the Commission is that he is entitled to benefit of his contract and the shares and options provisions of the contract are part of that benefit. It was also found that the Commission was unable to assess what the benefit would be because it had also made a finding that it was unable to order that the shares and options be issued to the applicant. It had heard no argument as to whether the Commission has power to make an award of damages when specific terms of the contract cannot be ordered.

8 The applicant says that the issue to be determined is one solely of jurisdiction namely whether the Commission has power to award a sum of money where specific performance of a benefit under a contract cannot be ordered. In his submissions Mr Odes QC was careful to describe the award as a 'sum of money' because it may be neither damages nor compensation. However described, it is a sum of money in lieu of a specific benefits, it is a substituted form of specific performance. The Commission's source of power relating to contractual benefits resides in s.29(1)(b)(ii) of the Act, this provision is to be read in conjunction with s.23(1) and s.26(2). Section 29(1)(b) provides an industrial matter may be referred to the Commission by an employee where he claims that he has not been allowed by his employer benefits to which he is entitled under his contract of service. Section 26(2) provides that in deciding such a matter the Commission in granting relief or redress under the Act is not confined to the specific claim made or to the subject matter of the claim.

9 The powers conferred by the Commission of the Act must be read consonant with the purpose of the Act, which is to provide a comprehensive scheme regulating mutual rights and duties of employers and employees. Amendments that have been made to the Act by introduction s.7(1)(A) and s.23(A) confirm that approach. It is argued for the applicant that once the Commission determines that a claim has been properly made under s.29(1)(b)(ii) it has the jurisdiction to decide the claim and in the exercise of that jurisdiction is to act in accordance with the equity, good conscience and substantial merits of the case. When it does so it is not restricted to the specific claim or the subject matter of the claim. This has been well and truly established by the Decision of the Full Bench in *Perth Finishing College Pty Ltd v Watts [(1989) 69 WAIG 2307] and in Welsh v Hills [(1982) 62 WAIG 2708]*.

10 In its decision in the *David Saab v Hotcopper Australia Ltd (supra)* the Commission has already found that the shares and options sought in the Particulars of Claim were a benefit referred to under s.29(1)(b) of the Act and all of the elements that are necessary to have been established by the applicant have been. Because they have, the Commission is not restricted to the specific claim or to the subject matter. This means an order can be made by the Commission where specific performance cannot be granted, in lieu of such specific performance. This must be so because to deny relief will enable the respondent to benefit from unlawful conduct; this would defeat the very purpose of the Act and would require an employee unfairly dismissed or denied a benefit under his contract to have to seek redress for a benefit under his contract in a civil court.

11 The Commission has consistently ordered an employer to pay damages in lieu of specific benefits promised under a contract of employment. In support of this contention Mr Odes submitted a schedule of authorities on denied contractual benefits citing 22 cases where the Commission has exercised the powers in the Act as the applicant says they ought be exercised in this case. Some examples are *Truijens v Hanson Publishing Pty Ltd t/a Jam Design Studios (2001) 81 WAIG 318* where the Commission in lieu of notice, annual leave and 17½% leave loading granted remedies in cash; *Pinnegar v The Lunching Pad Pty Ltd t/a Mezzonine (2000) 80 WAIG 5655* where once one month's notice was converted to cash; *Purnell v Arora Pty Ltd CAN 008947957 t/a Arb 4X4 Accessories (2000) 80 WAIG 4849* where a mobile telephone account was converted to cash; *Stokes v Wingstar Holdings Pty Ltd (1999) 79 WAIG 298* where salary packaging including commission and supplied motor vehicle was converted to cash and *Royal International (WA) v Valli (1998) 78 WAIG 1110* where 40% commission was converted to cash as a denied contractual benefit.

12 Mr Odes made clear that even though the respondent had tried to paint a picture that the claim is really for breach of contract and the applicant is seeking damages for loss of opportunity to get the shares and sell them, that is not the essence of the argument at all. The applicant is not seeking contractual damages, it simply wants to enforce a benefit under the contract. The mere fact that it could be categorized and could be valued by reference to common law concepts does not mean that it is no longer a contractual benefit under the contract, this is clearly the ratio in *Perth Finishing College (supra)*.

13 The respondent argues that the Commission does not have jurisdiction to hear and determine the matter because the application is not a claim that the applicant has not been allowed by the respondent, a benefit to which he is entitled under his contract of service and therefore the matter cannot be referred pursuant to s.29(1)(b)(ii). The Commission does not have power to make the orders sought because the subject of the application is not an industrial matter as defined in s.7(1) and s.7(1)(A) and is hence not within jurisdiction under s.23.

14 The vice in the applicant's claim is that it does not claim a benefit; it does not seek an order that the respondent issue him the shares and options. He claims instead, a sum of money equal to the value of the shares and options. That is not a benefit under the contract because the contract does not provide that the respondent is to pay the applicant a sum of money equal to the value of the shares. That is not to say the applicant could not make a claim for damages in the civil court which may make an award in his favour against the respondent for breach of contract in failing to issue the shares and options. That is an award he may recover as a result of breach of contract but it is not a benefit to which he is entitled under the employment contract and that is the key. In s.23A(1)(a) the Act recognizes the distinction between a benefit under the contract of employment and an amount to which a claimant is entitled on the one hand and compensation for loss or injury by a wrongful act.

15 The jurisdiction is not available because a claim for damages for breach of contract is not an industrial matter as defined in that it does not relate to rights and duties of employers' employees, instead it relates to failure to allow benefits under contract of services, that is damages for breach of contract, and that does not sufficiently relate to rights and duties of an employer and an employee. Section 7A expressly makes an industrial matter a matter relating to failure of employers to allow employees benefits under the contract of service it does not provide that an industrial matter includes a claim for compensation or damages for failure to allow a benefit.

16 The respondent through its Counsel Mr Le-Miere QC examined Industrial Court authorities and in particular dealt with in some detail the implications of the Decision in *Robe River Iron Associates v Adste [(1997) 68 WAIG 11] (Pepler's Case)*. The Commission is urged to regard that decision as authority that s.29(1)(b)(ii) is strictly limited to allowing an entitlement arising out of a contract of service, it is restricted to an employee's contractual rights and does not empower the award of compensation at large. The Industrial Appeal Court also held that the Commission does not have jurisdiction or power to make an order awarding compensation or any other money payment in the exercise of the separate head of jurisdiction. The principle applies to cases concerned with existing contractual entitlements as well as creation of

new rights to compensation for unfair dismissal or compensatory payments for redundancy subject to the termination of a contract of employment.

17 The authorities relied upon by the applicant are distinguishable. In *Perth Finishing College v Watts (supra)* the claim was for a benefit under the contract not a money sum in lieu of a benefit under the contract that the employer had not allowed the employee. The Full Bench had said it was not necessary to decide whether a claim for unliquidated damages for a breach of a contract of service may be a benefit. *Welsh v Hills (supra)* should also be distinguished as inconsistent with the decision in Pepler's Case and must be considered to be no longer good law. Finally it is argued that if those cases are not distinguishable and to the extent they support the applicant's argument they are inconsistent with the findings in Pepler's Case and should not be followed.

18 In my opinion the answer to the question of jurisdiction and power posed in this application that has been determined by the Full Bench in *Perth Finishing College v Watts (supra)*. At page 2308 the Full Bench observed "*that the question which the Commission quite rightly turned to consider was since the application was one pursuant to s.29(b)(ii) of the Act, whether the unexpired term of a fixed term contract is a "benefit" for the purpose of the section. After considering Walsh (sic) v. Hills 62 WAIG 2708 and Waroona Contracting v Usher 64 WAIG 1500 the Commissioner considered that the claim of the applicant in the proceedings had been denied a benefit under a contract of service, namely the promise of employment for three years. The claim was therefore one properly made*." Later the Full Bench noted that the Commission at first instance had clearly found that it was being asked to award an employee a benefit to which the employee was entitled by virtue of the contract of the service but which had been denied to her. The Commission found there was not a mutual determination of the contract and held that the claim that the applicant had been denied a benefit under the contract of service that being a promise of employment for three years. That claim was properly made under s.29(b)(ii).

19 The Full Bench further observed that once the Commission determined that the claim was properly made under s.29(b)(ii) it had the jurisdiction to decide it and that in the exercise of that jurisdiction it shall act according to equity, good conscience and substantial merits of the case and "*…In granting relief or redress the Commission is not restricted to the specific claim made or the subject matter of the claim see s.26(2)*to which the Full Bench added*… In addition, as the Commissioner said, the precise benefit forgone may be the relief to be granted in many cases, and in other cases, it may not*."

20 It is argued by the respondent that Pepler's case is authority for its argument that there is no jurisdiction and power. The Full Bench discussed this matter at page 2312 in *Perth Finishing College*—

> "*What Rowland J. said in Pepler's Case (op.cit.) as to the necessity for the contract to be extant and the effect of reinstatement in that situation was clearly restricted to section 29(b)(i). Section 29(b)(i) clearly apprehends that a claim for unfair dismissal, which must occur when the contract is not extant, should be contained within "an industrial matter".*
>
> *Section 29(b)(ii) does not exclude the same, and in this case, illustrates precisely how within the framework of an industrial matter such a claim can occur.*
>
> *It is, in our opinion clear also that section 29(b)(ii) expands the definition of industrial matter so that an industrial matter may be referred [i.e. because there is a claim under section 29(b)(ii)]. <u>That is, the claim renders it an "industrial matter" even if it were not"</u>*
>
> *(*emphasis added)

The Full Bench also observed that where there is an entitlement to a benefit under a contract that entitlement continues upon the termination because *…in section 29(b)(ii), the entitlement is "under" (i.e. "by virtue of or pursuant to") the contract of service. The entitlement remains whether it is pursued or not.*

21 On the basis of this reasoning the Full Bench determined that whatever the date of the termination of the contract in *Perth Finishing College*, and that was in dispute, there nevertheless remained an entitlement under the contract to remuneration for the balance of the three year period depending on the nature of the contract. It concluded there was clearly jurisdiction in that case because the benefit is …'therefore what is the employee's right under the contract.' Relevantly to for this case it referred to Olney J's opinion in Pepler's Case that there was nothing in the Act to justify the exercise of jurisdiction to award a dismissed employee compensation or any other money payment except as an incident to an order for reinstatement or re-employment made under s.29(b)(i). The Full Bench decided "*The words of section 29(b)(ii) are plain. A claim under section 29(b)(ii) cannot lie, therefore, for compensation as such, but for a benefit.*"

22 The Full Bench gave considerable attention to the meaning of the word "benefit" it included a wide variety of claimable items from the value of board and lodgings to recovery of value of tips which might have been expected to be earned. It observed that in a jurisdiction such as this where equity and good conscience and substantial merits of the case are mandatory considerations, a wide view of the meaning of "benefit" must be given. Relating this to the matters then before it, it said—

> "*Thus, quite clearly, the right to enforce a claim for wages by a claim for liquidated damages at law arising from a fixed term contract is easily identifiable as a benefit to which a person is entitled under his contract of service, as is the agreed provision of work for a fixed period under a fixed term contract. If a person were entitled to work and to be paid under a contract of service for the fixed term, then that clearly is a benefit. It matters not that the amount claimable is called "damages". It is the recovery of remuneration which he/she was entitled to be paid. Damages is what the amount might be called at law. It is still a benefit to which an employee is entitled as defined by Johnson C. in Balfour v. Travelstrength Ltd (op.cit.), and of the same genus as those benefits under the contract referred to by Macken McCarry and Sappideen (op.cit.).*
>
> *Although described as such in Waroona Contracting v. Usher (op.cit.) and Welsh v. Hills (op.cit.), it is not compensation, but the claiming and recovery of a benefit to which there is entitlement.*"

23 Finally the Full Bench said that the matter then before it was not a claim for compensation it was a claim for a benefit as described in s.29(b)(ii), but even if it were not so described and carried the label of compensation it would not be outside jurisdiction provided it fitted the definition of 'benefit' and the words 'entitled under his contract of service' in s.29(b)(ii). Pepler's Case is not authority for the proposition that a benefit is compensation under s.29(b)(ii) it is indeed authority that compensation is non available by that name under the Act and certainly authority for the proposition that s.29(b)(i) does not authorize compensation to be paid except in connection with an order for reinstatement.

24 I conclude that the claim as described in the Particulars of Claim relates to the rights and duties of an employer and an employee. It is therefore an industrial matter capable of being referred under s.29(1)(b)(ii). It relates to benefits as they are broadly defined in *Perth Finishing College (supra)*. The Commission therefore has jurisdiction and power to deal with it.

25 In my respectful view the circumstances in this case are so similar to the circumstances described by the Full Bench in Perth Finishing College that it is right to apply the ratio of the decision therein and for that reason the Commission will proceed to hear and determine the matter having decided that it has jurisdiction and power to do so.

26 The Commission has exercised the jurisdiction conferred on it under s.24 of the Act in this determination and in accordance with s.24(2)(b) grants leave to the respondent to appeal should it wish to exercise such leave.

2001 WAIRC 02313

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	DAVID SAAB, APPLICANT
	v.
	HOT COPPER AUSTRALIA LTD, RESPONDENT
CORAM	COMMISSIONER J F GREGOR
DELIVERED	WEDNESDAY, 14 MARCH 2001
FILE NO	APPLA 774 OF 1999
CITATION NO.	2001 WAIRC 02313

Result	Commission has jurisdiction and power to deal with the claim. Leave to appeal granted.
Representation	
Applicant	Mr M. Odes QC and with him Mr A. Lucev (of Counsel) appeared for the applicant
Respondent	Mr R. Le-Mierre QC and with him Mr A. Smetana (of Counsel) appeared for the respondent

Declaration and Order.

HAVING Heard Mr M. Odes QC and with him Mr A. Lucev (of Counsel) appeared for the applicant and Mr R. Le-Mierre QC and with him Mr A Smetana (of Counsel) appeared for the respondent, the Commission pursuant to the powers vested in it by the Industrial Relations Act 1979 does hereby declare and order—

(1) THAT the Commission has jurisdiction and power to deal with the claim; and

(2) THAT leave be granted to appeal pursuant to s.24(2) of the Industrial Relations Act 1979.

(Sgd.) J. F. GREGOR,
[L.S.] Commissioner.

SECTION 29 (1)(b)—Notation of—

Applicant	Respondent	Number	Commissioner	Result
Allison BA	West Australian Locomotive Engine Drivers' Firemen's and Cleaners' Union of Workers, The	2054/1998	Scott C	Dismissed
Allison BA	West Australian Locomotive Engine Drivers' Firemen's and Cleaners' Union of Workers, The	917/1999	Scott C	Dismissed
Argentieri J	Ian Dunn Century Drilling Ltd	1969/2000	Scott C	Withdrawn
Armstrong G	Perth Football Club	1431/2000	Fielding SC	Discontinued
Aylmore CR	Employment National (Administrations) Pty Ltd	796/2000	Scott C	Dismissed
Barron P	WA Spencer Electrical (Partners: J & S Poulsen)	73/2001	Scott C	Dismissed
Bell S	Patterson Ord Minnett Ltd	1115/2000	Kenner C	Discontinued
Berson RC	Margaret River Wine Company Pty Ltd T/A Stellar Ridge Estate	1846/2000	Smith C	Discontinued
Bewetz N	Chua Family Trust Pty Ltd	202/2001	Kenner C	Discontinued
Biss E	The Roman Catholic Archbishop Perth and Mater Christi Catholic Primary School Board	132/2001	Kenner C	Discontinued
Bjelanovic JJ	Dileum Pty Ltd & Austie Nominees Pty Ltd	447/2001	Coleman CC	Discontinued
Blunden PR	Cian Services Pty Ltd T/A Fastway Couriers (WA)	1982/2000	Gregor C	Discontinued
Bonannella G	Bartels Pty Ltd T/A Western Cabinets	2122/2000	Scott C	Dismissed
Bowman M	Coventry Group Ltd	2082/2000	Beech C	Discontinued
Bradley GG	Richard Lovegrove	238/2001	Scott C	Dismissed
Brindle IC	P & O Catering & Services Pty Ltd ACN 008 694 442	1135/1999	Gregor C	Discontinued
Burns C	Perth Candy Company	200/2001	Beech C	Discontinued
Bye D	Solomon Brothers	33/2001	Kenner C	Discontinued
Cann T	Kosta Suleski	1941/2000	Coleman CC	Discontinued
Caruso G	Reginald Leslie Kernaghan & Margreta Aline Kernaghan	1273/2000	Gregor C	Discontinued
Catalano SM	Alan Bruce Brokerage Group Pty Ltd	158/2001	Beech C	Withdrawn
Cate DA	Mr Michael Ahern	15/2001	Scott C	Dismissed
Cate RE	Mr Michael Ahern	14/2001	Scott C	Dismissed
Cates MJ	Direct Motors Pty Ltd T/A Bunbury Toyota	562/2001	Coleman CC	Discontinued
Corfe JS	Central City Drainers—John Ainsworth	66/2001	Beech C	Discontinued
Cox BL	Board of Management of Centrecare Marriage and Family Service	563/2000	Beech C	Discontinued
Crowley MJ	Perilya Mines Limited NL	1641/2000	Gregor C	Discontinued
Cunningham SN	Berachah Pty Ltd CAN T/F Armstrong Family Trust T/A Pizza Hut	1266/2000	Beech C	Discontinued
Daniels DJ	Leisurenet T/A Healthland Fitness International	1664/2000	Wood C	Discontinued
Davis CH	Foundation Christian School Board	2092/2000	Kenner C	Discontinued
Davison B	Tyco Australia Pty Ltd (ACN008 399 004)	1758/2000	Smith C	Discontinued

Applicant	Respondent	Number	Commissioner	Result
Dierckx RC	Kiam Corporation Limited	1788/2000	Smith C	Discontinued
Dodsworth A	ARCCA Industries Pty Ltd	1847/2000	Gregor C	Discontinued
Dumitru A	The Fox & Hound Bar & Bistro	181/2001	Beech C	Discontinued
Dunning P	Superstars and Legends Pty Ltd	2032/2000	Scott C	Dismissed
Dwyer CP	Supply Direct Pty Ltd	24/2001	Kenner C	Discontinued
Elliott G	Travelshop.com.au Pty Ltd	1041/2000	Kenner C	Discontinued
Emery L	Internet Tuition College Pty Ltd	1662/2000	Beech C	Discontinued
Fair M	HR Operations Pty Ltd T/A Hyatt Regency Perth	114/2000	Beech C	Discontinued
Fazio IG	Cusmia Corporation P/L T/A Cusmia Property Cons	551/2001	Coleman CC	Discontinued
Fitzhugh FA	Kid Care Pty Ltd T/A A Childs Kingdom	2130/2000	Smith C	Dismissed
Frayne AT	Community Newspaper Group Ltd	205/2001	Beech C	Discontinued
Frost DA	Feniche Investments P.L. Trading As Patersons Landscaping	163/2001	Scott C	Dismissed
Gailbraith LB	Barocco/Baysgold Ltd	1766/2000	Wood C	Dismissed
George M	Julia Ross Recruitment Pty Ltd	307/2001	Kenner C	Discontinued
Golding AI	Western Swan Community Living Association Inc.	1433/2000	Kenner C	Discontinued
Guinan BL	Cian Services Pty Ltd T/A Fastway Couriers (WA)	1972/2000	Gregor C	Discontinued
Hall N	Albany Esplanade Pty Ltd T/A The Esplanade Hotel	36/2001	Gregor C	Discontinued
Hanrahan I	J Corp Pty Ltd	2058/2000	Beech C	Discontinued
Harding JH	MR Bill Walker—Riverside Gardens Estate	150/2001	Wood C	Discontinued
Henderson HM	Gibsons & Paterson (WA) Pty Ltd	1525/2000	Beech C	Discontinued
Hooper TJ	East Point Pty Ltd trading as Auto Parts	1945/2000	Smith C	Discontinued
Howlett TL	Newcrest Mining Ltd	1602/2000	Kenner C	Discontinued
Ilijazi A	Canning Vale Weaving Mills Ltd	2057/2000	Kenner C	Discontinued
Jeff S	Resold.Com.Au Pty Ltd	71/2001	Gregor C	Discontinued
Karba C	Airport Retail Enterprises Pty Ltd	546/2001	Wood C	Discontinued
Kelly SA	Styleplan Interiors Pty Ltd	250/2001	Beech C	Discontinued
Kenyon AT	Western Australian Cricket Association	2140/2000	Beech C	Discontinued
Kern M	Instrumentation and Combustion Engineering	414/2001	Scott C	Dismissed
Kickett GD	Peedac Pty Ltd	1929/2000	Scott C	Dismissed
King MK	Perth 4WD Rentals	2056/2000	Gregor C	Dismissed
Kozyrski DK	Friends Tea and Coffee House	59/2001	Scott C	Dismissed
Laidley SA	The Telephone Connection	1842/2000	Gregor C	Discontinued
Langham K	Paradox Digital Pty Ltd	428/2001	Coleman CC	Discontinued
Langham K	Norgard Clohessy Chartered Accountants	429/2001	Coleman CC	Discontinued
Lavender LM	Servcorp Australia Holdings Pty Ltd	298/2001	Beech C	Discontinued
Lee K	Bartter Enterprises Pty Ltd	2074/2000	Wood C	Discontinued
Lehn CA	Godwin David Moss Realtors Group Pty Ltd	504/2001	Coleman CC	Discontinued
Lloyd KJ	JA & JG Della Bosca	19/2001	Kenner C	Discontinued
Logue N	Julia Ross Recruitment Limited	236/2001	Scott C	Dismissed
Lunt WT	Max Resources Ltd ARBN 009 568 594	1675/2000	Wood C	Discontinued
Maclean M	The Brand Agency Pty Ltd	125/2001	Beech C	Discontinued
Maclean M	The Brand Agency Pty ltd	125/2001	Beech C	Discontinued
Macri G	Dorsogna Limited	277/2001	Scott C	Withdrawn
Markiewicz M	Sphinx Restaurants Australia Pty Ltd	118/2001	Coleman CC	Discontinued
Markovich J	Channel 31 Access Television	1850/2000	Kenner C	Discontinued
Martello AS	National Office Products Ltd T/A Bookland	2097/2000	Gregor C	Discontinued
Matthews AJ	Templar Security Pty Ltd	74/2001	Beech C	Discontinued
Matthews KG	Stellar Systems Pty Ltd	120/2001	Coleman CC	Discontinued
McConkey AW	M & A's of Denmark	1951/2000	Beech C	Struck Out
McGavin C	Minora Investments Pty Ltd T/A Leisure Inn (ACN070 134 799)	1975/2000	Wood C	Discontinued
Medwin GL	Prestige Property Services	423/2000	Coleman CC	Discontinued
Moggridge J	Swan Christian Education Association	2069/2000	Kenner C	Discontinued
Moore WJ	Etos Australia Pty Ltd	474/2001	Coleman CC	Discontinued
Moylan DL	Chairman of Commissioners City of South Perth Council	622/2001	Gregor C	Dismissed
Mulliner F	Geisha Bar	1448/2000	Smith C	Discontinued
Neville M	McSwan and Associates	258/2001	Kenner C	Discontinued

Applicant	Respondent	Number	Commissioner	Result
Nicholls DT	Axis Information Systems Pty Ltd	1151/2000	Beech C	Discontinued
Nicholls T	A.N Gilbert Pty Ltd T/A Gilbert, Bridal, Floral & Handicraft, A.J. Gilbert T/A Aurora Traders	111/2001	Scott C	Dismissed
O'Keefe RJ	D.E. Engineers Trust T/A D.E. Engineers ABN 79 596 519 944	2117/2000	Gregor C	Discontinued
Oam FJB	Aherns (Suburban) Pty Ltd	546/2000	Beech C	Discontinued
Pepper SG	Carparts Distribution Pty Ltd	1314/2000	Fielding SC	Discontinued
Pool EM	Perth Flying Squadron Yacht Club Inc	1669/2000	Gregor C	Discontinued
Posa A	Internet Tuition College Pty Ltd	1661/2000	Beech C	Discontinued
Posa M	Internet Tuition College Pty Ltd	1660/2000	Beech C	Discontinued
Pring SK	Julia Ross Recruitment	1604/2000	Scott C	Dismissed
Quartermaine B	Salonika Pty Ltd T/A Spencer Signs	2039/2000	Scott C	Withdrawn
Quartermaine BJ	Spencer Signs	1579/2000	Gregor C	Discontinued
Quinn S	Westday Investments Pty Ltd ACN068100658 T/A Metro Filters	1932/2000	Kenner C	Discontinued
Raunchwald LM	Cove Fitness Pty Ltd	2138/2000	Scott C	Dismissed
Read C	Gary Gunn AG-Ready Services	38/2001	Smith C	Discontinued
Richards DL	Farmers Centre Pty Ltd Dumbleyung	323/2001	Coleman CC	Discontinued
Richardson R	Geraldton Port Security Pty Ltd	2129/2000	Kenner C	Discontinued
Robinson BK	KTM Enterprises Pty Ltd	1720/2000	Beech C	Discontinued
Russell R	Century Resources A Division of Downer Group Limited	61/2001	Kenner C	Discontinued
Ryder CE	Hungry Jacks Glengarry	1884/2000	Scott C	Dismissed
Saab D	Hotcopper Australia Ltd (ACN085 911 753)	188/2001	Gregor C	Discontinued
Save CL	William M Mercer	2131/2000	Scott C	Dismissed
Scott SJ	Benara Nurseries Iain James	2133/2000	Scott C	Dismissed
Shore RL	6PR Southern Cross Radio Pty Limited	1316/2000	Smith C	Discontinued
Shore RL	96FM Southern Cross Radio Pty Limited	1317/2000	Smith C	Discontinued
Skerman BL	HI Tech Cylinder Heads	182/2001	Scott C	Dismissed
Smith CJ	SP Hay	213/2001	Gregor C	Discontinued
Summerfield P	Shire of Katanning	694/1998	Kenner C	Discontinued
Theobald N	Car Lovers Car Wash Ltd	1942/2000	Coleman CC	Discontinued
Theobald WB	Banwell Pty Limited Trading As Boat Torque 2000	1749/2000	Scott C	Dismissed
Treadgold KR	Weskinglia Holdings Pty Ltd T/A Fast Eddys Morley	1258/2000	Beech C	Discontinued
Tuia A	Heo Foo	399/2001	Scott C	Withdrawn
Vadala D	Automotive Industrial & Mining Supplies (Automotive Electrical Technologies)	136/2001	Wood C	Dismissed
Verhoogt SA	Goldy Motors	1587/2000	Kenner C	Dismissed
Visscher JA	APC Engineering Pty Ltd	207/2001	Gregor C	Discontinued
Ward TA	Transmission Nominees Pty Ltd T/A Driveline Auto Parts	2027/2000	Gregor C	Discontinued
Whitehead LA	Jocor Pty Ltd C.P.E. Cables Manufactures	2073/2000	Beech C	Discontinued
Wilgenburg C	Genen Pty Ltd T/A Reubens Café	1902/2000	Kenner C	Discontinued
Wilkin S	Homebuyers Centre	2075/2000	Beech C	Discontinued
Wittwer KN	(Dianella Fruit & Vegetable) Volcano Investments Pty Ltd	143/2001	Kenner C	Discontinued
Wood HE	Donald Harrington, Peter Griffiths & Mark Smith T/A Marble Bar Travellers Stop	108/2001	Wood C	Discontinued
Wood TD	Donald Harrington, Peter Griffiths & Mark Smith T/A Marble Bar Travellers Stop	110/2001	Wood C	Discontinued
Woodward DJ	Collex Waste Movers	26/2001	Beech C	Discontinued
Worthington BL	"The British Sausage Co" Michael Ferrero	331/2001	Kenner C	Discontinued
Wright T	Grand Hotel (Mt Magnet Hotel)	17/2001	Kenner C	Discontinued
Zvork D	Clough Engineering Pty Ltd	802/2000	Gregor C	Discontinued

CONFERENCES—
Matters arising out of—

2001 WAIRC 02309

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	THE AUTOMOTIVE, FOOD, METALS, ENGINEERING, PRINTING AND KINDRED INDUSTRIES UNION OF WORKERS — WESTERN AUSTRALIAN BRANCH, APPLICANT
	v.
	ASIA METALS PTY LTD T/AS AUSSIE WASTE RECYCLING AND AUSSIE METALS, RESPONDENT
CORAM	COMMISSIONER J F GREGOR
DELIVERED	THURSDAY, 15 MARCH 2001
FILE NO	C 68 OF 2001
CITATION NO.	2001 WAIRC 02309

Result	Order re cessation of industrial action

Order.

WHEREAS on 9 March 2001 The Automotive, Food, Metals, Engineering Printing and Kindred Industries Union of Workers—Western Australian Branch applied to the Commission for a conference pursuant to Section 44 of the *Industrial Relations Act, 1979* over a dispute between it and Asia Metals Pty Ltd t/as Aussie Waste Recycling and Aussie Metals; and

WHEREAS the Commission was told the dispute related to the suspension from work of four members of the union allegedly because no work was available to them; and

WHEREAS the union complains that the real reason for the stand downs was the signing of the five individuals as members of the union; and

WHEREAS the parties canvassed the issues in conference. The Commission was told by the employer that the stand downs had been forced upon it by directions of the Department of Environmental Protection prohibiting them from working a night shift and because of breakdowns to equipment; and

WHEREAS the Commission caused enquiries to be made with the Department of Environmental Protection and has been advised that there are no orders that the respondent not work night shift on the contrary the respondent is obliged to comply with relevant noise pollution legislation; and

WHEREAS the Commission was advised that there has been picket lines at the premises and the company's business has been disrupted by the picket lines; and

WHEREAS the Commission directed the parties in a private conference in a view to resolving the matter; and

WHEREAS the parties have reported to the Commission that the matter has not been resolved but the union is of the view that further discussions will result in settlement; and

WHEREAS the Commission by s.44 of the Act can give directions and make such orders as will in its opinion prevent a deterioration of industrial relations in respect of the matter in question until conciliation or arbitration has resolved it; and

WHEREAS the Commission is of the view that the matter can be resolved by conciliation; and

WHEREAS the parties will be directed by the Commission to have further conciliation. To allow this to proceed in a proper atmosphere the Commission will order that industrial action by both parties cease. The union will be required to forthwith remove all picket lines and cease any action which might disrupt the operations of the employer, and the employer will be required forthwith to reinstate to the payroll each and everyone of the four employees who were stood down. The liberty will be reserved to either party to apply to lift this order on 12 hours notice.

NOW THEREFORE pursuant to the powers vested in it by the *Industrial Relations Act, 1979*, the Commission, hereby orders—

1. THAT picket lines at the premises of the respondent be removed and the union cease any action which would disrupt the business of the employer.
2. THAT the respondent forthwith reinstate to pay each and everyone of the four individuals who had been stood down.
3. THAT the parties are directed to enter into discussions with an aim to resolving the matter by conciliation.
4. THAT liberty is reserved to each party to apply to rescind this order on 12 hours notice.

(Sgd.) J. F. GREGOR,
[L.S.] Commissioner.

2001 WAIRC 02291

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	CONSTRUCTION, MINING, ENERGY, TIMBERYARDS, SAWMILLS AND WOODWORKERS UNION OF AUSTRALIA—WESTERN AUSTRALIAN BRANCH & OTHERS, APPLICANT
	v.
	BHP IRON ORE PTY LTD, RESPONDENT
CORAM	COMMISSIONER S J KENNER
DELIVERED	WEDNESDAY, 14 MARCH 2001
FILE NO/S	C 60 OF 2001
CITATION NO.	2001 WAIRC 02291

Result	
Representation	
Applicant	Mr D Schapper of counsel
Respondent	Mr R LeMiere QC and Mr R Lilburne of counsel

Reasons for Decision.

1 By this application pursuant to s 44 of the Industrial Relations Act 1979 ("the Act") the applicants seek an order that the respondent continue to be bound by and observe the terms and conditions of an unregistered industrial agreement known as the Industrial Relations Agreement (1997 as amended) ("the Agreement"). The reason for the application being that the respondent on 15 February 2001, gave notice of its intention to withdraw from the Agreement, to take effect on or about 17 March 2001. The applicants also seek an interim order to continue the effect of the Agreement, pending the hearing and determination of the substantive claim.

2 At a conference convened by the Commission pursuant to s 44 of the Act, a preliminary issue was raised by the respondent going to the jurisdiction of the Commission to entertain the application. Mr LeMiere QC on behalf of the respondent submitted that the effect of the application, given that a ground in support of it was that the Agreement is binding on the respondent by force of reference to it in the BHP Iron Ore Enterprise Bargaining Agreement 1997 ("EBA III"), amounted to an application to enforce EBA III. The application was therefore one involving the exercise of judicial power and beyond the jurisdiction of the Commission. A further submission was later put that the application also sought the imposition of an agreement on non-consenting parties, beyond the jurisdiction of the Commission.

3 Mr Schapper submitted that it was within the jurisdiction of the Commission to determine whether EBA III has the effect of continuing the application of the Agreement, notwithstanding the respondent's purported withdrawal from it, as a part of determining whether an order should issue, as a matter of discretion, to continue the application of the Agreement. The applicants submitted that in determining this issue, the Commission would not exercise judicial power but determine a matter of law, as a part of the resolution of the substantive dispute referred to the Commission pursuant to s 44 of the Act. Mr Schapper submitted that the claim clearly did not by its terms seek to enforce the Agreement. Rather, the claim sought the application of the terms of the Agreement to the parties by an order of the Commission.

Consideration

4 As an issue of jurisdiction has been raised by the respondent, the Commission is duty bound to determine that question before considering any further steps in resolving the present dispute: *Springdale Comfort Pty Ltd trading as Dalfield Homes v Building Trade's Association of Unions of Western Australia (Association of Workers)* (1987) 67 WAIG 325. The Commission clearly has jurisdiction and power to consider whether it has jurisdiction to deal with a matter: s 24 Act.

5 This Commission, unlike the position that obtains federally, whereby under Chapter III of the Constitution (Cth) only federal courts may exercise the judicial power of the Commonwealth (*R v Kirby; Ex parte Boilermakers Society* (1956) 94 CLR 254; *A-G (Cth) v R* (1957) 95 CLR 529), any distinction between judicial, arbitral and administrative power within the Commission's jurisdiction exists not by reason of any constitutional limitation, but as a result of construction of the terms of the Act itself.

6 It is trite to observe that the jurisdiction of this Commission may be judicial, arbitral or administrative, depending upon the nature of the proceedings concerned.

7 The enforcement powers of the Commission, including the Industrial Magistrates Court, are set out in Part III of the Act. There was no suggestion by counsel for the respondent, and nor could there be, that the present application concerns any matter arising under s 84A of the Act. The only other relevant enforcement provision is s 83, dealing with a contravention or failure to comply with any provision of an award, industrial agreement or order. An Industrial Magistrate then has available a range of powers by way of remedy as set out in ss 83(2)-(6) of the Act.

8 In my opinion, the present application does not seek relief in terms of any alleged contravention or failure to comply with EBA III that could be characterised as enforcement. Nor for that matter, does the present application involve a bare question of interpretation, without any claim for consequential orders, as would be appropriately brought within the terms of s 46 of the Act. The application does not by any other means seek to "enforce" the Agreement through the exercise of judicial power. In my view, the present claim for an order is one that is properly characterised as one seeking an order of the Commission, to create future rights and obligations, albeit reflecting the terms and conditions of the Agreement. This will entail the exercise of arbitral and not judicial power. Merely because the Commission may be called upon to interpret the terms of EBA III, as a part of the proceedings, does not of itself, fundamentally change the character of the matter: *Crewe and Sons Pty Ltd v AMWU* (1989) 69 WAIG 2623.

9 Moreover, given that the jurisdiction and power of the Commission, in particular that available under s 44 of the Act, is one to be determined by considering the terms of the Act as a whole, and not any underpinning constitutional limitation, the use of the powers under s 44 of the Act to make, at least to some extent, judicial determinations, is a live issue: *J Corp Pty Ltd v The Australian Builders Labourers Federated Union of Workers, Western Australia Branch* (1993) 49 IR 205.

10 As to the argument regarding the jurisdiction to impose an agreement on a party, the circumstances arising in *Director General of the Ministry for Culture and the Arts v The Civil Service Association of Western Australia Incorporated and Ors* (2000) 80 WAIG 453 were distinguishable from those before the Commission in this matter. In that case, the issue was whether the Commission could in effect impose a s 41 industrial agreement upon a non-consenting party as a matter of jurisdiction and power. This issue turned on the proper construction of s 41 of the Act, which does not arise in this matter.

11 Accordingly, for these reasons, in my view the present claim is within the jurisdiction of the Commission. Given the circumstances of the present application, I direct the parties to file and serve by 12pm on 15 March 2001, further submissions as to whether an interim order in the terms sought should issue.

2001 WAIRC 02341

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	CONSTRUCTION, MINING, ENERGY, TIMBERYARDS, SAWMILLS AND WOODWORKERS UNION OF AUSTRALIA—WESTERN AUSTRALIAN BRANCH & OTHERS, APPLICANTS *v.* BHP IRON ORE PTY LTD, RESPONDENT
CORAM	COMMISSIONER S J KENNER
DELIVERED	FRIDAY, 16 MARCH 2001
FILE NO/S	C 60 OF 2001
CITATION NO.	2001 WAIRC 02341

Result	Order issued.
Representation	
Applicant	Mr D Schapper of counsel
Respondent	Mr R LeMiere QC and Mr R Lilburne of counsel

Order.

WHEREAS on 2 March 2001 the applicants applied to the Commission for a conference pursuant to s 44 of the Industrial Relations Act, 1979 ("the Act");

AND WHEREAS on 7 March 2001 the Commission convened a conference between the parties pursuant to s 44 of the Act;

AND WHEREAS at the conference the Commission was informed that the parties were in dispute as to the respondent's notice of intention to withdraw from an unregistered industrial agreement known as the Industrial Relations Agreement (1997 as amended) ("the Agreement") which notice was given on or about 15 February 2001 and due to take effect on or about 17 March 2001 and with the applicants seeking interim and final relief in the form of orders that the terms of the Agreement continue;

AND WHEREAS the applicants submitted to the Commission that the Agreement was binding on the respondent by reason of it being referred to in and/or incorporated within the terms of the BHP Iron Ore Enterprise Bargaining Agreement 1997 ("EBA III") and thus such notice of purported withdrawal was ineffective and that in any event an order should issue on the merits preserving the terms of the Agreement;

AND WHEREAS the respondent raised as a preliminary issue the jurisdiction of the Commission to inquire into and deal with the matter referred to it pursuant to s 44 of the Act on the basis that the application sought the enforcement of EBA III alternatively the Agreement and thus entailed the exercise by the Commission of judicial power which was said

by the respondent not to be within the jurisdiction and power of the Commission;

AND WHEREAS the Commission invited the parties to file further submissions as to the Commission's jurisdiction to entertain the application which submissions were filed by the respondent and the applicants on or about 9 and 10 March 2001 respectively;

AND WHEREAS the Commission by reasons for decision dated 14 March 2001 determined that it did have jurisdiction and power to inquire into and deal with the matter and further directed the parties to file and serve written submissions by 12pm 15 March 2001 as to whether an interim order in the terms sought by the applicants should issue and invited the parties to file and serve any further submissions in reply;

AND WHEREAS the Commission has carefully considered the submissions as filed by the parties;

AND WHEREAS the Commission having regard to all of the matters raised by the parties in their submissions, both oral and written, including but not limited to the fact that the Agreement has in part governed the industrial relationship between the parties for a number of years containing provisions dealing with the orderly resolution of grievances and disputes; the engagement of contractors; provisions for the conduct of union business; continuation of remuneration and benefits for dismissed employees who commence proceedings in this Commission within a specified time; a commitment by the applicants to no industrial action and that it is apparent from the terms of EBA III and its predecessors that the Agreement, as amended from time to time, has formed and forms an element of the commitments, rights and obligations of the parties one to the other in their industrial relationship;

AND WHEREAS the Commission is of the view that there is a serious issue to be determined as to whether the Agreement has binding effect on the parties by reason of the terms of EBA III and whether in any event the Commission should by order preserve the terms of the Agreement by final relief and that the balance of convenience is in favour of the grant of an interim order by reason of there being substantial prejudice to employees of the respondent and to the applicants by way of the removal of rights and entitlements presently contained in the Agreement relative to any potential prejudice to the respondent in the interim and relatively short period given the time over which the Agreement has been in effect;

AND WHEREAS the Commission is of the opinion from all of the foregoing that there will be a deterioration in industrial relations between the parties in the event that an interim order does not issue until arbitration resolves the issues in dispute and notes that as a consequence of proposed changes to the Agreement in 1999 industrial action did occur (see: *Australian Workers Union v BHP Iron Ore Pty Ltd* (2001) FCA 3 per Kenny J at paras 90-94);

NOW THERFORE the Commission, having regard for the interests of the parties directly involved and to prevent the deterioration of industrial relations in respect of the matters in question, in accordance with the provisions of the Industrial Relations Act, 1979 hereby orders—

(1) THAT with effect from 17 March 2001 the applicants and the respondent shall be bound by and shall observe the terms and conditions of the Industrial Relations Agreement (1997 as amended) except clause 8 thereof pending the hearing and determination of the applicants' claim.

(2) THAT there be liberty to apply to any party on 24 hours notice to the others to vary, revoke or otherwise set aside the terms of this order.

(Sgd.) S. J. KENNER,
[L.S.] Commissioner.

2001 WAIRC 02486

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	AUSTRALIAN LIQUOR, HOSPITALITY AND MISCELLANEOUS WORKERS UNION, WESTERN AUSTRALIAN BRANCH, APPLICANT *v.* BURSWOOD RESORT (MANAGEMENT) LIMITED, RESPONDENT
CORAM	COMMISSIONER S WOOD
DELIVERED	WEDNESDAY, 4 APRIL 2001
FILE NO	C 75 OF 2001
CITATION NO.	2001 WAIRC 02486

Result	Application dismissed
Representation	
Applicant	Mr D Kelly
Respondent	Mr G Blyth

Order.

WHEREAS this application pursuant to section 44 of the Industrial Relations Act, 1979 was lodged in the Commission on 20 March 2001 by the applicant union seeking an order preventing the termination of Mr Derek Mitchell's employment; and

WHEREAS the Commission heard matter CR 350 of 2000 on 15, 16, 22 and 25 January 2001 in which the applicant union alleged that any termination of Mr Derek Mitchell would be unfair, and sought an order preventing the termination of Mr Derek Mitchell's employment; and

WHEREAS the Commission on 14 February 2001 ordered, in part, that the respondent not terminate the employment of Mr Mitchell as an Environmental Services Attendant prior to 3 calendar months from the date of that order, for reasons to do with his inability for medical reasons to perform duties as an Environmental Services Attendant; and

WHEREAS the applicant union instituted proceedings in the Industrial Magistrate's Court on 1 March 2001 for an enforcement of the Commission's order; and

WHEREAS this application was dealt with by the Commission in conference on 21 and 23 March 2001 and the matter was not resolved; and

WHEREAS having regard to the abovementioned, this matter was listed for hearing on 2 April 2001 as to whether the Commission is functus officio; and

WHEREAS the Commission finds that in respect of the remedy sought in this application the Commission is functus officio; and

WHEREAS having been advised by the applicant union on 2 April 2001 that the union does not oppose the dismissal of the matter and sought an order to that effect from the Commission; and

WHEREAS the respondent likewise advised the Commission on 2 April 2001 that they agreed with the position put by the applicant union that the matter be dismissed; and

WHEREAS the Commission has been made aware that Mr Mitchell was dismissed from his employment with the respondent on 23 March 2001; and

WHEREAS having regard to this and the representations by the applicant and respondent, the Commission is satisfied that pursuant to section 27(1) of the Act it is not necessary or desirable in the public interest to further hear this matter in relation to the remedy sought by the applicant union;

NOW THEREFORE the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders—

THAT the application be and is hereby dismissed.

(Sgd.) S. WOOD,
[L.S.] Commissioner.

CONFERENCES—
Matters referred—

2001 WAIRC 02414

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	CONSTRUCTION, MINING, ENERGY, TIMBERYARDS, SAWMILLS AND WOODWORKERS UNION OF AUSTRALIA—WESTERN AUSTRALIAN BRANCH & OTHERS, APPLICANTS *v.* BHP IRON ORE PTY LTD, RESPONDENT
CORAM	COMMISSIONER S J KENNER
DELIVERED	MONDAY, 26 MARCH 2001
FILE NO/S	CR 60 OF 2001
CITATION NO.	2001 WAIRC 02414

Result	Direction issued.
Representation	
Applicant	Mr D Schapper of counsel
Respondent	Mr R LeMiere QC and Mr R Lilburne of counsel

Direction.

HAVING heard Mr D Schapper of counsel on behalf of the applicants and Mr R LeMiere QC and Mr R Lilburne of counsel on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby directs—

(1) THAT the applicants file and serve further and better particulars of their claim by 30 March 2001.

(2) THAT evidence in chief in this matter be adduced by way of signed witness statements which will stand as the evidence in the chief of the maker. Evidence in chief other than that contained in the witness statements may only be adduced by leave of the Commission.

(3) THAT the applicants file and serve signed witness statements upon which they intend to rely by 6 April 2001.

(4) THAT the respondent file and serve signed witness statements upon which it intends to rely by 20 April 2001.

(5) THAT the applicants and respondent file any signed witness statements in reply by 27 April 2001.

(6) THAT the applicants file and serve an outline of submissions and any list of authorities upon which they intend to rely no later than seven days prior to the date of hearing.

(7) THAT the respondent file and serve an outline of submissions and any list of authorities upon which it intends to rely no later than five days prior to the date of hearing.

(8) THAT the application be listed for hearing together with application No. 501 of 2001 for eight days.

(9) THAT the parties have liberty to apply on short notice.

(Sgd.) S. J. KENNER,
[L.S.] Commissioner.

2001 WAIRC 02528

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	THE CONSTRUCTION, MINING, ENERGY, TIMBERYARDS, SAWMILLS AND WOODWORKERS UNION OF AUSTRALIA—WESTERN AUSTRALIAN BRANCH & OTHERS THE AUTOMOTIVE, FOOD, METALS, ENGINEERING, PRINTING AND KINDRED INDUSTRIES UNION OF WORKERS — WESTERN AUSTRALIAN BRANCH & OTHERS, APPLICANTS *v.* BHP IRON ORE PTY LTD, RESPONDENT
CORAM	COMMISSIONER S J KENNER
DELIVERED	MONDAY, 9 APRIL 2001
FILE NO/S	CR 60 OF 2001 & A 2 OF 2001
CITATION NO.	2001 WAIRC 02528

Result	Order issued.
Representation	
Applicant	Mr D Schapper of counsel
Respondent	Mr R LeMiere QC and Mr R Kelly of counsel

Order.

WHEREAS on 26 March 2001 the Commission issued directions in relation to the hearing and determination of application CR 60 of 2001;

AND WHEREAS on 2 April 2001 the AFMEPKIU, the CMETSU and the TWU ("award applicants"), applicants in application CR 60 of 2001, filed application A2 of 2001 in the Commission seeking a new award to apply to the operations of the respondent which award is sought to be made in substitution for the existing award and other industrial instruments governing the industrial relationship between the parties and which in part contains provisions similar to certain provisions in the Industrial Relations Agreement (1997 as amended) ("the Agreement");

AND WHEREAS by letter dated 2 April 2001 the applicants applied to the Commission pursuant to the liberty granted in the Commission's directions of 26 March 2001 for the revocation of directions two to eight inclusive and in substitution therefore there be a further direction that the hearing of application CR 60 of 2001 be listed for hearing together with application A2 of 2001 and the hearing of application A2 of 2001 be expedited;

AND WHEREAS the applicants submitted to the Commission that the grounds for the application to revoke the directions included that the substance of application CR 60 of 2001 would be effectively overtaken by the relief sought in application A2 of 2001; that the terms of application A2 of 2001 also entails the prospect of a resolution of the ongoing dispute between the applicants and the respondent in relation to the form of industrial regulation to apply at the respondent; that application A2 of 2001, if granted, will contribute to more harmonious industrial relations between the applicants and the respondent; that application A2 of 2001 could be heard over a period of time not considerably in excess of the estimated time to hear application CR 60 of 2001; and that an expedited hearing of application A2 of 2001 would be consistent with ss 6 and 26 of the Act;

AND WHEREAS the respondent opposed the applicant's application for revocation of the directions of 21 March 2001 and submitted that if granted the hearing of application CR 60 of 2001 would be inexorably delayed with such delay being inconsistent with the Commission's interim order of 16 March 2001 preserving the Agreement pending the hearing and determination of the herein application;

AND WHEREAS the Commission has carefully considered the submissions of the parties; the objects of the Act; the

interests of the parties immediately concerned pursuant to s 26 of the Act; the extent to which application CR 60 of 2001 would be rendered nugatory if an award is made in the terms of application A2 of 2001; the extent of any delay in dealing with application CR 60 of 2001 if heard together with application A2 of 2001; and any resulting prejudice to either party;

AND WHEREAS the Commission is of the opinion from all of the foregoing and in particular having regard to the relatively short additional period of time that may be involved in the hearing of both applications concurrently and the potential for application A2 of 2001 to resolve many of the outstanding issues in dispute between the parties that it would be consistent with in particular ss 6 and 26 of the Act for application CR 60 of 2001 to be heard together with application A2 of 2001;

NOW THERFORE the Commission, having regard for the interests of the parties directly involved and to prevent the deterioration of industrial relations in respect of the matters in question, in accordance with the provisions of the Industrial Relations Act, 1979 hereby orders—

(1) THAT directions two to eight inclusive of the Commission's directions dated 26 March 2001 in respect of application CR 60 of 2001 be and are hereby revoked.

(2) THAT application CR 60 of 2001 be listed for hearing together with application A2 of 2001 which application will be expedited and heard in June and July 2001 on dates to be fixed by the Commission.

(3) THAT the parties have liberty to apply on short notice.

(Sgd.) S.J. KENNER,
[L.S.] Commissioner.

2001 WAIRC 02524

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	THE INDEPENDENT SCHOOLS SALARIED OFFICERS' ASSOCIATION OF WESTERN AUSTRALIA, INDUSTRIAL UNION OF WORKERS, APPLICANT
	v.
	ROMAN CATHOLIC ARCHBISHOP OF PERTH INC & OTHER, RESPONDENTS
CORAM	COMMISSIONER S J KENNER
DELIVERED	FRIDAY, 6 APRIL 2001
FILE NO/S	CR 302 OF 2000
CITATION NO.	2001 WAIRC 02524

Result	Direction Issued.
Representation	
Applicant	Mr D Howlett of counsel
Respondent	Ms K Wroughton of counsel

Direction.

HAVING heard Mr D Howlett of counsel on behalf of the applicant and Ms K Wroughton of counsel on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby directs—

(1) THAT the parties do file and serve a list of discoverable documents no later than 20 April 2001.

(2) THAT the parties exchange discoverable documents no later than 27 April 2001.

(3) THAT the evidence in chief in this matter be adduced by way of signed witness statements which will stand as the evidence in chief of the maker. Evidence in chief other than that contained in the witness statements may only be adduced by leave of the Commission.

(4) THAT the parties do file and serve witness statements by no later than 2 May 2001.

(5) THAT the parties do file and serve witness statements in reply no later than 9 May 2001.

(6) THAT the parties have liberty to apply on short notice.

(Sgd.) S.J. KENNER,
[L.S.] Commissioner.

UNIONS— Application for alteration of rules—

2001 WAIRC 02527

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	THE MASTER PLUMBERS' AND MECHANICAL SERVICES ASSOCIATION OF WESTERN AUSTRALIA (UNION OF EMPLOYERS), APPLICANT
CORAM	FULL BENCH
	HIS HONOUR THE PRESIDENT P J SHARKEY
	CHIEF COMMISSIONER W S COLEMAN
	SENIOR COMMISSIONER G L FIELDING
DELIVERED	MONDAY, 9 APRIL 2001
FILE NO/S	FBM 1 OF 2001
CITATION NO.	2001 WAIRC 02527

Decision	Application granted.
Appearances	
Applicant	Mr R G Horton, as agent, and with him, Mr S I Henry

Reasons for Decision.

THE PRESIDENT—

INTRODUCTION

1 These are the unanimous reasons for decision of the Full Bench. This is an application by the abovenamed applicant organisation of employers, an "organisation", as that word is defined in s.7 of the *Industrial Relations Act* 1979 (as amended) (hereinafter referred to as "the Act") whereby it seeks the authority of the Full Bench to authorise the registration of certain alterations to its rules.

2 The application is one made pursuant to s.62(2) of the Act which gives jurisdiction to the Full Bench to authorise the Registrar to register any alterations to the rules of an organisation which relates to its name, qualification of persons for membership or a matter referred to in s.71(2) or (5) of the Act. Otherwise, the Registrar is prohibited from registering such an alteration to the rules. The application is properly brought pursuant to s.62(2) of the Act and is within the jurisdiction of the Full Bench.

3 First, by the application, it is sought to insert a new Rule 1, which provides for a new name for the applicant organisation, namely "The Master Plumbers and Gasfitters Association of Western Australia (Union of Employers)", instead of the existing name, "The Master Plumbers' and Mechanical Services Association of Western Australia (Union of Employers)".

4 New Rules 3, 4 and 6 are also sought to be inserted as follows—

"3—CONSTITUTION

The Association will be made up of an unlimited number of persons, firms, associations, joint ventures, companies and corporations who or which have been admitted as members in accordance with these Rules."

"4—SCOPE AND EXTENT OF THE PLUMBING AND MECHANICAL SERVICES INDUSTRY

Plumbing and Mechanical Services work shall be deemed to be the work and processes as described in the following clauses but shall not be limited to or by these clauses.

Plumbing work or Plumbing trade shall also mean all workmanship skills, trades expertise, applicable technology and materials currently used or which may in the future be used in connection with the design, fabrication, installation, commissioning, alteration, repair and maintenance of the following services—

(a) General plumbing, sanitary plumbing, water supply plumbing, domestic and industrial gas fitting.
(b) Drainage, storm water, sub-soil drainage, trade waste, sewer, nuclear waste treatment and disposal.
(c) Septic Tanks—construction and installation.
(d) Services embracing water heating, chilled water, steam and condensate, high temperature hot water, hot water, compressed air, oil, solar heating, condenser water, medical and industrial gases, vacuum, soap, sterile-water installations and recirculated water.
(e) General roof work, including roof and wall claddings, gutters, downpipes and flashings.
(f) Domestic, residential, commercial and industrial fire protection.
(g) Chemical, product, commercial and industrial pipe and ductwork installations.
(h) Ventilation, air conditioning and refrigeration installations.
(i) Laying, altering and/or repair of mains such as water, sewer, gas and oil reticulation.
(j) Installation and services to industrial, hospital, commercial and restaurant equipment (other than electrical services).
(k) Manufacture, installation and repair of tanks.
(l) Plumbing work shall be classed as such, wherever it is carried out; whether in employer's workshops, in any class or building or structure; in construction and development sites; in mines, ships, barges; oil rigs and platforms; in air, space and land vehicles.
(m) As plumbing work covers such a broad spectrum of work and the technological changes in materials and methods, this clause can only be considered a guide and in no way shall limit the scope of the work."

"6.—MEMBERSHIP

6.1 Eligibility

Any person, firm, company or corporation who, or which, is or is usually an employer within the meaning of the Act, or a sole trader working in, or in connection with all or any facet of the Plumbing Industry described in Rule 4 of this Constitution, will be eligible for membership.

6.2 Classes of Membership

The Association will have the following classes of membership—

Ordinary members
Country members
Associate members
Life members
Teaching members
Student members
Retired members

all of whom will, unless the context otherwise requires, be included in any reference to "member" wherever appearing in this Constitution.

6.3 Ordinary Members

Ordinary Members of the Association will consist of those persons, firms, associations, joint ventures, companies and corporations or other legal entities carrying on a bona fide plumbing, roofing, gas installation, plumbing consulting, draining and/or mechanical contracting business and the proprietor/principal/nominee of which shall hold a license or certificate where applicable issued by the appropriate statutory authority.

Ordinary Members may be admitted to the Association upon the endorsement of the Executive Committee.

6.4 Country Members

Country Members of the Association will consist of those persons, firms, associations, joint ventures, companies and corporations or other legal entities who or which meet the criteria for ordinary membership defined in Clause 6.3 but whose business is operated outside a 58 kilometre radius of the Registered Office of the Association.

Country Members may be admitted to the Association upon the endorsement of the Executive Committee.

6.5 Associate Members

Associate Members of the Association will consist of those persons, firms, associations, joint ventures, companies and corporations or other legal entities carrying on a bona fide business actively engaged in manufacture, distribution and/or servicing of the plumbing industry, and on the endorsement of the Executive Committee, may be admitted to the Association as Associate Members.

Associate members will be ineligible to hold office or exercise voting rights but will be eligible to display emblems of the Association as Associate Members.

6.6 Life Members

(a) An Annual General Meeting may elect a member as a Life Member of the Association in recognition of faithful service rendered to the Association by that member.
(b) Every nomination for the appointment of a Life Member must be submitted to the Executive Committee in writing and accompanied by not less than three testimonials in support.
(c) The conferring of Life Membership will be restricted to not more than one nominee per annum. Nomination must be submitted to the Annual General Meeting of members each year for approval by that meeting.
(d) Life Membership will entail all the privileges and rights of Ordinary Membership of the Association without payment of fees, subscriptions, dues or levies.

6.7 Teaching Members

(a) Any person who is an approved instructor, teacher or lecturer in plumbing, gasfitting and sheetmetal at any training institution either secondary or tertiary in nature, may apply to the Association for Teacher Membership. Every application for Teacher Membership must include details of the qualifications held, and the establishment or establishments at which tuition is currently being given.
(b) Teaching Members may be admitted to the membership of the Association upon endorsement by the Executive Committee.
(c) Teaching Members shall be ineligible to hold office or exercise voting rights.

6.8 Student Members

(a) Any person studying to complete his or her training in plumbing at any training institution may apply to the Association for Student Membership. Every application for Student Membership must include details of the type of training being undertaken and the establishment or establishments at which it is being undertaken.
(b) Student Members may be admitted to membership of the Association upon endorsement by the Executive Committee.
(c) Student members shall be ineligible to hold office or exercise voting rights.

6.9 Retired Members

For the purposes of this clause a Retired Member is a person, sole trader, nominee of a company or other legal entity, previously enrolled with the Association as an Ordinary Member, who has sold or otherwise relinquished control or has ceased to exercise control of a plumbing contracting organisation. Such a person may be admitted to the Association as a Retired Member."

THE APPLICATION

5 An application was filed on behalf of the applicant organisation in this Commission on 25 January 2001, duly sealed with the common seal of the applicant organisation and bearing the signature of Mr Rob de Joode, the President, and Mr Stuart Irwin Henry, the Executive Director, of the organisation. Notice of the application was advertised in accordance with the requirements of s.55(2) of the Act in the Western Australian Industrial Gazette (81 WAIG 732) on 28 February 2001. The same particulars appear in copies of the rules filed with the application and other documents herein.

6 The applicant organisation was required to comply with the *Industrial Relations Commission Regulations* 1985 (as amended) and has done so (see Regulation 98(1) and (3)).

ALTERATIONS—THE RULE AND THE ACT

7 The applicant organisation was also required to comply with Rule 8.1, its alteration or amendment rule. This rule, which is mandatory, reads as follows—

"**8.1 Alteration or Amendment of Rules**

(a) These Rules may be amended, added to, varied or repealed by written notice of any proposed alteration to the rules first being given by any member to the Executive Director in writing. This notice shall then be laid before the Executive Committee or before a General Meeting of the Association which may authorise the proposed alteration and apply to the Registrar, Western Australian Industrial Relations Commission, to register the alteration in accordance with the proposal in the said notice or any reasonable amendment of same.

(b) The proposed alteration shall not be authorised by the Executive Committee or a General Meeting unless a notice of the proposed alteration, and the reasons therefor, is—

(1) sent to each member of the Association for his or her attention; or

(2) published in an Association magazine which must be distributed to all members.

(c) In the notice referred to in rule 8.1(b) members are to be informed whether the rule change will be laid before the Executive committee or a special meeting of the Association as provided in rule 8.1(a).

(i) In the case of the proposed amendment, addition, variation or repeal being laid before the Executive Committee, members are to be informed in the notice referred to in rule 8.1(b) that they may object to the proposed alteration in writing, such objection being addressed to the Director at the Registered Office of the Association, within 21 days after the date of issue of the notice referred to in rule 8.1(b). Any object shall contain therein the reasons for the objection.

(ii) The Executive Committee shall not vote on the proposals until members are informed of the proposal in the notice referred to in rule 8.1(b) and until after the expiration of the 21 days specified in sub rule 8.1(c).

(iii) Any member or members who object to the proposed alteration as provided for in rule 8.1(c)(i) shall be allowed reasonable opportunity to address the Executive Committee meeting at which voting will take place on the proposed amendment, addition, variation or repeal.

(iv) In the case of the proposed amendment, addition, variation or repeal being laid before a special meeting of The Association then such proposal will be considered in accordance with these rules."

8 This rule requires that the following be done where it is sought to alter or amend the rules—

1. Notice of any proposed alterations to the rules must be given by any member to the Executive Director in writing.
2. Such notice of amendment shall then be laid before the Executive Committee or before a general meeting of the Association.
3. Such Executive Committee or a general meeting of the Association may amend, add to, vary or repeal rules or any part of them in accordance with the proposal in the said notice or any reasonable amendment of the same.
4. No amendment, addition to, variation, repeal or substitution of the rules shall be made unless a notice of the proposed alteration and the reasons therefor is—
   (i) Sent to each member for his attention;
   (ii) Published in an Association magazine which shall be distributed to all members.
5. In the notice referred to above, members are to be informed that they or any of them may object to the proposed alteration by forwarding a written objection to the Director at the registered office to reach him no later than twenty-one days after the date of issue of the notice or twenty-one days after the date of issue of the magazine referred to above, as the case may be.

9 In addition, s.62(4) of the Act, under which this application is made to the Full Bench, prescribes that s.55, s.56 and s.58(3) of the Act apply, with such modifications as are necessary to and in relation to an application by an organisation for alteration of a rule of a kind referred to above.

COMPLIANCE

10 In this case, on the documentary evidence and on the evidence contained in statutory declarations both declared by Mr Stuart Irwin Henry, the Executive Director of the applicant organisation, on 25 January 2001, and filed herein on the same date, the following occurred—

1. On 5 May 2000, a notice was received by the Executive Director from a member of the applicant organisation, Mr Craig Dundas, seeking alteration to the constitution rules.
2. The matter was put before the Executive Committee meeting of the organisation on 9 May 2000, duly called and convened, with a quorum present and in accordance with Rule 8.1(a), the Executive Committee approved the proposed alterations to the rules with a subsequent amendment on 13 June 2000.
3. In a circular to members of the organisation dated 29 August 2000, they were informed of the proposed changes, the reasons therefor, and of their right to object within twenty-one days, this notice being conveyed to each member by mailing by surface mail to each member's address as registered with the organisation.

11 Because those steps were taken, we were satisfied that s.55 had been complied with and that s.55, s.56, s.59, in particular s.55(4)(a), (b), (c), (d) and (e), of the Act have been complied with, in particular, inter alia, that 30 days had expired from 28 February 2001 to the hearing of the application on 2 April 2001, that the application had been authorised in accordance with the rules of the applicant organisation, that reasonable steps were taken to adequately inform the members, as required by s.55(4) of the Act.

12 The alteration rule, Rule 8.1 as is clear from its terms as quoted above, complies with s.55(4)(d) of the Act. S.55(4)(e) of the Act is complied with by Rule 10 and,

inter alia, Rule 10.3(y), where the necessity to ensure secrecy is expressed. S.55(5) of the Act and the question of membership overlapping was not an issue in these proceedings.

13 We turn to the proposed altered rules, Rules 6.2 and 6.8, where membership is confined on "Student Members". We were not satisfied that student members could be eligible pursuant to Rule 6.1 which confers membership and eligibility on employers or sole traders. Since we were not satisfied that a student (as defined) could be either and, because an organisation can only be registered as an organisation of employers or employees (see s.54 of the Act), the Full Bench agreed, after the matter had been put to Mr Horton, the advocate for the applicant, that the terms of the amendments to be authorised by the Full Bench be amended by deleting the reference to "student member" in Rule 6.2 and deleting Rule 6.8. To do so was permissible by virtue of s.58(3) of the Act, with any necessary modification. We were satisfied further because less than five per cent of members had objected, there having been no objection from any member (or from any other person), that s.55 of the Act had been complied with.

14 On approval of the rules, we were satisfied that s.56 of the Act had been complied with in that the rules provided for secret ballots and the other matters required under s.56 of the Act.

THE MERITS

15 The reasons for the abovenamed alterations, as submitted to the Full Bench, were as follows.

Rule 1—s.59—Alteration of name

16 The name was sought to be changed to reflect the increasing emphasis on gasfitting as part of plumbing work and to have the name of the association conform with the name of the apprenticeship served by apprentice tradespersons. It was said that a great deal of work was now done fitting premises to Alinta Gas supply, even though gasfitting has long been part of the work of members of the applicant organisation. This is self evidently sufficient reason to seek the rule change.

17 No person asserted that the new name of the applicant was identical with that by which any other organisation was registered or was a name which, by resemblance to the name of another organisation or body, was, in the opinion of the Full Bench, likely to deceive or mislead any person. Indeed, that that was so was claimed by Mr Horton on behalf of the applicant.

18 Further, the new name clearly indicates that the applicant is an organisation of employers. We are satisfied that s.59 of the Act has been complied with.

Rule 3

19 Rule 3, it was submitted, was sought to be amended to simplify the clause and convert it to "plain English", without altering its meaning. On the face of it, that is what it is sought to achieve; and that is sufficient reason for that alteration. However, the words do not, we make it clear, enable persons who are not employers to be members (see Rule 6.1).

Rule 4

20 As to Rule 4, the proposed alteration to Rule 4(f), the scope and extent of the plumbing industry is extended to work done (as prescribed and described in Rule 4 (second paragraph)) in relation to domestic, residential, commercial and industrial fire protection services.

21 The uncontroverted evidence from the bar table was that the proposed alteration was consistent with the fact that plumbers are now designing and installing in domestic houses and residential buildings automatic sprinklers, fire extinguishing systems, as building codes, statutes, or safety requirements demand. Examples were given to us of homes for the aged, motels and hotels. That is a very good reason to authorise the alteration to the rule so that work done by employer plumbers or their employees is properly recognised as a basis for eligibility for membership of the applicant.

Rule 6

22 The proposed Rule 6 contains, apart from Rule 6.2 and 6.8 and the reference to "students", no matters of controversy. These are procedural or administrative rules relating to membership, as proposed, and should be altered if the applicant's members so decide. Whilst it is not certain at all that "teachers", as a class, are necessarily eligible, their eligibility is already prescribed and that question, if it arises, can await another day.

23 We were satisfied, on that evidence, which we accepted, that the equity, good conscience and the substantial merits of the application, as well as the objects of the Act lay with granting the application and the Full Bench joined in making an order authorising registration.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	THE MASTER PLUMBERS' AND MECHANICAL SERVICES ASSOCIATION OF WESTERN AUSTRALIA (UNION OF EMPLOYERS), APPLICANT
CORAM	FULL BENCH HIS HONOUR THE PRESIDENT P J SHARKEY CHIEF COMMISSIONER W S COLEMAN SENIOR COMMISSIONER G L FIELDING
DELIVERED	MONDAY, 2 APRIL 2001
FILE NO/S	FBM 1 OF 2001
CITATION NO.	2001 WAIRC 02485

Decision	Application granted.
Appearances	
Applicant	Mr R G Horton, as agent, and with him Mr S I Henry

Order.

This matter having come on for hearing before the Full Bench on the 2nd day of April 2001, and having heard Mr R G Horton, as agent, and with him Mr S I Henry on behalf of the applicant, and the Full Bench having heard and determined the matter, and the Full Bench having determined that the reasons for decision should be delivered at a future date, it is this day, the 2nd day of April 2001, ordered that the Registrar be and is hereby authorised to register alterations to the rules of the abovementioned organisation, as amended in the following terms—

(1) By deleting the existing Rule 1 and substituting therefore the following Rule 1—

"1.—NAME

The name of the Association is "The Master Plumbers and Gasfitters Association of Western Australia (Union of Employers)"".

(2) By deleting the existing Rule 3 and substituting therefore the following Rule 3—

"3.—CONSTITUTION

The Association will be made up of an unlimited number of persons, firms, associations, joint ventures, companies and corporations who or which have been admitted as members in accordance with these Rules."

(3) By deleting the existing Rule 4 and substituting therefore the following Rule 4—

"4.—SCOPE AND EXTENT OF THE PLUMBING AND MECHANICAL SERVICES INDUSTRY

Plumbing and Mechanical Services work shall be deemed to be the work and processes as described in the following clauses but shall not be limited to or by these clauses.

Plumbing work or Plumbing trade shall also mean all workmanship skills, trades expertise, applicable technology and materials currently used or which may in the future be used in connection

with the design, fabrication, installation, commissioning, alteration, repair and maintenance of the following services—

(a) General plumbing, sanitary plumbing, water supply plumbing, domestic and industrial gas fitting.
(b) Drainage, storm water, sub-soil drainage, trade waste, sewer, nuclear waste treatment and disposal.
(c) Septic Tanks—construction and installation.
(d) Services embracing water heating, chilled water, steam and condensate, high temperature hot water, hot water, compressed air, oil, solar heating, condenser water, medical and industrial gases, vacuum, soap, sterile-water installations and recirculated water.
(e) General roof work, including roof and wall claddings, gutters, downpipes and flashings.
(f) Domestic, residential, commercial and industrial fire protection.
(g) Chemical, product, commercial and industrial pipe and ductwork installations.
(h) Ventilation, air conditioning and refrigeration installations.
(i) Laying, altering and/or repair of mains such as water, sewer, gas and oil reticulation.
(j) Installation and services to industrial, hospital, commercial and restaurant equipment (other than electrical services).
(k) Manufacture, installation and repair of tanks.
(l) Plumbing work shall be classed as such, wherever it is carried out; whether in employer's workshops, in any class or building or structure; in construction and development sites; in mines, ships, barges; oil rigs and platforms; in air, space and land vehicles.
(m) As plumbing work covers such a broad spectrum of work and the technological changes in materials and methods, this clause can only be considered a guide and in no way shall limit the scope of the work."

(4) By deleting the existing Rule 6.1 to 6.8 and substituting therefore the following Rule 6.1 to 6.8—

"6.—MEMBERSHIP

6.1 Eligibility

Any person, firm, company or corporation who, or which, is or is usually an employer within the meaning of the Act, or a sole trader working in, or in connection with all or any facet of the Plumbing Industry described in Rule 4 of this Constitution, will be eligible for membership.

6.2 Classes of Membership

The Association will have the following classes of membership—

Ordinary members
Country members
Associate members
Life members
Teaching members
Retired members

all of whom will, unless the context otherwise requires, be included in any reference to "member" wherever appearing in this Constitution.

6.3 Ordinary Members

Ordinary Members of the Association will consist of those persons, firms, associations, joint ventures, companies and corporations or other legal entities carrying on a bona fide plumbing, roofing, gas installation, plumbing consulting, draining and/or mechanical contracting business and the proprietor/principal/nominee of which shall hold a license or certificate where applicable issued by the appropriate statutory authority.

Ordinary Members may be admitted to the Association upon the endorsement of the Executive Committee.

6.4 Country Members

Country Members of the Association will consist of those persons, firms, associations, joint ventures, companies and corporations or other legal entities who or which meet the criteria for ordinary membership defined in Clause 6.3 but whose business is operated outside a 58 kilometre radius of the Registered Office of the Association.

Country Members may be admitted to the Association upon the endorsement of the Executive Committee.

6.5 Associate Members

Associate Members of the Association will consist of those persons, firms, associations, joint ventures, companies and corporations or other legal entities carrying on a bona fide business actively engaged in manufacture, distribution and/or servicing of the plumbing industry, and on the endorsement of the Executive Committee, may be admitted to the Association as Associate Members.

Associate members will be ineligible to hold office or exercise voting rights but will be eligible to display emblems of the Association as Associate Members.

6.6 Life Members

(a) An Annual General Meeting may elect a member as a Life Member of the Association in recognition of faithful service rendered to the Association by that member.
(b) Every nomination for the appointment of a Life Member must be submitted to the Executive Committee in writing and accompanied by not less than three testimonials in support.
(c) The conferring of Life Membership will be restricted to not more than one nominee per annum. Nomination must be submitted to the Annual General Meeting of members each year for approval by that meeting.
(d) Life Membership will entail all the privileges and rights of Ordinary Membership of the Association without payment of fees, subscriptions, dues or levies.

6.7 Teaching Members

(a) Any person who is an approved instructor, teacher or lecturer in plumbing, gasfitting and sheetmetal at any training institution either secondary or tertiary in nature, may apply to the Association for Teacher Membership. Every application for Teacher Membership must include details of the qualifications held, and the establishment or establishments at which tuition is currently being given.
(b) Teaching Members may be admitted to the membership of the Association upon endorsement by the Executive Committee.
(c) Teaching Members shall be ineligible to hold office or exercise voting rights.

6.8 Retired Members

For the purposes of this clause a Retired Member is a person, sole trader, nominee of a company or other legal entity, previously enrolled with the Association as an Ordinary Member, who has sold or otherwise relinquished control or has ceased to exercise control of a plumbing contracting organisation. Such a person may be admitted to the Association as a Retired Member."

By the Full Bench

(Sgd.) P.J. SHARKEY,
[L.S.] President.

CONFERENCES—Notation of—

Parties		Commissioner/ Conference Number	Date	Matter	Result
Australian Workers Union	BHP Iron Ore Ltd	Kenner C C61 of 2001	—	Use of Contractors	Discontinued
Australian Workers Union	Kalgoorlie Consolidated Gold Mines	Kenner C C37/2001	6/3/01	Sick Leave Entitlements	Discontinued
Automotive, Food, Metals, Engineering, Printing & Kindred Industries Union	Blackhawk Construction Labour Hire	Gregor C C330/2000	—	Non-payment of Wages	Concluded
Automotive, Food, Metals, Engineering, Printing & Kindred Industries Union	Housing Industry Association Limited (Western Australian Division)	Gregor C C298/2000	21/11/00	Withdrawal of Formal Warning Letter	Concluded
Automotive, Food, Metals, Engineering, Printing & Kindred Industries Union	Mentor Holdings Pty Ltd t/a Symonds Engineering	Gregor C C56/2001	21/3/01	Termination	Concluded
Automotive, Food, Metals, Engineering, Printing & Kindred Industries Union	RAC of WA (Inc)	Gregor C C49/2001	20/2/01 & 23/2/01	Industrial Action	Concluded
Automotive, Food, Metals, Engineering, Printing & Kindred Industries Union	Wesfarmers Transport Limited	Gregor C C57/2001	27/2/01	Downsize of workforce	Concluded
Builders' Labourers, Painters and Plasterers Union	Hanssen Pty Ltd	Gregor C C73/2001	—	Breach of undertaking re hourly rate of pay	Concluded
Builders' Labourers, Painters and Plasterers Union	Karrinyup Plastering Pty Ltd	Gregor C C58/2001	—	Entitlements to Former Employee	Concluded
Builders' Labourers, Painters and Plasterers Union	Kingscape Holdings Pty Ltd t/a J & P Metals	Gregor C C300/2000	18/12/00	Award Entitlements	Concluded
Builders' Labourers, Painters and Plasterers Union and Other	Marchese Investments	Gregor C C66/2001	15/3/01	Non provision of amenities on site	Concluded
Builders' Labourers, Painters and Plasterers Union	McGovern Construction Services Pty Ltd	Gregor C C72/2001	10/04/01	Access to time and wages records	Concluded
Civil Service Association	Chief Executive Officer, Fire and Emergency Services Authority	Fielding SC C28/2000	8/2/01	Pay Increase	Concluded
Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing & Allied Workers' Union	BOC Gases Australia Limited	Gregor C C295/2000	14/11/00	Employment Vacancy	Concluded
Construction, Mining, Energy, Timberyards, Sawmills and Woodworkers Union	BHP Iron Ore	Kenner C C354/2000	22/12/00	Deployment of contract workers	Discontinued
Construction, Mining, Energy, Timberyards, Sawmills and Woodworkers Union	Iluka Midwest Limited and Other	Beech C C313/2000	21/12/00	Dismissal	Referred
Liquor, Hospitality and Miscellaneous Workers' Union	Burswood Resort (Management) Limited	Wood C C75/2001	21 & 23/03/01	Termination of employment	Dismissed
Liquor, Hospitality and Miscellaneous Workers' Union	Education Department of WA	Kenner C C227 of 2000	30/8/00	Redundancy Entitlements and Access to Sick Leave	Discontinued
Liquor, Hospitality and Miscellaneous Workers' Union	Prestige Property Services	Wood C C24/2001	2/2/01 & 1/3/01	Employment Conditions	Referred
Liquor, Hospitality and Miscellaneous Workers' Union	SSL Healthcare Services	Wood C C304/2000	24/1/01	Contract of Employment	Discontinued

PROCEDURAL DIRECTIONS AND ORDERS—

2001 WAIRC 02269

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	GAVIN MICHAEL CANN, APPLICANT *v.* BLACKBURNE REAL ESTATE (LICENCEE: JOBURNE PTY LTD, BLACKBURNE PROPERTIES LIMITED, RESPONDENT
CORAM	COMMISSIONER J F GREGOR
DELIVERED	MONDAY, 12 MARCH 2001
FILE NO	APPLICATION 936 OF 2000, APPLICATION 937 OF 2000
CITATION NO.	2001 WAIRC 02269

Result	Orders for discovery and particulars granted in part
Representation	
Applicant	Mr R. Hooker (of Counsel) appeared on behalf of the applicant
Respondent	Mr I. Curlewis (of Counsel) appeared on behalf of the respondent

Reasons for Decision.

1 These applications were filed on 10th July 2000 they seek orders from the Commission on the grounds that the dismissal of Gavin Michael Cann (the Applicant) was harsh, oppressive and unfair and that at the time of dismissal there were outstanding contractual benefits. The Commission convened a conference under s.32 of the *Industrial Relations Act, 1979* (the Act), the purpose of which was to enable the parties to reach agreement if that were possible. Agreement was not reached and the applications were stood over for 30 days. Each party was given the liberty to apply for another conference. By letter dated 12th September 2000 the Commission was advised by solicitors for the applicant that the parties had met but had failed to reach an agreement and requested that both matters be referred for hearing and determination. It advised that it was their intention to write to the respondents for the purpose of seeking further particulars of its defence and discovery of relevant documents. An application to the Commission for orders was foreshadowed if that request was unsuccessful.

2 On 19th February 2001 notice of applications were filed seeking orders for discovery and particulars of the respondent's answer.

3 In an affidavit Mark John Diamond, solicitor, deposed that solicitors for the applicant had written to the solicitors for the respondent on 13th November 2000. A response was received on 1st December advising discovery would be provided. By the same letter the solicitors for the respondent provided particulars but only on one of the five of the matters about which particulars were requested. Concerning the other four matters where particulars were not provided, the solicitors for the respondent say they declined to supply the information because it was not relevant to the applicant's claim, or the particular sought was a matter of evidence rather than a document which should be discovered or, alternatively, the issue was a question of law. Leaving aside documents which are common to both parties the only documents that were covered by the respondents solicitor's letter of 13th February 2001 were minutes of directors meetings held between June 19th and May 2000 and a strategy document dated March 2000.

4 On 21st February 2001 at a conference convened by the Commission for the purpose, the parties discussed the applications for discovery and particulars. The Commission was told there had been insufficient discovery from the point of view of the applicant. It had received minutes of directors meetings but they had been given selectively and there was a feeling by the applicant's solicitors that the appropriate discovery had not been given. There must have been extensive meetings between the applicant and officers of the company and there had been no discovery of any notes of these.

5 Mr Curlewis, of Counsel, who appeared for the respondent advised that a letter concerning particulars was sent to the applicant's solicitors on 1st December 2000. Mr Curlewis opined that the application before the Commission was therefore made very late, there were requests for information about other employees which were not relevant. Notwithstanding this opinion in an effort to assist, Mr Curlewis made available the information during the conference. Twenty five sets of boardroom minutes had been discovered. The complete minutes had been supplied to the solicitor for the applicant for his perusal on condition that non relevant parts were not revealed to his client. The minutes were then discovered with the non relevant parts deleted. Through Mr Curlewis the respondent agreed that it would provide financial details by way of balance sheet if necessary. The respondent's solicitor believed that it discovered all that was necessary and the type of discovery being sought was futile.

6 The notes of the conference recorded by the Commission indicate that it was concluded on the basis that if Mr Curlewis would provide more details through the financial statements then the parties could discuss any residual issues. At the conclusion of the conference the parties would have further discussions. On the basis of these undertakings the Commission mentioned to the parties that it appeared that the orders would no longer be necessary and they would be dismissed in due course as a formality. No objection was raised.

7 The Commission is aware that on the same day an Appeal to the Full Bench was filed in the Commission by the applicant against the so called dismissal of the discovery and particulars applications. As had been previously scheduled the matter proceeded to hearing on 22nd February 2001 at which time Mr Hooker, of Counsel, who then appeared for the applicant sought to formally make the applications or alternatively renew them. In order to properly record what had happened in the conference on the previous day the Commission summarised the events. This summary was categorised in Mr Curlewis as 'perfect'. He said that he had implemented the arrangement by handing over a bundle of financial documents, he also reported that the foreshadowed discussion on a without prejudice basis had occurred following the conference.

8 Mr Hooker then proceeded to make submissions to the Commission in effect renewing the application for discovery and particulars. He raised the juridical issues which need not be recited for the purpose of these brief reasons, suffice to say that the authorities upon which he relies are the general authorities which have been found to bind the Commission in the exercise of its jurisdiction under s.27(1)(o) of the Act.

9 The complaint by Mr Hooker is that there was no discovery in the proper sense, that is of the documents which relate to matters in issue in the proceedings and which are in possession of custody or power of the respondent. The discovery which had been given was in a narrow category and exclusively confined to extracts of minutes of meetings of Blackburne Real Estate significantly starting on 24th June 1999 notwithstanding that the applicant's appointment commenced in August 1997. Mr Hooker complained there was no listing of a personal file which one would naturally expect to be in the possession of any employer nor was there any listing of memoranda or communications between the applicant as an employee and the respondent as an employer. Issues of redundancy arise and this raises questions of parity of treatment between one employee and another; there has been a refusal to supply that information. If the applicant was treated differently to other employees this might be unfair.

10 Mr Curlewis submitted correspondence (Exhibit MFI C1) that the respondent's solicitor had sent to the applicant's solicitor in its response to the application for discovery. Mr Curlewis drew to the Commission's attention that the applicant's solicitor itself only made discovery on the 4th February 2001. His Firm only received information from it on the 13th February 2001. The attention of the Commission was drawn to a spreadsheet which had been supplied by the applicant's solicitor that limited the information required to five projects. Mr Curlewis argues that the applicant is now restricted to those five projects. The demand of 1st December 2000had nominated eleven projects but some of those, according to Mr Curlewis, had never commenced. The applicant must have known this and therefore it is legitimate to draw the conclusion that the demand is nothing but a fishing expedition. There is nothing that indicates that any other project is relevant or might have a bearing on the case other than the five projects. According to Mr Curlewis his client had provided all that was reasonably necessary and more.

11 As for the particulars Mr Curlewis says it is clear that the request for information relating to particulars was within the knowledge of the applicant, he knew the situation with the company and he had admitted he was redundant. There was no need to provide this information.

12 Having considered the parties submissions the Commission has decided that it will require that the respondent give discovery of all documents relating to the establishment and operation of the following projects including financial records as are relevant—

1. Subiaco Centro
2. Haig Park
3. Buchan Site South Perth
4. Ascot Waters
5. Fitzgerald House and land Investment Sales

The respondent will also be required to provide the applicant's personal file and all documents and memoranda relating to the administration of the employment contract for the whole of the time of the contract of the employment period.

13 Insofar as particulars are concerned the respondent will provide to the applicant particulars of the date and the reasons why any other employee was made redundant on or about 31st May 2000. It will also be required to specify all matters or occurrences in the respondent's organisation that gave rise to the conclusion that the position was redundant. The applications are otherwise dismissed.

2001 WAIRC 02312

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	GAVIN MICHAEL CANN, APPLICANT
	v.
	BLACKBURNE REAL ESTATE (LICENCEE: JOBURNE PTY LTD) BLACKBURNE PROPERTIES LIMITED, RESPONDENT
CORAM	COMMISSIONER J F GREGOR
DELIVERED	WEDNESDAY, 14 MARCH 2001
FILE NO	APPLICATION 936 OF 2000, APPLICATION 937 OF 2000
CITATION NO.	2001 WAIRC 02312

Order for Discovery and Particulars.

HAVING heard Mr R. Hooker (of Counsel) on behalf of the applicant and Mr I. Curlewis (of Counsel) on behalf of the respondents, the Commission pursuant to the powers conferred on it under the *Industrial Relations Act, 1979*, hereby orders—

1. THAT the respondent give discovery of all documents in its power or possession relating to the establishment and operation of the following projects including financial records as are relevant;
   1. Subiaco Centro
   2. Haig Park
   3. Buchan Site South Perth
   4. Ascot Waters
   5. Fitzgerald House and land Investment Sales.
2. THAT the respondent provide the applicant's personal file and all documents and memoranda relating to the administration of the employment contract for the whole of the contract of the employment period.
3. THAT the respondent provide to the applicant particulars of the date and the reasons why any other employee was made redundant on or about 31st May 2000. It will also be required to specify all matters or occurrences in the respondent's organisation that gave rise to the conclusion that the position was redundant.

(Sgd.) J.F. GREGOR,
[L.S.] Commissioner.

2001 WAIRC 02368

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	NIGEL WILLIAM LORD, APPLICANT
	v.
	WESTPOINT CORPORATION PTY LTD, RESPONDENT
CORAM	COMMISSIONER S J KENNER
DELIVERED	FRIDAY, 16 MARCH 2001
FILE NO/S	APPLICATION 1184 OF 2000
CITATION NO.	2001 WAIRC 02368

Result	Order issued.
Representation	
Applicant	Ms M Quai of counsel
Respondent	Ms N Oldfield of counsel

Order.

HAVING heard Ms M Quai of counsel on behalf of the applicant and Ms N Oldfield of counsel on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders—

1. THAT the respondent file and serve further and better particulars of answer setting out with particularity the work performed by the applicant on specific contracts which are said by the respondent to have constituted misconduct by the applicant by 21 March 2001.
2. THAT the respondent shall produce for inspection by the applicant the drawings and site plans in respect of the contracts referred to in para 1 by 23 March 2001.

(Sgd.) S. J. KENNER,
[L.S.] Commissioner.

2001 WAIRC 02345

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	BEVERLEY ANNE SMITH, APPLICANT
	v.
	PENRHOS COLLEGE (INC), RESPONDENT
CORAM	COMMISSIONER S J KENNER
DELIVERED	FRIDAY, 16 MARCH 2001
FILE NO/S	APPLICATION 1302 OF 2000
CITATION NO.	2001 WAIRC 02345

Result	Direction issued.
Representation	
Applicant	Ms L Peak of counsel
Respondent	Ms D Peters of counsel

Direction.

HAVING heard Ms L Peak of counsel on behalf of the applicant and Ms D Peters of counsel on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby directs—

1. THAT the applicant provide informal discovery within 21 days and inspection of documents from the next business day thereafter upon reasonable notice.
2. THAT the respondent provide informal discovery within 14 days of receiving the applicant's discovery and inspection of documents from the next business day thereafter upon reasonable notice.
3. THAT evidence in chief in this matter be adduced by way of signed witness statements which will stand as evidence in chief of the maker.
4. THAT the applicant file and serve signed witness statements within 21 days of receiving the respondent's discovery.
5. THAT the respondent file and serve signed witness statements within 14 days of receiving the applicant's witness statements.
6. THAT each party give notice to the other party at least 7 days prior to the hearing as to—
   (a) which witnesses are required for cross examination; and
   (b) any objection taken to the evidence contained in the witness statements.
7. THAT the applicant and respondent file and serve an outline of submissions and any list of authorities upon which they intend to rely no later than 3 days prior to the date of hearing.
8. THAT leave of the Commission be sought for filing additional or supplementary witness statements.

(Sgd.) S. J. KENNER,
[L.S.] Commissioner.

2001 WAIRC 02418

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	ROBERT JAMES SULLIVAN
	TREVOR BAILEY
	IAN PICKEGILL
	TIMOTHY BOLTON
	GRAHAM BUSWELL, APPLICANTS
	v.
	CABLE SANDS (W.A.) PTY LTD, RESPONDENT
CORAM	COMMISSIONER P E SCOTT
DELIVERED	WEDNESDAY, 28 MARCH 2001
FILE NO	1693 OF 2000, 1710 OF 2000, 1711 OF 2000, 1712 OF 2000 and 1713 OF 2000
CITATION NO.	2001 WAIRC 02418

Result	Direction Varied
Representation	
Applicants	Mr D Schapper (of Counsel)
Respondent	Mr R Gifford and with him Ms S Germon

Order.

HAVING heard Mr D Schapper (of Counsel) on behalf of the applicants and Mr R Gifford and with him Ms S Germon on behalf of the respondent, the Commission pursuant to the powers conferred on it under the Industrial Relations Act 1979, and by consent, hereby orders—

THAT Direction 2 of the Directions made on the 1st day of March 2001 be varied by deleting "20th day of March 2001" and inserting "30th day of March 2001".

(Sgd.) P. E. SCOTT,
[L.S.] Commissioner.

2001 WAIRC 02498

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	MELODY HOUSTON, APPLICANT
	v.
	MINISTER FOR EDUCATION, RESPONDENT
CORAM	COMMISSIONER S J KENNER
DELIVERED	TUESDAY, 3 APRIL 2001
FILE NO/S	APPLICATION 2068 OF 2000
CITATION NO.	2001 WAIRC 02498

Result	Direction issued.
Representation	
Applicant	Mr G Stubbs of counsel
Respondent	Mr D Husdell

Direction.

HAVING heard Mr G Stubbs of counsel for the applicant and Mr D Husdell for the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby directs—

1. THAT evidence in chief in this matter be adduced by way of signed witness statements which will stand as the evidence in chief of the maker. Evidence in chief other than that contained in the witness statements may only be adduced by leave of the Commission.
2. THAT the applicant file and serve any signed witness statements upon which it intends to rely no later than 30 April 2001.
3. THAT the respondent file and serve any signed witness statements upon which it intends to rely no later than 21 May 2001
4. THAT the matter be listed for hearing for 2 days.
5. THAT the parties have liberty to apply on short notice

(Sgd.) S.J. KENNER,
[L.S.] Commissioner.

COAL INDUSTRY TRIBUNAL—Awards/Agreements—Application for—

WESFARMERS COAL LIMITED (MAINTENANCE) ENTERPRISE AGREEMENT 2001.

No. 3 of 2001.

COAL INDUSTRY TRIBUNAL OF WESTERN AUSTRALIA ACT 1992

(SECTION 12)

Wesfarmers Coal Limited

and

Australian Manufacturing Workers Union.

No. 3 of 2001.

Memorandum of Agreement.

WHEREAS a conference between Wesfarmers Coal Limited and the Australian Manufacturing Workers Union was convened by me pursuant to section 12(1) of the Coal Industry Tribunal of Western Australia Act 1992 on 23rd February 2001 for the purpose of finalising an agreement relating to the Wesfarmers Coal Limited (Maintenance) Enterprise Agreement 2001 for maintenance personnel.

AND WHEREAS agreement has been reached between the parties in terms of the Schedule annexed hereto, signed by me in accordance with section 12(3) of the Act is a memorandum of the matters upon which agreement has been reached and the terms and conditions agreed upon.

Dated at Perth this 23rd day of February 2001.

(Sgd.) G.L. FIELDING,
Chairman, Coal Industry Tribunal
of Western Australia.

1.—TITLE

(1) The terms and conditions of this Agreement shall be known as the 'Wesfarmers Coal Limited (Maintenance) Enterprise Agreement 2001'.

(2) The Wesfarmers Coal Limited (Maintenance) Enterprise Agreement 2001 shall replace the Wesfarmers Coal Limited Enterprise Agreement—Maintenance—1998-2001 registered on the 21 December 1998 with effect on the 14th day of January 2001.

2.—ARRANGEMENT

3.—SCOPE AND PARTIES BOUND

(1) The Wesfarmers Coal Limited (Maintenance) Enterprise Agreement 2001 shall apply to the operations of Wesfarmers Coal Limited in the "Collie Basin" Coal Resource Areas and its employees who are eligible to be members of the union party to it and who are employed in the classifications in Clause 16.—Wage Rates, Allowances, Penalties and Other Payments.

(2) The parties to the Wesfarmers Coal Limited (Maintenance) Enterprise Agreement 2001 are—

(a) Wesfarmers Coal Limited; and the

(b) Automotive Food, Metals, Engineering, Printing and Kindred Industries Union of Workers—Western Australian Branch.

4.—DEFINITIONS

(1) The following definitions shall apply for the purposes of the Wesfarmers Coal Limited (Maintenance) Enterprise Agreement 2001.

'Agreement' means the Wesfarmers Coal Limited (Maintenance) Enterprise Agreement 2001.

'Award' means the Coal Mining Industry (Engineers) Award 1990 as amended.

'base rate' means the Trades Person Level 1 rate of 100%.

'balance of skills' means the range of skills across all the trades.

'block' means all consecutive shifts an employee is rostered on for work.

'Christmas week' means the period commencing at 0700 on 25 December and concluding at 0700 hours on 2 January.

'crew' means a group of maintenance employees rostered on a twelve (12) hour continuous shift roster or on a ten (10) hour non-continuous shift roster as designated A, B, C or D.

'day' means a 24 hour period from midnight to midnight (0000 hours to 2400 hours).

'department' means all employees of Wesfarmers Coal Limited engaged in and managing the maintenance operations.

'employer' means Wesfarmers Coal Limited.

'make up shift' means that eight (8) hour shift worked on one (1) Saturday in four (4) weeks per roster for the purposes of making up an average of 42 hours on a ten (10) hour non-continuous shift roster.

'non peak period' means any time of the year other than a peak period.

'ordinary wage rate' means for an employee the rate prescribed for his/her classification in Clause 16(1)(a) of this Agreement.

'peak periods' means a school vacation period.

'pool' means the total number of fitters rostered on a ten (10) hour non-continuous shift roster.

'Progress 2000 Agreement' means the Wesfarmers Coal Limited (Maintenance) Progress 2000 Agreement.

'shift' means the period, times and date specified for an employee to attend for work as shown in the employee's current roster with payment being due having regard for the date and time the shift commenced.

'team' means crew as defined in this Clause.

'Tribunal' means the Coal Industry Tribunal.

'union' means the Automotive Food, Metals, Engineering, Printing and Kindred Industries Union of Workers—Western Australian Branch.

'WCL' means Wesfarmers Coal Limited.

'week' means seven (7) consecutive calendar days.

(2) Insofar as any of the definitions in this Agreement conflict with any definition in the Award, then the Agreement shall prevail.

5.—OBJECTIVES

(1) The objectives of this Agreement are—

(a) to secure and enhance the position of the operations of WCL and its employees in the Collie district;

(b) to clearly express the terms and conditions under this Agreement to apply to maintenance employees covered by it.

(2) The parties agree that the means of achieving these objectives will include—

(a) a process of improvement by agreement to ensure the operation of the workplace is as safe, cost efficient and productive as possible.

(b) maintenance services over three hundred and sixty two (362) days of each year.

(c) a commitment to the ability of WCL operations in Collie to meet demand and compete in the market place so as to better secure employment in those operations.

6.—TERM OF AGREEMENT

(1) This Agreement shall come into effect on the 14th day of January 2001 and shall remain in effect from that date to 10th day of January 2004.

(2) The parties will commence negotiations on a replacement for this Agreement no later than three (3) months prior to the 10th day of January 2004.

7.—RELATIONSHIP TO THE AWARD AND OTHER AGREEMENTS

(1) This Agreement shall be read and interpreted in conjunction with the Coal Mining Industry (Engineers) Award 1990 and the Wesfarmers Coal Limited (Maintenance)Progress 2000 Agreement.

(2) The following provisions in the Award shall be overridden for the duration of this Agreement—

- Clause 5.—Definitions of the Award shall be overridden by Clause 4.—Definitions of this Agreement insofar as there is any conflict.
- Clause 6.—Accident Pay of the Award shall be overridden by Clause 20.—Accident Pay of this Agreement.
- Clause 7.—Hours of the Award shall be overridden by Clause 9.—Hours of Work, Clause 10.—Overtime and Call Outs and Clause 16.—Wage Rates, Allowances, Penalties and Other Payments of this Agreement insofar as there are any conflict
- Clause 8.—Overtime of the Award shall be overridden by Clause 10.—Overtime and Call Outs of this Agreement.
- Clause 9.—Shift Work of the Award shall be overridden by Clause 11.—Shift Work of this Agreement.
- Clause 10.—Holidays of the Award shall be overridden by Clause 13.—Public Holidays and Clause 16.—Wage Rates, Allowances, Penalties and Other Payments of this Agreement.
- Clause 11.—Annual Leave of the Award shall be overridden by Clause 14.—Annual Leave and Clause 16.—Wage Rates, Allowances, Penalties and Other Payments of this Agreement.
- Clause 12.—Sick Leave shall be overridden by Clause 12.—Sick Leave of this Agreement insofar as there is any conflict.
- Clause 21.—Variable Duties shall be overridden by Clause 20.—Accident Pay of this Agreement if there is any conflict.
- Subclause (1) of Clause 23.—Special Rates and Provisions of the Award shall be overridden by Clause 8.—Dispute Resolution Procedure of this Agreement.
- Clause 23.—Special Rates and Provision and Part A and B of Schedule 1 of the Award shall be overridden by Clause 8.—Dispute Resolution Procedure and Clause 16.—Wage Rates, Allowances, Penalties and Other Payments insofar as there is any conflict.
- Clause 24.—Wages and Schedule 1 of the Award shall be overridden by Clause 16.—Wage Rates, Allowances, Penalties and Other Payments and Clause 17.—Packaging of Entitlements of this Agreement.

(3) Insofar as this Agreement is silent on a term in any of the documents specified in (1), then that term shall continue in effect.

(4) (a) The parties acknowledge the existence of other documented agreements.

(b) The parties agree that these documented agreements shall not be affected by this Agreement.

(c) Each party reserves a right to review any of these agreements.

(5) The Agreement as to shared work practices continues and is reflected in Schedule C.

8.—DISPUTES RESOLUTION PROCEDURE

(1) The parties are committed to the avoidance of lost time and lost production due to industrial disputes.

(2) The parties will endeavour to ensure normal work continues throughout any dispute provided that such continuation shall not prejudice the outcome of any proceedings before the Tribunal.

(3) 'Normal' work means the work that was taking place prior to the dispute being raised and as scheduled or rostered.

(4) Subject to (5) of this Clause the following steps will apply for the purposes of resolution of an issue.

(a) **Step 1**

The issue will be raised at crew level between the relevant employee/s and the supervisor. This process may be without a written record. It should be concluded within two (2) shifts or a time period agreed between the employee/s and the supervisor.

(b) **Step 2**

If the dispute is not resolved at Step 1, the relevant job delegate will join with the employee/s and supervisor, and together they will attempt to settle the issue within an agreed time period.

If there is no settlement, the supervisor will, in cooperation with the employee/s and delegate, compile an agreed written record of the dispute for referral to Step 3.

(c) **Step 3**

If the dispute is not resolved at Step 2, the written record of dispute will be referred to the relevant Manager and Senior Delegate for resolution. They shall agree a time period for resolution and/or referral to Step 4.

(d) **Step 4**

If the dispute is not resolved at Step 3, the written record of dispute (including detail from Step 3), will be referred to the Senior Manager and the relevant Regional or District Organiser for resolution. They shall agree a time period for resolution and/or referral to Step 5.

(e) **Step 5**

If the dispute is not resolved at Step 4, either party has the right to submit the issue to the Tribunal.

(5) Steps 1-3 above shall have no application for the purposes the compliance provisions in the Progress 2000 Agreement.

9.—HOURS OF WORK

(1) All employees are required to work an average of 42 hours per week in shifts as per the rosters in Schedule B of this Agreement.

(2) **Crib (meal) breaks**

(a) A crib break of 30 minutes shall form part of the ordinary rostered hours on a shift and will be taken by the employee within one (1) hour either side of the mid point of the shift.

(b) Work arrangements, including continuous operation, are to be maintained during crib breaks.

(3) **Short breaks**

(a) Short informal breaks/smokos may be taken during a shift to suit continuity of work.

(b) The tea/coffee making facility in the workshop is to be used by employees carrying out work in the workshop.

(c) A thermos is to be provided by the employer for use by any employee who is working in the field.

(4) **Delayed Crib Breaks**

An employee who, at the request of the employer, starts his/her crib break more than one (1) hour after the midpoint of the shift, shall be entitled to a payment at time and a half taken from one (1) hour after the midpoint of the shift up to the time he/she commences his/her break.

(5) **Start/Finish Location of Shift**

(a) The start and finish time of each shift shall be as specified in Schedule B.

(b) An employee will be required to attend in the workshop by the start of shift ready for instruction by the supervisor.

(c) The place for the issue of instruction within the workshop will be a matter for the discretion of the supervisor.

(d) Work will continue to the finish time of the shift and showers will be taken in the employee's own time.

(e) Travel back to the workshop by an employee who has been working away from the workshop shall be construed as work when it is necessary in order for that employee to be able to depart the workshop by the finish of the shift.

(f) Employees have a right to proceed to the showers at the finish of the shift.

(g) Subject to all relevant employees being on board, buses may depart from the designated departure points at any time after the finish of the shift but no earlier.

10.—OVERTIME AND CALL OUTS

(1) **Overtime**

(a) It is intended that the maintenance work be carried out on the basis of rostered time only.

(b) Overtime outside the regular roster will be designated 'non rostered' overtime and will only be required to be worked when the integrity of the operations is threatened or exceptional circumstances apply such as in an emergency.

(c) Any 'non rostered' overtime to be worked must be authorised by the relevant Superintendent or Manager.

(d) Authorised 'non rostered' overtime worked will be paid at double time.

(2) **Call Outs**

(a) In the event of an emergency (eg, injury, fire, fall or flood) where personnel or skills additional to those of employees rostered on shift are required, an employee who is rostered off and is called out to work shall be paid double their hourly rate for the time worked on such call out, with a minimum payment of four (4) hours.

(b) Where necessary WCL shall provide transport to and from work for the employee called out.

11.—SHIFTWORK

(1) **Definitions**

'crew' means a group of maintenance employees rostered on twelve (12) hour continuous shift roster or on ten (10) hour non-continuous shift roster as designated A, B, C or D

'shift' means the period, times and date specified for an employee to attend for work as shown in the employee's current roster with payment being due having regard for the date and time the shift commenced.

'make up shift' means that eight (8) hour shift worked on one (1) Saturday in four (4) weeks per roster for the purposes of making up an average of 42 hours of weekly work on a 10 hour roster.

'team' means crew

(2) **Base Roster System**

(a) The average hours of work per week shall be 42 as per the rosters in Schedule B.

(b) Rosters B2 and B3 will be available on a trial basis for six (6) months from 14th day of January 2001 with the continuation of them to be reviewed then.

(c) Maintenance employees will work in eight (8) balanced crews as follows—

(i) four (4) crews are to work a seven (7) day continuous roster of twelve (12) hour shifts across four (4) panels;

(ii) four (4) crews are to work a six (6) day non continuous roster of ten (10) hour shifts and a Saturday make up shift of eight (8) hours in each four (4) weeks.

(aa) The make up shift for the purposes of (c)(ii) may be varied from the Saturday as rostered by agreement between an employee and his/her supervisor.

(bb) If it is agreed that the replacement make up day is Sunday the rate to apply shall be double time.

(d) During the term of this Agreement any variation to the base roster system may only occur by agreement between the parties.

(3) **Shift Changes**

(a) Transfer of an employee between rosters required by the employer—

(i) Where there is a need to re-balance the skills between crews it will be by agreement between the employee concerned and the relevant Manager or, in the absence of agreement, by the next junior in classification at that time on that crew subject to a system of rotation.

(ii) In the case of a transfer of an employee from a crew by the employer to another roster the employee will be entitled to no less than 48 hours' notice.

(iii) If 48 hours' notice is not given to the employee the employee shall be paid as per the overtime rate for any work on any week day (Mon-Fri) and treble time for any work on a weekend day (ie. Sat or Sun) until the 48 hour period has elapsed.

(iv) Where the employee is given the notice prescribed in (ii) no penalty shall apply.

(v) If an equivalent trades position on the crew from which an employee was transferred becomes available the transferred employee will have the option to transfer back to his/her original crew.

(b) Shift swaps by an employee—

(i) If an employee arranges a shift swap with his/her supervisor, the rate to apply shall be as per the shift worked.

(ii) No shift swap onto a public holiday shift will be allowed.

(c) Voluntary change of shift roster by an employee—

(i) Subject to the completion of a roster cycle (eight (8) weeks) an employee may nominate to go onto another shift roster within his/her crew.

(ii) A nomination by an employee to change shift rosters must be raised by the employee with his/her supervisor no later than two (2) calendar weeks prior to the end of the roster cycle.

(iii) The employee must nominate the roster to which he/she wishes to be transferred at the time of nomination.

(iv) The decision as to whether the transfer can occur is subject to maintaining the levels agreed between the parties to this Agreement for the twelve (1 2) hour shift.

(v) Any transfer will apply for no less than a full cycle.

(4) **Payment for Shift Work**

Payments for shift work shall be made in accordance with Clause 16—Wages Rates, Allowances, Penalties and Other Payments.

12.—SICK LEAVE

(1) **Entitlement**

Any employee who is absent from work on account of personal illness or injury shall be entitled to paid leave of absence in accordance with the provisions of this Clause.

(2) **Crediting of Entitlement**

(a) On 1 July each year each employee shall be credited with 120 hours leave for the ensuing year or on a pro-rata basis if an employee commenced after 1 July.

(3) **Notification and Authorisation**

Where practical, within 24 hours, but not later than 72 hours (three (3) days) of the commencement of such absence, the employee shall inform the employer of the inability to attend for duty and, as far as practicable, state the nature of the injury or illness and the estimated duration of the absence.

(4) **Payment**

Payment for approved sick leave shall be as prescribed in Clause 16.—Wage Rates, Allowances, Penalties and Other Payments.

(5) **Accrual of Sick Leave**

Subject to this Clause, sick leave entitlements may accumulate.

(6) **Pay out of Accrued Sick Leave on Death, Retirement or Redundancy**

(a) On retirement or retrenchment of an employee any untaken accrued sick leave shall be paid out to that employee.

(b) In the event of the death of an employee, any accrued sick leave shall be paid to his/her estate.

(7) Sick Leave Accrued in a 12 Month Period

(a) The option in (b) of this subclause is subject to the employee—

(i) having no less than 400 hours of accumulated sick leave; and

(ii) having no more than five (5) shift absences (whether paid sick leave, unpaid sick leave or unauthorised absences) in the 12 months preceding November in any year.

(b) Subject to (a) above—

(i) The value of hours of sick leave accumulated in a 12 month period to November which is in excess of the minimum of 400 hours may be paid into the employee's superannuation fund by the employer.

(ii) An eligible employee who does not wish to have (i) apply shall inform the employer of that election within the time allowed in the employer's letter of notification per (c) of this subclause and may choose to receive his/her entitlement in cash, or may roll it over into his/her sick leave accumulation.

(iii) In the event no election per (ii) is made within the time allowed (i) shall apply.

(c) In November each year the employer will notify each employee in writing of the total number of shifts he/she has been absent from in the 12 months prior as a result of either paid sick leave or unpaid sick leave or being absent without leave (AWOL), the dates of these absences and the time allowed for the exercise of the election in (b)(ii) of this subclause.

(8) **Absences in Excess of five (5) shifts**

(a) For all absences in excess of five (5) shifts in the 12 months July to June, a medical practitioner's certificate must be provided in order to claim sick pay.

(b) An employee who has more than five (5) shift absences without a medical certificate in any 12 months from July to June will be counselled regarding his/her unsatisfactory attendance.

13.—PUBLIC HOLIDAYS

(1) **Mine Holidays**

(a) Christmas Day, Good Friday and Anzac Day will be recognised as non-working mine holidays on the date they fall.

(b) Employees rostered on for these days shall be allowed the shift off and not required to work as rostered and will be paid as for a public holiday.

(c) Employees on annual or long service leave or rostered off for any of these three (3) days will have a day added to their annual leave entitlement.

(2) **Other Public Holidays**

(a) New Year's Day, Australia Day, Labour Day, Easter Monday, the Queen's Birthday, Foundation Day and Boxing Day shall be recognised as public holidays for the purposes of this Clause.

(b) Where one (1) of these seven (7) public holidays occur during a period of annual leave or long service leave or when the employee is rostered off the employee shall have a day added to their annual leave entitlement.

(c) An employee who is rostered to and works on a public holiday shall be paid double time plus have a day added to their annual leave entitlement.

(d) Twelve (12) hour shift continuous roster employees will work the seven (7) public holidays on the day and date they fall in accordance with their roster.

(e) Ten (10) hour shift non-continuous roster employees rostered on a public holiday as published in the Government Gazette may choose to work as rostered in which case he/she shall be entitled to a day in lieu to be added to his/her annual leave as well as payment for the public holiday.

Subject to (ii)—

(i) Ten (10) hour shift non-continuous roster employees rostered to work on a gazetted public holiday may choose not to work on that day as rostered

(ii) An employee wishing to make that choice, no less than seven (7) days prior to the public holiday, shall advise his/her supervisor of their intent by way of a leave application form.

(f) A ten (10) hour non continuous shift roster employee absent in accordance with (e) shall not be counted for the purposes of the balance of skills on crews per Clause 14.—Annual Leave

(3) **Payment**

Payment for public holidays shall be as prescribed in Clause 16.—Wage Rates, Allowances, Penalties and Other Payments.

14.—ANNUAL LEAVE

(1) **Definitions**

The following definitions shall apply—

'balance of skills' means the range of skills across all the trades available on each crew.

'block' means all consecutive shifts an employee is rostered on for work.

'Christmas week' means the period commencing at 0700 on 25 December and concluding at 0700 hours on 2 January.

'crew' means a group of maintenance employees rostered on a twelve (12) hour continuous shift or on a ten (10) hour non-continuous shift as designated A, B, C or D.

'department' means all employees of WCL engaged in and managing the maintenance operations.

'non peak period' means any time of the year other than a peak period.

'peak period' means a school vacation period.

'pool' means the total number of fitters rostered on 10 hour non-continuous shift rosters.

'team' means crew.

(2) **Entitlement**

Each employee is entitled as follows to annual leave for each 12 months of continuous service—

(a) The annual base provision shall be 215 hours accrued on a pro-rata weekly basis.

(b) Twelve (12) hour shift continuous roster employees shall be credited an additional 35 hours annual leave (ie, total 250 hours) accrued on a pro-rata weekly basis.

(3) **Payment**

An employee taking annual leave shall be paid in accordance with Clause 16—Wage Rates, Allowances, Penalties and Other Payments.

(4) **Pro-Rata on Termination**

On resignation or termination, the employee shall be entitled to payment for any untaken accrued annual leave and pro-rata leave calculated on the basis of completed weeks of employment as a proportion of 52 provided that the employee shall not be entitled to pro-rata annual leave where the termination of employment is for misconduct.

(5) **Balance of Skills**

(a) In order to maintain the continuous operation throughout the year annual leave will be approved subject to a reasonable balance of skills being retained in each crew.

(b) The balance of skills means the range of skills available on each crew.

(c) The levels for a balance of skills on each crew normally will be as follows—

(i) twelve (12) hour continuous shift roster—for all periods excluding Christmas week, the maximum authorised absences from a crew will be—

Three (3) fitters

One (1) boilermaker

One (1) electrician

One (1) auto electrician from the A or C crew and one (1) auto electrician from the B or D crew.

(ii) ten (10) hour shift roster for all periods save the Christmas week, the maximum authorised absences from a crew, exclusive of fitters, will be—

One (1) boilermaker

One (1) electrician

One (1) auto electrician

One (1) tyre fitter

One (1) millwright

(iii) Generally the authorised annual leave of tyre fitters will not coincide.

(iv) Generally the authorised annual leave of millwrights will not coincide.

(v) For the purposes of annual leave applications and approvals, fitters on crews A, B, C and D (ten (10) hour non-continuous shift rosters) will be regarded as a pool with the maximum authorised absences for all periods (excluding the Christmas week) being four (4).

(vi) Christmas week—

ten (10) hour non-continuous shift rosters—no minimum numbers of employees will be required to work other than one (1) tyre fitter on day shift.

twelve (12) hour continuous shift roster—the minimum number of employees on crew will be—

Three (3) fitters

One (1) boiler maker

One (1) auto electrician from A or C crew and one (1) auto electrician from B or D crew.

(6) **Applications to Take Annual Leave**

(a) Notice periods required are as follows.

(i) For the Christmas week—

An employee who wishes to take annual leave in the Christmas week is to submit a leave application form to his supervisor within the month of February prior to that Christmas.

(ii) For peak periods—

(cc) An employee who wishes to take annual leave in a peak period (other than the Christmas week) shall submit a leave application form to his supervisor in the tenth (10th) calendar month prior to the month in which he/she wishes to commence that leave.

(dd) The ability to submit an application to take annual leave in a peak period (other than the Christmas week) will remain open for the whole of the tenth (10th) month preceding the commencement of the intended leave.

(iii) For other periods—

An employee wishing to take annual leave at any time other than the Christmas week or during a peak period shall submit a leave application form to his supervisor no less than seven (7) days prior to the commencement of the intended leave.

(iv) An application for annual leave is to state what shift roster the employee will be on at the time of taking the proposed annual leave.

(7) **Approval Process for Annual Leave Application**

(a) Approval of annual leave will be subject to this Clause.

(b) Unless as otherwise allowed in this subclause, any approval of an application for annual leave will be a matter for the supervisor of the affected crew.

(c) A supervisor's decision on an application for annual leave made in accordance with the notice period(s) prescribed in (6) of this Clause shall be based on the maintenance of balance of skills on the crew as set out in (5) of this Clause.

(d) An employee who works across a peak period will be given preference in the event he/she wishes to take paid leave in the next corresponding peak period.

(e) In the event of more than one (1) application for leave being submitted on the same day, consideration for approval will be in order of the submitting of the application save that an application for a block will be given preference over an application for a single day of annual leave.

(f) If the supervisor is absent from work on the day an employee submits an application for annual leave, the approval of the application will be the responsibility of the relevant superintendent.

(g) A record of approved leave will be maintained by the supervisor and updated on a daily basis.

(h) This record of approved leave will be open for inspection by a maintenance employee.

(8) **Unfairness Claims**

(a) An employee claiming that a supervisor has unfairly treated him / her in relation to an application for annual leave may raise that claim for review by the superintendent.

(b) The review process for the purposes of (a) will be as follows—

(i) Any request for review by the employee must be raised within two (2) days of the alleged unfairness arising and be notified to the employee's superintendent by the employee making that claim.

(ii) The request should be in writing and specify the employee's grounds or reasons for the claim of unfairness.

(iii) The review and its outcome will be completed and notified to the employee and supervisor within four (4) days of the request being raised.

(9) **Special Case Consideration**

(a) Application claiming extenuating personal circumstances—

(i) If any employee wishes to take annual leave on the grounds of extenuating personal circumstances, the employee may submit such an application to his supervisor.

(ii) The decision on such an application will be made by the employee's superintendent.

(iii) On receipt of such an application the supervisor is to provide it directly to the superintendent for decision along with any detail on the balance of skills situation at the relevant time.

(iv) The superintendent will interview the employee concerned at which time the employee shall identify the circumstances that he/she says constitute the reasons why his application should be approved.

(v) This discussion between the superintendent and the employee shall remain confidential.

(vi) The application for annual leave on the grounds of extenuating personal circumstances may be approved by the superintendent subject to the interview.

(vii) Any recording of authorised annual leave on the grounds of extenuating personal circumstances shall note this but no details as to the grounds on which the application was based will be recorded.

(b) Application not in compliance with the notice periods—

(i) If any employee wishes to make application for annual leave at a time not in accordance with subciause (6) he/she will state the reasons why he/she says the application should be approved at the time of making any such application.

(ii) Any approval of such an application will be subject to agreement between the union and the employer.

(iii) Approval will be subject to a joint conclusion by the union and the employer that the circumstances are very serious and or very special.

(10) **Block Bookings and Single Day Bookings of Annual Leave—Liberty to Review**

(a) The parties note that a practice of booking out short blocks of annual leave and single days of annual leave well in advance of taking that leave may have the effect of unreasonably impeding another employee from taking longer periods of annual leave.

(b) In the event that either party considers it necessary, the incidence of single day and short blocks of annual leave booked in advance and the effect of this will be reviewed no earlier than six (6) months from 14th day of January 2001.

(c) If the parties conclude from that review that employees seeking to book longer term annual leave periods are being disadvantaged unreasonably by a practice of booking single days in advance, they will have discussions for the purpose of implementing changes to notice requirements to remedy the situation or any other action agreed upon.

(11) **Cancellation of Annual Leave Authorised for a Peak Period**

(a) In the event that an employee notifies the employer less than two (2) months before the commencement of approved annual leave to be taken during a peak period that he/she no longer wishes to take that annual leave, the fact of an authorisation of it shall count for the purposes of satisfying of preferences in the timing of annual leave for that employee.

(b) In the case of a cancellation of annual leave on request by the employer, (a) shall not apply and the employee will not be disadvantaged so far as the satisfaction of any preferences is concerned.

15.—LONG SERVICE LEAVE

(1) Employees are entitled to long service leave of 13 weeks for each eight (8) years of continuous service in accordance with the provisions of Clause 17.—Long Service Leave of the Award paid at the rate for a 35 hour week.

(2) Specific provisions relating to the taking and payment of long service leave under this Agreement are detailed in Clause 16.—Wage Rates, Allowances, Penalties and Other Payments.

16.—WAGE RATES, ALLOWANCES, PENALTIES AND OTHER PAYMENTS

(1) Classification Wage Rates

(a) The ordinary wage rate for a 35 hour week for each classification is as follows—

Classification	Percentage of Base Trade Rate	14/01/01 Rate (per week) $	13/01/02 Rate (per week) $	12/01/03 Rate (per week) $
Trades Person Level 1* (base rate)	100%	736.00	769.40	800.40
Trades Person Level 2*	110%	809.60	846.40	880.60
Trades Person Level 3*	115%	846.40	884.90	920.70
Trades Person Level 4*	120%	883.20	923.30	960.50
Trades Person Level 5*	125%	920.00	961.80	1000.60
Apprentice Year 1	41%	301.80	315.50	328.20
Apprentice Year 2	55%	404.80	423.20	440.20
Apprentice Year 3	75%	552.00	577.10	600.30
Apprentice Year 4	88%	647.70	677.10	704.40
Tyre Fitter Level 1	95%	699.20	731.00	760.60
Tyre Fitter Level 2	100%	736.00	769.40	800.40
Tyre Fitter Level 3	105%	772.80	807.90	840.50
Tyre Fitter Level 4	110%	809.60	846.40	880.60

*Career Path

(b) The training/career path applicable to employees covered by this Agreement shall be the Wesfarmers Coal Limited (Maintenance) Progress 2000 Agreement

(c) The wage rates above incorporate the percentage loading on sick leave absence (1 7.5%) which previously applied.

(2) **42 hour average per week—Calculation of Payment**

The following rates, exclusive of shift penalties and other payments prescribed in this Agreement, are to apply to the weekly average of 42 hours worked over a year by rostered shifts.

(a) Payment on an hourly basis—

(i) for 35 hours worked Monday through Friday in a week the payment shall be calculated at the ordinary rate of pay for the employee's classification as prescribed in (1)(a) of this Clause in the case of an employee working on a twelve (12) hour seven (7) day continuous shift roster;

(ii) or seven (7) hours of work per day Monday—Friday calculated at the ordinary rate of pay for the employee's classification as prescribed in (1)(a) of this Clause in the case of an employee working a ten (10) hour non-continuous roster.

(b) A further payment calculated as follows shall apply—

(i) for twelve (12) hour shifts, a rate of time and a half for the first three (3) hours after 35 hours and double time thereafter.

(ii) for ten (10) hour shifts, a rate of time and a half for the next three (3) hours after seven

(7) hours worked on any day Monday through Friday; and

for any Saturday 'make up' shift of eight (8) hours as defined in Clause 11.—Shift Work, a rate of time and a half for the first three (3) hours and double time thereafter and in the event of a Sunday 'make up shift' of eight (8) hours, the rate to apply will be double time.

(3) **Allowances**

(a) Allowances which may be paid are as follows—

Allowance	Payable	14/01/01 Rate $	13/01/02 Rate $	12/01/03 Rate $
Trades Production Bonus	p/week	53.10	54.70	56.10
Trades Experience Allowance	p/week	18.91	19.50	20.00
Trade Disability	p/hour	0.15	0.20	0.20
Dust Money	p/hour	0.26	0.30	0.30
Artificial Light (AS)	p/shift	2.03	2.10	2.20
Artificial Light (NS)	p/shift	7.09	7.30	7.50
Meal Allowance	p/meal	5.85	6.00	6.20
Conveyor Belt	p/shift	0.55	0.60	0.60
First Aid Medallion	p/week	9.06	9.30	9.50
First Aid 3rd Year Certificate	p/week	12.23	12.60	12.90
Excessively wet—shift	p/shift	1.65	1.70	1.70
Wet Work	p/shift	1.82	1.90	1.90
Relief Supervisor	p/shift	45.57	46.90	48.10

(b) Allowances paid on a weekly basis shall continue to be paid during paid leave.

(c) Employees entitled to be paid trade allowances shall continue to be paid those allowances while on paid leave.

(4) Shift Allowances Monday—Friday

(a) Subject to (b) the following allowances shall apply—

(i) Afternoon Shift—15%

(ii) Night Shift —25%

(b) No shift allowance shall be paid when either overtime or weekend shift allowances or overtime is being paid.

(c) No shift allowance shall apply on Day Shift.

(5) **Overtime and Call Outs**

The rates to apply are as prescribed in Clause 10.—Overtime and Call Outs.

(6) **Leave Payments**

(a) Other than long service leave and public holidays, all approved leave shall be taken, paid and debited to the employee's accrued entitlement as follows—

(i) The days (shifts) on which the employee is rostered to work are the days (shifts) on which leave may be granted.

(ii) For the purposes of this Clause each week shall stand alone.

(iii) The hours for payment and debit against accruals shall be calculated as 35/42 x length of shift except in the case of the ten (10) hour non continuous shift crews where this produces a figure of less than 35 hours over any one (1) week in which case a maximum of 35 hours will be paid and debited.

(iv) For leave spanning less than one (1) week the 35/42 x length of shift formula shall determine the quantum for payment and for debit against accrual.

(7) **Long Service Leave**

(a) Long service leave shall be approved in periods spanning not less than 14 calendar days and be paid and debited at 35 hours for each period of seven (7) calendar days.

(b) An employee on long service leave who would ordinarily have been rostered to work or have been rostered off from work on a public holiday will have a day in lieu added to his/her annual leave entitlement, with payment to be at the long service leave rate and the leave continuing uninterrupted.

(8) **Public Holidays**

(a) An employee who is rostered on to and works on a public holiday, shall be entitled to double time plus a day in lieu added to his/her annual leave entitlement.

(b) An employee who is not rostered on for a public holiday is entitled to have a day added to his/her annual leave entitlement.

(c) An employee on annual leave, who would ordinarily have been rostered to work on a public holiday, will be paid as for a public holiday instead of being paid and debited a day of annual leave entitlement.

(d) An employee on annual leave who would ordinarily have been rostered off work will have a day in lieu added to annual leave entitlement.

(9) **Leave loadings**

(a) The following loadings shall be added to the employee's ordinary wage rate while on approved leave—

- 35% of the base rate—annual leave
- 17.5% of the base rate—long service leave and bereavement leave

(b) No loading shall apply on sick leave.

17.—PACKAGING OF ENTITLEMENTS

(1) Subject to this Clause, instead of taking a cash benefit an employee may elect to take it as a superannuation contribution provided that the value of benefits will equate to the total gross earnings (including overtime or any applicable allowances) for the position occupied.

(2) This election shall be known as 'packaging'.

(3) 'packaging' has the same meaning as 'salary sacrifice'.

(4) An employee taking this election must sacrifice gross earnings to cover the value of the non-cash benefit, any applicable fringe benefits tax, any applicable superannuation contribution tax or levy and/or any other tax imposed by the Australian Taxation Office from time-to-time.

(5) The amount of non-cash benefits must be nominated by the employee at the time of election.

(6) An employee may choose to take up to 40% of his gross earnings for his classification as—

(a) superannuation contributions; and/or

(b) additional death and disability insurance cover contributions.

The maximum allowable salary sacrifice is subject to the Commonwealth Income Tax Assessment Act 1938 as amended.

(7) Salary sacrifice will continue to operate during periods of paid leave.

(8) The right to elect to salary sacrifice may be exercised on registration of this Agreement and thereafter every November.

18.—TRAVEL INSURANCE

WCL will pay travel insurance for each employee covered by this Agreement to the equivalent standard of the policy existing prior to the commencement of this Agreement which includes provision, subject to the policy, of up to $1,000.00 per week for a maximum of two (2) years for lost wages and $100,000.00 in the event of death or disability.

19.—ENTRY INTO SHORT FIXED TERM CONTRACTS

(1) The union and WCL agree on the following to apply with respect to any employment on short fixed term employment contracts—

(2) **Objective**

(a) The purpose of this Clause is to assist the employer at times of specific work demands.

(b) This Clause shall not be used to undermine the position of the permanent workforce or to reduce the permanent workforce level.

(3) **Definitions**

For the purpose of this Clause—

"fixed term contract" shall have the same meaning as "short fixed term employee's contract" -1

"short fixed term employee's contract" means an employment contract entered into by the employer with a person for a limited period of employment;

"short fixed term contract employee" means any person engaged by the employer for a limited period on a short fixed term contract.

(4) Entry Into Fixed Term Contracts

(a) The employer shall not enter into any short fixed term contract that does not satisfy subclause (2) of this Clause.

(b) Any objection by the Union to the employer entering into short fixed term contract/s shall be based on consideration of the reasons advanced at the time by the employer in accordance with (6)(b) of this Clause.

(c) Subject to this Clause, preference in employing on short fixed term contracts will be given by the employer to applicant tradespersons who meet the required skills and other employment criteria and who have relevant work experience in the Collie district.

(5) **Contract Term Limits**

(a) Other than as provided for in (c) hereof, the minimum period of engagement under a short fixed term contract shall be three (3) months.

(b) Other than as provided in (c) hereof, the maximum period of engagement under a short fixed term contract shall be twelve (1 2) months.

(c) The employer may enter into a short fixed term contract of a lesser or greater period than prescribed in this subclause subject to the following—

(i) exceptional circumstances must exist in the particular case; and

(ii) the union agreeing to the employer entering into such a contract.

(6) **Consultation/Agreement With The Union**

(a) The employer shall notify the union when it is considering entering into a short fixed term contract or contracts.

(b) The notification shall include the number and the term/s (length/s) of such contract/s and a brief account of the circumstances it says give rise to the need for it/them.

(c) The union and the employer will have discussions prior to the employer entering into any fixed term contract. The discussions will include possible impact/s on permanent employees and work arrangements.

(d) The entry by the employer into any short fixed term contract shall be subject to prior agreement by the union.

(e) Any agreement between the parties is to be minuted with copies to be retained by each party.

(7) **Conditions of Employment**

(a) Short fixed term contracts will be bound by the Wesfarmers Coal Limited (Maintenance) Enterprise Agreement 2001—save that the conditions contained in this Clause shall prevail to the extent of any inconsistency.

(b) Short fixed term employees shall be employed as Level 2 Tradespersons principally engaged in the general maintenance of plant and equipment utilised on the site by Wesfarmers Coal Limited.

(i) for employment for a period of three (3) months or less and as Level 3 Tradesperson thereafter.

(c) Any sick leave entitlement accumulated on a short fixed term contract shall be paid out to the employee at the end of the contract.

(d) Any annual leave entitlement accumulated on a short fixed term contract shall be paid out to the employee at the end of the contract.

(e) As the qualifying period for a pro-rata long service leave entitlement is six (6) years, a short fixed term contract shall not be eligible for any accumulated long service benefit.

(f) Short fixed term employees shall be entitled to the following by way of a voucher—

(i) on commencement, one (1) set of work boots and one (1) set of work clothes;

(ii) at the beginning of any subsequent six (6) months of employment, one (1) set of work boots and one (1) set of work clothes;

(iii) (aa) on commencement, one (1) jacket; and

(bb) in the event the employment extends beyond a 12 month period, the employee shall be entitled to another jacket at that point.

(g) Short fixed term employees shall be expected to provide his/her own personal hand tools for use by the employee during the employment.

(8) **Severance Pay**

(a) On expiry of a short fixed term contract the employee shall be entitled to a severance payment in accordance with the length of service as follows—

(i) if less than three (3) months—nil;

(ii) if three (3) months and more up to six (6) months—one (1) week of pay;

and thereafter, for each three (3) months or part thereof—one (1) week of pay.

20.—ACCIDENT PAY

(1) This Clause shall override Clause 6.—Accident Pay of the Award and to the extent of any inconsistency, subclause 2 of Clause 21.—Variable Duties.

(2) An employee in receipt of weekly payments under the provisions of the Workers' Compensation and Rehabilitation Act 1981, shall be entitled to receive accident pay from the employer as prescribed in this Clause.

(3) The ordinary rate of pay for the purposes of this Clause shall be the rate for the employee's classification as prescribed in Clause 16. Wages, Rates, Allowances, Penalties and Other Payments of this Agreement.

(4) Payments shall be as follows—

(a) For the first three (3) consecutive weeks (21 days) commencing from the first full rostered shift off work after the incident giving rise to the work related injury or sickness, the employee shall be entitled to his/her ordinary rate of pay plus 7.5% loading at the rate of ten (10) hours per rostered shift off for twelve (12) hour continuous rostered employees, and at the rate of 8.33 hours per rostered shift off for ten (10) hour non continuous rostered employees.

(b) For any further period of absence/s from and including four (4) consecutive weeks up to 39 consecutive weeks from the first full rostered shift off work after the incident giving rise to the work related injury or sickness, the employee shall be entitled to payment as if at work on his/her approved roster as prescribed in Clause 11. Shift Work of this Agreement, provided that such payment shall include shift or overtime rates but the loading in (a) of this subclause shall not apply

(c) For any further consecutive absence/s beyond the 39 weeks from the incident, giving rise to the work related injury or sickness the payment per (a) of this subclause, with the exception of the loading, shall apply.

(5) There shall be no changes to the employee's approved roster during an employee's absence on workers compensation.

(6)(a) The parties agree that employees shall participate in rehabilitation programmes, provided by WCL and its Insurers, including early return to work initiatives.

(b) Any return to work, including return to full or alternate duties as part of rehabilitation, must be on the recommendation of a medical practitioner.

(7) A return to work shall constitute a break and the payment of accident pay for any future absence subject to payments under the Workers Compensation and Rehabilitation Act 1981 shall be subject to the application of (4) of this Clause in its entirety.

(8) Where the incapacity to work is for part of a week the amount payable to the employee as accident pay shall be a on a pro rata basis for that week.

(9) An employee shall not be entitled to any payment under this Clause in respect of any period of paid annual leave or long service leave or for any paid public holiday.

SCHEDULE A—COMMITMENTS REGARDING ANY REDUNDANCY

(1)(a) At the time of entering into this Agreement WCL employs 76 tradespersons covered by it.

(b) At the time of entering into this Agreement WCL has no plans to make any position in the maintenance section redundant or to reduce the maintenance workforce by way of redundancy and does not anticipate any redundancies arising for the life of the Agreement.

(c) It is acknowledged by WCL that the fact of any attrition in this number over the life of the Agreement should be recognised as contributing to the security of employees.

(d) In the event of an employee vacating a position covered by this Agreement, including as a result of promotion, WCL and the union will discuss the impact in the workplace with a view to reaching a common position.

(2) Voluntary Redundancies

(a) If at any time during the term of the Agreement WCL identifies a need for any redundancies as a result of a significant downturn in demand and revenue or loss of contracts it will have discussions with the union for the purposes of reaching agreement on any voluntary redundancies and the conditions to apply.

(b) In the event that during the life of the Agreement voluntary redundancies are offered, the package of terms and conditions to apply will be no less than as set out in (c).

(c) The package

(i) Subject to a maximum 65 weeks pay (excluding accrued annual leave entitlements on termination award entitlements).

- four (4) weeks' pay in lieu of notice.
- one (1) week's pay for each year of service.
- one (1) further week's pay per year for each year of service above 20 years of service.
- three (3) further weeks' pay for each above 50 years of age.

(ii) Long service leave—accrued entitlement (ie after six (6) years pro rata and loading).

(iii) Sick leave—accrued entitlement (no loading).

(iv) Annual leave—accrued entitlement (including loading).

(v) Superannuation—per Award plus seminars.

(vi) Coal Industry Super Fund—per fund regulations.

(vii) Job Search—paid time up to 16 hours during notice period to attend confirmed job interviews.

(viii) Classification rate including Leading Hand experience allowance and production bonus.

(ix) Redundancy pay (excluding accrued leave entitlements) not to exceed the total pay the employee would have received if he/she had worked to normal retirement age.

(x) All accepted volunteers will receive an additional $500.

(xi) Up to $1,000 retraining on presentation of receipts within six (6) months of the termination date.

(xii) $40,000 ex-gratia payment.

(xiii) An employee applying for voluntary redundancy for the purposes of (c) shall state at the time his preferred date for the employment to end.

(xiv) The employer will inform the employee within fourteen (14) days of his/her application whether it is accepted.

(xv) In the event that the application is accepted the employer and employee will discuss a mutually convenient time for the employment to end.

(xvi) In the event that the employer informs the employee that his application has been unsuccessful, then that application shall lapse.

SCHEDULE B—ROSTERS

ROSTER B1

7 DAY CONTINUOUS—4 CREWS—12 HOUR SHIFTS

Crew	Week	Sun	Mon	Tue	Wed	Thu	Fri	Sat
A	**1**	–	D	D	–	–	N	N
B	**2**	N	–	–	D	D	–	–
C	**3**	–	N	N	–	–	D	D
D	**4**	D	–	–	N	N	–	–
A	**5**	–	D	D	–	–	N	N
B	**6**	N	–	–	D	D	–	–
C	**7**	–	N	N	–	–	D	D
D	**8**	D	–	–	N	N	–	–

- Average 42 hours per week
- The normal start and finish times for this roster shall be—
  - * Day Shift (12 hours) START: 0700 hours FINISH: 1900 hours
  - * Night Shift (12 hours) START: 1900 hours FINISH: 0700 hours
- Payment for a shift shall be calculated having regard for the start time and the day on which it commenced.

ROSTER B2

6 DAY NON CONTINUOUS—4 CREWS—10 HOUR SHIFTS

PLUS I X 8 HOUR SHIFT

Crew	Week	Sun	Mon	Tue	Wed	Thu	Fri	Sat
A	**1**	–	D	D	D	D	–	–
B	**2**	–	–	D	D	D	D	D8
C	**3**	–	D	D	D	D	–	–
D	**4**	–	D	D	D	D	–	–

- Day shifts worked Monday—Friday plus one (1) Saturday make up shift of eight (8) hours each four (4) weeks
- Average 42 hours per week
- The normal start and finish times for this roster shall be—
  - * Day Shift (10hoursMon-Fri) START: 0700 hours FINISH: 1700 hours
  - * Saturday 'make up shift' (8 hours) START: 0700 hours FINISH: 1500 hours
- Payment for a shift shall be calculated having regard for the start time and the day on which it commenced.

ROSTER B3

6 DAY AND AFTERNOON NON CONTINUOUS—
4 CREWS—10 HOUR SHIFTS

PLUS 1 X 8 HOUR SHIFT

Crew	Week	Sun	Mon	Tue	Wed	Thu	Fri	Sat
A	**1**	–	D	D	D	D	–	–
B	**2**	–	–	D	D	D	D	D8
C	**3**	–	D	D	D	D	–	–
D	**4**	–	D	D	D	D	–	–

- Day and afternoon shifts worked on alternate weeks (with the afternoon shifts commencing on a Monday) plus one (1) Saturday make up shift of eight (8) hours each four (4) weeks
- Average 42 hours per week
- The normal start and finish times for this roster shall be—
  - * Day Shift (10 hours Mon-Fri)
    START: 0700 hours
    FINISH: 1700 hours
  - * Afternoon Shift (10 hours Mon -Thur)
    START: 1700 hours
    FINISH: 0300 hours
  - * Saturday 'make up shift' (8 hours)
    START: 0700 hours
    FINISH: 1500 hours
- Payment for a shift shall be calculated having regard for the start time and the day on which it commenced.

SCHEDULE C—SHARED WORK AGREEMENT

The following is a record of an agreement reached between the parties in 1998 about work arrangements which could involve Miners—

Forklifts

Trucks

All lifting devices

Spare wheels

Batteries

Lubrication/services

Filters

Minor maintenance.

Examples of shared work but not limited to—

Forklifts

1. Positioning of components.
2. Pick up and carry of parts.
3. Removing waste/rubbish from around jobs ie broken/worn parts to rubbish bins.

Trucks

1. Pick up of parts.
2. Delivery of tooling/parts to jobs.
3. Set up of service requirements on shutdown/major jobs.
4. General testing of machinery.

Lifting devices

1. Operation of cherry picker—man box.
2. Operation of HIAB truck mounted cranes.

Tyre Handler

1. Miners/tyre fitters to operate to complete whole of job.

Changing light vehicles wheels

1. All trades/miners/staff to change own wheels on light vehicles.

Batteries/air starts

1. Ability for both trades/miners to jump-start or refill air receivers for starting machines.

Lubrication

1. Ability for both trades/miners to refill/top-up lubricants.

Filters

1. Ability for both trades/miners to change/replace filters.

Minor maintenance

1. Pipe couplings (dewatering).
2. Changing light globes.
3. Changing outworn ground engaging tools, ie ripper boots, pin on teeth.
4. Changing mirrors.
5. Miners to assist in completion of full services.

SCHEDULE D—CESSATION OF SERVICE GRATUITY SCHEME

(1) **Background**

(a) In 1974, the parties applied a gratuity scheme calculated on the basis of one (1) weeks wages based on a 35 hour week as per the Award rate for each completed year of service.

(b) The commencement date for the purposes of applying the scheme was 1 January 1965

(c) In recent years the calculation for the purpose of this accumulated benefit has been the ordinary rate for the employee's classification under the relevant Enterprise Agreement current at the time plus 17.5% loading in lieu of the Award rate.

(d) Payment of any accumulated gratuity was only available to an employee on retirement at no less than the age of 55 years.

(2) **Cessation of Gratuity Scheme on 14 January 2001**

The gratuity scheme shall cease to exist on and from 14 January 2001 with the accrued entitlement being paid out to employees as prescribed in subclause (3).

(3) **Payout of Accrued Entitlements**

(a) Accrued entitlements shall be calculated up to 13 January 2001 on completed years of service.

(b) The wage rate to apply for calculation of the total payout figure shall be the ordinary weekly rate for the employee's classification as at 13 January 2001 as prescribed in the Enterprise Agreement Maintenance 1998—2001 ('the 1988 Agreement') plus 17.5%.

(c) The payout shall be paid into the employee's choice of superannuation fund, (Coal Industry Superannuation Fund or Westscheme) in three (3) equal instalments as follows.

(i) The first instalment shall be due in the first pay period commencing on or after 1 July 2001.

(ii) The second instalment shall be due in the first pay period on or after 1 July 2002.

(iii) The third instalment shall be due in the first pay period commencing on or after 1 July 2003.

(d) Any employee whose employment ceases prior to the completion of the three (3) year period in (c) may elect to have any remaining instalment/s paid into his/her superannuation or to be paid out directly.

SCHEDULE E—SUPERANNUATION

(1) For the life of this Agreement superannuation contributions by the employer on behalf of each employee will be paid on a fortnightly basis at 9% of gross earnings.

(2) The contribution will be made up as follows—

(a) The employer contribution paid into the Coal Industry Superannuation Fund as required by statute.

(b) The balance, which will be paid into either the Coal Industry Superannuation Fund or Westscheme as nominated by the employee.

Signed on behalf of—

The Automotive, Food, Metals, Engineering, Printed and Kindred Industries Union of Workers' Western Australian Branch (Registered as AFMEPKIU)	Wesfarmers Coal Limited
(Sgd.)	(Sgd.)
State Secretary	Managing Director
Date: 13/2/01.	Date: 7/2/01.
(Sgd.)	
WCL Convenor	
Date: 6/2/01.	

WESFARMERS COAL LIMITED (MAINTENANCE) PROGRESS 2000 AGREEMENT.

No. 4 of 2001.

Wesfarmers Coal Limited

and

Australian Manufacturing Workers Union

(No. 4 of 2001)

Memorandum of Agreement.

WHEREAS a conference between Wesfarmers Coal Limited and the Australian Manufacturing Workers Union was convened by me pursuant to section 12(1) of the Coal Industry Tribunal of Western Australia Act 1992 on 23 February 2001 for the purpose of finalising an agreement relating to sustainable work improvements (PROGRESS AGREEMENT) for maintenance personnel.

AND WHEREAS agreement has been reached between the parties in terms of the Schedule annexed hereto, signed by me in accordance with section 12(3) of the Act is a memorandum of the matters upon which agreement has been reached and the terms and conditions agreed upon.

Dated at Perth this 23rd day of February 2001.

G. L. FIELDING,
Chairman, Coal Industry Tribunal
of Western Australia.

1.—TITLE

This Agreement shall be known as the 'Wesfarmers Coal Limited (Maintenance) Progress 2000 Agreement'.

2.—ARRANGEMENT

3.—OBJECTS OF THE AGREEMENT

3.1 The Wesfarmers Coal Limited (Maintenance) Progress 2000 Agreement ('Progress 2000') is a co-operative initiative developed jointly between the management and workforce of the Maintenance Department of Wesfarmers Coal Limited ('WCL').

3.2 Progress 2000 is intended to provide both the employees (tradespersons and tyre fitters) and WCL with sustainable improvements in the way they work.

3.3 There is an expectation that Maintenance Department employees will have greater scope to fully exploit their trade competencies.

3.4 WCL expect that by having a more flexible and motivated workforce, improvements in safety and work quality will occur and cost reductions will be achieved.

3.5 The foundation of this Agreement is to ensure the SELL principal is applied to all work carried out within the Maintenance Department. The SELL principal provides for all work to be carried out—

- Safely
- Efficiently
- Logically
- Legally

3.6 The initiatives of the Agreement are intended to promote a culture where all Parties commit a high level of endeavour and co-operation within the workplace and—

- assist in maintaining Wesfarmers Coal Limited as the premier coal supplier in Western Australia;
- help secure the future for employees of Wesfarmers Coal; and
- contribute to ensuring the longer term viability of the State's coal industry.

3.7 This Agreement forms part the contract of employment between WCL and the maintenance employee.

4.—SCOPE AND PARTIES TO THIS AGREEMENT

4.1 This Agreement shall apply to the operations of Wesfarmers Coal Limited ('WCL') in the "Collie Basin" coal resources area and its employees who are eligible to be members of the Union party to it.

4.2 The Parties to this Agreement are Wesfarmers Coal Limited and The Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers—Western Australia ('the Union').

5.—DATE OF OPERATION

This Agreement shall apply from the first pay period to commence on or after 27 August 2000 and shall remain in force until altered, superseded or cancelled by the agreement of the two Parties.

6.—AGREEMENT SUPERSEDED

6.1 This Agreement supersedes wholly the Western Collieries Ltd Maintenance Employees Career Path 1994.

6.2 The Parties acknowledge that this Agreement satisfies in total that section of the Career Path 1994 Agreement, which specifies, "the content and application of levels beyond 120% were to be determined once the 120% target quota has been achieved".

7.—FLEXIBILITY PROVISIONS

Maintenance Department employees will work to their level of competency within their mainstream trade classification, while utilising multi-skilling to complete the job at hand. This will result in the 80:20 cross-skilling rule from the Career Path 1994 Agreement no longer applying.

8.—QUALITY MANAGEMENT SYSTEM

There is commitment from both Parties to the uninterrupted introduction and sustaining of the International Safety Organisation (ISO) Quality Management System (QMS).

QMS introduces a structured work methodology to focus on improving the system of work for WCL maintenance employees.

QMS will improve the performance of routine maintenance tasks and incorporate continual review by maintenance employees and management to improve and refine maintenance methods.

9.—AUTONOMY AND REPORTING PROVISIONS

In order to minimise equipment downtime and reduce maintenance costs, maintenance employees will exercise increasing levels of autonomy.

This will include, but not be limited to—

- Providing written accounts of work performed, recording job status and communicating shift changeover details as required.
- Utilisation of the Computerised Maintenance Management System for the input and retrieval of maintenance history and associated data collection.
- Recording of equipment faults, work performed, cause of failure information.
- By organising and maintaining whole of job continuance (within levels of competency).
- In association with his/her Supervisor, arrange resources external to the Maintenance Department ie, crane and forklift operators, sourcing and ordering of appropriate repair parts, etc.
- Organising and maintaining a continuous work flow without recourse to a supervisor on a task by task basis.

10.—FUTURE TRAINING

10.1 Future training for maintenance employees will be focused towards site specific requirements. It will consist of, but not be limited to—

- Site specific training
- New technology training
- Refresher training
- Safety training

The parties to this Agreement recognise that some training programs may not be provided to all maintenance employees.

10.2 WCL is committed to providing appropriate training to ensure its maintenance employees keep pace with leading practice and trends in mining industry maintenance procedures.

10.3 Training requirements will be identified and nominated by the appropriate Supervisor in consultation with the Superintendent, and then arranged and coordinated by the Maintenance Department Safety and Training Co-ordinator.

10.4 Providing adequate notification of a need to attend training is given, a maintenance employee shall not refuse training for which they have been nominated, provided it is relevant to his/her usual work and trade classification.

Whilst undertaking training as nominated by WCL, an employee will not be disadvantaged by way of a reduction in pay as a result of that training taking place.

Upon completion, the maintenance employee is required to willingly utilise all skills for which they have been trained.

10.5 An appeal process is available should any maintenance employee feel he/she are being unfairly denied, or required to undertake training, which does not fit the scope described above.

The appeal process shall comprise —

- Discussion with his/her immediate Supervisor and the Safety and Training Co-ordinator regarding the training request. The outcomes of this discussion are to be documented.
- If no agreement is reached, further discussion will take place between the maintenance employee (with elected union representative should the maintenance employee so request) and the Maintenance Superintendent and Supervisor responsible. Outcomes of this discussion are to be documented. It is anticipated an amicable resolution of the issue will be made at this level.
- In the event of no agreement being reached, discussions will be held with the Department Manager and the Parties involved, in order to reach a resolution.

11.—NON-COMPLIANCE RESOLUTION

Non-Compliance Resolution Process—

11.1 In the event of a disagreement between a Supervisor and a maintenance employee, relating to non-compliance with this Agreement, the SELL principal will be applied in seeking a resolution.

11.2 Should there be no agreement following discussion between the Supervisor and the maintenance employee, consultation will occur involving the maintenance employee, an elected Union representative, the relevant Supervisor and the relevant Maintenance Superintendent in order to resolve the issue.

11.3 Should the non-compliance continue by the maintenance employee despite agreement between the Union and Company representatives, a 5% reduction in wages for that maintenance employee, or a reduction back to no less than 120% of the tradesperson's base rate in the case of an experienced tradesman and 100% in the case of a tyre fitter, whichever is applicable, will occur until they fulfil the provisions of this Agreement.

11.4 In the event that a maintenance employee continues to prolong the non-compliance with this Agreement, further discussion will be held with the Maintenance Manager, the maintenance employee and a Union representative in order to reach a resolution.

12.—PAYMENT PROVISIONS

12.1 The parties agree the provisions of the Agreement conclude wage increases from training and career path arrangements with wages being capped for tradesperson's at 125% of the tradesperson's Level 1 rate in the case of tradesperson's and 105% in the case of tyre fitters.

12.2 Wage increases under this Agreement shall involve percentage increases for all tradesmen who have obtained the 120% Level 4 and tyre fitters who have obtained the 100% level 1 rate, at the relevant date as follows—

2% of Level 1 base rate from first pay period to commence on or after 27.08.2000

1.5% of Level 1 base rate from first pay period to commence on or after 09.09.2001

1.5% of Level 1 base rate from first pay period to commence on or after 08.09.2002

See Attachment 1, Table 1.

12.4 Provision has been made in this Agreement for advancement of new maintenance employees from the Level 1 commencement base wage rate of 1 00%, through to the top 125% level 5,over a 24 month period.

12.4.1 Wage movements for new employees will be automatic, providing there has been demonstrated levels of performance and co-operation displayed during this 24 month period and when necessary, training has been accepted and skills utilised. See Attachment 1, Table 2

12.4.2 Issues relating to non-compliance with this Agreement from new starters during their initial 24 month period of employment, will result in no further percentage wage movements under this Agreement until the required compliance is demonstrated.

12.4.3 In the event that a new employee continues to prolong the non-compliance with this Agreement, further discussion will be held with the Maintenance Manager, the maintenance employee and a Union representative in order to reach a resolution.

ATTACHMENT 1

PAYMENT INCREASE DATE

TABLE 1

Percentage Increase	Date to take effect
2.0%	Pay period ending September 9, 2000
1.5%	Pay period ending September 22, 2001
1.5%	Pay period ending September 21, 2002

TABLE 2

Wage Levels	Effective Date (first full pay following)
Level 1 100%	Commence employment
Level 2 110%	6 months from date of employment
Level 3 115%	12 months from date of employment
Level 4 120%	18 months from date of employment
Level 5 125%	1 24 months from date of employment

Signed on behalf of—
WESFARMERS COAL LIMITED
.....*Signed*.....
A. J. COLES
General Manager—Operations
Date: 11/12/2000

Signed on behalf of—
AUSTRALIAN MANUFACTURING WORKERS' UNION (AFMEPKIU)
.....*Signed*.....
WA State Secretary
Dated: 13/12/2000

.....*Signed*.....
M. MURRAY
Senior AMWU Delegate
WCL Premier Minesite
Date: 25/1/2001