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INDUSTRIAL APPEAL COURT—Appeals against decision of Full Bench—

[2002] WASCA 19

JURISDICTION	:	WESTERN AUSTRALIAN INDUSTRIAL APPEAL COURT
CITATION	:	THE COMMISSIONER OF POLICE *v.* THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED [2002] WASCA 19
CORAM	:	ANDERSON J (Presiding Judge) SCOTT J McKECHNIE J
HEARD	:	1 FEBRUARY 2002
DELIVERED	:	1 FEBRUARY 2002
FILE NO/S.	:	IAC 9 of 2001
BETWEEN	:	THE COMMISSIONER OF POLICE Appellant AND THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED Respondent

Catchwords—

Industrial relations - Public Service Arbitrator - Jurisdiction - Application on behalf of public service officer in temporary deployment

Legislation—

Industrial Relations Act 1979 (WA), s 80D, s 80E

Public Sector Management Act 1994 (WA), s 64, s 97(1)(a)

Result—

Appeal dismissed

Category: B

Representation—

Counsel—

Appellant	:	Mr D J Matthews
Respondent	:	Ms M M in de Braekt & Mr M Amati

Solicitors—

Appellant	:	State Crown Solicitor
Respondent	:	The Civil Service Association of Western Australia Incorporated

Case(s) referred to in judgment(s)—

Nil

Case(s) also cited—

Managing Director of the South Metropolitan College of TAFE v The Civil Service Association of Western Australia Incorporated (1999) 80 WAIG 7

Swan Television and Radio Broadcasters Ltd trading as STW Channel Nine Perth v Satie (1999) 79 WAIG 1863

1 **ANDERSON J (Presiding Judge):** This is an appeal by the Commissioner of Police from a judgment of the Full Bench of the Industrial Relations Commission, dismissing an appeal against part of a decision of the Public Service Arbitrator made pursuant to s 80E of the *Industrial Relations Act 1979 (WA)*.

2 The decision appealed from was a decision by the Public Service Arbitrator that the Arbitrator had jurisdiction to deal with the matter presented for the Arbitrator's consideration by the respondent to this appeal, The Civil Service Association of Western Australia Incorporated.

3 Briefly, the facts are that the respondent applied to the Arbitrator alleging unfair treatment of one of its members arising from the appellant's intention to restructure or rearrange positions within its bike education unit, road safety section. I will call it a restructure for convenience, although that might not be an entirely apt description of what happened within this particular unit.

4 The restructure has had the effect that a member of the respondent, Mr Stephen Brown, has lost his position as bike education area manager. This was a position which Mr Brown had obtained under a process of temporary deployment. Mr Brown had been deployed in the position for a considerable time - it would seem, from the papers, 5 and a half years or thereabouts - albeit on a temporary basis.

5 Under this deployment, he was paid at a higher level than the clerical officer level 1 salary which was his substantive position.

6 He had reached level 3 in the deployed position by the time of the restructure; that is, the position of bike education area manager. The abolition or transfer of the position of bike education area manager, or the movement of that position to a different area, meant that Mr Brown would have to revert to his clerical officer level 1 salary with consequent personal hardship.

7 Mr Brown is a public service officer appointed under s 64 of the *Public Sector Management Act 1994 (WA)*. The question is whether the industrial matter arising from what was perceived to be the unfair effect on Mr Brown of the restructure was a matter within the jurisdiction of the Public Service Arbitrator appointed under s 80D of the *Industrial Relations Act*.

8 The appellant contended before the Arbitrator that the Arbitrator did not have jurisdiction in the matter. That contention was rejected and the Full Bench upheld the Arbitrator's decision. It is on that point that the appellant now appeals to this Court. The case turns on the proper construction of s 80E(7) of the *Industrial Relations Act* which provides—

> "Notwithstanding subsections (1) and (6), an arbitrator does not have jurisdiction to enquire into or deal with … "

and I omit irrelevant words—

> "any matter in respect of which a procedure referred to in section 97(1)(a) of the Public Sector Management Act 1994 is or may be prescribed under that Act."

9 The section referred to, that is, s 97(1)(a) of the *Public Sector Management Act*, provides—

> "(1) The functions of the Commissioner under this Part are—
>
> (a) to make recommendations to the Minister on the making, amendment or repeal of regulations prescribing procedures … for employees and other persons to obtain relief in respect of the breaching of public sector standards;"

10 The decision of the Arbitrator and of the Full Bench was to the effect that the matter the subject of the application to the Arbitrator was not a matter in which relief was being sought in respect of the breaching of public sector standards. In my opinion, this is plainly correct on the face of it, which is all that we can go on. There is no allegation that I can see of any breach of public sector standards in the application which was before the Arbitrator.

11 The respondent does not complain in that application that in carrying out the restructure in the way that it did, having the effect that it did, there was any failure by the appellant to comply with the compliance requirements of any public sector standard relating to temporary deployment or to any other relevant subject.

12 The respondent's case for remediation of the perceived unfairness, that is the unfairness to Mr Brown, does not depend, so far as I can tell, on demonstrating that there was a breach of compliance requirements. There is no suggestion on the face of the application that there will be any issue about unfairness in the deployment procedures or anything of the kind.

13 The decision in question seems to me to be simply a decision to restructure the bike education unit. More specifically, it was a decision to abolish or remove an office within the unit. I am not persuaded that that is a decision about temporary deployment of public service officers. That the office which was abolished or removed happened to be occupied by a person temporarily deployed to the office, cannot affect the essential character of the decision. A decision to restructure by abolishing or removing an office or by changing the character of the office so that the present occupant of it is no longer qualified to occupy the office does not become a decision about temporary deployment merely because the occupant of the affected office happens to be acting and not permanent.

14 This case appears to be really about the disappointment of an expectation by an officer as to salary levels and about whether there was a legitimate expectation that the officer would continue to be paid at level 3 or at some level above level 1. I am not persuaded that the case does or will raise an issue about compliance or non-compliance with the public sector standards as to temporary deployment. They are my reasons for reaching the conclusion that this appeal should be dismissed.

15 **SCOTT J:** I agree with the reasons of the presiding Judge and I would add this, which I think is already apparent from the debate we have had today: this is yet another illustration of a case where a preliminary jurisdictional issue has progressed all the way through the industrial appeal process, from its initiation through to the Industrial Appeal Court, without any evidence being called or any substratum of fact having been established before the case arrived here.

16 I think in many respects that is regrettable, for no other reason than it means that Mr Brown has been left effectively without a remedy in the sense that he has not known what his final position will be during the period that it has taken for this issue to get to the Industrial Appeal Court. From here, it will need to go back for a further hearing.

17 That, in my view, is not what the *Industrial Relations Act* is all about, or the *Public Sector Management Act* for that matter, both of which are designed to bring to an end, speedily and effectively, these sorts of disputes. I think it is regrettable that these proceedings have taken this course.

18 That is all I wish to add to the reasons of the presiding Judge. I agree with his Honour's reasons and with his conclusion that this appeal should be dismissed.

19 **McKECHNIE J:** For the reasons given by the presiding Judge, I agree also that this appeal should be dismissed. I desire to associate myself with the additional comments by Scott J.

[2002] WASCA 16

JURISDICTION	:	WESTERN AUSTRALIAN INDUSTRIAL APPEAL COURT
CITATION	:	BHP BILLITON IRON ORE PTY LTD *v.* CONSTRUCTION, MINING, ENERGY, TIMBERYARDS, SAWMILLS AND WOODWORKERS' UNION OF AUSTRALIA (WESTERN AUSTRALIAN BRANCH) [2002] WASCA 16
CORAM	:	ANDERSON J (Presiding Judge)
HEARD	:	4 FEBRUARY 2002
DELIVERED	:	4 FEBRUARY 2002
FILE NO/S.	:	IAC 10 of 2001
BETWEEN	:	BHP BILLITON IRON ORE PTY LTD Appellant AND CONSTRUCTION, MINING, ENERGY, TIMBERYARDS, SAWMILLS AND WOODWORKERS' UNION OF AUSTRALIA (WESTERN AUSTRALIAN BRANCH) Respondent

Catchwords—

Industrial law - Appeal - Power to stay order for reinstatement pending appeal - Considerations - Need to show exceptional circumstances

Legislation—

Industrial Relations Act 1979 (WA), s 87(3)

Result—

Application dismissed

Category: B

Representation—

Counsel—

Appellant	:	Mr R L Hooker
Respondent	:	Mr D H Schapper

Solicitors—

Appellant	:	Mallesons Stephen Jacques
Respondent	:	Derek Schapper

Case(s) referred to in judgment(s)—

Burswood Resort (Management) Ltd v Australian Liquor, Hospitality & Miscellaneous Workers' Union (1996) 76 WAIG 1655

State School Teachers' Union of Western Australia & Anor v Bannon & Anor (1997) 77 WAIG 1647

Case(s) also cited—

Alexander v Cambridge Credit Corp Ltd (1985) 2 NSWLR 685

Concut Pty Ltd v Worrell (2000) 176 ALR 693

Powerflex Services Pty Ltd v Data Access Corporation (1996) 137 ALR 498

Sharkey; Ex parte Food Preservers' Union of Western Australia [2000] WASC 259

West Australian Locomotive Engine Drivers' Firemen's & Cleaners Union v Hathaway (1995) 75 WAIG 1785

1 **ANDERSON J:** This is an application to stay an order for reinstatement made in the Industrial Relations Commission on 28 May 2001 in relation to a locomotive driver who had been employed by the appellant at Nelson Point and who claimed to have been unfairly dismissed in September 2000. The circumstances of the case are fully set out in the decisions that have been delivered below and which are reported in 81 WAIG 1393 and 81 WAIG 3031, they being the decision of Kenner C at first instance and the decision of the Full Bench on appeal from his judgment.

2 The power to grant a stay of an order, if it exists at all, is to be found in s 87(3) of the *Industrial Relations Act 1979 (WA)*. It has been held in this Court that the provisions of that subsection are wide enough to include jurisdiction to grant a stay of an order made in the Commission. I have little doubt that that is so and that this Court does have the power to grant a stay of an order made below. It would be surprising indeed if the Court did not have such power, and I think the intention of the legislature must have been - in formulating the provisions of the subsection referred to so widely - to include what one would naturally expect to find; namely, a power in an appropriate case to stay the order of the Commission from which an appeal is brought.

3 One case to which I refer (in which Franklyn J held that the subsection does include a power to stay) is *State School Teachers' Union of Western Australia & Anor v Bannon & Anor* (1997) 77 WAIG 1647. However, it has also been held that the power will not be exercised and a stay will not be granted unless there are exceptional circumstances to justify it. I refer to *Burswood Resort (Management) Ltd v Australian Liquor, Hospitality & Miscellaneous Workers' Union* (1996) 76 WAIG 1655. I will accept this as the correct approach and I apply it in this case. I think some regard must also be had to the strength of the appellant's case.

4 I am not persuaded that the circumstances are exceptional in this case. The only circumstance that might possibly be described as exceptional is that before this employee will become operational as a locomotive driver, he will require retraining, perhaps lengthy retraining in view of the length of time that he has been not working as a locomotive driver. In that time there have been technological changes as well as different and new locomotives commissioned.

5 In respect to those areas of his vocation, it is natural to expect and the affidavit indicates that he will require substantial retraining, but I am not convinced that this is an exceptional circumstance. Retraining where a person has been dismissed and is reinstated can hardly be regarded as exceptional.

6 That the employer is prepared to continue salary payments, as it is in this case, until the appeal is disposed of is a little unusual. I accept that it may even be very unusual but of itself it does not constitute a relevant exceptional circumstance.

7 Furthermore, I have distinct reservations as to the strength of the appellant's case generally and, in particular, reservations as to whether there is an error of law in the decision below. I do not go into those matters for obvious reasons. It is sufficient for me to say that, all in all, this is not a case in which this Court ought to make an order staying the order for reinstatement made below, and the application must be dismissed.

2002 WAIRC 04774

WESTERN AUSTRALIAN INDUSTRIAL APPEAL COURT

PARTIES	BHP BILLITON IRON ORE PTY LTD, APPLICANT
	v.
	CONSTRUCTION, MINING, ENERGY, TIMBERYARDS, SAWMILLS AND WOODWORKERS UNION OF AUSTRALIA - WESTERN AUSTRALIAN BRANCH, RESPONDENT
CORAM	JUSTICE ANDERSON (PRESIDING JUDGE)
DELIVERED	MONDAY, 4 FEBRUARY 2002
FILE NO/S.	IAC 10 OF 2001
CITATION NO.	2002 WAIRC 04774

Result	Stay application dismissed
Representation	
Applicant	Mr RL Hooker (Of Counsel)
Respondent	Mr DH Schapper (Of Counsel)

Order

HAVING heard Mr RL Hooker (Of Counsel) for the Applicant and Mr DH Schapper (Of Counsel) on behalf of the Respondent, THE COURT HEREBY ORDERS THAT—

The application be dismissed

(Sgd.) JOHN SPURLING,

[L.S.] Clerk of Court.

[2002] WASCA 22

JURISDICTION	:	WESTERN AUSTRALIAN INDUSTRIAL APPEAL COURT
CITATION	:	Q-VIS LTD *v.* GORDON [2002] WASCA 22
CORAM	:	ANDERSON J (Presiding Judge) SCOTT J McKECHNIE J
HEARD	:	1 FEBRUARY 2002
DELIVERED	:	1 FEBRUARY 2002
FILE NO/S.	:	IAC 5 of 2001
BETWEEN	:	Q-VIS LTD Appellant AND SIMON DOIG GORDON Respondent

Catchwords—

Industrial law - Unfair dismissal - Claim for compensation - Assessment - Relevance of concurrent remedies

Legislation—

Industrial Relations Act 1979 (WA), s 23A(1)(ba)

Result—

Appeal dismissed

Category: B

Representation—

Counsel—

Appellant	:	Mr P G Clifford & Mr T M Retallack
Respondent	:	Mr R L Le Miere QC & Mr D G Berg

Solicitors—

Appellant	:	Wilson & Atkinson
Respondent	:	Mallesons Stephen Jaques

Case(s) referred to in judgment(s)—

Nil

Case(s) also cited—

Bogunovich v Bayside Western Australia Pty Ltd (1999) 79 WAIG 8

Capewell v Cadbury Schweppes Australia Ltd (1998) 78 WAIG 299

Gilmore v Cecil Bros & Ors (1996) 76 WAIG 4434

Manning v Huntingdale Veterinary Clinic (1998) 78 WAIG 1107

Manser v Spry (1994) 181 CLR 428

1 **ANDERSON J (Presiding Judge):** This is an appeal from the Full Bench of the Industrial Relations Commission dismissing the appellant's appeal from a decision of Beech C in an unfair dismissal case. The point which is presented for consideration is whether, in assessing the monetary compensation which may be awarded under s 23A(1)(ba) of the *Industrial Relations Act 1979 (WA)*, the Commissioner should make an allowance by way of a discount from the amount awarded if, at the time of the assessment of compensation by the Commissioner, it should appear that the applicant for relief in the Commission has commenced proceedings in a common law court for damages for breach of contract (that is, for damages for wrongful dismissal as that cause of action is known to the common law) or for specific performance of that contract which may result in a monetary award. Beech C assessed compensation in a manner as to which no exception is now taken except for this aspect of the assessment.

2 It was contended before him, I think, and anyway it was contended on appeal to the Full Bench, and it is now contended before us, that the respondent, who was the applicant in the unfair dismissal proceedings, should suffer some form of discount from his monetary compensation awarded in those proceedings on account of his pursuit of common law damages outside the Commission.

3 Central to the argument is the proposition that no award of compensation in unfair dismissal proceedings which fails to take account of the fact that there are concurrent common law proceedings on foot instigated by the applicant can be fair or equitable or in accordance with the substantial merits of the case.

4 This proposition was rejected by the Full Bench and, in our opinion and with great respect, it was rightly rejected. The mere fact that the victim of an unfair dismissal has started other forms of action in order to obtain relief arising from the fact of his or her dismissal does not amount to so-called double dipping.

5 Putting that another way, it cannot be relevant, in my opinion, to say in answer to a claim for compensation in an unfair dismissal case brought pursuant to s 23A(1)(ba) that the applicant may have other remedies - that he can sue at common law.

6 I can see nothing in the Act, that is, the *Industrial Relations Act*, including the requirement in s 26 that the Commission is to act according to equity and good conscience and the substantial merits of the case which requires the Commission to take into account the fact that the applicant may have other monetary remedies, or that he does have other monetary remedies, or that he may have begun proceedings to enforce those remedies.

7 That he may have such rights and may have moved to exercise them does not affect the fair assessment of his loss or injury within the meaning of s 23A(1)(ba). It seems to me that any unfairness that might conceivably arise out of the pursuit by an applicant of concurrent proceedings for relief would not arise unless and until there was a failure by one tribunal to take into account an actual monetary award made by the first tribunal arising from the dismissal. They are my reasons for coming to the conclusion that this appeal should be dismissed.

8 **SCOTT J:** I agree, for the reasons given by the Presiding Judge, that the appeal must be dismissed. In my view where, as here, the application under s 23A of the *Industrial Relations Act 1979* was brought prior to the conclusion of the civil proceedings, the learned Commissioner at first instance had an obligation under s 23A(1)(ba) to make an assessment of the appropriate compensation in all the circumstances of the case as they then appeared. It would have been improper for that Commissioner to take into account the fact that other proceedings were then in existence unless those proceedings had been concluded and an award of damages in the civil proceedings had been made.

9 That was not the case here, and indeed it is not the case even today, that those proceedings have been concluded. It simply is a forensic fact that the proceedings under the *Industrial Relations Act 1979* were heard first and proceeded to conclusion. All that is being said today in these appeal proceedings is that a writ has been issued to claim common law damages. In those circumstances, in my view, the fact of the issue of that writ had nothing to do with, nor could it be taken into account in, making an assessment of compensation under s 23A of the *Industrial Relations Act 1979*. I agree that this appeal should be dismissed.

10 **McKECHNIE J:** For the reasons given by the presiding Judge of this Court and also by Scott J, I also agree that this appeal should be dismissed.

FULL BENCH—Appeals against decision of Commission—

2002 WAIRC 04758

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
PARTIES	GARY EDWARD GARBETT, APPELLANT
	v.
	MIDLAND BRICK CO PTY LTD, RESPONDENT
CORAM	FULL BENCH
	HIS HONOUR THE PRESIDENT P J SHARKEY
	CHIEF COMMISSIONER W S COLEMAN
	COMMISSIONER J H SMITH
DELIVERED	WEDNESDAY, 6 FEBRUARY 2002
FILE NO/S.	FBA 28 OF 2001
CITATION NO.	2002 WAIRC 04758

Decision	Appeal dismissed.
Appearances	
Appellant	Mr B F Stokes, as agent
Respondent	Mr A D Lucev, Mr P G Brunner and Mr H M Downes of Counsel

Reasons for Decision

THE PRESIDENT—

INTRODUCTION

1 This is an appeal pursuant to s.49 of the *Industrial Relations Act* 1979 (as amended) (hereinafter referred to as "the Act") against, it would seem, the whole of the decision of the Commission, dated 9 May 2001,constituted by a single Commissioner, in matter No 791 of 2000 whereby he dismissed an application brought by the abovenamed appellant pursuant to s.29 of the Act.

APPLICATION TO AMEND THE APPEAL GROUNDS

2 The abovenamed appellant, Mr Gary Edward Garbett, appeals on the following grounds, as amended:-

"**The learned Commissioner of the Industrial Relations Commission erred in law and fact in that—**

1. In finding as a fact that at the time of termination on the grounds of redundancy the Applicant was performing the duties of a purchasing officer and had equal status with the other three purchasing officers. In making this finding of fact the learned Commissioner failed to take into account a number of matters particularised.
2. In assessing the credibility of respective witnesses the learned Commissioner failed to consider a number of factors particularised.
3. In assessing the fairness of the review of the Purchasing Office and Stores claimed to have been undertaken by Kelvin Ryan in September through to December, 1999 the learned Commissioner failed to consider a number of factors particularised.
4. In assessing the Respondent's compliance with its statutory obligations contained in sections 40 & 41 of the MCEA, the learned Commissioner failed to consider a number of matters particularised.
5. In assessing the genuineness of the decision to render the Applicant's position redundant the learned Commissioner failed to consider, in finding that the termination was within the definition contained in section 40 and section 41 of the MCEA, as a matter of law insofar as it is particularised in paragraphs (iv) and (v) of this paragraph.
6. In reaching his findings of fact the learned Commissioner failed to act with procedural fairness toward the Applicant in that he repeatedly:
   - (i) offended against the rule in Browne v. Dunn;
   - (ii) refused to order the Respondent provide adequate discovery of numerous documents;
   - (iii) unduly limited cross-examination of the Respondent's witnesses;
   - (iv) denied the Applicant the opportunity to lead rebuttal evidence, and
   - (v) allowed the unfair cross-examination of the Applicant to continue unreasonably."

OBJECTION THAT THE APPEAL WAS OUT OF TIME

3 A submission that the appeal was incompetent as being out of time and a consequent application for it to be dismissed for that reason were respectively rejected and dismissed by the Full Bench. The decision in this matter was delivered on 9 May 2001 and was deposited on 10 May 2001 and the notice of appeal was filed on 31 May 2001. S.49(3) of the Act provides that an appeal under s.49 shall be instituted within 21 days "of the date of the decision against which the appeal is brought". This Commission, in a number of matters, and the Full Bench by a majority in *Registrar v MEWU and Others* (1994) 74 WAIG 1487 held that there was no decision which had been perfected until it was deposited in the Registry, having regard to s.36 of the Act. That was certainly the view also taken in *McCorry v Como Investments Pty Ltd* 69 WAIG 1000 at 1001-1002 (IAC) per Brinsden J and in *CMEWU v The United Furniture Trades Industrial Union of Workers, WA* 70 WAIG 3913. The appeal was clearly instituted within the 21 days prescribed by s.49(3) of the Act in that the decision was only a decision which might be appealed against by when it was deposited in the office of the Registrar on 10 May 2001. The appeal was filed within 21 days of that date and was not out of time.

BACKGROUND

4 Evidence was given at first instance by the applicant, Mr Gary Edward Garbett, by Mr Frank Lazenby and by Mr Gary William McCorkell, on his behalf. For the respondent, Mr Kelvin Robert Ryan, the respondent's Engineering and Services and Manager and formerly its Human Resources Manager, gave evidence, and Mr Stewart Vernon Wheatley, the Procurement Manager of the respondent, gave evidence.

5 Mr Gary Edward Garbett applied, by application filed in the Commission on 24 May 2000, pursuant to s.29(1)(b)(i) of the Act, claiming that he was harshly, oppressively or unfairly dismissed by the respondent company on 18 May 2000 in that he was made redundant without any prior consultation in breach of s.40 to s.42 of the *Minimum Conditions of Employment Act* 1993 (hereinafter referred to as "the MCE Act"). The application made no allegation that his employment was otherwise unfairly terminated. He sought reinstatement or, in the alternative, an order for the payment of the maximum of six months' compensation. At the time of the hearing he was 55 years of age.

6 Mr Garbett's agent, in a letter to the respondent of 18 September 2000, gave particulars of the grounds which he said caused the redundancy to be unfair, which are as follows:-

> "1. The applicant was ostracized upon his return from leave on 1st May 2000;
>
> 2. The applicant wasn't advised that his position was under review;
>
> 3. He wasn't given an opportunity to contribute input to review;
>
> 4. Stewart Wheatley, Kelvin Ryan nor other senior management didn't consult with the applicant concerning the decision to abolish his position;
>
> 5. The applicant wasn't given time to accept decision or seek alternative opportunities within respondent company;
>
> 6. The respondent didn't engage in a selection process from the applicant's section when deciding to terminate the applicant;
>
> 7. This was but the latest of several attempts by Stewart Wheatley to get rid of the applicant, &
>
> 8. The applicant wasn't offered an opportunity to work out his notice period."

7 At the time of his dismissal, Mr Garbett was employed as Senior Purchasing Officer by the respondent and, in fact, was employed by the respondent, a manufacturer of bricks and other material, from 11 May 1994 to 18 May 2000. His responsibilities as at 18 May 2000 included directing purchases for maintenance, replacement of motor vehicles, supply agreements for commodities, hire equipment and supply support services, e.g. telephones and property maintenance. He said in evidence that his salary was $54,689.00 per annum, and he was provided with a company car.

8 Mr Garbett also asserted that the position was not, in fact, made redundant because of the definition in s.40(1) of the MCE Act in which "redundant" is defined as follows:-

> "**"redundant"** means being no longer required by an employer to continue doing a job because, for a reason that is not a usual reason for change in the employer's work-force, the employer has decided that the job will not be done by any person."

9 At the time of the hearing at first instance, the appellant was 55 years of age. In 1994, Mr Garbett had applied for a position advertised by the respondent in a newspaper, the position being that of Senior Purchasing and Store Manager. In that capacity, he was, as the evidence revealed, responsible for the supervision of 12 to 15 staff and was, as was admitted by witnesses for the respondent, the senior man in the area. He remained in that position performing the relevant duties and was answerable as a manager to the Operations Manager, Mr Vincent Scarvaci. Mr Garbett did tender in evidence an organisation chart which he had prepared in relation to the organisation whilst he was the Senior Purchasing and Store Manager, but this organisation chart had not been "signed off" as approved by Mr Scarvaci.

10 In March 1998, after having three weeks sick leave, he was called to a meeting by Mr Scarvaci and told by him that a review of the structural operations of the respondent had taken place. The memorandum dated 17 February 1998 to Mr Garbett confirmed this and confirmed his responsibility for the store personnel at Whiteman's.

11 From March 1998, as was not in issue, his contract of service was "revised". As a result, on 30 March 1998, Mr Scarvaci wrote to him proposing that he accept the lesser role, less pay and inferior conditions, and, in particular, that he accept a reporting role which he had not had before to a newly appointed Procurement Manager. In other words, he would not report to Mr Scarvaci but would report to a lesser manager, a Procurement Manager. It was also proposed a reduction in remuneration and the loss of a company vehicle with which he had been provided. However, that reduction in remuneration and the loss of a company vehicle was not brought about. As he admitted, he had been subject to criticism by Mr Scarvaci, the validity of which criticism he denied. As he said, he resented the attempts to reduce his role and his terms and conditions and put this to Ms Dale Colhoun, the Human Resources Manager of the parent company of the respondent, Boral Resources Ltd. There was correspondence between his employer and Mr Garbett, and Mr Garbett sought the advice of an industrial agent, Mr Raymond Clohessy. Ms Colhoun, in fact, came to Perth to attempt to resolve this dispute. In any event, notwithstanding this attempt, a Procurement Manager, Mr Stewart Wheatley, was appointed from outside the organisation.

12 A memorandum was forwarded on 15 May 1998 to all Departmental Managers by Mr Scarvaci as Operations Manager. In this he advised, inter alia, as follows:-

(a) That Mr Wheatley had recently joined the respondent in the "newly created role of Procurement Manager reporting to the Operations Manager".

(b) That in this role Mr Wheatley would assume responsibility for all of the procurement functions of the company and that he would liaise with Boral procurement personnel.

(c) That Mr Garbett "continue in the position of Purchasing Manager and will report to Stewart". As Mr Garbett admitted, he became the Purchasing Manager with diminished authority. On his own evidence, and on all of the evidence, he went from being boss of his own show (see page 31 of the transcript at first instance (hereinafter referred to as "TFI")) to being answerable to Mr Wheatley.

13 Quite clearly Mr Garbett accepted the new or varied contract of service and worked under it and subject to Mr Wheatley, accepting the terms offered him. He did complain about Mr Wheatley as domineering, in evidence.

14 In August 1998, Mr Paul Arndt became the new General Manager of the respondent and Mr Kelvin Ryan, shortly after, became the Manager. Mr Garbett admitted in evidence, that after Mr Arndt took up his appointment there occurred a series of group meetings with the workforce at which it was made clear that things were going to change; and that indeed everything and the whole of the process of how they did business was under review (see page 103-104 (TFI)). It was clear

that people had to fit in or move out. It was also the case that with the appointment of Mr Arndt all areas were put under pressure to perform.

15 There was evidence from Mr Garbett that Mr Wheatley used bad language which offended and embarrassed some other employees who complained about it, but that no action was taken. He also complained in evidence that Mr Wheatley had sold to Mr Frank Lazenby a quantity of surplus material on behalf of the respondent company without complying with the proper procedures. However the evidence was clear that Mr Wheatley's language was no worse than anyone else's. The witnesses for the respondent too, made no complaint about this.

16 In November 1998 (see page 38 (TFI)), there was instituted, on Mr Garbett's evidence, a change in reporting from the Operations Manager to the Commercial Manager, Mr Richard Hyland. That is, of course, that he reported through Mr Wheatley to Mr Hyland. He believed, he said, that he had a cordial relationship with Mr Hyland.

17 In November 1998, there was a significant meeting between Mr Garbett and Mr Hyland at which Mr Garbett's management style was discussed with him, it would seem, in critical terms. He was also advised of demotion of him which was admitted in evidence unequivocally by Mr Garbett to be a demotion (see page 40 (TFI)), although he purported to retreat from that position later in his evidence, and it was confirmed unequivocally as a demotion by Mr Ryan and Mr Wheatley in their evidence.

18 In his evidence in chief, Mr Garbett agreed that what occurred was a demotion because he would not henceforth perform all of the management functions which he had previously enjoyed.

19 He was formally advised by Mr Hyland in a letter dated 18 November 1998 (see page 48 (AB)) that there was a restructuring and that in the new structure his title and role would be "Senior Purchasing Officer" (see also pages 278-284 (TFI)). His remuneration, he was told, would remain unchanged, but importantly he was specifically advised as follows:-

> "Your role and that of the other Purchasing Officers report directly to the Procurement Manager, Stewart Wheatley." (my emphasis)

(There were at all material times four purchasing officers, including Mr Garbett).

20 Mr Garbett said in evidence in chief that, whilst before this change he was an individual who enjoyed a degree of autonomy in relation to decision-making aspects of the operation in the area in which he would be Departmental Manager, this was not the case anymore. He underwent a significant drop in status. He freely admitted that he felt as if his responsibilities and the overall part which he had to play in the organisation were diminished. He agreed that he changed from being Purchasing Manager to Senior Purchasing Officer, but did not however agree that there was a "... reporting role of purchasing officers including himself as senior purchasing officer to Mr Stewart Wheatley". Mr Ryan confirmed in his evidence that this was a demotion from Purchasing Manager to Purchasing Officer. Later in evidence Mr Garbett purported to say (see page128 (TFI)) that his being placed in the position of Senior Purchasing Officer was not a demotion. This was clearly a contradiction of what he said earlier in evidence. Further, Mr Ryan confirmed in evidence that he had dictated a letter confirming that Mr Garbett's role was that of other purchasing officers and that he reported directly to Mr Wheatley as did other purchasing officers.

21 In 1999, there was, according to the evidence and cross-examination of Mr Ryan, a performance appraisal which all purchasing officers underwent. They were all rated fully satisfactory, except for Mr Garbett who was rated "improvement required". It is quite clear that he agreed with the performance appraisal result and that he admitted this in evidence. He also acknowledged, in writing, on the document itself that he agreed with the result.

22 In April 2000, he returned from leave to find that the office which he occupied with another purchasing officer, Ms Caroline Jamieson, was partitioned so that he and she then had each a small office instead of both occupying one office. This was a matter of complaint by him in evidence. He alleged, as a result, that he felt ostracised and that his work area was reduced. He was given no explanation for this occurring he said, nor was he consulted about it. There was no evidence that he was consulted about it. There was some hearsay evidence that Ms Jamieson said that she had been glad to be removed from working in the same room as him.

23 On 18 May 2000, Mr Wheatley rang him and asked Mr Garbett to come to his office. Present were Mr Wheatley and Mr Kelvin Ryan. There Mr Garbett was told, in the course of a short interview, that a review had occurred of the stores and purchasing department as a result of which his position as Senior Purchasing Officer had been made redundant effective immediately, and, as a result, his employment would terminate that day. He was also told that no alternative positions were available. This, he said, did not accord with Mr Garbett's evidence which was to the contrary.

24 He also complained that there had been no selection process and no communication of any proposed retrenchment. He said he had not heard of the Boral Support Services Review, which, on the evidence, was a review of support services within Boral organisations and departments throughout Australia.

25 His dismissal, following his position becoming redundant, was confirmed in a memorandum to all employees of the respondent from the General Manager, Commercial, Mr Hyland, dated 18 May 2000. Mr Ryan said that he was the team leader of Boral Support Services Review, and that the personnel in the purchasing department were subject to that review. He did not discuss the situation before giving the letter to Mr Garbett advising of his position becoming redundant and of his dismissal. The discussion at the meeting was very brief. Mr Garbett, as was admitted by Mr Ryan, was not given a copy of the Boral Redundancy Policy, which policy was implemented in relation to his redundancy. There was evidence from Mr Wheatley and Mr Ryan who had asked if he wished to go immediately or not and said that he wished to make a clean break. They said that they in fact offered him a car for a week but he said that he wished to make a clean break. His evidence was that he was given no opportunity to work out his notice. It was his complaint, too, that he could have filled another position, which he was not offered the opportunity to do. In particular, his evidence was that Mr Vincent Gahan, the Maintenance Manager, was retiring on 30 June 2000, and that he, Mr Garbett, could have replaced Mr Gahan. For this assertion, he relied on the fact that he had, what he said was, a relevant trade qualification, that of fitter and turner. Mr Ryan and Mr Wheatley, in evidence, denied that such a position was available to him, gave evidence which was not contradicted that the position had not been filled, and further gave evidence that Mr Garbett was not capable of filling it.

26 Before his dismissal, as he admitted in evidence, the duties of senior purchasing officers were 80 to 90 percent the same as those being performed by other purchasing officers. He then went on, in evidence, to deny what he had said, namely that the duties which he had performed as a senior purchasing officer were to 80 to 90 percent the same as those performed by other purchasing officers. Inter alia, he described himself as 2IC to Mr Wheatley. He said that personnel problems were brought to him and that occupational safety matters were, as Senior Purchasing Officer, also his responsibilities. He said that Mr Wheatley granted to him full autonomy within his department. He said that he had special duties above the other purchasing officers in respect of freight consignments. Any significant difference from the role of other purchasing officers was denied by the witnesses for the respondent in evidence in some detail, it being their evidence that all four purchasing

officers performed the same duties. They also denied that other persons reported to him, as he asserted. They also denied that he had any responsibility for personnel or occupational health and safety. In any event, Mr Garbett said (page 130 (TFI)) that his role in co-ordinating stores had diminished a great deal and that he had reduced involvement in general day to day activities in connection with the stores.

27 In relation to the supervision of staff after Mr Wheatley became Procurement Manager, it is clear from his evidence, which was not denied, that it was he who approved the leave of staff including the purchasing officers. He also conducted performance reviews as well as acting in a managerial role which Mr Garbett did not.

28 Significantly, Mr Ryan referred to exhibit GG42, the outcome of the two step appraisal review conducted by him of all purchasing officers in which Mr Garbett received an "improvement required" rating. That he said, and it was not denied, was below the benchmark required of an employee. Mr Ryan gave further evidence as follows:- Remedial action would be required to be taken to "pull somebody out of such a grade". This appraisal was "signed off on" by Mr Wheatley and by Mr Hyland. This meant that the report was fully accepted and evidenced by the employee. He said that often such a rating, if there is no improvement in performance, meant the employment would be terminated as an ultimate end. Mr Ryan said that a selection process was used to identify Mr Garbett for redundancy, and a decision was made to make him redundant. Whilst the process was occurring, they did not tell him because it was not just him whom they were considering for termination. They did admit, however, that they certainly did not sit down with him until the morning of 18 May 2000 when they made the decision known to him. It was the General Manager, Mr Arndt, however, who made the decision. The redundancy was decided upon because there were discussions with Mr Hyland and Mr Wheatley about the cost position in stores and they agreed that the cost had to be reduced and someone had to go. Mr Ryan said in evidence that the choice was glaringly obvious because the worst performer, in stores, namely Mr Garbett, was costing twice as much as anyone else in the same role.

29 On the night of 17 May 2000, according to Mr Ryan, he went to see Mr Arndt and advised of the proposed redundancy. He sought permission to proceed to make the position redundant. Mr Arndt gave his consent and it was the next day that they saw Mr Garbett and advised him that the position had been made redundant, and he could work through his notice or go. It was then that Mr Garbett said, according to Mr Ryan and Mr Wheatley, that he wished to make a clean break. It was then that he asked Mr Garbett if he wished to speak to his friends and colleagues and he said yes, which he did. He then left.

30 In terms of the Boral Redundancy Policy, Mr Garbett was, according to Mr Ryan, entitled to two weeks pay for every year of service. To enable Mr Garbett's reinstatement, Mr Ryan said, would require the redundancy of two other purchasing officers. He said that Mr Vincent Gahan, the former Mobile Vehicle Workshop Manager, had not been replaced. Mr Ryan also gave evidence that he asked a Boral employee in Sydney, Mr Mark Radford, to prepare an estimate of the amount to be paid by way of severance payment so that if Mr Paul Arndt decided to proceed with the redundancy they would know what amount was involved. His request was made two or three days before the dismissal occurred. The letter of dismissal handed to Mr Garbett on 18 May 2000 was probably drafted the day before, subject to Mr Arndt's decision to proceed with the redundancy or not. However, it was printed off on the morning of 18 May 2000. Mr Ryan asked for the relevant documents to be prepared the day before in anticipation of an answer "Yes" from Mr Arndt. This was before he saw Mr Arndt for his decision. He also referred in evidence to the amount of the redundancy payment of $30,659.01 credited to Mr Garbett's account on 17 May 2000, that is the day before Mr Garbett was informed of the decision and was, in fact, dismissed. Mr Ryan's evidence, which was not shaken, was that the payment of the monies was a processing error made by the people in Sydney who did not understand what the request was. He reiterated that Mr Garbett was given an opportunity to work out his notice. He confirmed that the Boral Redundancy Policy was not shown to him. He assumed that the policy was confidential. Mr Garbett, on 18 May 2000, was also orally offered a car, but declined that offer. The redundancy, he said, was based on performance and cost, but primarily on cost, performance being secondary and cost a 60 percent ingredient of the reasons. He reiterated that Mr Garbett was costing double the cost of the other purchasing officers, and was the worst performer. This evidence of Mr Ryan was affirmed in cross-examination. Since one person had to go, the choice was obvious, Mr Ryan said. Mr Gahan's position was not offered to Mr Garbett because he did not have the management expertise to carry out that function. They did give consideration to other jobs which might be available to him in the company and informed him that this had been the case at the termination meeting. The review process leading to the making of his position redundant and the dismissal lasted several weeks and all the purchasing officers were considered for redundancy. The redundancy was necessary because there was a significant downturn in the industry and it was necessary to get the costs in the stores significantly lower. This was a redundancy based on the costs position. Indeed, the Boral Review was continuing still, he said, at the time of the hearing.

31 Mr Stewart Wheatley, the Procurement Manager, gave evidence that he commenced employment as such with the respondent on 20 April 1998. He was in charge of the supply and warehouse functions of the respondent with a broader role also in the Boral Group. Midland Brick is 100 percent owned by Boral. His role was and is directed to human resources management, amongst other things. When he first started, Mr Garbett was answerable to him and in charge of 15 employees. After three months, Mr Garbett was put in charge of the purchasing side only. Mr Wheatley took the warehousing work off Mr Garbett because he thought that it was not being handled well. Mr Wheatley said that later the supply function was put in the charge of Mr Richard Hyland and Mr Garbett was appointed as purchasing officer with the title "senior". At that point he was answerable to Mr Wheatley. All of the purchasing officers were answerable to Mr Wheatley. The accounts payable officer answered directly to Mr Wheatley. He also confirmed that the change to the role of purchasing officer amounted to a demotion and he was demoted from the senior man in purchasing to Purchasing Manager before that and then subsequently Senior Purchasing Officer. No one reported to him when he was senior purchasing officer.

32 Mr Wheatley confirmed that there was a review running across the whole of Boral and involving Mr Kelvin Ryan, the Engineering and Services Manager. Mr Ryan looked at the performance of the people in the purchasing area and the appraisals which they had done. Mr Garbett was the worst performing person in that area at the time. There were numerous conferences and meetings of staff to put them "on the focus of where they were". No employees were excluded from the review. Mr Arndt made it clear at meetings that if employees did not come up to a reasonable standard then they had to go. It should have been common knowledge, he said, that everything was under review. Performances were related to the review, he said. If people did not perform within the department, then positions might be made redundant. He was critical of the way that stores had been run.

33 He described the duties which Mr Garbett had before he was made redundant, which were attending to the residue of the work relating to motor vehicles and telephones which workload had been reduced a great deal. The rest of his duties amounted to general duties similar to what Mr Tom Wilkinson, another purchasing officer, was performing. Fifty percent of his time involved general duties and his function was not different to that of other purchasing officers, Mr Wheatley said.

34 There were at the same time major changes in other departments. The changes brought about a reduction in the workload of the purchasing officer personnel. Those changes increased efficiency. Ultimately, those changes led to there being a surplus

of staff. The Boral Support Services Review commenced in 1999. Mr Garbett was demoted because he failed to follow procedures. He was the worst performing purchasing officer. No purchasing officers reported to him after he was demoted to Senior Purchasing Officer. His remuneration had been increased in August 1998, because of earlier reviews and he did receive an increase "to try and meet the demands being put upon him".

35 The appraisal document (exhibit GG42) was referred to by Mr Wheatley in evidence. He said that no other employee in the purchasing department was rated "improvement required" that year. The others all achieved a fully satisfactory report. Mr Garbett had not achieved performance objectives set by Mr Garbett and himself. His failure to reach objectives was raised with him several times by Mr Wheatley. Mr Garbett's office was partitioned and he was given an office to himself. It was not practical to reinstate him. To do so one would have to sack others. Mr Wheatley did admit that he failed to find some duty statements in cross-examination.

36 There was evidence by one Gary William McCorkell, a friend of Mr Garbett since 1987, who described him as a "man of top integrity" who was distraught about his dismissal.

The Disposal of Equipment

37 There was evidence from Mr Wheatley and Mr Frank Lazenby, the Manager and Director of a company entitled WA Truck Repairs Pty Ltd, and a person who had known Mr Wheatley for 20 years or more. Mr Lazenby entered into a contract on his company's behalf with Midland Brick through Mr Wheatley to purchase material, it would seem to be surplus material, at the rate of $20.00 per ton. Mr Ryan said in evidence that he knew no impropriety on the part of Mr Wheatley in this matter and added that he had conducted his affairs with integrity. There was no complaint, in evidence, or action taken by the respondent about this matter. There was some reference to Mr Ryan's acquisition of a property at Toodyay in which Midland Brick had a pit operation to procure clay. The evidence was that he became involved in negotiations to reduce the royalty, but there was no complaint about that by his employer in evidence and no evidence that his employer had any concern about the matter.

FINDINGS AT FIRST INSTANCE

38 The Commissioner at first instance found the following:-

(a) That the respondent had discharged the onus in proving that there was a valid redundancy and that the employer was engaged in an extensive review of its operations.

(b) That Mr Garbett's position was not filled by anyone else following his termination, which followed a series of reviews including an assessment of Mr Garbett's work area and a decision to reduce costs by $100,000.00. Mr Garbett's duties were picked up by the remainder of the staff in purchasing and the unchallenged evidence was that this change was operating well.

(c) That the redundancy was effected to save costs and that Mr Garbett was made redundant largely, but not solely, for costs reasons, the other factor being performance.

(d) The Commissioner did not accept, the employer having made a choice between Mr Garbett and other purchasing staff, Mr Garbett's equivocal and unconvincing evidence that there were other positions for which he could have been considered.

(e) That Mr Garbett, on the evidence, was offered the opportunity to work out his notice and he did not consider that there was any malice or oppression in the changes to the office accommodation on the part of the respondent.

(f) That, whether another employee should have been chosen for redundancy instead of Mr Garbett, was not established by Mr Garbett.

(g) That the respondent had not offended the requirements of the MCE Act.

(h) That the evidence was that Mr Garbett was not targeted for cost cutting and that other workers were made redundant and operation of costs, including the costs of inventory, were reduced and continued to be reduced.

(i) That this fitted within the definition in s.40 of the MCE Act.

(j) That, as to s.41(1)(b) of the MCE Act, the Commissioner accepted Mr Ryan's evidence and that, whilst the respondent had not been sufficiently careful, this provision of the MCE Act was not breached.

(k) That, whilst he considered a greater level of discussion with Mr Garbett would have been appropriate, weighing up all of the circumstances in the matter, he did not consider that Mr Garbett's selection for redundancy was unfair, harsh or oppressive, and accordingly would dismiss the application.

ISSUES AND CONCLUSIONS

Principles

39 It is necessary to observe that the decision appealed against was a discretionary decision as that term was defined in *Norbis v Norbis* (1986) 161 CLR 513 (see also *Coal and Allied Operations Pty Ltd v AIRC* (2000) 74 ALJR 1348 (HC)).

40 Further, in determining the question of credibility, which questions were determined in this matter, the Full Bench was bound by the well known principle in *Devries and Another v Australian National Railways Commission and Another* [1992-1993] 177 CLR 472 which is as follows:-

> "A finding of fact by a trial judge, based on the credibility of a witness is not to be set aside because an appellate court thinks that the probabilities of the case are against – even strongly against – that finding. If the finding depends, to any substantial degree, on the credibility of the witness, the finding must stand unless it can be shown that the judge has failed to use or has palpably misused his advantage, or has acted on evidence which was inconsistent with facts incontrovertibly established by the evidence or which was glaringly improbable".

(See also *State Rail Authority of New South Wales v Earthline Constructions Pty Ltd (in liq)* (1999) 73 ALJR 306).

41 As a discretionary decision then the appellant must establish that the exercise of the discretion at first instance miscarried, applying the well known principles in *House v The King* [1936] 55 CLR 499 (see also *Gromark Packaging v FMWU* 73 WAIG 220 (IAC)). Unless it is established by the appellant that the exercise of the discretion at first instance miscarried, then there is no warrant for the Full Bench to interfere with the exercise of that discretion, in particular, no warrant to substitute its decision for that of the Commissioner at first instance.

42 The substance of the complaint in this matter at first instance was that the dismissal for redundancy was unfair. Mr Garbett complained that he was made redundant without any prior consultation in breach of s.40 and s.42 of the MCE Act. The particulars of the claim at first instance were provided in letter form in a letter for the applicant's agent which sets out a number of particulars. Save and except for particulars 7 and 8, the particulars allege complaints about the process of the redundancy and subsequent termination.

Ground 1

43 An issue was raised by ground 1 of the appeal that Mr Garbett was a Senior Purchasing Officer who had senior status compared to the other purchasing officers because of the salary which he was paid. It is quite clear on the evidence that he was not a Senior Purchasing Officer with any managerial powers. That was the clear evidence of Mr Ryan and Mr Wheatley, which was not in any way contradicted with any conviction. It was corroborated in part by Mr Garbett's own evidence that he lost managerial responsibilities and his status was diminished. In any event, we do not think that that could be relevant. It was clear that he was demoted; as he himself admitted, it was clear that he was no longer a manager; it was clear that the senior purchasing officer title was only that; and it was clear, on all of the evidence, that whether he was a senior purchasing officer of any substance or not, that he was part of a department of four, that he was the worst performer and that his salary cost the most when savings were required to be made. It is clear because that evidence was not contradicted nor were the witnesses shaken in evidence, that his position was considered along with other positions for redundancy and the retrenchment which would follow redundancy. The fact that his performance was the worst of all the four store staff was borne out by the appraisal review.

44 It was also made quite clear in the letter of 18 November 1998, to which we have referred above, that he, like all purchasing officers, would report to the Manager, Mr Wheatley. Indeed, it would seem somewhat unlikely that Mr Wheatley was the Manager and that the four purchasing officers were not required to report to him direct. This was also all borne out by the evidence that 80 to 90 percent of his and the other purchasing officers' time was spent on direct purchase activities and that activities of all four purchasing officers were substantially the same, something which Mr Garbett freely admitted and unequivocally admitted in evidence in chief (see page 107 (TFI)) and which he admitted, including his admission that primarily he was doing direct purchasing activities for goods and services required to be supplied by outside suppliers. This, he said, was a similar function to that being performed by the other three purchasing officers (see page 115 (TFI)), and he also agreed that it would be a fair statement that all four of them spent the majority of their time on direct purchase activities and that comparing those activities between each of the four of them would be a fair comment. The activities were 80 to 90 percent the same (see page 116 (TFI)).

45 Later, he attempted to dilute this evidence by self contradiction, and his evidence, generally, therefore, since it was self-contradictory on such important matters, could not be regarded as reliable. Another example, too, was that Mr Garbett said that he was unaware of the Boral Review which, given the participation of Mr Ryan in it, and the whole atmosphere of change and review, would be rightly thought to be highly unlikely the Commissioner found. Therefore, it was open to the Commission at first instance to find, as it did, that Mr Garbett's evidence was not to be preferred to that of Mr Wheatley and Mr Ryan, which, on this significant matter (see pages 568-575, 590, 598 and 692 (TFI)) was not at all self-contradictory and was not shaken.

46 In any event, as we have outlined the evidence above in detail, (and for the reasons expressed by the Commissioner at first instance who did not misuse his advantage in seeing the witnesses), there is indeed sufficient evidence to enable the Commission to find that Mr Garbett was a purchasing officer with equal status to the other purchasing officers and performing duties with no material difference each from the other. In particular he was, as the evidence for the respondent said, performing the same duties as Mr Tom Wilkinson, another purchasing officer. He also gave evidence that 80 to 90 percent of his duties and that of other purchasing officers involved direct purchasing activities. That evidence was, in substance, the same as the evidence of the witnesses for the respondent until Mr Garbett purported to contradict this later in evidence (see pages 115-116, 568-571 and 598 (TFI)).

47 Further the evidence of Mr Wheatley was that Mr Garbett had no supervisory or managerial duties after November 1998 and his evidence, and as we have observed, it was open to accept his evidence in preference to that of Mr Garbett who was self-contradictory and in other respects, on a fair reading of the evidence, not as reliable as Mr Wheatley or Mr Ryan, and indeed, not a reliable witness at all. In addition, insofar as it was alleged in this ground, that documentary evidence was sought to be adduced in rebuttal, it is not in fact clear what was sought to be adduced and what affect it might have.

48 Further, the evidence, even if it were accepted that Mr Wheatley assigned specific duties outside the normal role of purchasing officer to Mr Garbett, and it was not accepted, and correctly not accepted, in fact, it was not evidence which would have lead to a different finding. If he had performed the extra duties, which was open to find but he had not, then the nature and extent of those duties were not clear, and, in any event, would have had to be considered against the fact that the Commission was entitled to find, having accepted Mr Wheatley's evidence, as it was open for him to do, and also Mr Garbett's own admission that the duties of all four officers were the same or substantially the same.

49 The evidence that Mr Wheatley would leave the appellant in charge of the purchasing officers when he was absent, does not at all detract from the finding, which was open, that all four purchasing officers performed the same duties, or substantially the same duties.

50 That he was left in charge when Mr Wheatley was out was not evidence that his duties were not substantially the same as the other purchasing officers when there was direct evidence that they were. Mr Garbett's evidence that he was responsible for training personnel was caught up in the general and accepted denial of Mr Wheatley that he had any managerial duties at all, given that his duties were the same as Mr Wilkinson's and were 80 to 90 percent direct purchasing duties.

51 It is also simply irrelevant that Ms Jamieson did or did not embark on further studies or that the employment status qualifications and experience and higher duties of other purchasing officers were generally inferior to that of Mr Garbett, if that were so. The evidence which was accepted, and which the Commission was entitled to accept, was that all purchasing officers performed generally the same duties. Further, as Mr Garbett himself admitted in the performance appraisal, he was given a rating which found his performance to be, in general terms, unsatisfactory. The clear evidence was that the other three officers' performances were not found to be unsatisfactory.

52 There was ample evidence whether exhibit GG23 had any meaning or whether Mr Hyland gave evidence in the proceedings to support the Commission's findings for all of those reasons.

53 Ground 1 was not made out.

Ground 2

54 As to the question of Mr Garbett's evidence of Mr Wheatley's alleged bad language, the clear evidence was that it was no worse than that of any other employee. In any event, whether his language was bad, had no bearing on his credibility and could not, given the whole of the evidence on a fair reading of it. There was ample evidence on which to judge the credibility of the witnesses and ample evidence to lead to the conclusion that the Commissioner at first instance correctly found that their evidence could be accepted. The Commissioner correctly found, too, this issue to be quite irrelevant.

55 Next, it was alleged the procedures for the disposition of assets, namely surplus material to Mr Frank Lazenby by way of sales by Mr Wheatley, should be criticised. Mr Lazenby had been a friend of Mr Wheatley for some years and gave evidence in the proceedings. We would observe that Mr Ryan gave evidence which was not at all controverted that

Mr Wheatley had acted correctly at all times in his position. Mr Wheatley, Mr Lazenby and Mr Ryan all gave evidence that it would not have detracted from such a finding where it was necessary. Mr Wheatley was a witness whose evidence the Commissioner at first instance accepted, and Mr Garbett was one whose evidence he did not and he gave reasons for so doing, which were valid. He said that Mr Wheatley gave clear and consistent evidence, which he did, and Mr Garbett clearly did not on a clear reading of the reasons for decision (see reasons for decision, paragraphs 46, 47 and 50, page 23(AB)). In any event, there was no evidence that he had not complied with the procedures or requirements of the company, or certainly none from any employer witnesses, and there was no evidence of any view of the employer that Mr Ryan had acted incorrectly. In any event, what Mr Ryan did in relation to the sale of the material to Mr Lazenby was, in the context in which it was abused, entirely irrelevant.

56 As to Mr Ryan's evidence, that was attacked in the grounds of appeal because Mr Ryan treated the Boral Redundancy Policy and Review Report and other Boral documents as secret. He admitted that he did. He did so, he said, because of his understanding of company policy. It was not the evidence that he was wrong in that view of company policy. If the policy were wrong, then that was not something in relation to which Mr Ryan was culpable. There was no evidence that he was wrong. In any event, such evidence was not at all material to any question of credibility on a close reading of all of the evidence.

57 Next, there was no evidence that he did anything wrong in relation to motor vehicle accidents or that his dealings with the company in relation to motor vehicle accidents, or that his dealings with the company in relation to the clay pits on land in which he had an interest at Toodyay, were in any way to be properly criticised. Most significantly, there was no evidence that the respondent was dissatisfied with Mr Wheatley's conduct in relation to any of these matters. Again, none of these matters went to the issues in the proceedings at all, and was simply irrelevant.

58 There was nothing in that evidence which might have properly affected the correct finding that he was a credible witness (see paragraph 50, page 23 (AB)). Again there was no complaint by or on behalf of the respondent, and these matters were all simply irrelevant.

59 As to the complaint that the witnesses were reluctant to produce documents to support contentions, no instance in this case, can be drawn adverse or otherwise to their credibility because of that. A proper discovery and inspection process before the case commenced, and the issue of summons to witnesses, might well have been of assistance to the applicant but it is not clear to me on the submissions what effect the documents might have had one way or another. There was, as we have said, more than sufficient evidence, on a fair reading of the evidence, for the Commissioner to find as he did.

Ground 3

60 This ground of appeal attacks the fairness of the review of the purchasing office and stores which was undertaken by Mr Ryan from September 1999 to December 1999. By that ground it is asserted that in assessing the fairness of the review, it is clear that he conducted that review without any direct notice or reference to or input from Mr Garbett as alleged. There was, however, uncontroverted evidence from the witnesses for the respondent that it had been made clear by management to employees through meetings and other communication that changes in performances were required, that changes all round were to be made and that all employees were on notice as to these matters. In any event, the review led to the requirement that savings of $100,000.00 be achieved in the stores area, and that a reduction in the value of the inventory of stores should also be achieved. It is true that Mr Garbett was not specifically advised that his position was in jeopardy, but he had already been twice demoted and had been criticised for his flaws as a manager and these matters had been discussed with him. He himself had acknowledged the validity of the criticism that was made of him in that appraisal performance report.

61 The Commissioner at first instance found, and it was open to so find on the evidence, that it was highly unlikely that, and, indeed, more probable than not, that he was aware of the ongoing review of his area and that Mr Garbett was aware that he was to improve his performance. Indeed, he was well aware because of his unsatisfactory rating in the performance appraisal that his performance had to improve. In the light of all of that evidence, it was open to find that he was aware that a review was occurring.

62 However, the respondent's case was clear that Mr Garbett was not dismissed for poor performance, but rather, preponderantly, because of the cost situation and he was the least efficient of the four persons occupying the position of purchasing officer. His position was made redundant and he was dismissed ((ie) retrenched). What occurred was that by the effecting of that redundancy, a saving was achieved by the abolition of one purchasing officer position. This saving was achieved too because the reduction in the activities of other departments had an effect on the purchasing department so that it did not require so many purchasing officers. It was plainly open to find, and it was the clear credible evidence that the decision as to which position should be abolished in order to save money was made to effect a genuine redundancy. The performances of the purchasing officers were considered and that was considered as an integral part of the decision as to which position should be abolished. The emphasis was on cost.

63 That this was a true redundancy made the use of the respondent's disciplinary procedures entirely inapplicable. Mr Garbett was not dismissed as a disciplinary measure, but because his position was abolished. It was therefore not necessary to warn him that his performance had to improve or that he would be dismissed, since that was not the point. The uncontradicted and unshaken evidence was that his office was abolished because it was no longer required and because his position was the most expensive (the primary reason for the redundancy was costs), and his performance in it the most unsatisfactory, whilst the performance of the other employees was significantly good. It is quite clear that because their performances were satisfactory and their salaries were less, that it would have been entirely unfair to the other purchasing officers to make their positions redundant and retrench them. It was not suggested, on behalf of the appellant, that it would be fair to do so. Accordingly, none of the allegations in ground 3 are made out. In any event, the review itself could not be unfair as a review and did not constitute part of the process of selection for redundancy. The review was directed to establish what savings could be made and was, in any event, as we understand the evidence, not part of the selection process for redundancy and subsequent retrenchment. It was no ground, in any event, and it was not part of Mr Garbett's case, nor was it put as part of his case that any other purchasing officer should have been made redundant. Thus, the use of the 1999 performance appraisal was not a matter for complaint by Mr Garbett. In any event, he accepted the rating given him clearly and unequivocally. For those reasons, ground 3 is not made out.

64 We would also add that the documents in exhibit KW-3, which were thought to be produced after Mr Garbett's case was closed by his agent, were tendered without objection and that tendering was not at all exceptional nor established to be.

65 The payment of a bonus to Mr Garbett in 1999 was not at all significant being merely an amount of $500.00. It did not alter his rating in the performance appraisal and the other purchasing officers received more, together with salary increases, which increases Mr Garbett did not receive.

66 For those reasons ground 3 is not made out.

Ground 4

67 This is a ground by which it is alleged that, for a number of reasons, and having regard to a number of facts or factors, the Commissioner at first instance should have found that the respondent did not comply with the provisions of s.40 and s.41 of the MCE Act. Before we refer to those factors as they appear in ground 4, we should observe that, for the reasons which we have mentioned above, it was open to the Commission to find, and the Commission was correct in finding that it preferred the evidence of Mr Ryan to that of Mr Garbett, as we have already observed.

68 As a result, it was open to find, and the Commission should have found, that:-

(a) Mr Mark Radford had prepared an estimate of the cost of a severance payment to Mr Garbett on Mr Ryan's instructions, such estimate to be of the amount which might be payable were Mr Garbett to be redundant. Mr Radford, however, it was open to find, paid the amount of the severance pay into Mr Garbett's account on 17 May 2000 and this was not in accordance with Mr Ryan's instructions. The amount was therefore erroneously credited to Mr Garbett's account ahead of Mr Arndt's decision that Mr Garbett's position be made redundant. This question was raised with Mr Ryan in cross-examination and not in evidence in chief of Mr Ryan. It was not, therefore, a matter required to be put in cross-examination to Mr Garbett because it was not part of the respondent's case. In any event, even if it were, within the principle in *Browne v Dunn (1893) 6 R 67*, which is a rule of practice, we would not have regarded any such failure as fatal to the decision of the Commission in the matter.

(b) That Mr Garbett was given an opportunity to work out his notice and that he declined that opportunity saying that he wished to have a clean break.

(c) That whether there was a failure to comply with s.40 and s.41 of the MCE Act because of the decision to make Mr Garbett's position redundant and dismiss him, would depend on the application and interpretation of s.40 and s.41 of the MCE Act.

(d) That it was open to find, and should have been found, that the decision to make Mr Garbett's position redundant and dismiss him, was not communicated until 18 May 2000, and was decided only on the evening of 17 May 2000.

(e) Because Mr Wheatley's evidence was accepted in preference to that of Mr Garbett's, and Mr Ryan's evidence also was accepted, and it was correct to so find, that there was no position for Mr Garbett with the respondent after his position was made redundant.

(f) Once the findings of facts were made, based on the acceptance of Mr Wheatley's and Mr Ryan's evidence, including the explanation that the payment of severance pay on 17 May 2000 was premature and a mistake, then there could not be a finding that the decision to terminate Mr Garbett was made well before the evening of 17 May 2000. The correct finding was that it was not.

(g) It was correct to find that the decision was made on 17 May 2000 and that it was communicated to Mr Garbett at about 10.00 am on 18 May 2000.

69 It is necessary before determining whether there was any breach of the MCE Act, to find out whether the Act applies because the submission for the respondent was that s.40 and s.41 of the MCE Act did not apply in this case. This requires the interpretation of s.40 and s.41. We shall refer to the relevant parts of the sections, although they should be read in the context of the whole of the MCE Act.

70 S.40 defines "redundant" as follows:-

> "**"redundant"** means being no longer required by an employer to continue doing a job because, for a reason that is not a usual reason for change in the employer's work-force, the employer has decided that the job will not be done by any person."

71 It was the respondent's case that Mr Garbett's job was made redundant within the meaning of s.40 of the MCE Act and that he was then dismissed by retrenchment.

72 S.40(2) describes those acts which constitute "an action of an employer, which has a significant effect on an employee" for the purposes of Part 5 of the MCE Act (hereinafter called "an action" or "actions"). That subsection reads as follows:-

> "(a) there is to be a major change in the—
>
> (i) composition, operation or size of; or
>
> (ii) skills required in,
>
> the employer's work-force that will affect the employee;
>
> (b) there is to be elimination or reduction of—
>
> (i) a job opportunity;
>
> (ii) a promotion opportunity; or
>
> (iii) job tenure,
>
> for the employee;
>
> (c) the hours of the employee's work are to significantly increase or decrease;
>
> (d) the employee is to be required to be retrained;
>
> (e) the employee is to be required to transfer to another job or work location; or
>
> (f) the employee's job is to be restructured."

73 In *AWI Administration Services Pty Ltd v Birnie* (2001) 81 WAIG 2849 , the Full Bench at paragraph 46 and other paragraphs considered the section.

74 However, on a clear reading of s.41, and according to each of the words thereof, their ordinary natural meanings on the basis that to do so would not lead to ambiguity or absurdity or the attributing of a meaning not consonant with the sense or purpose of the MCE Act as a whole, we interpreted the same as follows:-

(a) S.41 requires certain things to be done where the employer has decided to take action that is likely to have a significant effect on an employee "or" an employer has decided to make an employee redundant.

(b) In this case, the employer decided to make the employee redundant on 17 May 2000 and communicated this to him on 18 May 2000, the next day.

(c) In both the case of a redundancy and in the case of an action likely to have a significant effect on an employee, the employee is to be entitled "as soon as reasonably practicable after the decision has been made" to be either

informed of "action" or the redundancy. In this case, s.41(1) required the respondent to inform the employee as soon as reasonably practicable after the decision was made on 17 May 2000 of the redundancy.

(d) The respondent was also required, as soon as reasonably practicable after the decision had been made, to discuss with the employee the matters mentioned in s.41(2).

(e) That was its clear statutory obligation.

(f) The matters which Mr Garbett was entitled as an employee to discuss were as follows:-

(i) The likely effect of the redundancy in respect of the employee (if it were "action" as defined it would be the likely effects of the action).

(ii) Measures that may be taken by the employee or the employer to avoid or minimise a significant effect "as the case requires". Those words are clear, the meaning is clear and no other meaning is applicable.

75 In our opinion, a redundancy can, in certain instances, also be "an action", as defined, in that a redundancy involved the elimination of job tenure or involved a major change in the operation of the workforce which affects the employee.

76 Not all "actions" of course are synonymous with a redundancy, quite obviously, because of the definition. However, having been informed as soon as it was reasonably practicable, namely early on in the work day after a decision had been made in the evening before, the Commission was entitled to find Mr Garbett was then entitled to discuss the matter as mentioned, namely the likely effects of the redundancy.

77 He did not raise the matters which he was entitled to discuss on the evidence, and he rejected offers for him to work out his notice and of the use of a company car.

78 It was open to so find, and it should have been found.

79 Next, Mr Garbett did not seek to discuss the measures that might be taken by either the employer or employee to minimise the effect of the action although the officers of the employer might clearly be held to have attempted to have done that by at least referring to offers to work out the notice and to provide the company car. It is quite clear, and it was open to so find, that Mr Garbett was anxious to make a clean break, and did. For those reasons, it is quite clear, and the Commissioner at first instance was correct in finding, that the employee, Mr Garbett, was informed in accordance with the MCE Act of the redundancy as soon as practicable after the decision was made, and was afforded an opportunity to discuss the matters required by the MCE Act, to be discussed, of which opportunity he did not avail himself of. In our opinion, the notice was given as soon as "reasonably practicable" because the word "practicable" might be paraphrased in the context of the section to provide that the notice is capable of being given in the circumstances of the case at a particular time. What is reasonably practicable is, in our opinion, a matter of fact to be determined upon the whole of the circumstances of the case, and in all of the circumstances of this case it could not be at all properly said that the notice was not given, being given the next day after the decision was made, as soon as it was reasonably practicable (see the discussion of the phrase "reasonably practicable" in *Lansdell v Reed* (1981) 28 SASR 253 at pages 254-256 per Walters J).

Ground 5

80 By this ground the appellant purports to allege that, in assessing the genuineness of the decision to render the appellant's position redundant, the Commissioner at first instance failed to find that the termination was within the definition of "redundancy" in s.40 of the MCE Act. We would make the following observations to the amended particulars of that ground which were sought to be relied on.

81 First, it is difficult to understand how some of them can relate to the genuineness or otherwise of the redundancy. It is difficult to understand why, in fact, this submission was made. The fact was that it was open to find on the evidence that Mr Garbett was no longer required to do a job within the definition because the employer decided that the job would not be done by any person. That was the clear evidence. That was what the Commission was entitled to find and it found correctly. There was no question of any dismissal for anything other than redundancy with cost being the main ingredient of the decision.

82 It was found, and found correctly, that the job was made redundant because of the need to save $100,000.00 and because less persons were required to be employed as stores officers because of reductions in operations in other areas of the respondent's enterprise. It was also found, and found correctly, that cost was the main ingredient, although Mr Garbett was also the worst performer of the four stores officers. There was no evidence that this was a usual reason for change. Indeed, it seems to have occurred as part of an unusual and wide ranging national review of Boral and its subsidiary company's administration and operations, requiring substantial changes in operation and very substantial cost reductions.

83 In this case, it was decided to, in part at least, save the $100,000.00 required to be saved by making a position redundant and reducing the number of stores officers. There was no doubt that the national review and the review in the respondent's operations was directed to cost production, inter alia. We repeat what we said above that this was not a question of discipline and the respondent's disciplinary policy, or its failure to apply it, were both simply irrelevant. The Commissioner at first instance found that there was, on Mr Ryan's evidence, no breach of s.41 of the MCE Act and was correct in so finding. However, even if there were a breach of s.41 it would not necessarily mean, as ground 5 alleges, that the redundancy was not genuine.

84 Further, it does not at all follow that a redundancy is not genuine merely because it is not fairly implemented. This ground, in referring to the redundancy as not being fairly implemented, does not clearly identify whether it is a complaint that s.41 was not complied with. We rather think it is because that was the only complaint made at first instance. There was no complaint of unfairness in the redundancy at large. The question of knowledge or input are not words used in s.41, however.

85 The Commissioner at first instance considered s.40 and s.41 of the MCE Act (see paragraphs 59 and 60) and correctly found that there was no breach of the provisions of those sections as alleged.

86 It was also alleged in ground 5 that the respondent was under cost pressures, but that this allegation was unsupported by evidence of budget overruns in the purchasing office or of a general lack of profitability or of overstaffing.

87 First, that evidence was simply not necessary. There was evidence that it was decided, and that evidence was correctly accepted, that there be, and there was carried out a national review of support structures in the Boral group, of which the respondent was a member. That a company or companies should seek to reduce costs where possible, reasonable and proper is, We think, axiomatically prudent and sensible and is a matter for the Board and Managers.

88 That was what occurred in this case. In the stores it was required that they bring about savings of $100,000.00 in costs. There was no requirement at all for evidence that the company was suffering a cost overrun or was overstaffed or anything of the kind. It is significant that at the time of the hearing the review of operations was still continuing. No further evidence in relation to the matter, in that respect, was required.

89 Next, it has, insofar as it has been relevant, not been established that the selection process was unfair, or most significantly that any other position could fairly have been chosen for redundancy. That was simply not part of the case for the appellant at first instance. The position which cost the most and contained the worst performer was abolished. The clear evidence, which was not controverted, was that that position did cost the most and its occupant was the worst performer. The greatest saving achievable was made. The MCE Act alone is being relied on in the grounds of appeal and the MCE Act makes no prescription for the fairness, or otherwise, or the necessity for a selection process. That also was not the submission as we understand it, nor at first instance was there any allegation that there was unfairness in the redundancy process outside the MCE Act.

90 Again we would observe that it was not contended that any other person should have been retrenched or his or her position made redundant as a matter of fairness in preference to that of Mr Garbett. That was also not established on the evidence, in any event.

91 There is some confusion arising from the categorisation of the redundancy as "unfair" when the dismissal is what must be established to be unfair. There was no mention of that in this ground. What the retrenchment was, was a fair termination or at least it was not established to be otherwise.

Ground 6

92 It is alleged that the Commissioner at first instance failed to afford procedural fairness to the applicant in that it "repeatedly":-

(a) Offended against the rule in *Browne v Dunn* (op cit).

(b) Refused to order the respondent to provide adequate discovery of numerous documents.

(c) Unduly limited cross-examination of the respondent's witnesses.

(d) Denied the applicant the opportunity to lead rebuttal evidence.

(e) Allowed the cross-examination of the applicant to continue unreasonably.

93 We would observe that the agent for the appellant was unable to take us to any sufficient detail of the transcript to support the submission. We have scrutinised all of the transcript very carefully.

94 Further, there is no evidence at all, nor was the Full Bench taken to any, to establish that any of the matters complained of were "repeated" errors as alleged in ground 6.

95 Further, we do not see how the Commission could be said to have offended against the rule in *Browne v Dunn* (op cit). Nor was it made clear how this occurred.

96 There was no repeated refusal to order adequate inspection and discovery and it is not at all clear that adequate inspection for discovery was not sought, granted or available before the proceedings commenced. Further, it was not in any way established that any prejudice was caused thereby by any failure to order discovery. There is no evidence at all that the Commission unduly limited cross-examination of the respondent's witnesses; nor in fact was the Commissioner, on a close reading of the transcript, unduly hard on cross-examination by the advocate for the appellant, at first instance, which was often rambling and otiose.

97 Further, there was no persuasive submission that any limitation on cross-examination caused or was likely to cause a different result. A fair reading of the transcript shows no such likely effect. As for rebuttal evidence there was no application to lead it and no evidence that any such failure to allow it would have altered the result. There was no unfair cross-examination of the appellant, at first instance, and if there were, there was no submission as to the manner in which such cross-examination achieved an unjust result.

98 No authorities were referred to in support of these arguments. But within the principle in *Stead v State Government Insurance Commission* [1986] 161 CLR 141 (HC), insofar as there was any denial of procedural fairness, and there was none, there was no submission nor were we taken to anything which could possibly have persuaded the Full Bench that a different result might have been achieved were the "procedural fairness" said to have been denied, afforded.

FINALLY

99 For those reasons, it was not established, in our opinion, that the exercise of the discretion at first instance at all miscarried, within the principles in *House v The King* (op cit). Further, no ground of appeal was made out. The appeal should therefore be dismissed.

100 COMMISSIONER J SMITH—

101 I have had the benefit of reading in draft the reasons to be published by the President. For the reasons his Honour gives, I agree the Appeal should be dismissed and I have nothing further to add.

102 CHIEF COMMISSIONER WS COLEMAN—

103 I have had the benefit of reading in draft the reasons to be published by the President. For the reasons his Honour gives, I agree the Appeal should be dismissed and I have nothing further to add.

104 THE PRESIDENT—

105 For those reasons, the appeal is dismissed.

Order accordingly

2002 WAIRC 04757

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	GARY EDWARD GARBETT, APPELLANT *v.* MIDLAND BRICK CO PTY LTD, RESPONDENT
CORAM	FULL BENCH HIS HONOUR THE PRESIDENT P J SHARKEY CHIEF COMMISSIONER W S COLEMAN COMMISSIONER J H SMITH
DELIVERED	WEDNESDAY, 6 FEBRUARY 2002
FILE NO/S.	FBA 28 OF 2001
CITATION NO.	2002 WAIRC 04757

Result	Appeal dismissed.
Appearances	
Appellant	Mr B F Stokes, as agent
Respondent	Mr A D Lucev, Mr P G Brunner and Mr H M Downes of Counsel

Order

This matter having come on for hearing before the Full Bench on the 30th day of August 2001 and the 9th day of November 2001, and having heard Mr B F Stokes, as agent, on behalf of the appellant and Mr A D Lucev (of Counsel), and with him Mr P G Brunner (of Counsel), by leave, and then Mr H M Downes (of Counsel), by leave, on behalf of the respondent, and the Full Bench having reserved its decision on the matter, and reasons for decision being delivered on the 6th day of February 2002, it is this day, the 6th day of February 2002, ordered that FBA 28 of 2001 be and is hereby dismissed.

By the Full Bench

(Sgd.) P. J. SHARKEY,
President.

[L.S.]

PRESIDENT—Matters dealt with—

2002 WAIRC 04656

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	AUSTRALIAN LIQUOR, HOSPITALITY AND MISCELLANEOUS WORKERS UNION, WESTERN AUSTRALIAN BRANCH, APPLICANT *v.* BURSWOOD RESORT (MANAGEMENT) LTD, RESPONDENT
CORAM	HIS HONOUR THE PRESIDENT P J SHARKEY
DELIVERED	WEDNESDAY, 16 JANUARY 2002
FILE NO/S.	PRES 1 OF 2002
CITATION NO.	2002 WAIRC 04656

Decision	Application dismissed
Appearances	
Applicant	Mr J Rosales-Castanada, of Counsel
Respondent	Mr G Blyth, as agent

Reasons for Decision

APPLICATION NO PRES 1 OF 2002

INTRODUCTION

1 This is an application by the abovenamed organisation of employees, hereinafter called "ALHMWU", naming as respondent the abovenamed employer. It was filed on 2 January 2002 and the application purports to be made pursuant to s.49(11) of the *Industrial Relations Act* 1979 (as amended) (hereinafter referred to as "the Act").

2 The application seeks the stay of operation of orders made in the Industrial Magistrates Court at Perth on 12 December 2001. There were orders, made pursuant to s.83 of the Act, that a claim contained in Claim M175 of 2001 by the abovenamed applicant organisation should be dismissed and that the claimant pay the respondent's costs fixed at $800.00. The decision was made in proceedings brought pursuant to s.83 of the Act.

3 A notice of appeal was filed herein on 2 January 2002 against the decision which was given on 12 December 2001. The notice of appeal was served on the third day of January 2002. The appeal was instituted pursuant to s.84 of the Act.

Grounds of this Application

4 The grounds on which it is sought that the application be stayed are:-

(a) That there was a serious question to be tried in that the learned Magistrate should have found that the respondent had breached an order made by Commissioner Wood and whether the learned Magistrate erred in law in dismissing the claim.

(b) That the balance of convenience favoured the applicant in that:-

(i) There was no doubt that the union had the means to pay the order for costs once the Full Bench makes a finding.

(ii) There is no status quo to protect.

(iii) There is no detriment to the respondent if the stay is granted.

THE CLAIM AT FIRST INSTANCE

5 The claim was that the respondent had not complied with an order made by Commissioner Wood dated 14 February 2001 pursuant to s.44, (but not s.44(6)), of the Act, in matter CR350/2000, which order was in the following terms, formal parts omitted:-

"1. THAT the respondent allocate forthwith duties to Mr Mitchell in the Environmental Services Area compatible with his capabilities and skills.

2. THAT the respondent engage in a full exploration, in consultation with Mr Mitchell, of options for his employment with the respondent, including any appropriate training relevant to available positions with the respondent, that are compatible with his capabilities and skills.

3. THAT in light of point 2 of the order, the respondent not terminate the employment of Mr Mitchell as an Environmental Services Attendant prior to 3 calendar months from the date of this order, for reasons to do with his inability for medical reasons to perform duties as an Environmental Services Attendant.

6 There was also sought a declaration by the court that the respondent had breached Commissioner Wood's order by terminating Mr Mitchell's contract of employment contrary to order No 3, and also an order that the defendant pay a penalty of not more than $1000.00 for the breach.

GROUNDS OF APPEAL

7 The grounds of appeal in the matter are as follows:-

"1. The Magistrate erred in law in holding that if a Magistrate cannot make any orders to enforce an order by the Commission, then there are no grounds for a claim for a breach of the Commission's order.

2. The Learned Magistrate erred in law in making a finding that the claim was frivolous or vexatious.

3. The learned Magistrate erred in law in finding that the original application did not have merit because—

a. there was no order or finding he could make; and

b. it would not be appropriate to impose a penalty in view of the proceedings that had taken place prior to this application.

4. The Learned Magistrate erred in law in finding that the Union was not entitled to pursue matter M175 of 2001 for the benefit of the union and other delegates.

5. The Learned Magistrate erred in law in finding that the Union was barred from pursuing the claim against the respondent, because a Union delegate had entered into a deed of settlement with the respondent (excluding the Union from any negotiations).

6. Because of all of the above grounds, the Learned Magistrate erred in law in making an order for costs against the appellant Union."

APPLICATION TO ADJOURN

8 There was also before the Commission, constituted by the President, an application on behalf of the respondent applying to adjourn the proceedings, which application was filed on 9 January 2002, and a declaration of service of which was not filed until 11 January 2002. This application was not pressed.

THE INDUSTRIAL COURT'S REASONS

9 His Worship found (see page 31 of the appeal book et seq):-

1. That there was nothing in the order which "could be enforced", and he did not believe that there was merit in the application, or that the application had any chance of being enforced under s.83 of the Act.

2. That there was some merit in the argument of Counsel for the respondent at first instance, namely that an employee must be able to make decisions in these matter, and unless "you can show that the deed of settlement was reached under some duress or that the employee was not capable for some reason of making this agreement, then the terms of the deed are that this put an end to the relationship between the employee and the employer respondent".

3. That each case has to be dealt with on the merits of the original case and he was not able to entertain applications which would have a general effect.

10 What His Worship seems to have done, although his reasons for so doing are expressed somewhat sparsely, was to have found that because the ALMWU member concerned, Mr Derek Mitchell, had entered into a deed of release in settlement on 10 May 2001 in relation to the termination of his employment and, in relation to which he released the respondent from any and all liabilities, claims, applications etc arising from in or in connection with his employment by and termination of the employment by the respondent, and having found that the deed also provided that it might be pleaded as a bar to any application by any person making claims through Mr Mitchell, found that the application for a declaration of the order of the Commission would have been breached was not released, which was available under the Act; and further found that the order had been overtaken by subsequent events; and further found that there existed no order that could be enforced under s.83 of the Act.

11 Costs were sought under s.83(3) of the Act, and it was submitted that the application was frivolously or vexatiously instituted. His Worship found that the application was without any merit and that the union was representing one employee, Mr Mitchell, in the Commission.

12 He found that the object or intention of the union was not to further the benefits of Mr Mitchell but that it had taken action in this court for the enforcement of the order in relation to delegates. This, he said, was no reason to bring an action before the Industrial Magistrates Court because there was no order that he could make pursuant to s.83 of the Act. He therefore found that the application made was frivolous and vexatious and ordered the claimant to pay costs as I have observed above.

ISSUES AND CONCLUSIONS

13 The first and substantial issue in this matter was whether the President had jurisdiction or power to order a stay of the orders made.

14 The respondent's case primarily was that there was no jurisdiction or power in the President to make an order staying the operation of the orders constituting the decision at first instance.

15 S.49 prescribes the right to institute appeals against decisions of the Commission constituted by a single Commissioner. S.49(11) expressly confers on the President the jurisdiction and power to order the stay of the operation of the decision of the Commission constituted by a single Commissioner.

16 S.84 of the Act prescribes the right of the parties to proceedings in the Industrial Magistrate's Court to appeal against a decision of the Industrial Magistrate's Court.

17 The Act in express terms confers no power or jurisdiction on the Commission however constituted to order the stay of operation of the decision made at first instance by the Industrial Magistrate's Court pursuant to s.83 of the Act pending the hearing and determination of an appeal against that decision under s.84 of the Act or at all.

18 There is certainly no power or jurisdiction expressly conferred on the Commission constituted by the President by the Act to order the stay of the operation of the decision of an Industrial Court, whilst an appeal is to be heard and determined, or at all.

19 S.27 cannot, in my opinion, support such a power or confer such a jurisdiction. As Brinsden J observed in *RRIA v FEDFU* (1986) 67 WAIG 315, s.27 does not confer substantial jurisdiction on the Commission, but merely legislates for the way in which the Commission may exercise the jurisdiction already conferred on it by the Act. (See also per Kennedy J at p.319).

20 In that case where no jurisdiction was expressly conferred to make interim orders under s.44 of the Act, the Industrial Appeal Court held that s.27(1) was not invocable to confer such a jurisdiction or power.

21 In *Personalised Tuition Services Pty Ltd and Fisher and Others* (1987) 67 WAIG 2261, O'Dea P held that an application to stay an order made by an Industrial Magistrate, which was the subject of appeal under s.84 of the Act, was incompetent. He so held because "no such provision for stay exists in the Act".

22 In *Como Investments Pty Ltd v McCorry* (1990) 70 WAIG 1094, that case was not cited to me, and the point was not an issue. However, I expressed some doubt that there was jurisdiction or power, and there were some submissions made by Counsel for the applicant, in that case. In the end, the point of jurisdiction or power was not decided.

23 I was taken in this matter to Regulation 29(13) of the Industrial Commission Regulations 1985 (as amended) (hereinafter called "the regulations"). That sub-regulation which was part of a regulation dealing with appeals provides as follows:-

> "(13) The provisions of these regulations relating to appeals to the Full Bench from a decision of the Commission shall apply, so far as is practicable and with such modifications to forms as are necessary, to and in relation to appeals to the Full Bench from a decision of an Industrial Magistrate."

24 Regulation 29(6) purports to somewhat otiosely repeat the express conferral of jurisdiction and power to grant a stay in relation to decisions of the Commission constituted by a single Commissioner, which is contained in s.49(11) of the Act.

25 However, Regulation 29 read as a whole does not apply or purport to apply to appeals under s.84. It expressly and only applies to appeals from decisions of the Commission constituted by a single Commissioner. (See in particular, Regulation 29(1), 29(4), 29(10) and 29(13) which expressly refer to the Commission).

26 The regulation does not in any way purport to confer any power or jurisdiction on the President or the Full Bench to order the stay of operation of orders of Industrial Courts or Magistrates, and cannot be read to relate in any way to appeals brought under s.84 of the Act.

27 There was reference in submissions to a certain power in the Commission, which means the members of the Commission or a majority of the Commission, to make regulations pursuant to s.113 of the Act. In particular, was there a reference to s.113(1)(f) which confers a power on the Commission to make regulations in the following terms:-

> "(f) providing for any matters which by this Act are required or permitted to be prescribed or which it may be necessary or convenient to regulate (either generally or in any particular case) for giving effect to this Act."

28 That provisions does not assist unless regulations are made and are made within power conferring the power or jurisdiction to make a stay.

29 In my opinion it is very doubtful that such regulations could validly confer power or jurisdiction. That I think could only be done by the legislation.

30 However, the only submission made in opposition to the submissions made on behalf of the respondent on this point were that s.113(e) enabled the making of regulations such as regulation 29. S.113(1)(e) confers on the Commission power to make regulations:-

> "(e) prescribing any act or thing necessary to supplement or render more effectual the provisions of this Act as to proceedings or the conduct of proceedings before the Court and the Commission."

31 For the reasons which I have expressed, regulation 29, even if it could confer power or jurisdiction in relation to the stay of s.83 orders or decisions on a s.84 appeal does not, in its terms, do so or purport to do so, referring only to appeals against decisions of the Commission.

32 Even if such regulations could be made, which I strongly doubt, they have not been made.

33 I raised with Mr Blythe, the advocate for the respondent, the proposition of that effect of acceding to his submission was that a number of appeals would be rendered nugatory, because there was no power to maintain the status quo whilst the appeal against the decision made at first instance was heard and determined by the Full Bench pursuant to s.84, in the absence of any power or jurisdiction express or implied to stay s.83 orders.

34 (It is interesting to note that s.84 came into existence before the enforcement of orders made under s.44 (except s.44(6) orders which this was not) were brought within the jurisdiction of the Industrial Courts by amending Act No. 79 of 1995, s.24. However that does not affect the substance of this reasoning).

35 Mr Blythe's submission in response to my questions was in effect that if Parliament had intended to confer jurisdiction and power to stay orders made pursuant to s.83 then it would have said so and it had not. That is the submission with which, as will appear hereunder, I agree.

36 In my opinion, for those reasons, namely that no express power is conferred by the Act on the President (or the Full Bench) to order a stay whilst an appeal under s.84 is heard and determined, because there is no power or jurisdiction to do so conferred by regulation, even if it could be validly conferred, which in my opinion it could not, and because s.27(1) or no other section can be read or is capable of being read in its present form to confer power and jurisdiction to grant stays. There was no submission, nor could there be, that such a power was conferred by implication from the statute or the regulations. Therefore I follow the view expressed by O'Dea P in *Personalised Tuition Services Pty Ltd v Fisher and Others* (op cit), with which, in any event, for the reasons which I have advanced, I respectfully agree. There is no power or jurisdiction in the President to grant the stay of an order made by an Industrial Court or Magistrate pending the hearing and determination of an appeal against that decision or order brought pursuant to s.84 of the Act, or at all. Accordingly this application is incompetent. Such an interpretation of the statute arises correctly from a fair reading of the words of the whole of the Act and the regulations. In particular there is no warrant in me to fill obvious gaps in the legislation in this case.

37 As Lord Mersey said in *Thompson v Goold & Co* [1910] AC 409 at 420:-

> "It is a strong thing to read into an Act of Parliament words which are not there, and in the absence of clear necessity it is a wrong thing to do".
>
> (See also *Marshall v Watson* (1972) 124 CLR 640 at 649 per Stephen J).

38 It is in fact clear to me that Parliament might be said to have evinced an intention not to confer jurisdiction and power on the President to order the stay of s.83 orders pending the hearing and determination of an appeal instituted pursuant to s.84 of the Act.

THE MERITS

39 If I did have power and jurisdiction, then in the absence of what I apprehend to be strong commissions to the contrary, I would hold that a stay should be granted applying s.26(1)(a) and s.21(c) of the Act and the principles enunciated by me in a number of cases including *AWU v BHP* (2001) 81 WAIG 406.

40 I would do so first because there was a serious issue to be tried.

41 Questions arose as to the correctness of the Magistrate's decision which questions raise serious issues to be tried. There was a question as to whether there was a breach of an order of the Commission which required enforcement, notwithstanding the expiry of the order, given that the alleged breach occurred while the order was still on foot. Further, there was a question whether a deed entered into by a person not a party to the order made at first instance with a party to the order made at first instance could affect the enforceability of the order by another party to the proceedings in which the order was made. That being the case claimed, and there being a serious issue to be tried, a serious issue arose as to whether the claim was instituted as a frivolous or vexatious claim and therefore whether the costs order was a correct order. (See s.83(3) in relation to costs and see *WABLPPU v Clarke and Another* (1996) 76 WAIG 4(IAC) and also *ALHMWU v Falcon Investigations and Security Pty* (2001) 81 WAIG 2425 (FB).

42 As far as the balance of convenience was concerned it would follow, since costs follow the event, that the order for costs should be stayed in its operation whilst the question of the correctness of the order which founded the order for costs was determined by the Full Bench.

FINALLY

43 For those reasons, the Commission having no jurisdiction or power as presently constituted to hear and determine this application, the application should, in my opinion, be dismissed. I will so order.

2002 WAIRC 04655

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	AUSTRALIAN LIQUOR, HOSPITALITY AND MISCELLANEOUS WORKERS UNION, WESTERN AUSTRALIAN BRANCH, APPELLANT
	v.
	BURSWOOD RESORT (MANAGEMENT) LIMITED, RESPONDENT
CORAM	HIS HONOUR THE PRESIDENT P J SHARKEY
DELIVERED	WEDNESDAY, 16 JANUARY 2002
FILE NO/S.	PRES 1 OF 2002
CITATION NO.	2002 WAIRC 04655

Decision	Application dismissed
Appearances	
Appellant	Mr J Rosales-Castanada, of Counsel
Respondent	Mr G Blyth, as agent

Order

This matter having come on for hearing before me on the 15th day of January of 2002, and having heard Mr J Rosales-Castanada (of Counsel), by leave on behalf of the applicant and Mr G Blyth on behalf of the respondent, and having determined that the application should be dismissed and having issued my reasons for decision therefore, it is this day, the 16th day of January 2002, ordered that application No PRES 1 of 2002 be and is hereby dismissed.

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

PUBLIC SERVICE ARBITRATOR—Awards/Agreements—Variation of—

2002 WAIRC 04628

CHILDREN'S SERVICES (GOVERNMENT) AWARD 1989

Nos. A9 of 1985 and PSA A29A of 1985

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	AUSTRALIAN LIQUOR, HOSPITALITY AND MISCELLANEOUS WORKERS UNION, WESTERN AUSTRALIAN BRANCH, APPLICANT
	v.
	HONOURABLE MINISTER FOR COMMUNITY SERVICES, RESPONDENT
CORAM	CHIEF COMMISSIONER W S COLEMAN
DELIVERED	TUESDAY, 8 JANUARY 2002
FILE NO/S.	APPLICATION 1052 OF 2001
CITATION NO.	2002 WAIRC 04628

Result	Award varied

Order

Having heard Ms D MacTiernan on behalf of the applicant and Mr J Lange on behalf of the respondent, and by consent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders—

THAT the Children's Services (Government) Award 1989 (No.s A 9 of 1985 and PSA A 29A of 1985) be varied in accordance with the following schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after the 7th day of January 2002.

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

SCHEDULE

1. Clause 10. – Overtime: Delete subclause (4)(a) of this Clause and insert the following in lieu thereof—

(4) (a) An employee required to work continuous overtime for more than one hour shall be supplied with a meal by the employer or be paid $8.15 for a meal, and if, owing to the amount of overtime worked, a second or subsequent meal is required he/she shall be supplied with each meal by the employer or be paid $4.75 for each meal so required.

2002 WAIRC 04692

GOVERNMENT OFFICERS SALARIES, ALLOWANCES AND CONDITIONS AWARD 1989

No. PSA A3 of 1989

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED, APPLICANT
	v.
	ALBANY PORT AUTHORITY AND OTHERS, RESPONDENTS
CORAM	COMMISSIONER P E SCOTT
	PUBLIC SERVICE ARBITRATOR
DELIVERED	WEDNESDAY, 23 JANUARY 2002
FILE NO.	P 47 OF 2001
CITATION NO.	2002 WAIRC 04692

Result Award varied

Order

HAVING heard Mr G Wauhop on behalf of the applicant and Mr D West and with him Ms A Davison on behalf of the respondents, and by consent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders—

THAT the Government Officers Salaries, Allowances and Conditions Award 1989 (No. PSA A 3 of 1989) be varied in accordance with the following Schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after the 18th day of January 2002.

(Sgd.) P. E. SCOTT,
[L.S.] Commissioner.
Public Service Arbitrator.

SCHEDULE

1. Schedule I – Overtime: Delete Part 1 – Out of Hours Contact of this Schedule and insert the following in lieu thereof—

PART I - OUT OF HOURS CONTACT

(Operative from 1st pay period commencing on or after the 18th day of January 2002)

Standby	$5.97 per hour
On Call	$2.98 per hour
Availability	$1.49 per hour

2. Schedule K – Shift Work Allowance: Delete this Schedule and insert the following in lieu thereof—

A shift work allowance of $13.86 is payable for each afternoon or night shift of seven and one half (7.5) hours worked.

The shiftwork allowance calculation is 12.5% of the daily salary rate for a Level 1, Year 7 officer.

3. Schedule L – Other Allowances: Delete this Schedule and insert the following in lieu thereof—

(1) Diving - (Clause 33)

$4.79 per hour or part thereof.

(2) Flying - (Clause 34)

(a) Observation and photographic duties in fixed wing aircraft - $8.85 per hour or part thereof.

(b) Cloud seeding and fire bombing duties, observation and photographic duties involving operations in which fixed wing aircraft are used at heights less than 304 metres or in unpressurised aircraft at heights more than 3048 metres - $12.12 per hour or part thereof.

(c) When required to fly in a helicopter on fire bombing duties, observation and photographic duties or stock surveillance - $16.75 per hour or part thereof.

(3) Sea Going Allowances (Clause 40)

(a) Victualling

(i) Government Vessel - meals on board not prepared by cook - $22.55 per day.

(ii) Government Vessel - meals on board are prepared by a cook - $16.97 per day.

(iii) Non Government Vessel - $20.58 each overnight period.

(b) Hard Living Allowance - 46 cents per hour or part thereof.

2002 WAIRC 04688

GOVERNMENT OFFICERS (SOCIAL TRAINERS) AWARD 1988

No. PSA A20 of 1985

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED, APPLICANT
	v.
	DISABILITY SERVICES COMMISSION, RESPONDENT
CORAM	COMMISSIONER P E SCOTT
	PUBLIC SERVICE ARBITRATOR
DELIVERED	WEDNESDAY, 23 JANUARY 2002
FILE NO.	P 49 OF 2001
CITATION NO.	2002 WAIRC 04688

Result Award varied

Order

HAVING heard Mr G Wauhop on behalf of the applicant and Mr D West and with him Ms A Davison on behalf of the respondent, and by consent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders—

THAT the Government Officers (Social Trainers) Award 1988 (No. PSA A 20 of 1985) be varied in accordance with the following Schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after the 18th day of January 2002.

[L.S.]

(Sgd.) P. E. SCOTT,
Commissioner.
Public Service Arbitrator.

SCHEDULE

1. Schedule B – Clause 22. - Overtime: Delete Part 1 – Out of Hours Contact of this Schedule and insert the following in lieu thereof—

PART I - OUT OF HOURS CONTACT

(Operative from 1st pay period commencing on or after the 18th day of January 2002)

Standby	$5.97 per hour
On Call	$2.98 per hour
Availability	$1.49 per hour

2. Schedule G – Clause 28. – Shift Work Allowances: Delete this Schedule and insert the following in lieu thereof—

For each afternoon or night shift worked - $13.86.

The shiftwork allowance calculation is 12.5% of the daily salary rate for a Level 1, Year 7 officer.

2002 WAIRC 04689

GRAYLANDS SELBY-LEMNOS AND SPECIAL CARE HEALTH SERVICES AWARD 1989

No. PSA A1 of 1999

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED, APPLICANT
	v.
	COMMISSIONER OF HEALTH METROPOLITAN HEALTH SERVICE BOARD (FORMERLY DEPARTMENT OF HEALTH), RESPONDENT

CORAM	COMMISSIONER P E SCOTT PUBLIC SERVICE ARBITRATOR
DELIVERED	WEDNESDAY, 23 JANUARY 2002
FILE NO.	P 50 OF 2001
CITATION NO.	2002 WAIRC 04689

Result Award varied

Order

HAVING heard Mr G Wauhop on behalf of the Civil Service Association of Western Australia Incorporated and the Hospital Salaried Officers Association of Western Australia (Union of Workers) and Mr D West and with him Ms A Davison on behalf of the respondent, and by consent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders—

THAT the Graylands Selby-Lemnos and Special Care Health Services Award 1999 (No. PSA A 1 of 1999) be varied in accordance with the following Schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after the 18th day of January 2002.

(Sgd.) P. E. SCOTT,
[L.S.] Commissioner.
Public Service Arbitrator.

SCHEDULE

1. Schedule H. – Overtime: Delete Part 1 – Out of Hours Contact of this schedule and insert the following in lieu thereof—

PART 1 - OUT OF HOURS CONTACT

(Operative from 1st pay period commencing on or after the 18th day of January 2002)

Standby	$5.97 per hour
On Call	$2.98 per hour
Availability	$1.49 per hour

2. Schedule K. – Diving, Flying and Seagoing Allowances: Delete this schedule and insert the following in lieu thereof—

(1) Diving - (Clause 33)

$4.79 per hour or part thereof.

(2) Flying - (Clause 34)

(a) Observation and photographic duties in fixed wing aircraft - $8.85 per hour or part thereof.

(b) Cloud seeding and fire bombing duties, observation and photographic duties involving operations in which fixed wing aircraft are used at heights less than 304 metres or in unpressurised aircraft at heights more than 3048 metres - $12.12 per hour or part thereof.

(c) When required to fly in a helicopter on fire bombing duties, observation and photographic duties or stock surveillance - $16.75 per hour or part thereof.

(3) Sea Going Allowances (Clause 40)

(a) Victualling

(i) Government Vessel - meals on board not prepared by a cook - $22.55 per day.

(ii) Government Vessel - meals on board are prepared by a cook - $16.97 per day.

(iii) Non Government Vessel - $20.58 each overnight period.

(b) Hard Living Allowance - 46 cents per hour or part thereof.

The allowances prescribed in this schedule shall apply from the 18th day of January 2002, and shall be varied in accordance with any movement in the equivalent allowances in the Public Service Award 1992.

2002 WAIRC 04690

PUBLIC SERVICE ALLOWANCES (MORTUARY STAFF) AWARD 1985

No. PSA A3 of 1985

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED, APPLICANT *v.* WESTERN AUSTRALIAN CENTRE FOR PATHOLOGY AND MEDICAL RESEARCH, RESPONDENT
CORAM	COMMISSIONER P E SCOTT PUBLIC SERVICE ARBITRATOR
DELIVERED	WEDNESDAY, 23 JANUARY 2002
FILE NO.	P 48 OF 2001
CITATION NO.	2002 WAIRC 04690

Result Award varied

Order

HAVING heard Mr G Wauhop on behalf of the applicant and Mr D West and with him Ms A Davison on behalf of the respondent, and by consent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders—

THAT the Public Service Allowances (Mortuary Staff) Award 1985 (No. 3 of 1985) be varied in accordance with the following Schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after the 18th day of January 2002.

[L.S.]

(Sgd.) P. E. SCOTT,
Commissioner.
Public Service Arbitrator.

SCHEDULE

1. Clause 4. – Disabilities Allowance: Delete this Clause and insert the following in lieu thereof—

Officers covered by this Award are hereby granted an allowance of $1,458 per annum, payable by fortnightly instalments.

This allowance is compensation for the following matters—

(i) the disabilities involved in the handling of and autopsy work associated with decomposed, obnoxious, vermin infested and infected bodies; and

(ii) the need to perform work in refrigerated and other low temperature storage areas of the Mortuary.

2002 WAIRC 04691

PUBLIC SERVICE AWARD 1992

No. PSA A4 of 1989

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED, APPLICANT
	v.
	ABORIGINAL AFFAIRS DEPARTMENT AND OTHERS, RESPONDENTS
CORAM	COMMISSIONER P E SCOTT
	PUBLIC SERVICE ARBITRATOR
DELIVERED	WEDNESDAY, 23 JANUARY 2002
FILE NO.	P 46 OF 2001
CITATION NO.	2002 WAIRC 04691

Result Award varied

Order

HAVING heard Mr G Wauhop on behalf of the applicant and Mr D West and with him Ms A Davison on behalf of the respondents, and by consent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders—

THAT the Public Service Award 1992 (No. PSA A 4 of 1989) be varied in accordance with the following Schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after the 18th day of January 2002.

[L.S.]

(Sgd.) P. E. SCOTT,
Commissioner.
Public Service Arbitrator.

SCHEDULE

1. Schedule H – Overtime: Delete Part 1 – Out of Hours Contact of this Schedule and insert the following in lieu thereof—

PART I - OUT OF HOURS CONTACT

(Operative from 1st pay period commencing on or after the 18th day of January 2002)

Standby	$5.97 per hour
On Call	$2.98 per hour
Availability	$1.49 per hour

2. Schedule J – Shift Work Allowance: Delete this Schedule and insert the following in lieu thereof—

A shift work allowance of $13.86 is payable for each afternoon or night shift of seven and one half (7.5) hours worked.

The shiftwork allowance calculation is 12.5% of the daily salary rate for a Level 1, Year 7 officer.

3. Schedule K – Diving, Flying and Seagoing Allowances: Delete this Schedule and insert the following in lieu thereof—

(1) Diving - (Clause 33)

$4.79 per hour or part thereof.

(2) Flying - (Clause 34)

(a) Observation and photographic duties in fixed wing aircraft - $8.85 per hour or part thereof.

(b) Cloud seeding and fire bombing duties, observation and photographic duties involving operations in which fixed wing aircraft are used at heights less than 304 metres or in unpressurised aircraft at heights more than 3048 metres - $12.12 per hour or part thereof.

(c) When required to fly in a helicopter on fire bombing duties, observation and photographic duties or stock surveillance - $16.75 per hour or part thereof.

(3) Sea Going Allowances (Clause 40)

(a) Victualling

(i) Government Vessel - meals on board not prepared by cook - $22.55 per day.

(ii) Government Vessel - meals on board are prepared by a cook - $16.97 per day.

(iii) Non Government Vessel - $20.58 each overnight period.

(b) Hard Living Allowance - 46 cents per hour or part thereof.

AWARDS/AGREEMENTS—Variation of—

2002 WAIRC 04564

ABORIGINAL MEDICAL SERVICE EMPLOYEES' AWARD

No. A26 of 1987

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	AUSTRALIAN LIQUOR, HOSPITALITY AND MISCELLANEOUS WORKERS UNION, WESTERN AUSTRALIAN BRANCH, APPLICANT
	v.
	BROOME REGIONAL ABORIGINAL MEDICAL SERVICE & OTHERS, RESPONDENTS
CORAM	CHIEF COMMISSIONER W S COLEMAN
DELIVERED	TUESDAY, 8 JANUARY 2002
FILE NO/S.	APPLICATION 1024 OF 2001
CITATION NO.	2002 WAIRC 04564

Result Award varied

Order

Having heard Ms D MacTiernan on behalf of the applicant and Mr L Joyce on behalf of the respondents, and by consent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders—

THAT the Aboriginal Medical Service Employees' Award (No. A26 of 1987) be varied in accordance with the following schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after the 8th day of January 2002.

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

SCHEDULE

1. Clause 6. – Hours of Duty, Overtime and On Call: Delete subclause (4)(b) of this Clause and insert the following in lieu thereof—

(4) (b) An employee shall be paid $2.91 for each hour or part thereof they are on call. Provided that payment in accordance with this paragraph shall not be made with respect to any period for which payment is made in accordance with the overtime provisions of this award when the employee is recalled to work.

2. Clause 18. – Laundry and Uniforms: Delete this Clause and insert the following in lieu thereof—

18. - LAUNDRY AND UNIFORMS

(1) The employer shall provide all uniforms which shall at all times remain the property of the employer. Provided that in lieu of providing uniforms the employer may pay an allowance of $3.65 per week, and the employee shall wear uniforms which conform to the uniform stipulated by the employer with respect to material, colour, pattern and conditions. Where the employer does not require the employee to wear a uniform no allowance shall be payable.

(2) Each employee shall be entitled to all reasonable laundry work at the expense of the employer, but where the employer elects not to launder the uniforms the employee shall be paid an allowance of $1.92 per week.

3. Clause 23. – District Allowance: Delete subclause (6) of this Clause and insert the following in lieu thereof—

(6) The weekly rate of District Allowance payable to employees pursuant to subclause (3) of this clause shall be as follows—

COLUMN I	COLUMN II	COLUMN III	COLUMN IV
DISTRICT	STANDARD RATE	EXCEPTIONS TO STANDARD RATE	RATE
	$ per week	Town or Place	$ per week
6	60.16	Nil	Nil
5	49.18	Fitzroy Crossing	66.17
		Halls Creek	
		Turner River Camp	
		Nullagine	
		Liveringa (Camballin)	61.61
		Marble Bar	
		Wittenoom	
		Karratha	58.02
		Port Hedland	53.84
4	24.75	Warburton Mission	66.75
		Carnarvon	23.31
3	15.64	Meekatharra	24.75
		Mount Magnet	
		Wiluna	
		Laverton	
		Leonora	
		Cue	
2	11.09	Kalgoorlie	3.70
		Boulder	
		Ravensthorpe	14.79
		Norseman	
		Salmon Gums	
		Marvel Loch	
		Esperance	
1	Nil	Nil	Nil

(Note: In accordance with subclause (4) of this clause employees with dependants shall be entitled to double the rate of district allowance shown).

The allowances prescribed in this subclause shall operate from the beginning of the first pay period commencing on or after January 8, 2002.

4. Clause 24. – Outpost – Availability Allowance: Delete subclauses (1) & (7) of this Clause and insert the following in lieu thereof—

(1) Where an employee is transferred to work at any of the locations as prescribed in the groups listed in subclause (8) then the following provisions shall apply—

Group 4 -An allowance of $81.23 per week plus four weeks' special leave per annum.

Group 3 -An allowance of $60.82 per week plus two weeks' special leave per annum.

Group 2 -An allowance of $40.54 per week plus two weeks' special leave per annum.

Group 1 -An allowance of $40.54 per week.

(7) Deleted.

5. Clause 24A. – Bilingual Allowance: Delete subclause (2) of this Clause and insert the following in lieu thereof—

(2) In recognition of the increased effectiveness and productivity of bilingual employees, if an employee is required during the course of employment or as part of his/her duties to apply skills within subclause (1) of this clause, the employee who shall be competently bilingual shall be paid an allowance of—

Level 1 - $1164.61 per annum.

Level 1 is an elementary level. This level of accreditation is appropriate for employees who are capable of using a minimal knowledge of language for the purpose of simple communication.

Level 2 - $2330.46 per annum.

Level 2 represents a level of ability for the ordinary purposes of general business, conversation, reading and writing.

6. Clause 26. – Wages: Delete subclauses (6)(a), (b), (18)(a), (b) & (c) of this Clause and insert the following in lieu thereof—

(6) (a) The ordinary rate of wage prescribed in subclause (1) hereof shall be increased by $11.10 per week when a registered enrolled nurse has obtained a post basic certificate approved by the Nurses Board of Western Australia and he/she is required to use the knowledge gained in that certificate as part of his/her employment.

(b) The ordinary rate of wage prescribed in subclause (1) hereof shall be increased by $8.90 per week when a registered enrolled nurse becomes proficient to do work deemed extraordinary by the employer or the Western Australian Industrial Relations Commission.

(18) Leading hands shall be paid the ordinary wage prescribed for the classification in which they are employed increased by—

(a) $15.95 per week when in charge of not less than three and not more than 10 other employees;

(b) $23.85 per week when in charge of more than 10 and not more than 20 other employees; and

(c) $31.75 per week when in charge of more than 20 employees.

2002 WAIRC 04561

AERATED WATER AND CORDIAL MANUFACTURING INDUSTRY AWARD

No. 10 of 1975

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	AUSTRALIAN LIQUOR, HOSPITALITY AND MISCELLANEOUS WORKERS UNION, WESTERN AUSTRALIAN BRANCH, APPLICANT
	v.
	COCA COLA BOTTLERS & OTHERS, RESPONDENTS
CORAM	CHIEF COMMISSIONER W S COLEMAN
DELIVERED	TUESDAY, 8 JANUARY 2002
FILE NO/S.	APPLICATION 1044 OF 2001
CITATION NO.	2002 WAIRC 04561

Result Award varied

Order

Having heard Ms D MacTiernan on behalf of the applicant and Mr L Joyce on behalf of the respondents, and by consent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders—

THAT the Aerated Water and Cordial Manufacturing Award 1975 (No. 10 of 1975) be varied in accordance with the following schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after the 8th day of January 2002.

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

SCHEDULE

1. Clause 9. – Overtime: Delete subclause (4) of this Clause and insert the following in lieu thereof—

(4) An employee required to work overtime for more than two hours without being notified on the previous day or earlier that he will be so required to work shall be supplied with a meal by the employer or be paid $7.40 for a meal.

If the amount of overtime required to be worked necessitates a second or subsequent meal the employer shall, unless he has notified the employees concerned on the previous day or earlier that such second or subsequent meal will also be required, provide such meals or pay an amount of $5.20 for each such second or subsequent meal.

No such payments need to be made to employees living in the same locality as their workshop who can reasonably return home for such meals.

If an employee in consequence of receiving such notice has provided himself with a meal or meals and is not required to work overtime, or is required to work less overtime than notified, he shall be paid amounts as prescribed in respect of the meals not then required.

2. Clause 10. – Wages: Delete subclauses (1)(b), (2)(c), (4)(a), (b) & (c) of this Clause and insert the following in lieu thereof—

(1)	(b)	Production Employee - Grade 2 Shall mean an employee classified as such who is engaged on work in connection with or incidental to the production and distribution operations of the employer and who in addition to the duties of a Production Employee - Grade 1 may be required to regularly carry out the specific duties listed hereunder. Specific Duties - Grade 2 • Syrup and/or cordial makers mixing recipes or formulae who are not solely responsible for ensuring adherence to quality standards of batches. • Operators of Filling machines. • Operators of labelling, palletising or depalletising, case packing or unpacking, carton or multi packing machines. • Employees engaged on routine line testing.	410.00	88.00	498.00

- Forklift Driver
- Truck Driver

Provided that drivers who are required to collect money during any week or portion of a week as part of their duties and account for it shall be paid $4.10 for such a week in addition to the rate of wage prescribed above.

(2)	(c)	Driver of motor vehicle	387.70	88.00	475.70

Provided that drivers who are required to collect money during any week or portion of a week as part of their duties and account for it shall be paid $3.80 for such week in addition to the rate of wage prescribed above.

(4) Leading Hands—

In addition to the appropriate rate prescribed in this clause a leading hand shall be paid—

		$ Per Week
(a)	If placed in charge of not less than 3 and not more than 10 other employees	19.85
(b)	If placed in charge of more than 10 and not more than 20 other employees	30.60
(c)	If placed in charge of more than 20 other employees	40.65

2002 WAIRC 04593

AGED AND DISABLED PERSONS HOSTELS AWARD, 1987

No. A6 of 1987

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	AUSTRALIAN LIQUOR, HOSPITALITY AND MISCELLANEOUS WORKERS UNION, WESTERN AUSTRALIAN BRANCH, APPLICANT
	v.
	ANGLICAN HOMES FOR THE AGED (INCORPORATED) & OTHERS, RESPONDENTS
CORAM	CHIEF COMMISSIONER W S COLEMAN
DELIVERED	TUESDAY, 8 JANUARY 2002
FILE NO/S.	APPLICATION 1034 OF 2001
CITATION NO.	2002 WAIRC 04593

Result

Order

Having heard Ms D MacTiernan on behalf of the applicant and Mr L Joyce on behalf of the respondents, and by consent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders—

THAT the Aged and Disabled Persons Hostels Award, 1987 (No. A 6 of 1987) be varied in accordance with the following schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after the 8th day of January 2002.

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

SCHEDULE

1. Clause 10. – Overtime: Delete subclause (4) of this Clause and insert the following in lieu thereof—

(4) Where an employee is required to work overtime and such overtime is worked for a period of at least two hours in excess of the required daily hours of work, the employee shall be provided with a meal free of cost, or shall be paid the sum of $7.00 as meal money.

Provided that where the employee has been advised of the requirement to work overtime on the previous day or earlier this subclause shall not apply.

2. Clause 18. – Wages: Delete subclause (3) of this Clause and insert the following in lieu thereof—

(3) The ordinary wages of any employee other than a supervisor or assistant supervisor placed in charge of three or more employees shall be increased by $16.84 per week.

3. Clause 20. – Uniforms and Laundering: Delete subclause (4) of this Clause and insert the following in lieu thereof—

(4) Each employee shall be entitled to all reasonable laundry work at the expense of the employer, but where the employer elects not to launder the uniforms, the employee shall be paid an allowance of $1.25 per week.

4. Clause 27. – Call Allowance: Delete subclause (1)(b) of this Clause and insert the following in lieu thereof—

(1) An employee who is required to be present at the workplace for any period to be available for call shall be—

(b) paid an on call allowance at the rate of $5.60 for each hour spent on call.

5. Clause 33. – Fares and Motor Vehicle Allowances: Delete subclause (2)(c) of this Clause and insert the following in lieu thereof—

(2) (c) A year for the purpose of this clause shall commence on the 1st day of July and end on the 30th day of June next following.

Rates of hire for use of employee's own vehicle on employer's business:

Schedule 1 - Motor Vehicle Allowances

Area and Details	Engine Displacement (in cubic centimetres)		
	Over 2600cc	Over 1600cc -2600cc	1600 cc & Under
	Rate per Kilometre (Cents)		
Metropolitan Area	69.2	60.2	53.2
South West Land Division	71.1	61.7	54.9
North of 23.5° South Latitude	78.0	68.1	60.6
Rest of the State	73.5	63.8	56.6

Schedule 2 - Motor Cycle Allowances

Distance Travelled During a Year on Official Business	Rate per Kilometre ¢/km
All Areas of State	23.9

Motor vehicles with rotary engines are to be included in the 1600 – 2600cc.

2002 WAIRC 04579

ANIMAL WELFARE INDUSTRY AWARD

No. 8 of 1968

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	AUSTRALIAN LIQUOR, HOSPITALITY AND MISCELLANEOUS WORKERS UNION, WESTERN AUSTRALIAN BRANCH, APPLICANT
	v.
	P S ADAMS, ASCOT VETERINARY HOSPITAL & OTHERS, RESPONDENTS
CORAM	CHIEF COMMISSIONER W S COLEMAN
DELIVERED	TUESDAY, 8 JANUARY 2002
FILE NO/S.	APPLICATION 1037 OF 2001
CITATION NO.	2002 WAIRC 04579
Result	Award varied

Order

Having heard Ms D MacTiernan on behalf of the applicant and Mr L Joyce on behalf of the respondents, and by consent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders—

THAT the Animal Welfare Industry Award (No. 8 of 1968) be varied in accordance with the following schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after the 8th day of January 2002.

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

SCHEDULE

1. Clause 9. – Meal Money: Delete subclause (1) of this Clause and insert the following in lieu thereof—

(1) Subject to the provisions of subclause (2) of this clause an employee, required to work overtime for more than two hours, shall be supplied with a meal by the employer or be paid $6.90 for a meal and, if owing to the amount of overtime worked, a second or subsequent meal is required the employee shall be supplied with such meal by the employer or paid $4.70 for each meal so required.

2. Clause 17. – Travelling and Expenses: Delete subclause (2)(c) of this Clause and insert the following in lieu thereof—

(2) (c) A year for the purpose of this clause shall commence on the 1st day of July and end on the 30th day of June next following.

Rates of hire for use of employee's own vehicle on employer's business—

Schedule 1 - Motor Vehicle Allowance

Area and Details	Engine Displacement (in cubic centimetres)		
	Over 2600cc	Over 1600cc-& 2600cc	1600 cc Under
	Rate per kilometre (Cents)		
Metropolitan Area	69.2	60.2	53.2
South West Land Division	71.1	61.7	54.8
North of 23.5^{o} South Latitude	78.0	68.1	60.6
Rest of the State	73.5	63.8	56.6

Schedule 2 - Motor Cycle Allowance

Distance Travelled During a Year on Official Business	Rate ¢/km
Rate per kilometre	23.9

Motor vehicles with rotary engines are to be included in the 1600-2600cc

3. Clause 19. – Travelling and Expenses: Delete subclauses (7) & (8) of this Clause and insert the following in lieu thereof—

(7) An employee placed in charge of three or more other employees shall be paid an amount of $20.35 per week in addition to his/her ordinary rate of pay.

(8) Where an employee is required to carry out the ordinary hours of duty per day in more than one shift an allowance of $1.85 per day shall be paid.

4. Clause 20. – Protective Clothing and Uniforms: Delete subclauses (5) & (6) of this Clause and insert the following in lieu thereof—

(5) In lieu of the provision of uniforms the employer may pay an allowance of $3.65 per week.

(6) Each employee shall be entitled to all reasonable laundry work at the expense of the employer but where the employer elects not to launder the uniforms, the employee shall be paid an allowance of $1.00 per week.

2002 WAIRC 04580

BAG, SACK AND TEXTILE AWARD

No. 3 of 1960

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	AUSTRALIAN LIQUOR, HOSPITALITY AND MISCELLANEOUS WORKERS UNION, WESTERN AUSTRALIAN BRANCH, APPLICANT
	v.
	JOYCE BROS W.A. PTY LTD & OTHERS, RESPONDENTS
CORAM	CHIEF COMMISSIONER W S COLEMAN
DELIVERED	TUESDAY, 8 JANUARY 2002
FILE NO/S.	APPLICATION 1038 OF 2001
CITATION NO.	2002 WAIRC 04580

Result Award varied

Order

Having heard Ms D MacTiernan on behalf of the applicant and Mr L Joyce on behalf of the respondents, and by consent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders—

THAT the Bag Sack and Textile Award (No. 3 of 1960) be varied in accordance with the following schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after the 8th day of January 2002.

(Sgd.) W. S. COLEMAN,
Chief Commissioner.

[L.S.]

SCHEDULE

1. Clause 12. – Meal Money: Delete this Clause and insert the following in lieu thereof—

12. - MEAL MONEY

(1) An employee required to work overtime for more than two hours without being notified on the previous day or earlier that he/she will be so required to work, shall be supplied with a meal by his/her employer or paid $7.75 for a meal.

(2) If the amount of overtime required to be worked necessitates a second or subsequent meal, the employer shall, unless he/she has notified the employees concerned on the previous day or earlier, that such second or subsequent meal will also be required, provide such meals or pay an amount of $6.80 for each second or subsequent meal.

(3) No such payments need be made to employees living in the same locality as their workshops who can reasonably return home for such meals.

(4) If an employee in consequence of receiving such notice has provided himself/herself with a meal or meals and is not required to work overtime, or is required to work less overtime than notified, he/she shall be paid the amount prescribed in respect of the meals not then required.

2. Clause 23. – Extra Rates: Delete this Clause and insert the following in lieu thereof—

23. - EXTRA RATES

Any employee required to repair canvas goods of all descriptions which are of an unusually dirty or offensive nature shall be paid 29 cents per hour in addition to the ordinary rate.

3. Clause 25. – Wages: Delete subclauses (5) & (6) of this Clause and insert the following in lieu thereof—

(5) Leading Hands: Any employee placed by the employer in charge of other employees shall be paid the following rates in addition to their ordinary rate of wage—

	Per Week $
In charge of 1 - 5 employees	20.15
In charge of 6 - 10 employees	30.95
In charge of 11 or more employees	39.75

(6) Tool Allowance—

(a) Where an employer does not provide a tradesperson or an apprentice with the tools ordinarily required by that tradesperson or apprentice in the performance of their work as a tradesperson or apprentice the employer shall pay tool allowance of—

(i) $9.40 per week to such tradesperson; or

(ii) in the case of an apprentice a percentage of $9.85 being the percentage which appears against his/her year of apprenticeship in subclause (4) of this clause.

for the purpose of such tradesperson or apprentice supplying and maintaining tools ordinarily required in the performance of his/her work as a tradesperson or apprentice.

(b) Any tool allowance paid pursuant to paragraph (a) of this subclause shall be included in, and form part of the ordinary weekly wage prescribed in this clause.

(c) An employer shall provide for the use of tradespersons or apprentices all necessary power tools, special purpose tools and precision measuring instruments.

(d) A tradesperson or apprentice shall replace or pay for any tools supplied by their employer if lost through their own negligence.

2002 WAIRC 04556

BAKERS' (COUNTRY) AWARD

No. 18 of 1977

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	AUSTRALIAN LIQUOR, HOSPITALITY AND MISCELLANEOUS WORKERS UNION, WESTERN AUSTRALIAN BRANCH, APPLICANT *v.* ACME BAKERY & OTHERS, RESPONDENTS
CORAM	CHIEF COMMISSIONER W S COLEMAN
DELIVERED	TUESDAY, 8 JANUARY 2002
FILE NO/S.	APPLICATION 1039 OF 2001
CITATION NO.	2002 WAIRC 04556

Result Award varied

Order

Having heard Ms D MacTiernan on behalf of the applicant and Mr L Joyce on behalf of the respondents, and by consent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders—

THAT the Bakers' (Country) Award (No. R 18 of 1977) be varied in accordance with the following schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after the 8th day of January 2002.

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

SCHEDULE

1. Clause 8. – Wages: Delete subclause (1)(d) & (e) of this Clause and insert the following in lieu thereof—

(1) (d) Foreman—

In addition to the total wage prescribed in this subclause for a doughmaker a foreman shall be paid—

		Rate Per Week $
(i)	if placed in charge of less than four other employees	12.75
(ii)	if placed in charge of more than four but less than ten other employees	20.15
(iii)	if placed in charge of more than ten and not more than 20 other employees	30.90
(iv)	if placed in charge of more than 20 other employees	42.10

(e) Disability Allowance—

In addition to the total wage prescribed in this subclause, a disability allowance of $5.40 per week shall be paid to doughmakers and single hand bakers.

2002 WAIRC 04553

BAKERS' (METROPOLITAN) AWARD

No.13 of 1987

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	AUSTRALIAN LIQUOR, HOSPITALITY AND MISCELLANEOUS WORKERS UNION, WESTERN AUSTRALIAN BRANCH, APPLICANT
	v.
	BAKERS INDUSTRY EMPLOYERS ASSOCIATION OF WESTERN AUSTRALIA, RESPONDENT
CORAM	CHIEF COMMISSIONER W S COLEMAN
DELIVERED	TUESDAY, 8 JANUARY 2002
FILE NO.	APPLICATION 1026 OF 2001
CITATION NO.	2002 WAIRC 04553
Result	Award varied

Order

HAVING heard Ms D MacTiernan on behalf of the applicant and Mr L Joyce on behalf of the respondent and by consent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders—

THAT the Bakers' (Metropolitan) Award No. 13 of 1987 be varied in accordance with the following schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after the 8th day of January 2002.

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

SCHEDULE

1. Clause 8. – Wages:

A. Delete paragraph (d) of subclause (1) of this Clause and insert the following in lieu thereof—

(d) Foreperson: In addition to the total wage prescribed in this clause for a doughmaker, a foreperson shall be paid—

		$
(i)	if placed in charge of less than four other employees (per week)	12.55
(ii)	if placed in charge of four but less than ten other employees (per week)	20.05
(iii)	if placed in charge of ten and not more than 20 other employees (per week)	30.80
(iv)	if placed in charge of 20 or more other employees (per week)	39.70

B. Delete paragraph (e) of subclause (1) of this Clause and insert the following in lieu thereof—

(e) Disability Allowance—

In addition to the total wage prescribed in this subclause a disability allowance of $5.25 per week shall be paid to doughmakers and single hand bakers.

2. Clause 9. – Overtime: Delete subclause (5) of this Clause and insert the following in lieu thereof—

(5) (a) An employee required to work overtime for two hours or more shall be supplied with a meal by his/her employer or paid $8.05 for a meal.

(b) If the amount of overtime required to be worked necessitates a second or subsequent meal, the employer shall provide such meal or pay an amount of $5.45 for each such meal.

(c) The provisions of paragraphs (a) and (b) of this subclause do not apply—

(i) in respect of any period of overtime for which the worker has been notified on the previous day or earlier than he will be required, or

(ii) to any worker who lives in the locality in which the place of work is situated in respect of any meal for which he can reasonably go home.

2002 WAIRC 04554

BP REFINERY (KWINANA) (SECURITY OFFICERS') AWARD, 1978

No. R56 of 1978

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	AUSTRALIAN LIQUOR, HOSPITALITY AND MISCELLANEOUS WORKERS UNION, WESTERN AUSTRALIAN BRANCH, APPLICANT
	v.
	BP OIL REFINERY (KWINANA) PTY LTD AND OTHERS, RESPONDENTS
CORAM	CHIEF COMMISSIONER W S COLEMAN
DELIVERED	TUESDAY, 8 JANUARY 2002
FILE NO.	APPLICATION 1027 OF 2001
CITATION NO.	2002 WAIRC 04554

Result Award varied

Order

HAVING heard Ms D MacTiernan on behalf of the applicant and Mr L Joyce on behalf of the respondents and by consent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders—

THAT the BP Refinery (Kwinana) (Security Officers') Award, 1978 (No. 56 of 1978) be varied in accordance with the following schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after the 8th day of January 2002.

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

SCHEDULE

1. Clause 15. – Overtime: Delete subclause (2) of this Clause and insert the following in lieu thereof—

(2) An officer required to work in excess of one hour after completion of his/her ordinary shift, without being notified before the completion of the previous day or shift, shall be paid a meal allowance of $7.15. A further meal allowance of $4.85 shall be paid on the completion of each additional four hours' overtime worked.

2. Clause 20. – Wages: Delete subclause (4) of this Clause and insert the following in lieu thereof—

(4) Leading Hands:—

Any officer placed in charge of other officers shall be paid in addition to the appropriate wage prescribed, the following—

		$ Per Week
(a)	if placed in charge of not less than 3 and not more than 10 other officers	20.10
(b)	if placed in charge of not less than 10 and not more than 20 other officers	30.80
(c)	if placed in charge of more than 20 other officers	39.65

2002 WAIRC 04552

BRUSHMAKERS' AWARD

No 30 of 1959

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	AUSTRALIAN LIQUOR, HOSPITALITY AND MISCELLANEOUS WORKERS UNION, WESTERN AUSTRALIAN BRANCH, APPLICANT
	v.
	E.D. OATES BRUSHWARE LTD, RESPONDENT
CORAM	CHIEF COMMISSIONER W S COLEMAN
DELIVERED	TUESDAY, 8 JANUARY 2002
FILE NO.	APPLICATION 1025 OF 2001
CITATION NO.	2002 WAIRC 04552

Result Award varied

Order

HAVING heard Ms D MacTiernan on behalf of the applicant and Mr L Joyce on behalf of the respondent and by consent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders—

THAT the Brushmakers' Award No. 30 of 1959 be varied in accordance with the following schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after the 8th day of January 2002.

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

SCHEDULE

1. Clause 7. – Meal Money: Delete this Clause and insert the following in lieu thereof—

(1) An employee required to work overtime for more than two hours, without being notified on the previous day or earlier that he/she will be so required to work, shall be supplied with a meal by the employer or be paid $7.85

(2) If the amount of overtime required to be worked necessitates a second or subsequent meal, the employer shall, unless he has notified the employees concerned on the previous day or earlier that such second or subsequent meal will also be required, provide such meals or pay an amount of $7.85 for each such second or subsequent meal.

(3) No such payments need be made to employees living in the same locality as their workshops who can reasonably return home for such meals.

(4) If an employee in consequence of receiving such notice has provided himself/herself with a meal or meals, and is not required to work overtime, or is required to work less overtime than notified, he/she shall be paid the amounts above prescribed.

2. Clause 9. – Leading Hands: Delete this Clause and insert the following in lieu thereof—

An employee appointed by the employer as a leading hand shall be paid in addition to the prescribed rates—

		Per Week $
(1)	When placed in charge of not less than two nor more than four other employees	22.60
(2)	When placed in charge of five or more other employees	28.00

2002 WAIRC 04751

BUILDING AND ENGINEERING TRADES (NICKEL MINING AND PROCESSING) AWARD 1968

No. 50 of 1968

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	COMMUNICATIONS, ELECTRICAL, ELECTRONIC, ENERGY, INFORMATION, POSTAL, PLUMBING, AND ALLIED WORKERS UNION OF AUSTRALIA, ENGINEERING & ELECTRICAL DIVISION, WA BRANCH, APPLICANT
	v.
	WESTERN MINING CORPORATION RESOURCES LIMITED, RESPONDENT
CORAM	COMMISSIONER S J KENNER
DELIVERED	WEDNESDAY, 6 FEBRUARY 2002
FILE NO/S.	APPLICATION 1748 OF 2001
CITATION NO.	2002 WAIRC 04751

Result	Award varied.
Representation	
Applicant	Ms C Bowden and with her Mr C Young on behalf of the CEPU & AFMEPKIU Ms L Dowden on behalf of the BLPPU and the CMETU
Respondent	Ms K Smallacombe as agent

Order

HAVING heard Ms C Bowden and with her Mr C Young on behalf of the applicant and on behalf of the Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers, Western Australian Branch, Ms L Dowden on behalf of the Australian Builders' Labourers, Painters and Plasterers Union of Workers, WA and the Construction, Mining, Energy Timberyards, Sawmills and Woodworkers Union of Australia, Western Australian Branch and Ms K Smallacombe as agent on behalf of the respondent and by consent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders—

THAT the Building and Engineering Trades (Nickel Mining and Processing) Award 1968 be varied in accordance with the following Schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after 11 December 2001.

(Sgd.) S. J. KENNER,
[L.S.] Commissioner.

SCHEDULE

1. Clause 8 – Overtime (Other Than Continuous Shift Employees): Delete subclause (6) of this clause and insert the following in lieu thereof—

(6) When an employee, without being notified on the previous day, is required to continue working after the usual knock-off time for more than one hour, such employee shall be provided with a suitable meal by the employer or be paid **$6.68** in lieu thereof.

2. Clause 9 – Continuous Shift Workers: Delete subclause (7) of this clause and insert the following in lieu thereof—

(7) When an employee, without being notified on the previous day, is required to continue working after the usual knock-off time for more than one hour, such employee shall be provided with a suitable meal by the employer or be paid **$6.68** in lieu thereof.

3. Clause 11 – Shift Work: Delete subclause (2) of this clause and insert the following in lieu thereof—

(2) A shift employee shall, in addition to their ordinary rate, be paid per shift of eight hours at the rate of **$9.63** when on afternoon or night shift.

Liberty is reserved to either party to apply to amend this subclause in the event of any variation in shift loadings generally.

4. Clause 25 – First Aid: Delete subclause (4) of this clause and insert the following in lieu thereof—

(4) Any first aid person appointed by the employer to perform first aid duties shall be paid an allowance of **$1.23** per shift in addition to their ordinary rate of pay.

5. Clause 30 – Special Rates and Provisions: Delete this clause and insert the following in lieu thereof—

(1) **Engineering Trades**—

(a) **Height Money** - Tradespersons and welders engaged on the surface in the erection, repair and/or maintenance of steel frame buildings, smoke stacks, bridges or similar structures at a height of 15.5 metres or more above the nearest horizontal plane shall be paid at the rate of **$1.07** per shift extra.

(b) (i) Goggles, glasses and gloves or other efficient substitutes therefore shall be available for the personal use of any employee engaged in welding.

(ii) Every employee shall sign an acknowledgement on receipt thereof and on leaving employment shall return same to the employer.

(iii) During the time the same are on issue to the employee, he/she shall be responsible for any loss or damage thereto, fair wear and tear attributable to ordinary use excepted.

(iv) No employee shall lend another employee the goggles, glasses or gloves or substitutes issued to such first mentioned employee, and if the same are lent, both the lender and the borrower shall be deemed guilty of wilful misconduct.

(v) Before goggles, glasses or gloves or any substitutes which have been used by a employee are re-issued by the employer to another employee, they shall be effectively sterilised.

(c) **Dirt Money**—

Employees employed on dirty work or in wet places, shall be paid **23 cents** per hour extra.

(d) Employees in very wet places shall be provided with oilskin coats and rubber boots.

(e) **Heat Money**—

(i) Employees employed for more than one hour in the shade where the artificial temperature is between 46° and 55° Celsius shall be paid **23 cents** per hour extra.

(ii) Employees employed for more than one hour where the artificial temperature exceeds 55° Celsius shall be paid **27 cents** per hour extra. Where work continues for more than two hours in temperatures exceeding 55° Celsius, employees shall be entitled to twenty minutes' rest after every two hours, without deduction of pay.

(f) **Confined Space—**

Employees employed in confined spaces as hereinafter defined, shall be paid **29 cents** per hours extra. "Confined space" means a working space the dimensions of which necessitate a employee working continuously in a stooped or otherwise cramped position, or without proper ventilation or where confinement within a limited space is productive of unusual discomfort.

(g) **Fumes—**

Employees engaged on repair work to the roasters, under circumstances subjecting them to serious inconvenience from fumes, shall be entitled to payment of **28 cents** per hour extra, with a minimum of **31 cents** while so engaged.

(h) **Explosive Powered Tools—**

A employee required to use an explosive powered tool shall be paid **13 cents** per hour extra.

(i) **Special Rates Not Cumulative—**

Where more than one of the disabilities entitling a employee to extra rates exists on the same job, the employer shall be bound to pay only one rate, namely - the highest for the disabilities so prevailing. Provided that this subclause shall not apply to Confined Space, Dirt Money, Height Money, or Heat Money, the rates for which are cumulative.

(i) An Electrician - Special Class, an Electrical Fitter and/or Armature Winder or an Electrical Installer who holds and in the course of their employment may be required to use a current "A" grade or "B" grade licence issued pursuant to the relevant regulation in force on the 28th day of February, 1978 under the Electricity Act, 1945 shall be paid an allowance of **$14.64** per week.

(2) **Building Trades—**

(a) **Wet and Dusty Places—**

A employee employed in places where the atmosphere is excessively dust laden or where water is continuously dripping so that the clothing or feet become wet shall be paid **27 cents** per hour in addition to the prescribed rate.

(b) **Excessively Dirty Work—**

A employee employed on excessively dirty work which is likely to render the employee or his/her clothes dirtier than on the normal run of work shall be paid **25 cents** per hour in addition to the prescribed rate, but with a minimum payment as for four hours in any one day.

(c) **Winder Drums and Head Frame Wheels—**

A employee engaged in work on winder drums or head frame wheels shall be paid **27 cents** per hour in addition to the prescribed rate, but with a minimum payment as for four hours in any one day.

(d) **S.O.2. Towers—**

A employee engaged on repair work to S.O.2 Towers shall be paid **27 cents** per hour in addition to the prescribed rate, but with a minimum payment as for four hours in any one day.

(e) **Boat Type and Swinging Scaffold—**

A employee employed on a boat type or swinging scaffold shall be paid **27 cents** per hour in addition to the prescribed rate. "Swinging Scaffold" means any scaffold suspended from the ground and which by reason of the operations carried out on it or by reason of wind force or vibration is likely to swing or sway. No employer shall permit an apprentice who has served less than two years of apprenticeship to work on a boat type or swinging scaffold and no such apprentice shall work on such a scaffold.

(f) **Heat Money—**

(i) A employee required to work for more than one hour continuously in the shade in places where the temperature is raised by artificial means to between 46.1° Celsius and 51.6° Celsius shall be paid **27 cents** per hour in addition to the prescribed rate.

(ii) (aa) A employee required to work for more than one hour continuously in the shade in places where the temperature is raised by artificial means to exceed 51.6° Celsius shall be paid **33 cents** per hour in addition to the prescribed rate.

(bb) Where work continues for more than two hours in that temperature employees shall be entitled to twenty minutes rest every two hours without deduction of pay.

(g) **Boiler Flue or Roaster Work—**

Where bricklayers are employed for more than one hour inside the gas or water spaces of any boiler, flue or roaster, then six hours shall constitute a shift's work, provided that this subclause shall not apply in addition to the provisions of subclause (f) of this Clause.

(h) **Grinding Time—**

The employer shall provide sandstone grindstones. Employees shall be allowed to maintain their tool in proper working condition in working hours.

When an employee who has been employed for five consecutive working days is discharged, he/she shall be allowed two hours for grinding tools or be paid two hours' pay in lieu thereof.

(i) (i) **Lead Paint Surfaces—**

No surface painted with Lead paint shall be rubbed down or scraped by a dry process.

(ii) **Width of Brushes—**

All paint brushes shall not exceed 127mm in width and no kalsomine brush shall be more than 175mm in width.

(iii) **Meals not to be taken in Paint Shop—**

No employee shall be permitted to have a meal in any paint shop or place where paint is stored or used.

(j) **Spray Painting (Painters)—**

(i) Lead paint shall not be applied by a spray to the interior of any building.

(ii) All employees (including apprentices) applying paint by spraying shall be provided with full overalls and head covering and respirators by the employer.

(iii) Where from the nature of the paint or substance used in spraying, a respirator would be of little or no practical use in preventing the absorption of fumes or materials from substances used by a employee in spray painting, the employee shall be paid a special allowance of **71 cents** per day.

(k) **Water and Soap—**

Water and soap shall be provided in each shop or on each job by the employer for the use of painters.

(l) **Electrical Sanding Machines—**

The use of electrical sanding machines for sanding down paint work shall be governed by the following provisions:-

(i) The weight of each such machine shall not exceed 5.9kgs.

(ii) Every employer operating any such machine shall ensure that each such machine together with all electrical leads and associated equipment is kept in a safe condition and shall, if requested so to do by any employee, but not more often than once in any four weeks, cause the same to be inspected by a licensed electrical employee under the Electricity Act and the Regulations made thereunder.

(iii) Employers shall provide and supply respirators of a suitable type to each employee and shall maintain same in an effective and cleanly state at all times. Where respirators are used by more than one employee, each such respirator shall be sterilised and a new pad inserted after use by each such employee.

(iv) Employers shall also provide and supply goggles of a suitable type: Provided that goggles with celluloid lenses shall not be regarded as suitable.

(v) All employees shall use such protective equipment when using electrical sanding machines of any type.

(m) (i) **Carpenters and Joiners—**

A secure and weatherproof place shall be provided by the employer where carpenters' and joiners' tools may be locked up apart from the employer's plant and material.

(ii) **Other Employees—**

The employer shall, where practicable, provide a place on each job for the safekeeping of the employees' tools when not in use.

(n) **Attendants on Ladders—**

No employee shall work on a ladder at a height of over 7.6 metres from the ground when such ladder is standing in any street, way or lane, where traffic is passing to and fro without an assistant on the ground.

(o) **Plumbers on Sewerage Work—**

Plumbers employed on work involving the opening up of house drains or waste pipes for the purpose of cleaning blockages or for any other purpose, or on work involving the cleaning of septic tanks or dry wells, shall be paid **$1.29** per day in addition to the prescribed rate.

(p) All work made up by plumbers shall be welded by those employees.

(q) **Change Room—**

The employer shall provide on each job a proper change room where the employee may change his/her clothes, and such place shall not be used for any other purpose.

(r) **Boiling Water—**

The employer shall provide boiling water on each job for the use of the employees.

(s) (i) The employer shall supply a safety helmet for each employee requesting one on any job where, pursuant to the regulations made under the Construction Safety Act, 1972 a employee is required to wear such helmet.

(ii) Any helmet so supplied shall remain the property of the employer and during the time it is on issue, the employee shall be responsible for any loss or damage thereto, fair wear and tear attributable to ordinary use excepted.

(t) **Toxic Substances—**

(i) An employee required to use toxic substances or materials of a like nature shall be informed by the employer of the health hazards involved and instructed in the correct and necessary safeguards which must be observed in the use of such materials.

(ii) An employee using such materials will be provided with and shall use all safeguards as are required by the appropriate Government Authority or in the absence of such requirement such safeguards as are determined by a competent authority or person chosen by the union and the employer.

(iii) An employee using toxic substances or materials of a like nature shall be paid **33 cents** per hour extra. Employees working in close proximity to employees so engaged shall be paid **12 cents** per hour extra.

(iv) For the purpose of this subclause all materials which include or require the addition of a catalyst hardener and reactive additives or two pack catalyst system shall be deemed to be materials of a like nature.

(u) **Special Rates Not Cumulative**—

Where more than one of the disabilities entitling an employee to extra rates exists on the same job, the employer shall be bound to pay only one rate, namely - the highest so prevailing. Provided that this subclause shall not apply to excessively dirty work or heat money, the rates for which are cumulative.

(3) Any dispute which may arise between the parties in relation to the application of any of the foregoing special rates and provisions may be determined by the Board of Reference.

6. Clause 44 – Rates of Pay and Classification Definitions: Delete subclause (5) of this clause and insert the following in lieu thereof—

(5) **Tool Allowance**

(a) Bricklayers, Carpenters and Joiners, Plumbers or Painters shall be paid the following tool allowance:

	$
Bricklayers	1.46
Carpenter and Joiners	2.71
Plumbers	2.03
Painters	0.62

This allowance includes an amount of **five cents** for the purpose of enabling employees to insure their tools against loss or damage by theft or fire and shall not be paid where the employer supplies employees with all necessary tools.

An employee in receipt of a tool allowance shall provide all necessary tools kept in suitable condition for the performances of the work.

An employee who fails to provide all such tools when required shall be guilty of a breach of this award and shall not be entitled to the tool allowance prescribed above until they comply with this provision.

(b) Metal Trades Employees—

Notwithstanding the previous provisions of this clause, a metal tradesperson, including an apprentice, to whom the employer does not supply all necessary tools, shall be paid an allowance of **$10.14** per week.

A "tradesperson", for the purpose of this clause, shall be deemed to be an employee who is paid an equal rate of wage or higher than for the classification "Boilermaker".

7. Clause 44 – Rates of Pay and Classification Definitions: Delete subclause (6) of this clause and insert the following in lieu thereof—

(6) **Leading Hands**

In addition to the appropriate wage prescribed in this clause, a Leading Hand shall be paid -

		$
(a)	If placed in charge of not less than 3 and not more than 10 other employees	17.35
(b)	If place in charge of more than 10 and not more than 20 other employees	26.03
(c)	If place in charge of more than 20 other employees	33.91

8. Clause 44 – Rates of Pay and Classification Definitions: Delete subclause (7) of this clause and insert the following in lieu thereof—

(7) **Disabilities Allowance—**

An employee employed outside of his/her shop on construction work shall for the time so employed be paid a disabilities allowance at the rate of **$1.20** per week in addition to the prescribed rate.

9. Clause 44 – Rates of Pay and Classification Definitions: Delete subclause (8) of this clause and insert the following in lieu thereof—

(8) **Industry Allowance—**

(a) Each employee shall be paid an allowance of **$79.99** per week.

(b) The allowance recognises, and is in payment for, all aspects of work in the industry, including the location and nature of individual operations within it.

(c) The allowance shall be paid in addition to the rate of wage set out in this clause and shall be paid for all purposes of the award.

10. First Schedule – District Allowances: Delete this clause and insert the following in lieu thereof—

FIRST SCHEDULE - DISTRICT ALLOWANCES

Payment shall be paid in accordance with the provision of this schedule so far as applicable.

(1) In addition to the wages prescribed in Clause 5. - Rates of Wages of this Award, the following allowances shall be paid for five days per week to employees employed in the districts which are hereinafter respectively described, with the exception of districts contained therein which are situated within a radius of ten miles of Kalgoorlie, Coolgardie and Southern Cross, viz:-

(a) **First District**—

Lying south of Kalgoorlie and comprised within lines starting from Kalgoorlie, then W.S.W. to Woolgangie, thence S.E. to Dundas, thence N.E. to a point ten miles east of Karonie on the Trans-Australia line, and thence back to Kalgoorlie; at the rate of **63 cents** per week extra for those mines within ten miles of the railway and **96 cents** per week for those outside.

(b) **Second District**—

Starting from Kalgoorlie W.S.W. to Woolgangie, thence N.N.W. to the intersection of the 120E. meridian with the 30S parallel of latitude, thence N.E. by E. to Kookynie, thence back to the point ten

miles east of Kookynie on the Trans-Australia line, and thence back to Kalgoorlie; at the rate of **84 cents** per week extra for those mines within ten miles of the railways and **$1.08** per week for those outside.

(c) **Third District**—

Starting from and including Kookynie, then N. by W. to Kurrajong, thence N.E. to Stone's Soak, thence S.E. to and including Burtville, thence S.W. through Pindinnie to Kookynie; at the rate of **84 cents** per week extra for those mines within ten miles of the railways and **$1.08** per week for those outside.

(d) **Fourth District**—

Surrounding Southern Cross within a radius of thirty miles; for those mines outside a radius of ten miles from Southern Cross, including Westonia and Bullfinch, at the rate of **31 cents** per week.

(e) **Fifth District**—

Comprising all mines not specifically defined in the foregoing boundaries but within the area comprised within the 24th and 26th parallels of latitude; at the rate of **$1.44** per week.

(2) Notwithstanding anything herein contained, the following allowances shall be paid in the districts or mines mentioned hereunder:-

	Per Week $
Ora Banda and Waverley Districts	0.84
Yalgoo District	0.84
Meekatharra, Mt. Magnet and Cue Districts	1.03
Wiluna District	1.20
Youanmi District	1.20
Cox's Find Goldmine	1.08
Corduroy Goldmine and mines within ten miles' radius therefrom	1.44
Lallah Rooke Goldmine, Halley's Comet Goldmine, Prophecy Goldmine and mines within ten miles' radius therefrom	1.80
Mayfield District	0.84
Evanston District	1.20

With regard to the Meekatharra, Mt. Magnet, Cue, Yalgoo and Wiluna Districts, an additional allowance at the rate of **19 cents** per week shall be paid to employees employed at mines situated five miles from a Government railway.

With regard to the Big Bell Goldmine, the Triton Goldmine and Cox's Find Goldmine, the sum of **19 cents** per week may be deducted from the district allowance which would otherwise be paid.

(3) In the case of any mine or district within the area to which this Award applies which is not dealt with under the provisions of this schedule, the Union may apply to the Western Australian Industrial Commission at any time for the purpose of having an allowance prescribed, upon serving upon the employer concerned fourteen days' notice thereof prior to the date of such application the service of such notice shall be made pursuant to the provisions relating thereto prescribed by the regulations under the Industrial Arbitration Act, 1979.

2002 WAIRC 04595

BURSWOOD HOTEL (MAINTENANCE EMPLOYEES') AWARD, 1990

No. A6 of 1989

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	COMMUNICATIONS, ELECTRICAL, ELECTRONIC, ENERGY, INFORMATION, POSTAL, PLUMBING, AND ALLIED WORKERS UNION OF AUSTRALIA, ENGINEERING & ELECTRICAL DIVISION, WA BRANCH, APPLICANT
	v.
	BURSWOOD PTY LTD AND OTHERS, RESPONDENTS
CORAM	COMMISSIONER S WOOD
DELIVERED	THURSDAY, 3 JANUARY 2002
FILE NO.	APPLICATION 1893 OF 2001
CITATION NO.	2002 WAIRC 04595

Result	Allowances Varied
Representation	
Applicant	Ms C Bowden
Respondent	Mr P Robertson on behalf of Burswood Pty Ltd Ms J Harrison on behalf of the Construction, Mining, Energy, Timberyards, Sawmills and Woodworkers' Union of Australia, Western Australian Branch and the Western Australian Builders Labourers, Painters & Plasterers Union of Workers, Western Australian Branch

Order

HAVING heard Ms C Bowden on behalf of the Applicant and Mr P Robertson on behalf of Burswood Pty Ltd and Ms J Harrison on behalf of the Construction, Mining, Energy, Timberyards, Sawmills and Woodworkers' Union of Australia, Western Australian Branch and the Western Australian Builders Labourers, Painters & Plasterers Union of Workers, Western Australian Branch, and by consent, I the undersigned, pursuant to the powers conferred by the Industrial Relations Act 1979 do hereby order—

THAT the Burswood Hotel (Maintenance Employees') Award, 1990 as amended be further varied in accordance with the following Schedule with effect from the beginning of the first pay period commencing on or after 3 January 2002.

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

SCHEDULE

1. Clause 12. – Overtime: Delete paragraph (f) of subclause (3) of this clause and insert in lieu thereof the following—

f) An employee required to work overtime for more than two hours shall be supplied with a meal by the Company or if no meal is supplied be paid $8.00 for a meal, and if owing to the amount of overtime worked, a second subsequent meal is required they shall be supplied with each such meal by the Company or be paid $5.42 for each meal so required.

2. Clause 14. – Wage Rates: Delete subclauses (2), (3), (4), (7), (8), (9), (10) of this clause and insert in lieu thereof the following—

(2) Nominee

A licensed electrical mechanic or fitter who acts as nominee for an electrical contractor shall be paid an allowance of $47.02 per week.

(3) In addition to the weekly wage rate provided by subclause (1) of this clause an adult employee shall be paid—

		$
(a)	After the completion of one year's continuous service	13.94
(b)	After the completion of two year's service	28.23

Such payment shall be deemed part of the weekly wage rate for all purposes of the award.

(4) In addition to the weekly wage rate provided by subclause (1) of this clause a leading hand shall be paid—

		$
(a)	If placed in charge of not less than three and not more than ten other employees	19.61
(b)	If placed in charge of more than ten and not more than 20 other employees	30.01
(c)	If placed in charge of more than 20 other employees	38.63

(7) An employee holding either a Third Year First Aid Medallion of the St. John Ambulance Association or a "C" Standard Senior First Aid Certificate of the Australian Red Cross Society, appointed by the Company to perform first aid duties, shall be paid $7.56 per week in addition to their ordinary rate.

(8) An employee who holds, and in the course of their employment is required to use, a current "A" Grade or "B" Grade, or "L" Grade or "R" Grade licence issued pursuant to the relevant regulation in force on the 28th day of February 1978 under the Electricity Act 1945 shall be paid an allowance of $15.60 per week.

(9) An employee, who is in possession of, and is requested by the Company to use, a plumber's licence issued by the Metropolitan Water Supply, Sewerage and Drainage Board, shall, in each week so requested, be paid an allowance of $28.83 per week.

(10) A plumber holding registration in accordance with the Metropolitan Water Supply, Sewerage and Drainage Act shall be paid $19.87 per week in addition to their ordinary rate.

2002 WAIRC 04555

BURSWOOD ISLAND RESORT EMPLOYEES AWARD

Nos. A23 & A25 of 1985

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	AUSTRALIAN LIQUOR, HOSPITALITY AND MISCELLANEOUS WORKERS UNION, WESTERN AUSTRALIAN BRANCH, APPLICANT
	v.
	BURSWOOD RESORT (MANAGEMENT) LTD, RESPONDENT
CORAM	CHIEF COMMISSIONER W S COLEMAN
DELIVERED	TUESDAY, 8 JANUARY 2002
FILE NO.	APPLICATION 1031 OF 2001
CITATION NO.	2002 WAIRC 04555
Result	Award varied

Order

HAVING heard Ms D MacTiernan on behalf of the applicant and Mr L Joyce on behalf of the respondent and by consent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders—

THAT the Burswood Island Resort Employees Award (No. A 23 of 1985 and A 25 of 1985) be varied in accordance with the following schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after the 8th day of January 2002.

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

———

SCHEDULE

1. Clause 5. – Wages: Delete subclause (1) of this Clause and insert the following in lieu thereof—

(1) The following tables as listed hereunder shall be the minimum fortnightly rate of wage payable to employees covered by the terms and conditions of the Burswood Island Resort Employees Award—

The rates of pay in this award include arbitrated safety net adjustments available since December 1993, under the Arbitrated Safety Net Adjustment Principle.

These arbitrated safety net adjustments may be offset against any equivalent amount in the rate of pay received by employees since 1 November 1991 above the rate prescribed in the Award, except where such absorption is contrary to the terms of an industrial agreement.

Increases in rates of pay otherwise made under the State Wage Case Principles, excepting those resulting from enterprise agreements, are not to be used to offset arbitrated safety net adjustments.

		Per Fortnight	ASNA	TOTAL
		$	$	$
A.	**FOOD AND BEVERAGE**			
1.	Bar Attendant (Grade 1)	676.30	176.00	852.30
2.	Bar Attendant (Grade 2)	689.20	176.00	865.20
3.	Head Bar Attendant	733.90	176.00	909.90
4.	Cellarperson	692.90	176.00	868.90
5.	Waiter/Waitress	661.70	176.00	837.70
6.	Steward/Stewardess	661.70	176.00	837.70
7.	Head Waiter/Waitress	718.30	176.00	894.30
8.	Head Steward/Stewardess	718.30	176.00	894.30
9.	Snack Bar Attendant	661.70	176.00	837.70
10.	Bar Useful	655.60	176.00	831.60
11.	Host/Hostess	718.30	176.00	894.30
B.	**HOUSE**			
1.	Housekeeper	733.90	176.00	909.90
2.	Porter	655.60	176.00	831.60
3.	Room Attendant	655.60	176.00	831.60
4.	Timekeeper	676.30	176.00	852.30
C.	**KITCHEN**			
1.	Chef	771.00	176.00	947.00
2.	Qualified Cook	718.30	176.00	894.30
3.	Cook Employed Alone	677.50	176.00	853.50
4.	Breakfast and/or Other Cook	670.60	176.00	846.60
5.	Kitchenhand	655.60	176.00	831.60
6.	Qualified Butcher	718.30	176.00	894.30
7.	Other Butcher	694.10	176.00	870.10
D.	**MISCELLANEOUS**			
1.	Cafeteria Attendant - (Grade 1)	661.70	176.00	837.70
2.	Cafeteria Attendant - (Grade 2)	670.60	176.00	846.60
3.	Commissionaire	655.60	176.00	831.60
4.	Valet/Carparking Attendant	655.60	176.00	831.60
5.	Storeperson	670.60	176.00	846.60
6.	Laundry Attendant (Grade 1)	655.60	176.00	831.60
7.	Laundry Attendant (Grade 2)	672.00	176.00	848.00
8.	Cleaner	655.60	176.00	831.60
9.	Gardener	655.60	176.00	831.60
10.	Qualified Gardener	795.20	176.00	971.20
11.	Groundsperson	655.60	176.00	831.60
12.	General Hand	655.60	176.00	831.60

		Per Fortnight	ASNA	TOTAL
		$	$	$
13.	Seamstress	722.60	176.00	898.60
14.	Wardrobe Attendant	655.60	176.00	831.60
15.	Guest Services Attendant	718.30	176.00	894.30
16.	Cashier	676.30	176.00	852.30

(a) A Waiter or Waitress who has completed an accepted course recognised by the Western Australian Tourism Industry Training Committee shall in addition to his/her ordinary time rate of pay be paid a fortnightly allowance of $13.57.

(b) In-Charge Rates—

An employee who is appointed and placed in charge of other employees shall be paid the following rates in addition to his/her ordinary time rate of pay—

		Per Fortnight
		$
(i)	if placed in charge of less than six employees	21.66
(ii)	if placed in charge of six to ten employees	29.13
(iii)	if placed in charge of eleven to twenty employees	33.74
(iv)	if placed in charge of more than twenty employees	56.15

Provided that these additional rates shall not be payable to any employee employed in the classifications of Chef, Housekeeper, Head Waiter, Head Waitress, Head Steward, Head Stewardess, Head Bar Attendant, and Casino Operations Employees.

(c) Service Payments—

In addition to the wage rates prescribed in sections A, B, C and D of this subclause, all employees (other than Apprentices) employed on a full time basis, shall be paid Service Payments at the following rates—

	Per Fortnight
	$
After 1 year of service	16.81
After 2 years of service	25.77
After 3 years and subsequent years of service	34.49

E. <u>CASINO OPERATIONS</u>

		Per Fortnight	ASNA	TOTAL
		$	$	$
1.	Croupier Dealer			
	On commencement	689.00	176.00	865.00
	On completion of 3 months' service	899.30	176.00	1075.30
	On completion of 12 months' service	918.40	180.00	1098.40
	On completion of 18 months' service	937.70	180.00	1117.70
	On completion of 24 months' service and thereafter	956.90	180.00	1136.90
2.	Inspector			
	First 12 months' service	962.30	180.00	1142.30
	On completion of 12 months' service	981.30	180.00	1161.30
	On completion of 18 months' service	1000.80	176.00	1176.80
	On completion of 24 months' service and thereafter	1020.30	176.00	1196.30
3.	Keno Runner	689.00	176.00	865.00
4.	Keno Operator			
	On commencement	689.00	176.00	865.00
	On completion of 3 months' service	765.30	176.00	941.30
	On completion of 12 months' service	800.50	176.00	976.50
	On completion of 24 months' service and thereafter	833.50	176.00	1009.50
5.	Video Attendant			
	On commencement	689.00	176.00	865.00
	On completion of 3 months' service	765.30	176.00	941.30
	On completion of 12 months' service	800.50	176.00	976.50
	On completion of 24 months' service and thereafter	833.50	176.00	1009.50
6.	Count Team			
	On commencement	689.00	176.00	865.00
	On completion of 3 months' service	765.30	176.00	941.30

		Per Fortnight	ASNA	TOTAL
		$	$	$
	On completion of 12 months' service	800.50	176.00	976.50
	On completion of 24 months' service and thereafter	833.50	176.00	1009.50
7.	Change Booth Cashier			
	On commencement	689.00	176.00	865.00
	On completion of 3 months' service	765.30	176.00	941.30
	On completion of 12 months' service	800.50	176.00	976.50
	On completion of 24 months' service and thereafter	833.50	176.00	1009.50
8.	Main Cage Cashier			
	First 12 months' service	943.80	180.00	1123.80
	On completion of 12 months' service	962.30	180.00	1142.30
	On completion of 18 months' service	981.30	180.00	1161.30
	On completion of 24 months' service and thereafter	1020.30	176.00	1196.30
9.	Camera Surveillance Operator			
	First 12 months' service	943.80	180.00	1123.80
	On completion of 12 months' service	962.30	180.00	1142.30
	On completion of 18 months' service	981.30	180.00	1161.30
	On completion of 24 months' service and thereafter	1020.30	176.00	1196.30
10.	Security Officer			
	First 3 months' service	767.10	176.00	943.10
	On completion of 3 months' service	807.50	176.00	983.50
	On completion of 12 months' service	850.10	176.00	1026.10
	On completion of 24 months' service and thereafter	918.40	180.00	1098.40

Provided that an employee appointed as Senior Security Officer shall, in addition to the appropriate Security Officer's rate receive an additional payment of $56.15 per fortnight which shall be paid for all purposes of the Award.

Notwithstanding the provisions contained in Section E of this subclause, employees engaged on a casual contract of service in accordance with the provisions of Clause 14. - Casual Employees of this Award in the classifications of Croupier/Dealer, Keno Operator/Runner, Video Attendant, Count Team, Change Booth Cashier and Security Officer shall perform at least 494 hours of work prior to moving from his/her commencement of employment wage rate to his/her next wage increment. Provided that where 494 hours has not been worked at the completion of six months' service, the employee shall be entitled at that time to the next wage increment. Provided further that where 494 hours has been worked prior to the completion of three months' service, the employee shall not be entitled to the next wage increment until the completion of three months' service.

2. Clause 12. – Additional Rates for Ordinary Hours: Delete of this Clause and insert the following in lieu thereof—

(1) An employee who is rostered to work any of his/her ordinary hours prior to 7.00am or after 7.00pm, Monday to Friday, both inclusive shall, in addition to his/her ordinary time rate of pay be entitled to an allowance of $1.25 per hour for each such hour completed or part thereof, with a minimum payment of $2.49 per shift.

(2) (a) All ordinary hours worked between midnight Friday and midnight Saturday shall be paid at the rate of time and one half.

(b) All ordinary hours worked between midnight Saturday and midnight Sunday shall be paid at the rate of time and three quarters, provided that those employees employed in the classifications of Bar Attendant, Head Bar Attendant and Casino Operations shall be paid at the rate of double time.

(c) An employee who is required to work any of his/her ordinary hours on any day in more than one period, other than for meal breaks as prescribed in Clause 16. – Meal and Rest Breaks of this Award, shall be paid an allowance of $2.09 per day, for such broken work period worked.

(d) Where a Cleaner is rostered to perform normal duties within the organisation Casino rest-room facilities, and such duties include work of an unusually unsavoury or unhygienic nature, such employee shall, in addition to his/her ordinary time rate of pay be paid a flat allowance of $6.72 per shift.

3. Clause 15. – Part-Time Employees: Delete sub paragraph (ii) of paragraph (a) of subclause (2) of this Clause and insert the following in lieu thereof—

(ii) A part time employee who is required to work any of his/her ordinary hours prior to 7.00am or after 7.00pm, Monday to Friday, both inclusive shall, in addition to his/her ordinary time rate of pay be entitled to an allowance of $1.25 per hour for each such hour completed or part thereof, with a minimum payment of $2.49 per shift.

4. Clause 17. – Meal Money: Delete subclause (2) of this Clause and insert the following in lieu thereof—

(2) Any employee who is required to work overtime for two hours or more shall be supplied with a meal free of charge to be consumed in the employee cafeteria. Provided that where the Company does not supply such a meal the employee shall be paid $7.08 meal money.

5. Clause 24. – Bar Work: Delete this Clause and insert the following in lieu thereof—

(1) Any employee, other than a Bar Attendant, who in addition to his/her normal duties, is required to dispense liquor from a bar, shall in addition to his/her ordinary time rate of pay, be paid a flat allowance of 82 cents per shift for the performance of such additional duties.

(2) Any employee employed as a Bar Attendant, who is required in addition to his/her normal duties, to be responsible for and/or the purchasing of stock, shall be paid in addition to his/her ordinary time rate of pay an allowance of $13.57 per fortnight.

6. Clause 26. – Uniforms and Laundering: Delete this Clause and insert the following in lieu thereof—

(1) Where the Company requires an employee to wear a special uniform in the performance of their duties such special uniform shall be provided by the Company and shall at all times remain the Company's property. A special uniform shall consist of such articles of clothing as monogrammed or coloured jackets, dresses, blouses, overalls, aprons, caps collars, cuffs, or other special apparel which the Company may require an employee to wear whilst on duty; provided that the ordinary apparel usually worn by Waiters and Stewards shall not be deemed to be special uniforms within the meaning of this clause.

(2) Where a cook wears the ordinary apparel usually worn by cooks, such as black and white check or white trousers, white coats, white shirt, white apron and cap, such garments shall be laundered at the Company's expense or otherwise the employee shall be paid $8.78 per fortnight as laundry allowance.

(3) Subject to subclause (2) hereof, where the Company requires any of the articles of clothing to be worn as described in subclause (1) of this clause, then such clothing shall be laundered at the Company's expense or otherwise the employee shall be paid $5.76 per fortnight as a laundry allowance.

(4) Where such special uniforms are supplied, employees shall be obliged to wear special uniforms at all times and in line with Company standards.

7. Clause 28. – Employees' Equipment: Delete subclause (1) of this Clause and insert the following in lieu thereof—

All knives, choppers, tools, brushes, towels and other utensils, implements, and materials which may be required to be used by an employee for the purpose of carrying out his/her duties, shall be supplied by the company free of charge. Provided that where an employee is required by the Company to use his/her own knives he/she shall be paid an allowance of $10.71 per fortnight.

2002 WAIRC 04596

BURSWOOD ISLAND RESORT (MAINTENANCE EMPLOYEES') AWARD

No. A22 of 1086

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	COMMUNICATIONS, ELECTRICAL, ELECTRONIC, ENERGY, INFORMATION, POSTAL, PLUMBING, AND ALLIED WORKERS UNION OF AUSTRALIA, ENGINEERING & ELECTRICAL DIVISION, WA BRANCH, APPLICANT
	v.
	BURSWOOD RESORT (MANAGEMENT) LTD AND OTHERS, RESPONDENTS
CORAM	COMMISSIONER S WOOD
DELIVERED	THURSDAY, 3 JANUARY 2002
FILE NO.	APPLICATION 1896 OF 2001
CITATION NO.	2002 WAIRC 04596

Result	Allowances Varied
Representation	
Applicant	Ms C Bowden
Respondent	Mr P Robertson on behalf of Burswood Resort (Management) Ltd Ms J Harrison on behalf of the Construction, Mining, Energy, Timberyards, Sawmills and Woodworkers' Union of Australia, Western Australian Branch and the Western Australian Builders Labourers, Painters & Plasterers Union of Workers, Western Australian Branch

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Order

HAVING heard Ms C Bowden on behalf of the Applicant and Mr P Robertson on behalf of Burswood Resort (Management) Ltd and Ms J Harrison on behalf of the Construction, Mining, Energy, Timberyards, Sawmills and Woodworkers' Union of Australia, Western Australian Branch and the Western Australian Builders Labourers, Painters & Plasterers Union of Workers, Western Australian Branch, and by consent, I the undersigned, pursuant to the powers conferred by the Industrial Relations Act 1979 do hereby order—

THAT the Burswood Island Resort (Maintenance Employees') Award No. A 22 of 1986 as amended be further varied in accordance with the following Schedule with effect from the beginning of the first pay period commencing on or after 3 January 2002.

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

SCHEDULE

1. Clause 11. – Overtime: Delete paragraph (f) of subclause (3) of this clause and insert in lieu thereof the following—

(f) An employee required to work overtime for more than two hours shall be supplied with a meal by the Company or if no meal is supplied be paid $8.13 for a meal, and if owing to the amount of overtime worked, a second subsequent meal is required they shall be supplied with each such meal by the Company or be paid $5.51 for each meal so required.

2. Clause 13. – Wage Rates: Delete subclauses (2) through to (9) of this clause and insert in lieu thereof the following—

(2) In addition to the weekly wage rate provided by subclause (1) hereof an adult employee shall be paid—

		PER WEEK $
(a)	After the completion of one year's continuous service	13.94
(b)	After the completion of two years' continuous service	28.23

Such payments shall be deemed part of the weekly wage rate for all purposes of the award.

(3) Leading Hand: In addition to the appropriate total wage prescribed in this clause a Leading Hand shall be paid—

		$
(a)	If placed in charge of not less than three and not more than ten other employees	19.61
(b)	If placed in charge of more than ten and not more than twenty other employees	30.01
(c)	If placed in charge of more than twenty other employees	38.63

(4) A casual employee shall be paid 20 per cent of the ordinary rate in addition to the ordinary rate for the calling in which they are employed.

(5) Nominee

A licensed electrical mechanic or fitter who acts as nominee for the Company shall be paid an allowance of $47.02 per week.

(6) An employee holding either a Third Year First Aid Medallion of the St. John Ambulance Association or a "C" Standard Senior First Aid Certificate of the Australian Red Cross Society, appointed by the Company to perform first aid duties, shall be paid $7.32 per week in addition to their ordinary rate.

(7) An employee who holds, and in the course of their employment is required to use, a current "A" Grade or "B" Grade licence issued pursuant to the relevant regulation in force on the 28th day of February, 1978 under the Electricity Act 1945 shall be paid an allowance of $15.60 per week.

(8) An employee who is in possession of, and is requested by the Company to use, a plumber's licence issued by the Metropolitan Water Supply, Sewerage and Drainage Board, shall, in each week so requested, be paid an allowance of $27.05 per week.

(9) A plumber holding registration in accordance with the Metropolitan Water Supply, Sewerage and Drainage Act shall be paid $11.22 per week in addition to their ordinary rate.

2002 WAIRC 04597

CAN MANUFACTURING (PRODUCTION AND MAINTENANCE – AMALGAMATED INDUSTRIES PTY LTD) AWARD 1985

No. A4 of 1985

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	COMMUNICATIONS, ELECTRICAL, ELECTRONIC, ENERGY, INFORMATION, POSTAL, PLUMBING, AND ALLIED WORKERS UNION OF AUSTRALIA, ENGINEERING & ELECTRICAL DIVISION, WA BRANCH, APPLICANT
	v.
	WESTCAN (A DIVISION OF AMCOR LTD) AND ANOTHER, RESPONDENTS
CORAM	COMMISSIONER S WOOD
DELIVERED	THURSDAY, 3 JANUARY 2002
FILE NO.	APPLICATION 1876 OF 2001
CITATION NO.	2002 WAIRC 04597

Result	Allowances Varied
Representation	
Applicant	Ms C Bowden
Respondent	Mr P Robertson on behalf of Westcan

Order

HAVING heard Ms C Bowden on behalf of the Applicant and Mr P Robertson on behalf of Westcan, and by consent, I the undersigned, pursuant to the powers conferred by the Industrial Relations Act 1979 do hereby order—

THAT the Can Manufacturing (Production and Maintenance – Amalgamated Industries Pty Ltd) Award 1985 as amended be further varied in accordance with the following Schedule with effect from the beginning of the first pay period commencing on or after 3 January 2002.

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

SCHEDULE

1. Clause 6. –Rates of Pay:

A. Delete paragraph (a) of subclause (4) of this clause and insert in lieu thereof the following—

(4) Tool Allowance

(a) Where the employer does not provide a tradesperson or an apprentice with the tools ordinarily required by that tradesperson or apprentice in the performance of work as a tradesperson or as an apprentice, the employer shall pay a tool allowance of—

(i) $11.04 per week to such tradesperson; or

(ii) in the case of an apprentice a percentage of $11.04, being the wage percentage which is appropriate to the year of apprenticeship pursuant to subclause (3) hereof,

for the purpose of such tradesperson or apprentice supplying and maintaining tools ordinarily required in the performance of work as a tradesperson or as an apprentice.

B. Delete subclauses (5) and (6) of this clause and insert in lieu thereof the following—

(5) Electrician's Licence Allowance—

An electrical tradesperson who holds, and in the course of employment may be required to use, a current "A" Grade or "B" Grade licence issued pursuant to the relevant regulation in force on the 28th day of February 1978 under the Electricity Act 1945, shall be paid an allowance of $15.83 per week.

(6) Laundry Allowance—

Employees shall receive a laundry allowance of $9.35 per week as reimbursement of their personal outlay for maintenance and cleaning of work clothing issued by Westcan.

2002 WAIRC 04626

CATERING EMPLOYEES AND TEA ATTENDANTS (GOVERNMENT) AWARD 1982

No. A34 of 1981

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	AUSTRALIAN LIQUOR, HOSPITALITY AND MISCELLANEOUS WORKERS UNION, WESTERN AUSTRALIAN BRANCH, APPLICANT
	v.
	HON MIN FOR PRIMARY INDUSTRY & OTHERS, RESPONDENTS
CORAM	CHIEF COMMISSIONER W S COLEMAN
DELIVERED	TUESDAY, 8 JANUARY 2002
FILE NO/S.	APPLICATION 1030 OF 2001
CITATION NO.	2002 WAIRC 04626

Result Award varied

Order

Having heard Ms D MacTiernan on behalf of the applicant and Mr J Lange on behalf of the respondents, and by consent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders—

THAT the Catering Employees and Tea Attendants (Government) Award 1982 (No. A 34 of 1981) be varied in accordance with the following schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after the 7th day of January 2002.

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

SCHEDULE

1. Clause 9. – Additional Rates for Ordinary Hours: Delete subclauses (1) & (2) of this Clause and insert the following in lieu thereof—

(1) A full-time or part-time employee who is required to work any ordinary hours between 7.00pm and 7.00am Monday to Friday, inclusive, shall be paid, in addition to the appropriate wage set out in Clause 22. - Wages, an additional payment equivalent to 15% of the wages paid for the time so worked with a minimum payment of $2.46 per day.

(2) An employee who is required to work any of his ordinary hours on any day in more than one period of employ and other than for meal breaks as prescribed by Clause 13. - Meal Breaks of this award, shall be paid an allowance of $2.09 per day, for such broken work period worked.

2. Clause 14. – Meal Money: Delete this Clause and insert the following in lieu thereof—

14. - MEAL MONEY

When an employee is required to work overtime for more than one hour on any day, he or she will either be supplied with a substantial meal by the employer or be paid $8.41 meal money.

3. Clause 22. – Wages: Delete subclauses (2) & (3) of this Clause and insert the following in lieu thereof—

(2) In addition to the above wage rates service pay will be paid for each year of service at the following rates per week—

	$
Year 1	62.80
Year 2	68.50
Year 3 and thereafter	73.60

(3) Leading Hands—

An employee (other than a Chef) who is appointed and placed in charge of other employees by the employer shall be paid the following rates in addition to his or her normal wage per week:-

		$
(a)	If placed in charge of less than six employees	10.50
(b)	If placed in charge of six to ten employees	14.00
(c)	If placed in charge of 11 to 20 employees	16.20
(d)	If placed in charge of more than 20 employees	27.00

4. Clause 25. – Bar Work: Delete this Clause and insert the following in lieu thereof—

25. - BAR WORK

Any employee other than a Bar Attendant, who in addition to their normal duties is required to dispense liquor from a bar, shall be paid a flat rate of 82 cents per day in addition to the rate prescribed for such normal duties.

5. Clause 27. – Uniforms and Laundering: Delete this Clause and insert the following in lieu thereof—

27. - UNIFORMS AND LAUNDERING

Where uniforms are required to be worn by the employer they shall be supplied and laundered by the employer and remain the property of the employer, provided that in lieu of the employer laundering same, the employee shall be paid $3.00 per week for such laundering. Provided further that any employee employed as a Cook shall be paid $4.40 per week for laundering.

6. Clause 28. – Protective Clothing: Delete subclause (1) of this Clause and insert the following in lieu thereof—

(1) Employees who are required to wash dishes, or otherwise handle detergents, acids, soaps or any injurious substances, shall be supplied with rubber gloves free of charge by the employer, or be paid an allowance of $1.40 per week in lieu.

7. Clause 29. – Employees Equipment: Delete this Clause and insert the following in lieu thereof—

29. - EMPLOYEE'S EQUIPMENT

All knives, choppers, tools, brushes, towels and other utensils, implements and material which may be required to be used by the employee for the purpose of carrying out their duties, shall be supplied by the employer free of charge.

Provided that where an employee is required by the employer to use his own knives he shall be paid an allowance of $7.60 per week.

2002 WAIRC 04559

CHILD CARE (OUT OF SCHOOL CARE - PLAYLEADERS) AWARD

No. A13 of 1984

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	AUSTRALIAN LIQUOR, HOSPITALITY AND MISCELLANEOUS WORKERS UNION, WESTERN AUSTRALIAN BRANCH, APPLICANT
	v.
	COMMUNICARE & OTHERS, RESPONDENTS
CORAM	CHIEF COMMISSIONER W S COLEMAN
DELIVERED	TUESDAY, 8 JANUARY 2002
FILE NO/S.	APPLICATION 1042 OF 2001
CITATION NO.	2002 WAIRC 04559

Result Award varied

Order

Having heard Ms D MacTiernan on behalf of the applicant and Mr L Joyce on behalf of the respondents, and by consent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders—

THAT the Child Care (Out of School Care – Playleaders) Award (No. A 13 of 1984) be varied in accordance with the following schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after the 8th day of January 2002.

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

SCHEDULE

1. Clause 7. – Meal Breaks and Allowances: Delete subclause (2) of this Clause and insert the following in lieu thereof—

(2) Where any employee, without being notified on the previous day, has to continue working after the usual finishing time for more than two hours he or she shall be paid $8.15 for a meal or be provided with a meal at the Centre.

2. Clause 23. – Fares and Travelling Allowances: Delete subclause (2)(c) of this Clause and insert the following in lieu thereof—

(2) (c) A year for the purpose of this clause shall commence on the 1st day of July and end on the 30th day of June next following.

Rates of hire for use of employee's own vehicle on employer's business

Schedule 1 - Motor Vehicle Allowances

Area and Details	Engine Displacement (in cubic centimetres)		
	Over 2600cc	Over 1600cc & -2600cc	1600 cc Under
	Rate per Kilometre (Cents)		
Metropolitan Area	69.2	60.2	53.2
South West Land Division	71.1	61.7	54.8
North of 23.5° South Latitude	78.0	68.1	60.6
Rest of the State	73.5	63.8	56.6

Schedule 2 - Motor Cycle Allowances

Distance Travelled During a Year on Official Business	Rate per Kilometre (Cents)
All Areas of State	23.9

Motor vehicles with rotary engines are to be included in the 1600-2600cc category.

2002 WAIRC 04558

CHILD CARE (SUBSIDISED CENTRES) AWARD

No. A26 of 1985

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	AUSTRALIAN LIQUOR, HOSPITALITY AND MISCELLANEOUS WORKERS UNION, WESTERN AUSTRALIAN BRANCH, APPLICANT
	v.
	BASSENDEAN DAY CARE CENTRE & OTHERS, RESPONDENTS
CORAM	CHIEF COMMISSIONER W S COLEMAN
DELIVERED	TUESDAY, 8 JANUARY 2002
FILE NO/S.	APPLICATION 1041 OF 2001
CITATION NO.	2002 WAIRC 04558

Result Award varied

Order

Having heard Ms D MacTiernan on behalf of the applicant and Mr L Joyce on behalf of the respondents, and by consent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders—

THAT the Child Care (Subsidised Centres) Award (No. A 26 of 1985) be varied in accordance with the following schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after the 8th day of January 2002.

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

SCHEDULE

1. Clause 12A. – Fares and Travelling Allowances: Delete subclause (2)(c) of this Clause and insert the following in lieu thereof—

(2) (c) A year for the purpose of this clause shall commence on the 1st day of July and end on the 30th day of June next following.

Rates of hire for use of employee's own vehicle on employer's business

Schedule 1 - Motor Vehicle Allowances

Area and Details	Engine Displacement (in cubic centimetres)		
	Over 2600cc	Over 1600cc & -2600cc	1600 cc Under
	Rate per Kilometre (Cents)		
Metropolitan Area	69.2	60.2	53.2
South West Land Division	71.1	61.7	54.8
North of 23.5° South Latitude	78.0	68.1	60.6
Rest of the State	73.5	63.8	56.6

Schedule 2 - Motor Cycle Allowances

Distance Travelled During a Year on Official Business	Rate per Kilometre (Cents)
All Areas of State	23.9

Motor vehicles with rotary engines are to be included in the 1600-2600cc category.

2. Clause 22. – Meal Breaks and Allowances: Delete subclause (1) of this Clause and insert the following in lieu thereof—

(1) Where an employee, without being notified on the previous day, is required to continue working after the usual ceasing time for two hours or more she/he shall be provided with a meal free of charge or be paid $8.15 for such meal.

2002 WAIRC 04557

CHILDREN'S SERVICES CONSENT AWARD, 1984

No. A1 of 1985

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	AUSTRALIAN LIQUOR, HOSPITALITY AND MISCELLANEOUS WORKERS UNION, WESTERN AUSTRALIAN BRANCH, APPLICANT
	v.
	WINTERFOLD CHILD CARE CENTRE INCORPORATED & OTHERS, RESPONDENTS
CORAM	CHIEF COMMISSIONER W S COLEMAN
DELIVERED	TUESDAY, 8 JANUARY 2002
FILE NO/S.	APPLICATION 1040 OF 2001
CITATION NO.	2002 WAIRC 04557

Result Award varied

Order

Having heard Ms D MacTiernan on behalf of the applicant and Mr L Joyce on behalf of the respondents, and by consent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders—

THAT the Children's Services Consent Award 1984 (No. A 1 of 1985) be varied in accordance with the following schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after the 8th day of January 2002.

(Sgd.) W. S. COLEMAN,
Chief Commissioner.

[L.S.]

SCHEDULE

1. Clause 25. – Fares and Travelling Time: Delete subclause (2)(c) of this Clause and insert the following in lieu thereof—

(2) (c) A year for the purpose of this clause shall commence on the 1st day of July and end on the 30th day of June next following.

Rates of hire for use of employees' own vehicle on employer's business.

Schedule 1 - Motor Car Allowance

Area and Details	Engine Displacement (in cubic centimetres)		
Rate per kilometre	Over 2600cc	Over 1600cc -2600cc	1600 cc & Under
Metropolitan Area	69.2	60.2	53.2
South West Land Division	71.1	61.7	54.8
North of 23.5° South Latitude	78.0	68.1	60.6
Rest of the State	73.5	63.8	56.6

Schedule 2 - Motor Cycle Allowance

Distance Travelled During a Year on Official Business	Rate ¢/km
Rate per kilometre	23.9

Motor vehicles with rotary engines are to be included in the 1600-2600cc category.

2002 WAIRC 04560

CHILDREN'S SERVICES (PRIVATE) AWARD

No. A10 of 1990

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	AUSTRALIAN LIQUOR, HOSPITALITY AND MISCELLANEOUS WORKERS UNION, WESTERN AUSTRALIAN BRANCH, APPLICANT
	v.
	BASSENDEAN TOWN COUNCIL & OTHERS, RESPONDENTS
CORAM	CHIEF COMMISSIONER W S COLEMAN
DELIVERED	TUESDAY, 8 JANUARY 2002
FILE NO/S.	APPLICATION 1043 OF 2001
CITATION NO.	2002 WAIRC 04560

Result Award varied

Order

Having heard Ms D MacTiernan on behalf of the applicant and Mr L Joyce on behalf of the respondents, and by consent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders—

THAT the Children's Services (Private) Award (No. A 10 of 1990) be varied in accordance with the following schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after the 8th day of January 2002.

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

SCHEDULE

1. Clause 10. – Meal Breaks and Allowances: Delete subclause (1) of this Clause and insert the following in lieu thereof—

(1) Where an employee, without being notified on the previous day, is required to continue working after the usual ceasing time for two hours or more the employee shall be provided with a meal free of charge or be paid $7.50 for such meal.

2002 WAIRC 04583

CLEANERS AND CARETAKERS AWARD, 1969

No. 12 of 1969

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	AUSTRALIAN LIQUOR, HOSPITALITY AND MISCELLANEOUS WORKERS UNION, WESTERN AUSTRALIAN BRANCH, APPLICANT
	v.
	COCA-COLA BOTTLERS (PERTH) PTY LTD & OTHERS, RESPONDENTS
CORAM	CHIEF COMMISSIONER W S COLEMAN
DELIVERED	TUESDAY, 8 JANUARY 2002
FILE NO/S.	APPLICATION 1023 OF 2001
CITATION NO.	2002 WAIRC 04583

Result Award varied

Order

Having heard Ms D MacTiernan on behalf of the applicant and Mr L Joyce on behalf of the respondents, and by consent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders—

THAT the Cleaners and Caretakers Award, 1969 (No. 12 of 1969) be varied in accordance with the following schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after the 8th day of January 2002.

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

SCHEDULE

1. Clause 13. – Overtime: Delete subclause (4)(a) of this Clause and insert the following in lieu thereof—

(4) (a) Subject to the provisions of paragraph (b) of this subclause an employee, required to work overtime for more than two hours, shall be supplied with a meal by the employer or be paid $6.90 for a meal and, if owing to the amount of overtime worked, a second or subsequent meal is required the employee shall be supplied with such meal by the employer or paid $4.70 for each meal so required.

2. Clause 20. – Special Rates and Conditions: Delete subclauses (8)(a), (b), (10)(a), (b), (11) & (15) of this Clause and insert the following in lieu thereof—

(8) Washing: Where an employee is called upon to wash articles, the following payments shall be made—

(a) Washing towels, 29 cents each.

(b) Washing dusters, 21 cents each.

(10) (a) Where it is necessary to go wholly outside a building to clean windows an employee shall, if such cleaning be 15.5 metres or more from the nearest horizontal plane, be paid an allowance of $2.05 per day.

(b) Where an employee is required to clean windows from a swinging scaffold or similar device he/she shall be paid 36 cents per hour extra for every hour or part thereof so worked.

(11) Where an employee is required to carry out the ordinary hours of duty per day in more than one shift and where the break is not less than three hours, an allowance of $2.34 per day shall be paid. This allowance shall not apply to caretakers.

(15) All employees called upon to clean closets connected with septic tanks and sewerage shall receive an allowance as follows—

		Per Week $
(a)	five closets or greater but less than ten closets per day	3.30
(b)	ten closets or greater but less than 30 closets per day	9.95
(c)	30 closets or greater but less than 50 closets per day	19.65
(d)	50 closets or greater per day	24.75

For the purpose of this clause one metre of urinal shall count as one closet and three urinal stalls shall count as one closet.

3. Clause 22. – Wages: Delete subclause (3) of this Clause and insert the following in lieu thereof—

(3) Leading Hands: Any employee in charge of other employees shall be paid in addition to the appropriate wage prescribed, the following—

(a)	if placed in charge of not less than three and not more than six other employees	10.75
(b)	if placed in charge of not less than six and not more than ten other employees	19.10
(c)	if placed in charge of not less than ten and not more than 15 other employees	23.95
(d)	if placed in charge of not less than 15 and not more than 20 other employees	29.05
(e)	if placed in charge of more than 20 other employees	37.35

2002 WAIRC 04563

CLEANERS AND CARETAKERS (CAR AND CARAVAN PARKS) AWARD 1975

No. 5 of 1975

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	AUSTRALIAN LIQUOR, HOSPITALITY AND MISCELLANEOUS WORKERS UNION, WESTERN AUSTRALIAN BRANCH, APPLICANT
	v.
	KINGS PARKING CO (W.A.) P/L & OTHERS, RESPONDENTS
CORAM	CHIEF COMMISSIONER W S COLEMAN
DELIVERED	TUESDAY, 8 JANUARY 2002
FILE NO/S.	APPLICATION 1051 OF 2001
CITATION NO.	2002 WAIRC 04563

Result Award varied

Order

Having heard Ms D MacTiernan on behalf of the applicant and Mr L Joyce on behalf of the respondents, and by consent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders—

THAT the Cleaners and Caretakers (Car and Caravan Parks) Award 1975 (No. 5 of 1975) be varied in accordance with the following schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after the 8th day of January 2002.

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

SCHEDULE

1. Clause 10. – Overtime: Delete subclause (4)(a) of this Clause and insert the following in lieu thereof—

(4) (a) Subject to the provisions of paragraph (b) of this subclause an employee, required to work overtime for more than two hours, shall be supplied with a meal by the employer or be paid $6.90 for a meal and, if owing to the amount of overtime worked, a second or subsequent meal is required the employee shall be supplied with such meal by the employer or paid $4.70 for each meal so required.

2. Clause 12. – Fares and Travelling Time: Delete subclause (2)(c) of this Clause and insert the following in lieu thereof—

(2) (c) A year for the purpose of this clause shall commence on the 1st day of July and end on the 30th day of June next following.

Rates of hire for use of employee's own vehicle on employer's business

Schedule 1 - Motor Vehicle Allowances

Area and Details	Engine Displacement (in cubic centimetres)		
Over	Over 2600cc	1600cc -2600cc	1600 cc &Under
	Rate per Kilometre (Cents)		
Metropolitan Area	69.2	60.2	53.2
South West Land Division	71.1	61.7	54.8
North of 23.5° South Latitude	78.0	68.1	60.6
Rest of the State	73.5	63.8	56.6

Schedule 2 - Motor Cycle Allowances

Distance Travelled During a Year on Official Business	Rate per Kilometre (Cents)
All Areas of State	23.9

Motor vehicles with rotary engines are to be included in the 1600-2600cc category.

3. Clause 13. – Special Rates and Provisions: Delete subclauses (9)(a), (10), (13) & (14) of this Clause and insert the following in lieu thereof—

(9) Height Money—

(a) Where it is necessary to go wholly outside a building to clean windows, an employee shall, if such cleaning be 15.5 metres or more from the nearest horizontal plane, be paid an allowance of $2.05 per day.

(10) Where an employee is required to carry out the ordinary hours of duty per day in more than one shift and where the break is not less than three hours an allowance of $2.34 per day shall be paid.

(13) Cash Handling Allowance—

An employee who is required by his or her employer to collect money from the customers of that employer shall be paid an allowance of $5.71 per week.

(14) All employees called upon to clean closets connected with septic tanks and sewerage shall receive an allowance as follows—

		Per Week $
(a)	five closets or greater but less than ten closets per day	3.30
(b)	ten closets or greater but less than 30 closets per day	9.95
(c)	30 closets or greater but less than 50 closets per day	19.65
(d)	50 closets or greater per day	24.75

For the purpose of this clause, one metre of urinal shall count as one closet and three urinal stalls shall count as one closet.

4. Clause 24. – Wages: Delete subclause (4) of this Clause and insert the following in lieu thereof—

(4) Leading Hands: Any employee in charge of other employees shall be paid in addition to the appropriate wage prescribed, the following—

		Per Week $
(a)	if placed in charge of not less than three and not more than six other employees	10.75
(b)	if placed in charge of more than six and not more than ten other employees	19.10
(c)	if placed in charge of more than 10 and not more than 15 other employees	23.95
(d)	if placed in charge of more than 15 and not more than 20 other employees	29.05
(e)	if placed in charge of more than 20 other employees	37.35

2002 WAIRC 04627

CLEANERS AND CARETAKERS (GOVERNMENT) AWARD, 1975

No. 32 of 1975

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	AUSTRALIAN LIQUOR, HOSPITALITY AND MISCELLANEOUS WORKERS UNION, WESTERN AUSTRALIAN BRANCH, APPLICANT
	v.
	THE HON PREMIER OF WESTERN AUSTRALIA & OTHERS, RESPONDENTS
CORAM	CHIEF COMMISSIONER W S COLEMAN
DELIVERED	TUESDAY, 8 JANUARY 2002
FILE NO/S.	APPLICATION 1050 OF 2001
CITATION NO.	2002 WAIRC 04627

Result Award varied

Order

Having heard Ms D MacTiernan on behalf of the applicant and Mr J Lange on behalf of the respondents, and by consent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders—

THAT the Cleaners & Caretakers (Government) Award 1975 (No. 32 of 1975) be varied in accordance with the following schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after the 7th day of January 2002.

(Sgd.) W. S. COLEMAN,
Chief Commissioner.

[L.S.]

SCHEDULE

1. Clause 8. – Overtime: Delete subclause (4) of this Clause and insert the following in lieu thereof—

(4) Any employee, who without being notified the previous day, is required to continue working for more than one hour after the usual ceasing time shall be provided with a meal by the employer, or be paid $8.15 in lieu thereof.

2. Clause 11. – Special Rates and Provisions: Delete subclauses (1)(a), (2), (5), (6)(a), (b), (c), (9)(b) & (10)(a) of this Clause and insert the following in lieu thereof—

(1) (a) All employees called upon to clean closets, connected with septic tanks or sewerage shall receive an allowance of 55 cents per closet per week.

(2) Employees called upon outside the ordinary working hours to wash towels shall be paid $3.31 per dozen for ordinary towels, and $2.48 per dozen for dusters, hand towels and tea towels.

(5) Employees who are required to work their ordinary hours each day in two shifts and where the break between the two shifts is not less than three hours, shall be paid an allowance $3.14 per day.

(6) An employee who is required to open and close classrooms, halls and other school facilities for any activities authorised by the Principal, shall be paid an allowance according to the following scale—

		Per Day
(a)	Evenings - Monday to Friday	$
	Up to 40 rooms per week.....	5.30
	41 rooms to 100 per week.....	8.07
	over 100 rooms per week.....	10.62
(b)	Saturday and Sunday	10.06

(c) An additional allowance of $3.15 shall be paid to a caretaker on each occasion he/she is required to open or close a school facility after 11.00 pm, Monday to Friday, or for any opening or closing required on a Saturday or Sunday after the initial opening and closing. Provided that on a Saturday or Sunday the additional allowance shall not be paid if the duty is performed less than one hour after the initial or any subsequent opening or closing.

(9) (b) Any employee performing in wood chopping duties shall be paid an allowance of $11.95 per tonne to a maximum of—

(i) 100% of the weight of bushwood supplied or 50% of the weight of mill-ends supplied for enclosed fire places such as Wonderheats.

(ii) 50% of the weight of bushwood supplied or 20% of the weight of mill-ends supplied for open fireplaces.

(10) (a) An Estate Attendent (Homeswest) who, in his/her privately owned vehicle commutes from estate to estate and is required to carry sundry cleaning and/or gardening implements and/or supplies shall be paid $5.92 per week for all purposes of this award.

3. Clause 21. – First Aid: Delete subclause (2) of this Clause and insert the following in lieu thereof—

(2) The employer shall, wherever practicable, appoint an employee holding current first aid qualifications from St. John Ambulance or similar body to carry out first aid duty at all works or depots where employees are employed. Such employees so appointed in addition to first aid duties, shall be responsible under the general supervision of the foreperson for maintaining the contents of the first aid kit, conveying it to the place of work and keeping it in a readily accessible place for immediate use.

Employees so appointed shall be paid the following rates in addition to their prescribed rate—

	10 Employees or less $ per day	In excess of 10 Employees $ per day
Qualified Attendant	1.08	1.85

2002 WAIRC 04716

CLOTHING TRADES AWARD 1973

No. 16 of 1972

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE WESTERN AUSTRALIAN CLOTHING AND ALLIED TRADES' INDUSTRIAL UNION OF WORKERS, APPLICANT
	v.
	FULLIN TAILORING CO & OTHERS, RESPONDENT
CORAM	COMMISSIONER A R BEECH
DELIVERED	WEDNESDAY, 30 JANUARY 2002
FILE NO.	APPLICATION 2081 OF 2001
CITATION NO.	2002 WAIRC 04716

Result	Application to vary the Clothing Trades Award granted.
Representation	
Applicant	Mr T. Pope
Respondent	No appearance

Order

HAVING HEARD Mr T. Pope on behalf of the applicant and there being no appearance on behalf of the respondents, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders –

THAT the *Clothing Trades Award* be varied in accordance with the following schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after the 30th day of January 2002.

(Sgd.) A. R. BEECH,
[L.S.] Commissioner.

SCHEDULE

1. Clause 12. – Overtime: Delete subclause (4) of this clause and insert in lieu thereof the following—

(4) An employee required to work for more than one hour after the usual ceasing time or beyond 6.00 p.m. (whichever is the later) on any day, Monday to Friday inclusive shall be paid meal money of $6.45 for the purchase of any meal required.

2002 WAIRC 04575

CLUB WORKERS' AWARD, 1976

No. 12 of 1976

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	AUSTRALIAN LIQUOR, HOSPITALITY AND MISCELLANEOUS WORKERS UNION, WESTERN AUSTRALIAN BRANCH, APPLICANT
	v.
	KALAMUNDA CLUB (INC) & OTHERS, RESPONDENTS
CORAM	CHIEF COMMISSIONER W S COLEMAN
DELIVERED	TUESDAY, 8 JANUARY 2002
FILE NO/S.	APPLICATION 1003 OF 2001
CITATION NO.	2002 WAIRC 04575

Result Award varied

Order

Having heard Ms D MacTiernan on behalf of the applicant and Mr L Joyce on behalf of the respondents, and by consent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders—

THAT the Club Workers Award, 1976 (No. 12 of 1976) be varied in accordance with the following schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after the 8th day of January 2002.

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

SCHEDULE

1. Clause 9. – Additional Rates for Ordinary Hours: Delete this Clause and insert the following in lieu thereof—

9. - ADDITIONAL RATES FOR ORDINARY HOURS

(1) An employee who is required to work any ordinary hours prior to 7.00 am or after 7.00 pm on any day Monday to Friday, both inclusive, shall be paid at the rate of an extra $1.30 per hour for each such hour, or part thereof worked. Provided that any employee who works the majority of his/her ordinary hours between midnight and 7.00 am shall be paid $1.36 per hour extra for each such hour, or part thereof worked.

(2) All time worked during the ordinary hours of work on Saturdays and Sundays shall be paid for at the rate of time and a half.

(3) An employee who is required to work any of his/her ordinary hours on any day in more than one period of employment, other than for meal breaks as prescribed in accordance with the provisions of Clause 13. - Meal Breaks of this Award, shall be paid an allowance of $2.14 per day, for such broken work period worked.

(4) The provisions of subclauses (1) and (2) hereof shall not apply to any work performed on a holiday and to which the provisions of subclause (2) of Clause 17. - Holidays are applicable.

(5) The provisions of this clause shall not apply to casual employees.

2. Clause 14. – Meal Money: Delete this Clause and insert the following in lieu thereof—

14. - MEAL MONEY

Any employee who is required to work overtime for two hours or more on any day, without being notified on the previous day or earlier, that he or she will be so required to work such overtime, will either be supplied with a substantial meal by the employer or be paid $8.60 meal money.

3. Clause 26. – Uniforms and Laundering: Delete subclauses (2) & (3) of this Clause and insert the following in lieu thereof—

(2) Subject to subclause (3) hereof, an employer requiring any of the articles of clothing to be worn as described in subclause (1) of this clause, shall cause such clothing to be laundered at his/her own expense or otherwise shall pay to the employee concerned $5.55 per fortnight worked as a laundry allowance. The allowance provided herein shall be halved for employees who work less than thirty-eight ordinary hours each fortnight.

(3) Where a cook wears the ordinary apparel usually worn by cooks such as black and white check trousers, white shirt, white apron and cap, such garments shall be laundered at the employer's expense or otherwise the employee shall be paid $8.40 per fortnight worked as a laundry allowance. The allowance provided herein shall be halved for employees who work less than thirty-eight ordinary hours each fortnight.

4. Clause 27. – Protective Clothing: Delete subclauses (1) of this Clause and insert the following in lieu thereof—

(1) Employees who are required to wash dishes, clean toilets or otherwise handle detergents, acids, soaps or any injurious substances, shall be supplied with rubber gloves free of charge by the employer, or be paid, in lieu, an allowance of

\$2.96 per fortnight worked. The allowance provided herein shall be halved for employees who work less than thirty-eight ordinary hours each fortnight.

5. Clause 28. – Employee Equipment: Delete this Clause and insert the following in lieu thereof—

28. - EMPLOYEE EQUIPMENT

All knives, choppers, tools, brushes, towels and other utensils, implements and material which may be required to be-used by the employee for the purpose of carrying out his/her duties, shall be supplied by the employer free of charge. Provided that where an employee is required by the employer to use his/her own knives he shall be paid an allowance of \$11.30 per fortnight worked. The allowance provided herein shall be halved for employees who work less than thirty-eight ordinary hours each fortnight.

2002 WAIRC 04715

COMMERCIAL TRAVELLERS AND SALES REPRESENTATIVES AWARD 1978

No. R43 of 1978

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	SALES REPRESENTATIVES' AND COMMERCIAL TRAVELLERS' GUILD OF W.A., INDUSTRIAL UNION OF WORKERS, APPLICANT
	v.
	LEONARD INDUSTRIES PTY LTD & ORS, RESPONDENT
CORAM	COMMISSIONER A R BEECH
DELIVERED	WEDNESDAY, 30 JANUARY 2002
FILE NO.	APPLICATION 1979 OF 2001
CITATION NO.	2002 WAIRC 04715

Result	Application to vary the Commercial Travellers And Sales Representatives' Award granted.
Representation	
Applicant	Mr T. Pope
Respondent	Mr W. Wild (as agent) for those named respondents for whom he has filed Warrants to Appear.

Order

HAVING HEARD Mr T. Pope on behalf of the applicant and Mr W. Wild (as agent) on behalf of those named respondents for whom he has filed Warrants to Appear, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, and by consent, hereby orders –

THAT the *Commercial Travellers and Sales Representatives" Award* be varied in accordance with the following schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after the 30th day of January 2002.

(Sgd.) A. R. BEECH,
[L.S.] Commissioner.

SCHEDULE

1. Clause 8. – Special Rates:

(A) In subclause (1) of this clause delete the figure \$15.70 and insert in lieu thereof the figure \$16.18.

(B) In subclause (2) of this clause delete the figure \$20.95 and insert in lieu thereof the figure \$21.59.

2. Clause 10. – Vehicle Provisions: Delete subclause (3) of this clause and insert in lieu thereof the following—

10. - VEHICLE PROVISIONS

(3) Rates of hire for use of an employee's own vehicle on employer's business—

(a) Sales Representative/Commercial Traveller—

(i) Up to 2.5 litre \$147.10 per week plus 15.12 cents per kilometre

(ii) Over 2.5 litre \$179.23 per week plus 17.31 cents per kilometre

(b) Country Sales Representative/Commercial Traveller—

(i) Up to 2.5 litre - \$177.32 per week plus 15.12 cents per kilometre

(ii) Over 2.5 litre - \$221.48 per week plus 17.31 cents per kilometre

(c) For the purpose of this clause, travelling to and from the employee's home shall be regarded as employer's business.

(d) The standing charges prescribed in paragraphs (a) and (b) of this subclause have been computed on the basis of their being payable during the employee's absence on annual leave, sick leave and long service leave as provided by this award.

2. Clause 19 – Air Conditioning: In subclause (3) of this clause delete the figure \$4.00 and insert in lieu thereof the figure \$4.10.

2002 WAIRC 04621

COMMUNITY WELFARE DEPARTMENT HOSTELS AWARD 1983

No. A27 of 1981

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	AUSTRALIAN LIQUOR, HOSPITALITY AND MISCELLANEOUS WORKERS UNION, WESTERN AUSTRALIAN BRANCH, APPLICANT
	v.
	HON MIN FOR COMMUNITY DEVELOPMENT, RESPONDENT
CORAM	CHIEF COMMISSIONER W S COLEMAN
DELIVERED	TUESDAY, 8 JANUARY 2002
FILE NO/S.	APPLICATION 970 OF 2001
CITATION NO.	2002 WAIRC 04621

Result Award varied

Order

Having heard Ms D MacTiernan on behalf of the applicant and Mr J Lange on behalf of the respondents, and by consent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders—

THAT the Community Welfare Department Hostels Award 1983 (No. A 27 of 1981) be varied in accordance with the following schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after the 7th day of January 2002.

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

SCHEDULE

1. Clause 8. – Overtime: Delete subclause (5) of this Clause and insert the following in lieu thereof—

(5) Where an employee has not been notified the previous day or earlier that they are required to work overtime the employer shall ensure that the employee working such overtime for an hour or more shall be provided with any of the usual meals occurring during such overtime or be paid $8.15 for each meal.

2. Clause 18. – Special Rates and Provisions: Delete subclause (1)(a) of this Clause and insert the following in lieu thereof—

(1) (a) All employees called upon to clean closets, connected with septic tanks or sewerage shall receive an allowance of 54 cents per closet per week.

3. Clause 21. – Wages: Delete subclause (3)(b), (c) & (d) of this Clause and insert the following in lieu thereof—

(3) General Conditions—

(b) Senior employees appointed as such by the employer shall be paid $18.40 per week in addition to the rates prescribed herein.

(c) A leading hand placed in charge of not less than three other employees shall be paid $18.40 per week in addition to the rates prescribed herein.

(d) Employees who are required to work their ordinary hours each day in two shifts and where the break between the two shifts is not less than three hours shall be paid $2.95 per day reimbursement for travelling expenses.

2002 WAIRC 04562

CONTRACT CLEANERS AWARD, 1986

No. A6 of 1985

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	AUSTRALIAN LIQUOR, HOSPITALITY AND MISCELLANEOUS WORKERS UNION, WESTERN AUSTRALIAN BRANCH, APPLICANT
	v.
	AIRLITE CLEANING & OTHERS, RESPONDENTS
CORAM	CHIEF COMMISSIONER W S COLEMAN
DELIVERED	TUESDAY, 8 JANUARY 2002
FILE NO/S.	APPLICATION 1049 OF 2001
CITATION NO.	2002 WAIRC 04562

Result Award varied

Order

Having heard Ms D MacTiernan on behalf of the applicant and Mr L Joyce on behalf of the respondents, and by consent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders—

THAT the Contract Cleaners Award 1986 (No. A 6 of 1985) be varied in accordance with the following schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after the 8th day of January 2002.

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

———

SCHEDULE

1. Clause 7. – Overtime: Delete subclause (3)(a) of this Clause and insert the following in lieu thereof—

(3) (a) Subject to the provisions of paragraph (b) of this subclause an employee, required to work overtime for more than two hours, shall be supplied with a meal by the employer or be paid $8.15 for a meal and, if owing to the amount of overtime worked, a second or subsequent meal is required the employee shall be supplied with such meal by the employer or paid $5.50 for each meal so required.

2. Clause 18. – Special Rates and Conditions: Delete subclause (8)(a), (b), (c), (10) & (11) of this Clause and insert the following in lieu thereof—

(8) All employees called upon to clean closets connected with septic tanks and sewerage shall receive an allowance as follows —

		Rate Per Day $
(a)	Cleaners required to cleanup to seven closets per day	0.26
(b)	Cleaners required to clean eight or more toilets per day	1.31
(c)	Cleaners who for a minimum of two hours per day are engaged in cleaning closets, in lieu of the allowance in subparagraph (a) or (b) of this subclause shall receive an allowance of	4.26

For the purpose of this clause, one metre of urinal shall count as one closet and three urinal stalls shall count as one closet.

(10) Height Money—

(a) A cleaner shall not be required to work from the top of a ladder more than three metres long which rests on the ground or floor level.

(b) Where it is necessary to go wholly outside a building to clean windows, an employee shall, if such cleaning be 15.5 metres or more from the nearest horizontal plane, be paid an allowance of $1.91 per day.

(c) Where an employee is required to clean windows from a swinging scaffold or similar device, he shall be paid 34 cents per hour extra for every hour or part thereof so worked.

(11) Broken Shift—

Where an employee is required to carry out the ordinary hours of duty at the same location each day in more than one shift and where the break is not less than four hours an allowance of $2.17 per day shall be paid.

3. Clause 19. – Fares and Travelling Time: Delete subclause (2)(c) of this Clause and insert the following in lieu thereof—

(2) (c) A year for the purpose of this clause shall commence on the 1st day of July and end on the 30th day of June next following.

Rates of hire for use of employee's own vehicle on employer's business

Schedule 1 - Motor Vehicle Allowances

Area and Details	Engine Displacement (in cubic centimetres) Over 2600cc	Over 1600cc & -2600cc	1600 cc Under
	Rate per Kilometre (Cents)		
Metropolitan Area	69.2	60.2	53.2
South West Land Division	71.1	61.7	54.8
North of 23.5° South Latitude	78.0	68.1	60.6
Rest of the State	73.5	63.8	56.6

Schedule 2 - Motor Cycle Allowances

Distance Travelled During a Year on Official Business	Rate per Kilometre (Cents)
All Areas of State	23.9

Motor vehicles with rotary engines are to be included in the 1600-2600cc category.

4. Clause 20. – Wages: Delete subclause (3) of this Clause and insert the following in lieu thereof—

(3) Leading Hands—

Any full-time employee placed in charge of other employees shall be paid, in addition to the appropriate wage prescribed, the following:

	Rate Per Hour
	$
In charge of up to ten Cleaners	0.67
More than ten Cleaners	1.29

2002 WAIRC 04531

CONTRACT CLEANERS' (MINISTRY OF EDUCATION) AWARD, 1990

No. A5 of 1981

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	AUSTRALIAN LIQUOR, HOSPITALITY AND MISCELLANEOUS WORKERS UNION, WESTERN AUSTRALIAN BRANCH, APPLICANT
	v.
	MASTERCARE PROPERTY SERVICES PTY LTD AND OTHERS, RESPONDENTS
CORAM	CHIEF COMMISSIONER W S COLEMAN
DELIVERED	TUESDAY, 8 JANUARY 2002
FILE NO.	APPLICATION 983 OF 2001
CITATION NO.	2002 WAIRC 04531

Result Award varied

Order

HAVING heard Ms D MacTiernan on behalf of the applicant and Mr L Joyce on behalf of the respondents, and by consent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders—

THAT the Contract Cleaners' (Ministry of Education) Award, 1990 (No. A 5 of 1981) be varied in accordance with the following schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after the 8th day of January 2002.

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

SCHEDULE

1. Clause 8. – Overtime: Delete paragraph (a) of subclause (3) of this Clause and insert the following in lieu thereof—

(3) (a) Subject to the provisions of paragraph (b) of this subclause an employee, required to work overtime for more than two hours, shall be supplied with a meal by the employer or be paid $8.15 for a meal and, if owing to the amount of overtime worked, a second or subsequent meal is required the employee shall be supplied with such meal by the employer or paid $5.50 for each meal so required.

2. Clause 10. – Fares and Travelling Time: Delete paragraph (c) of subclause (2) of this Clause and insert the following in lieu thereof—

(c) A year for the purpose of this clause shall commence on the 1st day of July and end on the 30th day of June next following.

Rates of hire for use of employee's own vehicle on employer's business

Schedule 1 - Motor Vehicle Allowances

Area and Details	Engine Displacement (in cubic centimetres)		
	Over 2600cc	Over 1600cc & -2600cc	1600 cc Under
	Rate per Kilometre (Cents)		
Metropolitan Area	69.2	60.2	53.2
South West Land Division	71.1	61.7	54.8
North of 23.5° South Latitude	78.0	68.1	60.6
Rest of the State	78.6	63.8	56.6

Schedule 2 - Motor Cycle Allowances

Distance Travelled During a Year on Official Business	Rate ¢/km
All Areas of State	23.9

Motor vehicles with rotary engines are to be included in the 1600-2600cc.

3. Clause 11. – Special Rates and Provisions:

A. Delete subclause (1) of this Clause and insert the following in lieu thereof—

(1) All employees called upon to clean closets connected with septic tanks and sewerage shall receive an allowance as follows—

		Rate per week $
(a)	Cleaners required to clean up to 10 closets per day	5.05
(b)	Cleaners required to clean between 11 and 20 closets per day	10.05
(c)	Cleaners required to clean 21 or more closets per day	15.15

For the purposes of this clause one metre of urinal shall count as one closet and three urinal stalls shall count as one closet.

B. Delete subclause (2) of this Clause and insert the following in lieu thereof—

(2) Employees called upon outside the ordinary working hours to wash towels shall be paid $3.50 per dozen for ordinary towels, and $2.55 per dozen for dusters, hand towels and tea towels.

C. Delete subclause (5) of this Clause and insert the following in lieu thereof—

(5) Employees who are required to work their ordinary hours each day in two shifts and where the break between the two shifts is not less than three hours, shall be paid an allowance of $3.20 per day.

D. Delete subclause (6) of this Clause and insert the following in lieu thereof—

(6) An employee who is required to open and close classrooms, halls and other school facilities for any activities authorised by the School Principal, shall be paid an allowance according to the following scale—

		$ Per Day
(a)	Evenings - Monday to Friday	
Up to 40 rooms per week	5.50	
	41 rooms to 100 per week	8.20
	Over 100 rooms per week	10.85
(b)	Saturdays and Sundays	10.85

4. Clause 20. – Wages: Delete subclause (3) of this Clause and insert the following in lieu thereof—

(3) Leading Hands—

Any full-time employee placed in charge of other employees shall be paid, in addition to the appropriate wage prescribed, the following—

Cleaner In Charge of a High School	**$19.00 per week**
Cleaner In Charge of a TAFE College:	
35 hours or less	$56.75 per week
35 hours or more	$75.70 per week

2002 WAIRC 04622

COUNTRY HIGH SCHOOL HOSTELS AWARD, 1979

No. R7A of 1979

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	AUSTRALIAN LIQUOR, HOSPITALITY AND MISCELLANEOUS WORKERS UNION, WESTERN AUSTRALIAN BRANCH, APPLICANT
	v.
	COUNTRY HIGH SCHOOLS HOSTELS AUTHORITY, RESPONDENT
CORAM	CHIEF COMMISSIONER W S COLEMAN
DELIVERED	TUESDAY, 8 JANUARY 2002
FILE NO/S.	APPLICATION 982 OF 2001
CITATION NO.	2002 WAIRC 04622

Result Award varied

Order

Having heard Ms D MacTiernan on behalf of the applicant and Mr J Lange on behalf of the respondent, and by consent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders—

THAT the Country High Schools Hostels Award, 1979 (No. R 7A of 1979) be varied in accordance with the following schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after the 7th day of January 2002.

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

SCHEDULE

1. Clause 9. – Overtime: Delete subclause (6) of this Clause and insert the following in lieu thereof—

(6) Where an employee has not been notified the previous day or earlier that they are required to work overtime the employer shall ensure that employees working such overtime for an hour or more shall be provided with any of the usual meals occurring during such overtime or be paid $8.15 each meal.

2. Clause 20. – Meal Money: Delete subclause (1) of this Clause and insert the following in lieu thereof—

(1) An employee required to work overtime for more than two hours, without being notified on the previous day or earlier that they will be so required to work, shall be supplied with a meal by the employer or paid $8.15 for a meal.

3. Clause 21. – Special Rates and Provisions: Delete subclause (1)(a) of this Clause and insert the following in lieu thereof—

(1) (a) All employees called upon to clean closets, connected with septic tanks or sewerage shall receive an allowance of 54 cents per closet per week.

4. Clause 22. – Supported Wage System: Delete subclauses (3)(b) & (9)(c) of this Clause and insert the following in lieu thereof—

(3) Supported Wage Rates

(b) Provided that the minimum amount payable shall not be less than $53.00 per week.

(9) Trial Period

(c) The minimum amount payable to the employee during the trial period shall be no less than $53.00 per week.

5. Clause 24. – Wages: Delete subclauses (2)(a) & (b) of this Clause and insert the following in lieu thereof—

(2) General Conditions—

(a) Senior employees appointed as such by the employer shall be paid $17.80 per week in addition to the rates prescribed herein.

(b) A leading hand placed in charge of not less than three other employees shall be paid $17.80 per week extra.

2002 WAIRC 04620

CULTURAL CENTRE AWARD 1987

No. A28 of 1988

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	AUSTRALIAN LIQUOR, HOSPITALITY AND MISCELLANEOUS WORKERS UNION, WESTERN AUSTRALIAN BRANCH, APPLICANT
	v.
	LIBRARY BOARD OF W.A. & OTHERS, RESPONDENTS
CORAM	CHIEF COMMISSIONER W S COLEMAN
DELIVERED	TUESDAY, 8 JANUARY 2002
FILE NO/S.	APPLICATION 969 OF 2001
CITATION NO.	2002 WAIRC 04620

Result Award varied

Order

Having heard Ms D MacTiernan on behalf of the applicant and Mr J Lange on behalf of the respondents, and by consent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders—

THAT the Cultural Centre Award 1987, (No. A 28 of 1988) be varied in accordance with the following schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after the 7th day of January 2002.

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

SCHEDULE

1. Clause 8. – Overtime: Delete subclause (9)(a) of this Clause and insert the following in lieu thereof—

(9) (a) An employee required to work continuous overtime for more than one hour shall be supplied with a meal by the employer or be paid $8.15 for a meal and if, owing to the amount of overtime worked, a second or subsequent meal is required the employee shall be supplied with each meal by the employer or be paid $4.75 for each meal so required.

2. Clause 15. – Special Rates and Provisions: Delete subclauses (3)(a), (5), (6), (7)(a) & (8)(c) of this Clause and insert the following in lieu thereof—

(3) (a) All employees called upon to clean closets connected to septic tanks or sewers shall be paid an allowance of 53 cents per closet per week.

(5) An allowance of $2.01 per day or part thereof shall be paid to an employee required to use an airlift in the course of their duties.

(6) An allowance of $7.78 per day shall be paid in addition to the ordinary rate to an attendant required to operate audio visual equipment.

(7) (a) Except as provided for in paragraph (b) of this subclause an allowance of $4.25 per day shall be paid to an employee required to carry keys and be responsible for securing the premises at the close of business.

(8) (c) An employee who commences or completes a shift at or between the hours of 11.00pm and 5.00am, shall in addition to the ordinary rate of pay for that shift be paid an allowance of $9.48 per shift.

3. Clause 16. – Wages: Delete subclauses (2)(a), (b) & (c) of this Clause and insert the following in lieu thereof—

(2) Leading Hands: In addition to the appropriate total wage prescribed in this clause, a leading hand shall be paid—

		$
(a)	if placed in charge of not less than one and more than five other employees	18.75
(b)	if placed in charge of more than six and not more than ten other employees	28.85
(c)	if placed in charge of more than 11 other employees	37.10

2002 WAIRC 04541

DAIRY FACTORY WORKERS' AWARD 1982

No. A15 of 1982

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	AUSTRALIAN LIQUOR, HOSPITALITY AND MISCELLANEOUS WORKERS UNION, WESTERN AUSTRALIAN BRANCH, APPLICANT
	v.
	BROWNES DAIRY PTY LTD & ANOTHER, RESPONDENTS
CORAM	CHIEF COMMISSIONER W S COLEMAN
DELIVERED	TUESDAY, 8 JANUARY 2002
FILE NO/S.	APPLICATION 998 OF 2001
CITATION NO.	2002 WAIRC 04541

Result Award variation

Order

Having heard Ms D MacTiernan on behalf of the applicant and Mr L Joyce on behalf of the respondents, and by consent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders—

THAT the Dairy Factory Workers' Award 1982 (No. A 15 of 1982) be varied in accordance with the following schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after the 8th day of January 2002.

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

SCHEDULE

1. Clause 6. – Special Rates: Delete this Clause and insert the following in lieu thereof—

6. - SPECIAL RATES.

(1) An employee required to enter and clean any enclosed vat or tank shall be paid 44 cents per clean.

(2) An employee required to clean out a "powder box" or "spray drier" shall be paid $1.15 per clean.

(3) An employee shall receive 54 cents for every hour of which he/she spends 20 minutes or more in a cold chamber in which the temperature is less than 0oC.

(4) An employee shall receive 17 cents for every hour he/she spends in a cold chamber in which the temperature is between 4oC and 0oC inclusive.

2. Clause 8. – Leading Hands: Delete this Clause and insert the following in lieu thereof—

8. - LEADING HANDS.

In addition to the rates prescribed in Clause 29. - Wages, of this award a leading hand shall be paid—

		Per Week $
(1)	if placed in charge of not less than three and not more than ten other employees	20.25
(2)	if placed in charge of more than ten and not more than 20 other employees	31.20
(3)	if placed in charge of more than 20 other employees	39.90

3. Clause 11. – Meal Money: Delete subclauses (1)(a) & (2) of this Clause and insert the following in lieu thereof—

(1) (a) Subject to the provisions of this clause an employee who is required to continue working after his usual ceasing time for more than two hours shall be supplied with a meal by his employer or be paid $7.40 for a meal.

(2) Where the amount of overtime worked is at least four hours from the time the employee became entitled to a meal, the employer shall supply an additional meal or pay to the employee $6.40 for each such additional meal.

4. Clause 28. – Vehicle Allowance: Delete subclause (2)(c) of this Clause and insert the following in lieu thereof—

(2) (c) A year for the purpose of this clause shall commence on the 1st day of July and end on the 30th day of June next following.

Rates of hire for use of employee's own vehicle on employer's business

Schedule 1 - Motor Vehicle Allowances

Area and Details	Engine Displacement (in cubic centimetres) Over 2600cc	Over 1600cc & -2600cc	l600 cc Under
		Rate per Kilometre (Cents)	
Metropolitan Area	69.2	60.2	53.2
South West Land Division	71.1	61.7	54.8
North of 23.5° South Latitude	78.0	68.1	60.6
Rest of the State	73.5	63.8	56.6

Schedule 2 - Motor Cycle Allowances

Distance Travelled During a Year on Official Business	Rate per Kilometre (Cents)
All Areas of State	23.9

Motor vehicles with rotary engines are to be included in the 1600-2600cc category.

2002 WAIRC 04590

DRUM RECLAIMING AWARD

No. 21 of 1961

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	AUSTRALIAN LIQUOR, HOSPITALITY AND MISCELLANEOUS WORKERS UNION, WESTERN AUSTRALIAN BRANCH, APPLICANT
	v.
	DRUM SERVICES PTY LIMITED, RESPONDENT
CORAM	CHIEF COMMISSIONER W S COLEMAN
DELIVERED	TUESDAY, 8 JANUARY 2002
FILE NO/S.	APPLICATION 996 OF 2001
CITATION NO.	2002 WAIRC 04590

Result Award varied

Order

Having heard Ms D MacTiernan on behalf of the applicant and Mr L Joyce on behalf of the respondent, and by consent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders—

THAT the Drum Reclaiming Award (No. 21 of 1961) be varied in accordance with the following schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after the 8th day of January 2002.

[L.S.]

(Sgd.) W. S. COLEMAN,
Chief Commissioner.

SCHEDULE

1. Clause 12. – Meal Money: Delete subclause (1) of this Clause and insert the following in lieu thereof—

(1) Subject to the provisions of subclause (2) of this clause an employee, required to work overtime for more than two hours, shall be supplied with a meal by the employer or be paid $6.50 for a meal and, if owing to the amount of overtime worked, a second or subsequent meal is required the employee shall be supplied with such meal by the employer or paid $4.40 for each meal so required.

2. Clause 20. – Shift Work: Delete subclause (5) of this Clause and insert the following in lieu thereof—

(5) The loading on the ordinary rates of pay for shift work shall be $6.95 for afternoon shift and for night shift.

3. Clause 23. – Leading Hands: Delete subclause (5) of this Clause and insert the following in lieu thereof—

23. - LEADING HANDS

In addition to the appropriate rates prescribed in Clause 25. - Rates of Pay of this award, a leading hand shall be paid—

		Per Week $
(1)	if placed in charge of not less than three and not more than ten other employees	21.30
(2)	if placed in charge of more than ten and not more than 20 other employees	32.60
(3)	if placed in charge of more than 20 other employees	42.10

2002 WAIRC 04585

DRY CLEANING AND LAUNDRY AWARD 1979

No. R35 of 1978

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	AUSTRALIAN LIQUOR, HOSPITALITY AND MISCELLANEOUS WORKERS UNION, WESTERN AUSTRALIAN BRANCH, APPLICANT
	v.
	ERIC DRY CLEANERS & OTHERS, RESPONDENTS
CORAM	CHIEF COMMISSIONER W S COLEMAN
DELIVERED	TUESDAY, 8 JANUARY 2002
FILE NO/S.	APPLICATION 997 OF 2001
CITATION NO.	2002 WAIRC 04585

Result Award varied

Order

Having heard Ms D MacTiernan on behalf of the applicant and Mr L Joyce behalf of the respondents, and by consent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders—

THAT the Dry Cleaning and Laundry Award 1979 (No. R 35 of 1978) be varied in accordance with the following schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after the 8th day of January 2002.

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

SCHEDULE

1. Clause 11. – Meal Money: Delete subclause (1) of this Clause and insert the following in lieu thereof—

(1) An employee required to work overtime for more than one hour after the usual ceasing time or beyond 6.30pm (whichever is the later) on any day, Monday to Friday inclusive, shall either be supplied with an adequate recognised evening meal by the employer from an established canteen on the premises or paid $4.12 in lieu thereof.

2. Clause 18. – Special Rates: Delete this Clause and insert the following in lieu thereof—

18. - SPECIAL RATES

Where an employee is required to sort foul linen an extra allowance of 26 cents per hour shall be paid whilst the employee is so employed on that type of work.

3. Clause 30. – Wages: Delete subclause (2)(a)(iv) of this Clause and insert the following in lieu thereof—

(2) Junior Employees—

(a) Dry Cleaning and Dyeing Industry

(iv) Junior employed in a Receiving Depot: Notwithstanding anything hereinbefore contained any junior working alone and responsible for cash transactions and/or in charge of depot shall be paid not less than the rate prescribed for a junior '19 years and under 20 years' plus an amount of $5.35 per week.

2002 WAIRC 04594

ENGINEERING TRADES AND ENGINE DRIVERS (NICKEL REFINING) AWARD 1971

No. 10 of 1971

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	COMMUNICATIONS, ELECTRICAL, ELECTRONIC, ENERGY, INFORMATION, POSTAL, PLUMBING, AND ALLIED WORKERS UNION OF AUSTRALIA, ENGINEERING & ELECTRICAL DIVISION, WA BRANCH, APPLICANT
	v.
	WESTERN MINING CORPORATION LIMITED AND OTHERS, RESPONDENTS
CORAM	COMMISSIONER S WOOD
DELIVERED	THURSDAY, 3 JANUARY 2002
FILE NO.	APPLICATION 1878 OF 2001
CITATION NO.	2002 WAIRC 04594

Result	Allowances Varied
Representation	
Applicant	Ms C Bowden
Respondents	Mr R H Gifford on behalf of Western Mining Corporation Limited

Order

HAVING heard Ms C Bowden on behalf of the Applicant and Mr R H Gifford on behalf of Western Mining Corporation Limited, and by consent, I the undersigned, pursuant to the powers conferred by the Industrial Relations Act 1979 do hereby order—

THAT the Engineering Trades and Engine Drivers (Nickel Refining) Award, 1971 as amended be further varied in accordance with the following Schedule with effect from the beginning of the first pay period commencing on or after 3 January 2002.

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

SCHEDULE

1. Clause 9. – Special Rates and provisions: Delete subclause (1) of this clause and insert in lieu thereof the following—

(1) (a) An employee employed in a workshop shall receive an allowance of **$18.12** per week for all disabilities experienced.

(b) An employee employed in the plant shall receive an allowance of **$23.08** per week for all disabilities experienced.

These allowances are in lieu of height money, dirt money, confined space, excessive heat, percussion tools allowance and breathing apparatus allowance and are for all disabilities associated with work at the refinery.

2. Clause 11. – Overtime (Other Than Continuous Shift Workers): Delete subclause (6) of this clause and insert in lieu thereof the following—

(6) When a worker without being notified on the previous day is required to continue working after his/her usual knock off time for more than two hours he/she shall be provided with any meal required or be paid **$7.58** in lieu thereof. Provided that such payment need not be made to employees living in the same locality as their place of employment who can reasonably return home for a meal.

3. Clause 12. – Continuous Shift Workers: Delete subclause (6) of this clause and insert in lieu thereof the following—

(6) When an employee without being notified on the previous day is required to continue working after his/her usual knock off time for more than two hours he/she shall be provided with any meal required or be paid **$7.58** in lieu thereof. Provided that such payment need not be made to employees living in the same locality as their place of employment who can reasonably return home for a meal.

4. Clause 13. – Shift Work: Delete subclause (3) of this clause and insert in lieu thereof the following—

(3) A shift employee shall, in addition to this ordinary rate, be paid per shift of eight hours at the rate of **$9.66** when on afternoon or night shift.

5. Clause 30. – Wages:

A. Delete subclause (2) – (7) of this clause and insert in lieu thereof the following—

(2) Employees employed in the classifications prescribed in subclause (1) hereof shall, in addition to the prescribed award rate of pay, receive a weekly all purpose industry allowance of **$80.17.**

(3) Employees meeting the requirements of an Instrument/Electrical Fitter Stage 1 as provided in Clause 6 - Definitions of this award shall receive a weekly all purpose payment of **$7.65** in addition to the wages rates set out in subclause (1) hereof for their classification.

(4) Employees meeting the requirements of Electrical/Instrument Tradesperson Level 2 or Engineering Tradesperson Level 2 as prescribed in Clause 6 - Definitions of the Award shall receive a weekly all purpose payment of **$12.39** in addition to the wage rates set out in subclause (1) hereof for these classifications.

(5) Employees meeting the requirements of Electrical/Instrument Tradesperson Level 3 or Engineering Tradesperson Level 3 as prescribed in Clause 6 - Definitions of the Award shall receive a weekly all purpose payment of **$24.77** in addition to the wage rates set out in subclause (1) hereof for these classifications.

(6) Employees employed on boiler cleaning inside the boiler or flues or combustion chamber shall be paid an additional rate of **33 cents** per hour whilst so engaged.

(7) **Leading Hands** - In addition to the appropriate rate prescribed in subclause (2) of this Clause a leading hand shall be paid—

		$
(a)	If placed in charge of not less than three and not more than 10 other employees	17.39
(b)	If placed in charge of more than 10 and not more than 20 other employees	26.09
(c)	If placed in charge of more than 20 other employees	33.99

B. Delete subclause (12) of this clause and insert in lieu thereof the following—

(12) **Tool Allowance**

A tradesperson to whom the employer does not supply all necessary tools shall be paid a tool allowance of **$5.87** per week.

A tradesperson for the purpose of this Clause shall be deemed to be a employee who is paid at equal rate of wage or higher than the classification Engineering Tradesperson or Electrical/Instrument Tradesperson.

2002 WAIRC 04540

ENROLLED NURSES AND NURSING ASSISTANTS (PRIVATE) AWARD

No. 8 of 1978

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	AUSTRALIAN LIQUOR, HOSPITALITY AND MISCELLANEOUS WORKERS UNION, WESTERN AUSTRALIAN BRANCH, APPLICANT
	v.
	ST JOHN OF GOD HOSPITAL & OTHERS, RESPONDENTS
CORAM	CHIEF COMMISSIONER W S COLEMAN
DELIVERED	TUESDAY, 8 JANUARY 2002
FILE NO/S.	APPLICATION 995 OF 2001
CITATION NO.	2002 WAIRC 04540
Result	Award variation

Order

Having heard Ms D MacTiernan on behalf of the applicant and Mr L Joyce on behalf of the respondents, and by consent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders—

THAT the Enrolled Nurses and Nursing Assistants (Private) Award (No. 8 of 1978) be varied in accordance with the following schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after the 8th day of January 2002.

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

SCHEDULE

1. Clause 8. – Overtime: Delete subclause (5) of this Clause and insert the following in lieu thereof—

(5) Where an employee is required to work overtime and such overtime is worked for a period of at least two hours in excess of the required daily hours of work the employee shall be provided with a meal free of cost or shall be paid the sum of paid $7.01 as meal money.

This subclause shall not apply where the employee has been advised of the necessity to work overtime on the previous day or earlier.

2. Clause 17. – Laundry and Uniforms: Delete subclause (4) of this Clause and insert the following in lieu thereof—

(4) Each employee shall be entitled to all reasonable laundry work at the expense of the employer, but where the employer elects not to launder the uniforms, the employee shall be paid an allowance of $1.25 per week.

3. Clause 32. – Fares and Motor Vehicle Allowances: Delete subclause (2)(c) of this Clause and insert the following in lieu thereof—

(2) (c) A year for the purpose of this clause shall commence on the 1st day of July and end on the 30th day of June next following.

Rates of hire for use of employee's own vehicle on employer's business:

Schedule 1 - Motor Vehicle Allowances

Area and Details	Engine Displacement (in cubic centimetres)		
	Over 2600cc	Over 1600cc -2600cc	1600 cc & Under
	Rate per Kilometre (Cents)		
Metropolitan Area	69.2	60.2	53.2
South West Land Division	71.1	61.7	54.9
North of 23.5° South Latitude	78.0	68.1	60.6
Rest of the State	73.5	63.8	56.6

Schedule 2 - Motor Cycle Allowances

Distance Travelled During a Year on Official Business	Rate per Kilometre ¢/km
All Areas of State	23.9

Motor vehicles with rotary engines are to be included in the 1600 - 2600cc.

2002 WAIRC 04589

FAMILY DAY CARE CO-ORDINATORS' AND ASSISTANTS' AWARD, 1985

NO. A16 OF 1985

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	AUSTRALIAN LIQUOR, HOSPITALITY AND MISCELLANEOUS WORKERS UNION, WESTERN AUSTRALIAN BRANCH, APPLICANT
	v.
	COMMUNICARE & OTHERS, RESPONDENTS
CORAM	CHIEF COMMISSIONER W S COLEMAN
DELIVERED	TUESDAY, 8 JANUARY 2002
FILE NO/S.	APPLICATION 993 OF 2001
CITATION NO.	2002 WAIRC 04589

Result Award varied

Order

Having heard Ms D MacTiernan on behalf of the applicant and Mr L Joyce on behalf of the respondents, and by consent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders—

THAT the Family Day Care Co-ordinators' and Assistants' Award 1985 (No. A 16 of 1985) be varied in accordance with the following schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after the 8th day of January 2002.

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

SCHEDULE

1. Clause 21. – Fares and Travelling Time: Delete subclause (2)(c) of this Clause and insert the following in lieu thereof—

(2) (c) A year for the purpose of this clause shall commence on the 1st day of July and end on the 30th day of June next following.

Rates of hire for use of employee's own vehicle on employer's business:

Schedule 1 - Motor Vehicle Allowances

Area and Details	Engine Displacement (in cubic centimetres)		
	Over 2600cc	Over 1600cc -2600cc	1600 cc & Under
	Rate per Kilometre (Cents)		
Metropolitan Area	69.2	60.2	53.2
South West Land Division	71.1	61.7	54.8
North of 23.5° South Latitude	78.0	68.1	60.6
Rest of the State	73.5	63.8	56.6

Schedule 2 - Motor Cycle Allowances

Distance Travelled During a Year on Official Business	Rate per Kilometre ¢/km
All Areas of State	23.9

Motor vehicles with rotary engines are to be included in the 1600 – 2600cc.

2002 WAIRC 04714

FOOD INDUSTRY (FOOD MANUFACTURING OR PROCESSING) AWARD

No. 20 of 1990

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE FOOD PRESERVERS' UNION OF WESTERN AUSTRALIA, UNION OF WORKERS, APPLICANT
	v.
	ANCHOR PRODUCTS PTY LTD & ORS, RESPONDENT
CORAM	COMMISSIONER A R BEECH
DELIVERED	WEDNESDAY, 30 JANUARY 2002
FILE NO.	APPLICATION 1978 OF 2001
CITATION NO.	2002 WAIRC 04714

Result	Application to vary the Food Industry (Food Manufacturing or Processing) Award No. A20 of 1990 granted.
Representation	
Applicant	Mr T. Pope
Respondents	Mr W. Wild (as agent) for those named respondents for whom he has filed Warrants to Appear.

Order

HAVING HEARD Mr T. Pope on behalf of the applicant and Mr W. Wild (as agent) on behalf of those named respondents for whom he has filed Warrants to Appear, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, and by consent, hereby orders –

THAT the *Food Industry (Food Manufacturing or Processing) Award No. 20 of 1990* be varied in accordance with the following schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after the 30th day of January 2002.

(Sgd.) A. R. BEECH,
[L.S.] Commissioner.

SCHEDULE

1. Clause 19. – Meal Allowance: Delete the figures $5.90 and $4.00 in this clause and insert in lieu thereof the figures $7.30 and $5.00 respectively.

2. Clause 31. – Wages: Delete subclause (3) of this clause and insert in lieu thereof the following—

(3) Leading Hands—

		Per Week Extra $
A Leading Hand in charge of:-		
(a)	Less than three other employees	10.85
(b)	Not less than three and not more than ten other employees	21.45
(c)	More than ten other employees	31.45

2002 WAIRC 04538

FUNERAL DIRECTORS' ASSISTANTS' AWARD

No. 18 of 1962

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	AUSTRALIAN LIQUOR, HOSPITALITY AND MISCELLANEOUS WORKERS UNION, WESTERN AUSTRALIAN BRANCH, APPLICANT
	v.
	BOWRA AND O'DEA PTY LTD & OTHERS, RESPONDENTS
CORAM	CHIEF COMMISSIONER W S COLEMAN

DELIVERED TUESDAY, 8 JANUARY 2002
FILE NO/S. APPLICATION 992 OF 2001
CITATION NO. 2002 WAIRC 04538

Result Award varied

Order

Having heard Ms D MacTiernan on behalf of the applicant and Mr L Joyce on behalf of the respondents, and by consent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders—

THAT the Funeral Directors' Assistants' Award (No. 18 of 1962) be varied in accordance with the following schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after the 8th day of January 2002.

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

SCHEDULE

1. Clause 9. – Meal Time and Allowances: Delete subclause (3)(a) of this Clause and insert the following in lieu thereof—

(3) (a) Subject to the provisions of paragraph (b) of this subclause an employee, required to work overtime for more than two hours, shall be supplied with a meal by the employer or be paid $7.75 for a meal and, if owing to the amount of overtime worked, a second or subsequent meal is required the employee shall be supplied with such meal by the employer or paid $6.25 for each meal so required.

2. Clause 10. – Wages: Delete subclause (3) of this Clause and insert the following in lieu thereof—

(3) Leading Hands: Any employee placed by the employer in charge of three or more other employees shall be paid $20.40 per week in addition to the amounts prescribed in this clause.

3. Clause 15. – Special Rates and Conditions: Delete subclauses (1) & (2) of this Clause and insert the following in lieu thereof—

(1) An employee who is required to come into contact with a body which is in an advanced state of decomposition shall be paid $14.80. No employee shall be entitled to more than one payment in respect of each such case.

(2) An employee who is required to do any work in connection with an exhumation shall receive an allowance of $45.80 or each body exhumed. No worker shall be entitled to more than one payment in respect to each such case.

4. Clause 26. – Standing By: Delete subclauses (1) & (2) of this Clause and insert the following in lieu thereof—

(1) Between the hours of 5.30 p.m. and midnight (Monday to Friday) - $8.55 per night.

(2) Between 7.00 a.m. and midnight on a Saturday, Sunday or any of the holidays prescribed in Clause 12. - Public Holidays of this award - $18.50 per day.

5. Clause 27. – Car Allowance: Delete this Clause and insert the following in lieu thereof—

27. - CAR ALLOWANCE

Where an employee is required and authorised to use his/her own motor vehicle he/she shall be paid 53.96 cents per kilometre for each kilometre travelled on his/her employer's business.

2002 WAIRC 04623

GARDENERS (GOVERNMENT) 1986 AWARD

No. 16 of 1983

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES AUSTRALIAN LIQUOR, HOSPITALITY AND MISCELLANEOUS WORKERS UNION, WESTERN AUSTRALIAN BRANCH, APPLICANT

v.

THE HON PREMIER OF WESTERN AUSTRALIA & OTHERS, RESPONDENTS

CORAM CHIEF COMMISSIONER W S COLEMAN
DELIVERED TUESDAY, 8 JANUARY 2002
FILE NO/S. APPLICATION 991 OF 2001
CITATION NO. 2002 WAIRC 04623

Result Award varied

Order

Having heard Ms D MacTiernan on behalf of the applicant and Mr J Lange on behalf of the respondents, and by consent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders—

THAT the Gardeners (Government) Award 1986 (No. A 16 of 1983) be varied in accordance with the following schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after the 7th day of January 2002.

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

SCHEDULE

1. Clause 12. – Overtime: Delete subclause (2) of this Clause and insert the following in lieu thereof—

(2) When an employee without being notified on the previous day or earlier is required to continue working after his usual knock off time for more than two hours, the employee shall be provided with a meal or be paid $8.15 in lieu thereof.

2. Clause 16. – First Aid – Kits and Attendants: Delete subclause (2) of this Clause and insert the following in lieu thereof—

(2) The employer shall, wherever practicable and where there are two or more employees, appoint an employee holding current first aid qualifications from St John Ambulance or similar body to carry out first aid duty at all works or depots where employees are employed. Such employees so appointed in addition to first aid duties, shall be responsible under the general supervision of the supervisor or foreperson for maintaining the contents of the first aid kit, conveying it to the place of work and keeping it in a readily accessible place for immediate use.

Employees so appointed shall be paid the following rates in addition to their prescribed rate per day—

Qualified Attendant	$ Per Day
10 employees or less	1.08
In excess of 10 employees	1.85

3. Clause 25. – Wages – Part C – All Employees: Delete subclauses (3), (5) & (10)(a) of this Clause and insert the following in lieu thereof—

(3) A Senior Gardener/Ground Attendant who is required to maintain turf wickets, bowling greens or tennis courts shall be paid in addition to the rates prescribed an amount of $5.20 per week. Occasional off-season attention shall not qualify an employee for payment under this subclause.

(5) Leading Hands

Leading Hands and Senior Gardener/Ground Attendants if placed in charge of —

(a) five and not more than ten other employees shall be paid $18.20 per week extra;

(b) more than ten but not more than 20 other employees shall be paid $26.70 per week extra;

(c) more than 20 other employees shall be paid $35.40 per week extra.

(10) Toilet Cleaning Allowance (Zoological Gardens)

(a) Employees of the Zoological Gardens Board covered by this award who are required to clean public toilets shall be paid 56 cents per closet, per week.

4. Clause 28. – Travel Allowance: Delete subclause (1)(a) of this Clause and insert the following in lieu thereof—

(1) (a) An employee required on any day to report directly to the job as distinct from the permanent depot to which such employee is attached (or where a permanent depot does not exist the head office of the employer shall be regarded as the permanent depot) shall be paid $9.30 per day to compensate for the excess fare and travelling time from the employee's home to his place of work and return.

2002 WAIRC 04713

HAIRDRESSERS AWARD 1989

No. A32 of 1988

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE WEST AUSTRALIAN HAIRDRESSERS' AND WIGMAKERS' EMPLOYEES' UNION OF WORKERS, APPLICANT
	v.
	THE MASTER LADIES HAIRDRESSERS' INDUSTRIAL UNION OF EMPLOYERS OF W.A., RESPONDENT
CORAM	COMMISSIONER A R BEECH
DELIVERED	WEDNESDAY, 30 JANUARY 2002
FILE NO.	APPLICATION 1969 OF 2001
CITATION NO.	2002 WAIRC 04713

Result	Application to vary the Hairdressers Award 1989 granted.
Representation	
Applicant	Mr T. Pope and with him Mr L. Marshall
Respondents	Mr W. Wild (as agent) for the Central Area Region Training Scheme

Order

HAVING HEARD Mr T. Pope and with him Mr L. Marshall on behalf of the applicant and Mr W. Wild (as agent) on behalf of the Central Area Region Training Scheme, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, and by consent, hereby orders –

THAT the *Hairdressers Award 1989* be varied in accordance with the following schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after the 30th day of January 2002.

(Sgd.) A. R. BEECH,
[L.S.] Commissioner.

SCHEDULE

1. Clause 16. – Meal Money: Delete subclause (1) of this clause and insert in lieu thereof the following—

(1) The meal money required to be paid to all employees pursuant to this clause shall be $8.50.

2. Clause 22. – Tools of Trade: Delete subclause (4) of this clause and insert in lieu thereof the following—

(4) Tool Allowance

In addition to the weekly wage a tool allowance of $5.95 per week shall be payable to full time Seniors, part time Seniors, indentured apprentices, and probationary apprentices.

2. Clause 32. – First Aid Allowance: Delete this clause and insert in lieu thereof the following—

32. - FIRST AID ALLOWANCE

An employee holding either a Red Cross or St. John Senior First Aid Certificate of at least 'A' level who is appointed by the employer to perform first aid duties shall be paid $7.15 per week in addition to the employee's ordinary rate.

2002 WAIRC 04537

HEALTH ATTENDANTS AWARD, 1979

No. A49 of 1978

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	AUSTRALIAN LIQUOR, HOSPITALITY AND MISCELLANEOUS WORKERS UNION, WESTERN AUSTRALIAN BRANCH, APPLICANT
	v.
	CARINE GLADES HEALTH STUDIO & OTHERS, RESPONDENTS
CORAM	CHIEF COMMISSIONER W S COLEMAN
DELIVERED	TUESDAY, 8 JANUARY 2002
FILE NO/S.	APPLICATION 990 OF 2001
CITATION NO.	2002 WAIRC 04537

Result Award varied

Order

Having heard Ms D MacTiernan on behalf of the applicant and Mr L Joyce on behalf of the respondents, and by consent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders—

THAT the Health Attendants Award 1979 (No. A 49 of 1978) be varied in accordance with the following schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after the 8th day of January 2002.

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

SCHEDULE

1. Clause 14. – Overtime: Delete subclause (3)(a) of this Clause and insert the following in lieu thereof—

(3) (a) Subject to the provisions of paragraph (b) of this subclause an employee, required to work overtime for more than two hours, shall be supplied with a meal by the employer or be paid $6.95 for a meal and, if owing to the amount of overtime worked, a second or subsequent meal is required the employee shall be supplied with such meal by the employer or paid $4.80 for each meal so required.

2002 WAIRC 04548

HOSPITAL EMPLOYEES' (BRIGHTWATER) CONSOLIDATED AWARD 1981

NO. 26 OF 1960

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	AUSTRALIAN LIQUOR, HOSPITALITY AND MISCELLANEOUS WORKERS UNION, WESTERN AUSTRALIAN BRANCH, APPLICANT
	v.
	BRIGHTWATER, RESPONDENT
CORAM	CHIEF COMMISSIONER W S COLEMAN
DELIVERED	TUESDAY, 8 JANUARY 2002
FILE NO.	APPLICATION 1015 OF 2001
CITATION NO.	2002 WAIRC 04548

Result Award varied

Order

HAVING heard Ms D MacTiernan on behalf of the applicant and Mr L Joyce on behalf of the respondent and by consent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders—

THAT the Hospital Employees' (Brightwater) Consolidated Award 1981 (No. 26 of 1960) be varied in accordance with the following schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after the 8th day of January 2002.

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

SCHEDULE

1. Clause 9. – Overtime: Delete subclause (5) of this Clause and insert the following in lieu thereof—

(5) Where an employee is required to work overtime and such overtime is worked for a period of at least two hours in excess of the required daily hours of work the employee shall be provided with a meal free of cost or shall be paid the sum of $7.01 as meal money.

This subclause shall not apply where the employee has been advised of the necessity to work overtime on the previous day or earlier.

2. Clause 28. – Wages: Delete paragraph (a) of subclause (2) of this Clause and insert the following in lieu thereof—

(a) The ordinary wages of any employee, placed in charge of three or more employees, shall be increased by $17.00 per week.

3. Clause 29. – Fares and Motor Vehicle Allowances: Delete paragraph (c) of subclause (2) of this Clause and insert the following in lieu thereof—

(c) A year for the purpose of this clause shall commence on the 1st day of July and end on the 30th day of June next following.

Rates of hire for use of employee's own vehicle on employer's business:

Schedule 1 - Motor Vehicle Allowances

Area and Details	Engine Displacement (in cubic centimetres)		
	Over 2600cc	Over 1600cc -2600cc	1600 cc & Under
	Rate per Kilometre (Cents)		
Metropolitan Area	69.2	60.2	53.2
South West Land Division	71.1	61.7	54.9
North of 23.5° South Latitude	78.0	68.1	60.6
Rest of the State	73.5	63.8	56.6

Schedule 2 - Motor Cycle Allowances

Distance Travelled During a Year on Official Business	Rate per Kilometre (Cents)
All Areas of State	23.9

Motor vehicles with rotary engines are to be include in the 1600-2600cc.

2002 WAIRC 04569

HOSPITAL EMPLOYEES' (PERTH DENTAL HOSPITAL) AWARD 1971

No. 4 of 1970

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	AUSTRALIAN LIQUOR, HOSPITALITY AND MISCELLANEOUS WORKERS UNION, WESTERN AUSTRALIAN BRANCH, APPLICANT
	v.
	BOARD OF MANAGEMENT PERTH DENTAL HOSPITAL, RESPONDENT
CORAM	CHIEF COMMISSIONER W S COLEMAN
DELIVERED	TUESDAY, 8 JANUARY 2002
FILE NO.	APPLICATION 1014 OF 2001
CITATION NO.	2002 WAIRC 04569
Result	Award varied

Order

HAVING heard Ms D MacTiernan on behalf of the applicant and there being no appearance on behalf of the respondent and by consent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders—

THAT the Hospital Employees' (Perth Dental Hospital) Award 1971 (No. 4 of 1970) be varied in accordance with the following schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after the 8th day of January 2002.

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

SCHEDULE

1. Clause 19. – Wages: Delete subclause (2) of this Clause and insert the following in lieu thereof—

(2) Where an employee is designated to be Technician in Charge of one of the following dental laboratories,

Orthodontic Laboratory Clinic
North Perth Clinic
Liddell Clinic
Gustafsen Clinic
Sir Charles Gairdner Hospital Clinic
Bunbury Clinic
Albany Clinic
Warwick Dental Clinic
Rockingham Dental Clinic
Mount Henry Dental Clinic

that employee shall be paid at the rate of $18.14 per week in addition to the ordinary rate of wage prescribed by this clause.

2002 WAIRC 04578

HOSPITAL WORKERS (CLEANING CONTRACTORS – PRIVATE HOSPITALS) AWARD 1978

No. R2 of 1977

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	AUSTRALIAN LIQUOR, HOSPITALITY AND MISCELLANEOUS WORKERS UNION, WESTERN AUSTRALIAN BRANCH, APPLICANT
	v.
	POWERCLEAN, RESPONDENT
CORAM	CHIEF COMMISSIONER W S COLEMAN
DELIVERED	TUESDAY, 8 JANUARY 2002
FILE NO.	APPLICATION 1022 OF 2001
CITATION NO.	2002 WAIRC 04578

Result Award varied

Order

HAVING heard Ms D MacTiernan on behalf of the applicant and Mr L Joyce on behalf of the respondent and by consent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders—

THAT the Hospital Workers (Cleaning Contractors – Private Hospitals) Award 1978 (No. R 2 of 1977) be varied in accordance with the following schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after the 8th day of January 2002.

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

SCHEDULE

1. Clause 10. – Overtime: Delete subclause (4) of this Clause and insert the following in lieu thereof—

(4) Where an employee is required to work overtime and such overtime is worked for a period of at least two hours in excess of the required daily hours of work the employee shall be provided with a meal free of cost, or shall be paid the sum of $7.39 as meal money.

This subclause shall not apply where the employee has been advised of the necessity to work overtime on the previous day or earlier.

2. Clause 13. – Special Rates and Conditions:

A. Delete subclause (5) of this Clause and insert the following in lieu thereof—

(5) Toilets: Workers engaged in any week for the major portion of their time cleaning lavatories shall be paid an extra $1.15 per week.

B. Delete subclause (6) of this Clause and insert the following in lieu thereof—

(6) Broken Shift: Where a worker is required to carry out the ordinary hours of duty per day in more than one shift and where the break is not less than four hours an allowance of 85 cents per day shall be paid.

3. Clause 18. – Laundry: Delete subclause (2) of this Clause and insert the following in lieu thereof—

(2) Where the uniform of any worker cannot be laundered at the hospital an allowance of $1.32 per week shall be paid to the worker.

4. Clause 19. – Height Money:

A. Delete subclause (2) of this Clause and insert the following in lieu thereof—

(2) Where it is necessary to go wholly outside a building to clean windows an employee shall, if such cleaning be 15.5 metres or more from the nearest horizontal plane, be paid an allowance of $1.73 per day.

B. Delete subclause (3) of this Clause and insert the following in lieu thereof—

(3) Where an employee is required to clean windows from a swinging scaffold or similar device, he/she shall be paid 29 cents per hour extra for every hour or part thereof so worked.

5. Clause 23. – Fares, Travelling Time and Transport: Delete paragraph (c) of subclause (2) of this Clause and insert the following in lieu thereof—

(2) (c) A year for the purpose of this clause shall commence on the 1st day of July and end on the 30th day of June next following.

Rates of hire for use of employee's own vehicle on employer's business:

Schedule 1 - Motor Vehicle Allowances

Area and Details	Engine Displacement (in cubic centimetres)		
	Over 2600cc	Over 1600cc -2600cc	1600 cc & Under
	Rate per Kilometre (Cents)		
Metropolitan Area	69.2	60.2	53.2
South West Land Division	71.1	61.7	54.9
North of 23.5° South Latitude	78.0	68.1	60.6
Rest of the State	73.5	63.8	56.6

Schedule 2 - Motor Cycle Allowances

Distance Travelled During a Year on Official Business	Rate per Kilometre ¢/km
All Areas of State	23.9

Motor vehicles with rotary engines are to be included in the 1600 – 2600cc.

6. Clause 32. – Wages: Delete paragraph (a) of subclause (2) of this Clause and insert the following in lieu thereof—

(2) (a) Leading Hands: In addition to the rates herein prescribed a leading hand shall be paid per week—

		$
(i)	If placed in charge of not less than three and not more than 10 other workers	17.50
(ii)	If placed in charge of more than 10 and not more than 20 other workers	26.35
(iii)	If placed in charge of more than 20 other workers	35.15

2002 WAIRC 04551

HOSPITAL WORKERS (N'GALA) AWARD

No. 6A of 1958

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	AUSTRALIAN LIQUOR, HOSPITALITY AND MISCELLANEOUS WORKERS UNION, WESTERN AUSTRALIAN BRANCH, APPLICANT
	v.
	BOARD OF MANAGEMENT NGALA INC, RESPONDENT
CORAM	CHIEF COMMISSIONER W S COLEMAN
DELIVERED	TUESDAY, 8 JANUARY 2002
FILE NO.	APPLICATION 1021 OF 2001
CITATION NO.	2002 WAIRC 04551

Result Award varied

Order

HAVING heard Ms D MacTiernan on behalf of the applicant and Mr L Joyce on behalf of the respondent and by consent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders—

THAT the Hospital Workers (N'gala) Award No. 6A of 1958 be varied in accordance with the following schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after the 8th day of January 2002.

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

SCHEDULE

1. Clause 14. – Overtime: Delete subclause (4) of this Clause and insert the following in lieu thereof—

(4) Where an employee is required to work overtime and such overtime is worked for a period of at least two hours in excess of the required daily hours of work the employee shall be provided with a meal free of cost or shall be paid the sum of $7.00 as meal money.

This subclause shall not apply where the employee has been advised of the necessity to work overtime on the previous day or earlier.

2. Clause 17. – Allowances and Special Provisions: Delete this Clause and insert the following in lieu thereof—

(1) Any employee handling foul linen in laundry procedures shall be paid an allowance of $1.61 per week.

(2) An employee engaged as a casual shall be paid 25% over the rates specified in this award.

3. Clause 26. – Fares and Motor Vehicle Allowances: Delete paragraph (c) of subclause (2) of this Clause and insert the following in lieu thereof—

(c) A year for the purpose of this clause shall commence on the 1st day of July and end on the 30th day of June next following.

Rates of hire for use of employee's own vehicle on employer's business

Schedule 1 - Motor Vehicle Allowances

Area and Details	Engine Displacement (in cubic centimetres)		
	Over 2600cc	Over 1600cc -2600cc	1600 cc & Under
	Rate per Kilometre (Cents)		
Metropolitan Area	69.2	60.2	53.2
South West Land Division	71.1	61.7	54.9
North of 23.5° South Latitude	78.0	68.1	60.6
Rest of the State	73.5	63.8	56.6

Schedule 2 - Motor Cycle Allowances

Distance Travelled During a Year on Official Business	Rate per Kilometre (Cents)
All Areas of State	23.9

2001 WAIRC 04570

HOTEL AND TAVERN WORKERS' AWARD, 1978

No. R31 of 1977

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	AUSTRALIAN LIQUOR, HOSPITALITY AND MISCELLANEOUS WORKERS UNION, WESTERN AUSTRALIAN BRANCH, APPLICANT
	v.
	IMPERIAL HOTEL & OTHERS, RESPONDENTS
CORAM	CHIEF COMMISSIONER W S COLEMAN
DELIVERED	TUESDAY, 8 JANUARY 2002
FILE NO/S.	APPLICATION 1002 OF 2001
CITATION NO.	2002 WAIRC 04570
Result	Award varied

Order

Having heard Ms D MacTiernan on behalf of the applicant and Mr D Crowe and Mr L Joyce on behalf of the respondents, and by consent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders—

THAT the Hotel and Tavern Workers' Award, 1978 (No. R 31 of 1977) be varied in accordance with the following schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after the 8th day of January 2002.

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

SCHEDULE

1. Clause 9. – Additional Rates for Ordinary Hours: Delete this Clause and insert the following in lieu thereof—

9. – ADDITIONAL RATES FOR ORDINARY HOURS

(1) An employee who is required to work any ordinary hours prior to 7.00 am or after 7.00 pm on any day Monday to Friday, both inclusive, shall be paid at the rate of an extra $1.30 per hour for each such hour, or part thereof worked. Provided that any employee who works the majority of his/her ordinary hours between midnight and 7.00 am shall be paid $1.36 per hour extra for each such hour, or part thereof worked.

(2) All time worked during the ordinary hours of work on Saturdays and Sundays shall be paid for at the rate of time and a half.

(3) An employee who is required to work any of his/her ordinary hours on any day in more than one period of employment, other than for meal breaks as prescribed in accordance with the provisions of Clause 13. - Meal Breaks of this Award, shall be paid an allowance of $2.14 per day, for such broken work period worked.

(4) The provisions of subclauses (1) and (2) hereof shall not apply to any work performed on a holiday and to which the provisions of subclause (2) of Clause 17. - Holidays are applicable.

(5) The provisions of this clause shall not apply to casual employees.

2. Clause 14. – Meal Money: Delete this Clause and insert the following in lieu thereof—

14. – MEAL MONEY

Any employee who is required to work overtime for two hours or more on any day, without being notified on the previous day or earlier, that he or she will be so required to work such overtime, will either be supplied with a substantial meal by the employer or be paid $8.60 meal money.

3. Clause 26. – Uniforms and Laundering: Delete subclauses (2) & (3) this Clause and insert the following in lieu thereof—

(2) Subject to subclause (3) hereof, an employer requiring any of the articles of clothing to be worn as described in subclause (1) of this clause, shall cause such clothing to be laundered at his/her own expense or otherwise shall pay to the employee concerned $5.55 per fortnight worked as a laundry allowance. The allowance provided herein shall be halved for employees who work less than thirty-eight ordinary hours each fortnight.

(3) Where a cook wears the ordinary apparel usually worn by cooks such as black and white check trousers, white shirt, white apron and cap, such garments shall be laundered at the employer's expense or otherwise the employee shall be paid $8.40 per fortnight worked as a laundry allowance. The allowance provided herein shall be halved for employees who work less than thirty-eight ordinary hours each fortnight.

4. Clause 27. – Protective Clothing: Delete subclauses (1) this Clause and insert the following in lieu thereof—

(1) Employees who are required to wash dishes, clean toilets or otherwise handle detergents, acids, soaps or any injurious substances, shall be supplied with rubber gloves free of charge by the employer, or be paid, in lieu, an allowance of $2.96 per fortnight worked. The allowance provided herein shall be halved for employees who work less than thirty-eight ordinary hours each fortnight.

5. Clause 28. – Employee Equipment: Delete this Clause and insert the following in lieu thereof—

28. - EMPLOYEE EQUIPMENT

All knives, choppers, tools, brushes, towels and other utensils, implements and material which may be required to be-used by the employee for the purpose of carrying out his/her duties, shall be supplied by the employer free Of charge. Provided that where an employee is required by the employer to use his/her own knives he shall be paid an allowance of $11.30 per fortnight worked. The allowance provided herein shall be halved for employees who work less than thirty-eight ordinary hours each fortnight.

2002 WAIRC 04586

JENNY CRAIG EMPLOYEES AWARD, 1995

No. A1 of 1994

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	AUSTRALIAN LIQUOR, HOSPITALITY AND MISCELLANEOUS WORKERS UNION, WESTERN AUSTRALIAN BRANCH, APPLICANT
	v.
	JENNY CRAIG WEIGHTLOSS CENTRES, RESPONDENT
CORAM	CHIEF COMMISSIONER W S COLEMAN
DELIVERED	TUESDAY, 8 JANUARY 2002
FILE NO.	APPLICATION 1001 OF 2001
CITATION NO.	2002 WAIRC 04586

Result	Award varied

Order

HAVING heard Ms D MacTiernan on behalf of the applicant and Ms N Thomson on behalf of the respondent, and by consent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders—

THAT the Jenny Craig Employees Award, 1995 (No. A 1 of 1994) be varied in accordance with the following schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after the 8th day of January 2002.

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

SCHEDULE

1. Clause 9. – Special Rates and Conditions:

A. Delete subclause (1) of this Clause and insert the following in lieu thereof—

(1) All employees will receive a laundry allowance of $6.20 per week.

B. Delete subclause (4) of this Clause and insert the following in lieu thereof—

(4) In addition to the wages prescribed by this award, all employees shall be entitled to be paid the following—

(a) when facilitating workshops a minimum payment of 95 cents per client; and

(b) for the number of clients seen

1 to 14 clients	$1.96 per client
15 or more clients	$2.49 per client; and

(c) for Jenny Craig products and programs sold by the employee, a cash bonus of 3% of the sale value.

C. Delete paragraph (c) of subclause (8) of this Clause and insert the following in lieu thereof—

(c) A year for the purpose of this clause shall commence on the first day of July and end on the thirtieth day of June next following.

Rates of Hire for the use of the employee's own vehicle on the employer's business.

Schedule 1 - Motor Vehicle Allowance

Area and Details	Engine Displacement (in cubic centimetres)		
	Over 2600cc	Over 1600cc-2600cc	1600 cc & Under
	Cents per Kilometre		
Metropolitan Area	64.7	56.1	49.8
South West Land Division	66.5	57.7	51.3
North of 23.5° South Latitude	73.0	63.7	56.7
Rest of the State	68.8	59.7	52.9

Schedule 2 - Motor Cycle Allowances

Distance Travelled During a Year on Official Business	Rate cents/km
Rate per kilometre	22.4

Motor vehicles with rotary engines are to be included in the 1600-2600cc category.

2. Clause 14. – Overtime: Delete paragraph (a) of subclause (3) of this Clause and insert the following in lieu thereof—

(3) (a) Subject to the provisions of paragraph (b) of this subclause an employee required to work overtime for more than two hours shall be supplied with a meal by the employer or be paid $7.75 for a meal and if, owing to the amount of overtime worked, a second or subsequent meal is required, the employee shall be supplied with such meal by the employer or paid $5.30 for each meal so required.

2002 WAIRC 04543

LAUNDRY WORKERS' AWARD, 1981

No. A29 of 1981

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	AUSTRALIAN LIQUOR, HOSPITALITY AND MISCELLANEOUS WORKERS UNION, WESTERN AUSTRALIAN BRANCH, APPLICANT
	v.
	ALSCO LINEN SERVICE PTY LTD AND OTHERS, RESPONDENTS
CORAM	CHIEF COMMISSIONER W S COLEMAN
DELIVERED	TUESDAY, 8 JANUARY 2002
FILE NO.	APPLICATION 1000 OF 2001
CITATION NO.	2002 WAIRC 04543

Result Award varied

Order

HAVING heard Ms D MacTiernan on behalf of the applicant and Mr L Joyce on behalf of the respondents and by consent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders—

THAT the Laundry Workers' Award, 1981 (No. A 29 of 1981) be varied in accordance with the following schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after the 8th day of January 2002.

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

SCHEDULE

1. Clause 20. – Meal Money: Delete this Clause and insert the following in lieu thereof—

(1) An employee required to work overtime for more than two hours without being notified on the previous day or earlier, that he/she will be so required to work, shall be supplied with a meal by the employer or paid $7.40 for a meal.

(2) If the amount of overtime required to be worked necessitates a second or subsequent meal, the employer shall, unless he/she has notified the employee concerned on the previous day or earlier that such second or subsequent meal will also be required, provide such meals or pay an amount of $7.40 for each second or subsequent meal. No such payments need be made to employees living in the same locality as their workshops who can reasonably return home for such meals.

(3) If an employee in consequence of receiving such notice has provided him/herself with a meal or meals and is not required to work overtime or is required to work less overtime than notified, he/she shall be paid the amount above prescribed in respect of the meals not then required.

2. Clause 22. – Allowances: Delete this Clause and insert the following in lieu thereof—

Where an employee is required to sort foul linen an extra allowance of 35 cents per hour will be paid whilst so employed on this type of work.

2002 WAIRC 04705

LICENSED ESTABLISHMENTS (RETAIL AND WHOLESALE) AWARD 1979

No. R23 of 1977

SHOP AND WAREHOUSE (WHOLESALE AND RETAIL ESTABLISHMENTS) STATE AWARD 1977—THE

No. R32 of 1976

STOREMEN INDEPENDENT WOOLDUMPERS PTY LTD AWARD 1982—THE

No. A36 of 1982

WOOL, HIDE AND SKIN STORE EMPLOYEES' AWARD

No. 8 of 1966

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE SHOP, DISTRIBUTIVE AND ALLIED EMPLOYEES' ASSOCIATION OF WESTERN AUSTRALIA, APPLICANT
	v.
	MYER STORES LIMITED AND OTHERS, RESPONDENTS
CORAM	COMMISSIONER A R BEECH
DELIVERED	THURSDAY, 10 JANUARY 2002
FILE NO.	APPLICATIONS 1609, 1610, 1611 & 2123 OF 2001
CITATION NO.	2002 WAIRC 04705

Result	Application to vary awards granted.
Representation	
Applicant	Mr T. Pope
Respondent	Mr W. Wild (as agent) on behalf of D'Orsogna Limited and Woolworths WA Pty Ltd and Independent Wooldumpers Pty Ltd.

Reasons for Decision

(Extemporaneous)

1 These are applications to vary a number of allowances in these awards. There is really only one difference between the union and the respondents who appear. That difference is whether meal money should be increased by reference to the meals and take-away food component of the 8 capital cities CPI, as the union has calculated, or by the equivalent Perth CPI, as those respondents propose.

2 The requirement of Principles of the State Wage Principles is that existing allowances which constitute a reimbursement of expenses incurred may be adjusted from time to time where appropriate to reflect the relevant change in the level of such expenses. The issue really then is what is the relevant change in the level of meal money?

3 In my view the manner in which the union has approached the matter is consistent with that Principle; that is, the use of the food component of the eight capital cities index is, in my view, a relevant change in the level of such expenses. There may be room for argument as to whether it is the most relevant or the least relevant, but I consider that it is nevertheless relevant and that by granting these applications I am applying the Principles.

4 The issue brought by these respondents has arisen very much at the last minute, given these applications were filed in the Commission on 7 September 2001. Further, the difference after applying the two indices, on this occasion, is less than 5 cents. I am not prepared to use these applications to set some standard for the future increases to meal money, or delve into the consistent, or perhaps inconsistent, way the parties may have increased meal money in these awards in the past. It is almost a moot point.

5 It would seem to me that the applications as brought by the union ought to go through as claimed. If there is to be an argument that there ought be a particular index used to increase meal moneys across all awards that is something that might be considered generally by a future State Wage Case. In that way, there may then be consistency in the future.

6 The four applications therefore seem to me to be in proper form and I propose to amend the awards in the terms of the schedules. Minutes of the proposed orders now issue and the parties are to advise by 4:00 pm today whether they wish to speak to the minutes.

2002 WAIRC 04603

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE SHOP, DISTRIBUTIVE AND ALLIED EMPLOYEES' ASSOCIATION OF WESTERN AUSTRALIA, APPLICANT
	v.
	BALCATTA LIQUOR STORE & ORS, RESPONDENTS
CORAM	COMMISSIONER A R BEECH
DELIVERED	THURSDAY, 10 JANUARY 2002
FILE NO.	APPLICATION 1610 OF 2001
CITATION NO.	2002 WAIRC 04603

Result	Award varied
Representation	
Applicant	Mr T. Pope
Respondent	No appearance on behalf of the respondents.

Order

HAVING HEARD Mr T. Pope on behalf of the applicant and there being no appearance on behalf of the respondents, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979* hereby orders—

THAT the *Licensed Establishments (Retail and Wholesale) Award 1979* be varied in accordance with the following schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after 10 January 2002.

(Sgd.) A. R. BEECH,
[L.S.] Commissioner.

SCHEDULE

1. Clause 10. – Meal Times and Meal Allowance—

(A) Delete subclause (2) of Part I – Retail Establishments of this clause and insert in lieu thereof the following—

(2) When an employee is required to continue working after the usual finishing time for more than one hour he/she shall be paid $8.60 for the purchase of any meal required.

(B) Delete subclause (3) of Part II – Wholesale Establishments of this clause and insert in lieu thereof the following—

(3) When an employee is required to continue working after the usual finishing time for more than one hour he/she shall be paid $8.60 for the purchase of any meal required.

2. Clause 21. – Wages—

(A) Delete paragraphs (a) and (b) of subclause (1) of PART IV – ADDITIONAL PAYMENTS of this clause and insert in lieu thereof the following—

(a) An employee required to operate a ride-on power operated tow motor, a ride-on power operated pallet truck or a walk beside power operated high lift stacker in the performance of his/her duties shall be paid an additional 41 cents per hour whilst so engaged.

(b) An employee required to operate a ride-on operated fork lift, high lift stacker or high lift stock picker or a power operated overhead traversing hoist in the performance of his/her duties shall be paid an additional 57 cents per hour whilst so engaged.

(B) Delete sub-paragraphs (i), (ii) and (iii) of paragraph (a) of subclause (2) of PART IV – ADDITIONAL PAYMENTS of this clause and insert in lieu thereof the following—

(i) Below 0 degrees Celsius to - 20 degrees Celsius 62 cents per hour.

(ii) Below - 20 degrees Celsius to - 25 degrees Celsius 71 cents per hour

(iii) Below - 25 degrees Celsius, 82 cents per hour.

2002 WAIRC 04608

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE SHOP, DISTRIBUTIVE AND ALLIED EMPLOYEES' ASSOCIATION OF WESTERN AUSTRALIA, APPLICANT
	v.
	MYER STORES LIMITED & ORS, RESPONDENTS
CORAM	COMMISSIONER A R BEECH
DELIVERED	THURSDAY, 10 JANUARY 2002
FILE NO.	APPLICATION 1609 OF 2001
CITATION NO.	2002 WAIRC 04608

Result	Award varied.
Representation	
Applicant	Mr T. Pope
Respondent	Mr W. Wild (as agent) for those named respondents for whom Warrants to Appear have been filed.

Order

HAVING HEARD Mr T. Pope on behalf of the applicant and Mr W. Wild (as agent) on behalf of those named respondents for whom Warrants to Appear have been filed, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979* hereby orders—

THAT *The Shop and Warehouse (Wholesale and Retail Establishments) State Award 1977* be varied in accordance with the following schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after 10 January 2002.

(Sgd.) A. R. BEECH,
[L.S.] Commissioner.

SCHEDULE

1. Clause 7A. – Nightfill Duty:

(A) Delete placitum (aa) and (bb) of sub-paragraph (i) of paragraph (a) of sub-clause (9) of this clause and insert in lieu thereof the following—

(aa) Full-time and Part-time Workers

- a loading of $2.36 per hour in addition to the ordinary hourly rate of a full-time or part-time worker.

(bb) Casual Workers

- a loading of $2.36 per hour in addition to the ordinary casual rate as laid down in paragraph (a) of subclause (4) of Clause 7. - Casual Workers.

(B) Delete placitum (aa), (bb) and (cc) of sub-paragraph (ii) of paragraph (a) of sub-clause (9) of this clause and insert in lieu thereof the following—

(aa) Full-time and Part-time Workers

- a loading of $3.34 per hour in addition to the ordinary hourly rate of a full-time worker as prescribed in column (i) of subclause (1) of Part I of Clause 28. - Wages.

(bb) Part-time Workers

- a loading $7.26 per hour in addition to the ordinary hourly rate of a full-time shop assistant as prescribed in column (i) of subclause (1) of Part I of Clause 28. - Wages.

(cc) Casual Workers

- a loading of $8.70 per hour in addition to the ordinary casual rate as laid down in paragraph (a) of subclause (4) of Clause 7. - Casual Workers.

2. Clause 12. – Meal Money: Delete sub-clauses (1) and (2) of this clause and insert in lieu thereof the following—

(1) When a worker is required to continue working after the usual finishing time for more than one hour he/she shall be paid $8.60 for the purchase of any meal required.

(2) Late Night Trading Meal Allowance—

A worker who commences work at or prior to 1.00pm on the day of late night trading and is required to work beyond 7.00pm on that day shall be paid a meal allowance of $8.60.

3. Clause 28. – Wages—

(A) Delete paragraphs (a) and (b) of sub-clause (1) in PART III of this clause and insert in lieu thereof the following—

(1) (a) A worker required to operate a ride-on power operated tow motor, a ride-on power operated pallet truck or a walk beside power operated high lift stacker in the performance of his duties shall be paid an additional 50 cents per hour whilst so engaged.

(b) A worker required to operate a ride-on power operated fork lift, high lift stacker or high lift stock picker or a power operated overhead traversing hoist in the performance of his duties shall be paid an additional 57 cents per hour whilst so engaged.

(B) Delete sub-paragraphs (i), (ii) and (ii) of paragraph (a) of sub-clause (4) in PART III of this clause and insert in lieu thereof the following—

(i) Below 0° Celsius to -20° Celsius - 62 cents per hour

(ii) Below -20° Celsius to -25° Celsius - 71 cents per hour

(iii) Below -25° Celsius - 82 cents per hour.

(C) Delete subclause (7) in PART III of this clause and insert in lieu thereof the following—

(7) An automotive spare parts or accessories salesman qualified (i.e. one who has passed the appropriate course of technical training) shall be paid the sum of $19.04 per week in addition to the rates prescribed herein.

4. Clause 28A. – Structural Efficiency Agreement – Cold Storage Industry: Delete the figures $17.34 and $2.89 in this clause and insert in lieu thereof $18.43 and $3.07 respectively.

5. Clause 46. – First Aid Allowance: Delete the figure $6.93 in this clause and insert in lieu thereof $7.37.

6. Clause 48. – Additional Loading For Late Night Trading Establishments: Delete subclauses (1) and (2) of this clause and insert in lieu thereof the following—

(1) A full-time or part-time worker employed in a "General Retail Shop" or "Special Retail Shop" who works ordinary hours between 6.00 p.m. and 9.00 p.m. on the day of late night trading shall be paid a loading of $2.94 per hour in addition to the ordinary hourly rate of a full-time or part-time worker.

(2) A casual worker employed in a "General Retail Shop" or "Special Retail Shop" who works ordinary hours between 6.00 p.m. and 9.00 p.m. on the day of late night trading shall be paid the amount of $2.94 per hour in addition to the ordinary casual rate as laid down in paragraph (a) of subclause (4) of Clause 7. - Casual Workers.

7. Schedule D – Union Party: Delete the words ", 3rd Floor Rear, 22 St George's Terrace, Perth WA 6000."

2002 WAIRC 04607

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE SHOP, DISTRIBUTIVE AND ALLIED EMPLOYEES' ASSOCIATION OF WESTERN AUSTRALIA, APPLICANT
	v.
	INDEPENDENT WOOLDUMPERS PTY LTD, RESPONDENT
CORAM	COMMISSIONER A R BEECH
DELIVERED	THURSDAY, 10 JANUARY 2002
FILE NO.	APPLICATION 2123 OF 2001
CITATION NO.	2002 WAIRC 04607

Result	Award varied.
Representation	
Applicant	Mr T. Pope
Respondent	Mr W. Wild (as agent)

Order

HAVING HEARD Mr T. Pope on behalf of the applicant and Mr W. Wild (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 *Storemen Independent Wooldumpers Pty Ltd Award 1982* be varied in accordance with the following schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after 10 January 2002.

(Sgd.) A. R. BEECH,
Commissioner.

[L.S.]

SCHEDULE

1. Clause 10. – Wages: Delete subclause (4) and (5) of this clause and insert in lieu thereof the following—

(4) Sixty two cents per hour in addition to the above rates shall be paid to any employee who actually handles "dead" wool.

(5) If an employee is required by the employer to act as a first aid attendant in any store, for so acting he/she shall be paid in addition to his/her ordinary rate of pay the sum of $1.38 per day.

2. Clause 12. – Meal Hours and Meal Money: Delete subclause (2)(a) of this clause and insert in lieu thereof the following—

(2) (a) An employee shall be entitled to meal money of $8.55 in the following circumstances:-

3. Clause 28. – Vehicle Allowance: Delete this clause and insert in lieu thereof the following—

28. - VEHICLE ALLOWANCE

Where an employee maintains a motor vehicle and is authorised by the employer to use the vehicle in the performance of his/her duties, he/she shall be paid in accordance with the following schedule—

Area and Details Rate per kilometre	Engine Displacement (in cubic Centimetres) Over 2600cc	Over 1600cc -2600cc	1600cc & Under
Metropolitan Area	51.6	46.2	40.2
South West Land Division	52.8	47.4	41.2
North of 23.5 degrees South Latitude	58.0	52.2	45.4
Rest of the State	54.6	48.9	42.5
Motor Cycle (in all areas)	17.8 cents per kilometre		

2002 WAIRC 04604

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE SHOP, DISTRIBUTIVE AND ALLIED EMPLOYEES' ASSOCIATION OF WESTERN AUSTRALIA, APPLICANT *v.* WESFARMERS LIMITED & ORS, RESPONDENTS
CORAM	COMMISSIONER A R BEECH
DELIVERED	THURSDAY, 10 JANUARY 2002
FILE NO.	APPLICATION 1611 OF 2001
CITATION NO.	2002 WAIRC 04604

Result	Application to vary an award
Representation	
Applicant	Mr T. Pope
Respondent	No appearance.

Order

HAVING HEARD Mr T. Pope on behalf of the applicant and there being no appearance on behalf of the respondents, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979* hereby orders—

THAT the *Wool, Hide and Skin Store Employees' Award No. 8 of 1966* be varied in accordance with the following schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after 10 January 2002.

(Sgd.) A. R. BEECH,
[L.S.] Commissioner.

SCHEDULE

1. Clause 15. – Meal Hours and Meal Money: Delete paragraph (a) of sub-clause (2) of this clause and insert in lieu thereof the following—

(a) An employee shall be entitled to meal money of $8.65 in the following circumstances.

(i) Where he is required to work for more than one hour before his normal commencing time or to continue to work for more than one hour after his normal ceasing time; or

(ii) Where he is required to continue working after 12.00 midnight for more than one hour; or

(iii) Where he is required to continue working after midday on Saturday, Sunday or public holiday for more than one hour; or

(iv) Where he is required to continue overtime after 5.00pm on a Saturday, Sunday or public holiday for not less than one hour.

2. Schedule B – Union Party: Delete this schedule and insert in lieu thereof the following—

SCHEDULE B - UNION PARTY

The Union party to this award is The Shop, Distributive and Allied Employees' Association of Western Australia.

2002 WAIRC 04542

MARINE STORES AWARD

No. 13 of 1958

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	AUSTRALIAN LIQUOR, HOSPITALITY AND MISCELLANEOUS WORKERS UNION, WESTERN AUSTRALIAN BRANCH, APPLICANT
	v.
	STANLEE (PERTH), RESPONDENT
CORAM	CHIEF COMMISSIONER W S COLEMAN
DELIVERED	TUESDAY, 8 JANUARY 2002
FILE NO/S.	APPLICATION 999 OF 2001
CITATION NO.	2002 WAIRC 04542

Result Award varied

Order

Having heard Ms D MacTiernan on behalf of the applicant and Mr L Joyce on behalf of the respondent, and by consent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders—

THAT the Marine Stores Award (No. 13 of 1958) be varied in accordance with the following schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after the 8th day of January 2002.

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

SCHEDULE

1. Clause 23. – Meal Money: Delete subclause (1) of this Clause and insert the following in lieu thereof—

(1) Subject to the provisions of subclause (2) of this clause an employee, required to work overtime for more than two hours, shall be supplied with a meal by the employer or be paid $6.90 for a meal and, if owing to the amount of overtime worked, a second or subsequent meal is required the employee shall be supplied with such meal by the employer or paid $4.70 for each meal so required.

2002 WAIRC 04568

MASTERS DAIRY AWARD 1994

No. A2 of 1994

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	AUSTRALIAN LIQUOR, HOSPITALITY AND MISCELLANEOUS WORKERS UNION, WESTERN AUSTRALIAN BRANCH, APPLICANT
	v.
	MASTERS DAIRY AND OTHERS, RESPONDENTS
CORAM	CHIEF COMMISSIONER W S COLEMAN
DELIVERED	TUESDAY, 8 JANUARY 2002
FILE NO.	APPLICATION 987 OF 2001
CITATION NO.	2002 WAIRC 04568

Result Award varied

Order

HAVING heard Ms D MacTiernan on behalf of the applicant and there being no appearance on behalf of the respondents and by consent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders—

THAT the Masters Dairy Award 1994 (No. 2 of 1994) be varied in accordance with the following schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after the 8th day of January 2002.

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

SCHEDULE

1. Schedule 3 – Vehicle Allowances: Delete this Schedule and insert the following in lieu thereof—

(1) Motor Car Allowances

Area and Details Rate per Kilometre:	Engine Displacement (In cubic centimetres) Over 2600cc c/km	1600-2600cc c/km	1600cc & Under c/km
Metropolitan Area	69.2	60.2	53.2
South West Land Division	71.1	61.7	54.8
North of 23.5° South Latitude	78.0	68.1	60.6
Rest of State	73.5	63.8	56.6

Motor vehicles with rotary engines are to be included in the 1600-2600cc category.

(2) Motor Cycle Allowance

Distance Travelled During a Year on Official Business	Rate c/km
Rate per Kilometre	23.9

2. Schedule 4 – Other Allowances: Delete this Schedule and insert the following in lieu thereof—

(1)	Freezer Allowances—		
	(a)	Van Salesperson	$1.69 per day
	(b)	Storeperson	$0.82 per hour
(2)	Train Allowance $0.60 per hour when driving B. Train		
(3)	BPU Drivers		$3.73 per day for milk testing
(4)	Dryer Cleaning		$1.15 for every dryer cleaned
(5)	Dirt Money		$0.40 per hour
(6)	Confined Space		$0.47 per hour
(7)	Meal Money		$7.30
(8)	Driver (General) - over 43 tonnes all purposes of the award allowance		$0.95 for each additional tonne over 43 tonnes to be paid for all purposes of the award as part of the weekly wage.
(9)	Van Driver - Salesperson allowance per week for all purposes of the Award		$8.38 per week extra
(10)	Leading Hand allowance for all purposes of the Award		
	(a)	Not less then 3 and not more than 10 other employees	$21.64 per week
	(b)	More than 10 and not more than 20 other employees	$32.36 per week
	(c)	More than 20 other employees	$40.42 per week

2002 WAIRC 04536

MINERAL EARTHS EMPLOYEES' AWARD

No. 9 of 1975

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	AUSTRALIAN LIQUOR, HOSPITALITY AND MISCELLANEOUS WORKERS UNION, WESTERN AUSTRALIAN BRANCH, APPLICANT
	v.
	COMMERCIAL MINERALS LTD, RESPONDENT
CORAM	CHIEF COMMISSIONER W S COLEMAN
DELIVERED	TUESDAY, 8 JANUARY 2002
FILE NO.	APPLICATION 986 OF 2001
CITATION NO.	2002 WAIRC 04536

Result Award varied

Order

HAVING heard Ms D MacTiernan on behalf of the applicant and Mr L Joyce on behalf of the respondent, and by consent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders—

THAT the Mineral Earths Employees' Award (No. 9 of 1975) be varied in accordance with the following schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after the 8th day of January 2002.

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

SCHEDULE

1. Clause 7. – Overtime: Delete subclause (5) of this Clause and insert the following in lieu thereof—

(5) (a) Subject to the provisions of paragraph (b) of this subclause an employee, required to work overtime for more than two hours, shall be supplied with a meal by the employer or be paid $6.55 for a meal and, if owing to the amount of overtime worked, a second or subsequent meal is required the employee shall be supplied with such meal by the employer or paid $4.45 for each meal so required.

(b) The provisions of paragraph (a) of this subclause do not apply—

(i) in respect of any period of overtime for which the employee has been notified on the previous day or earlier that he/she will be required; or

(ii) to any employee who lives in the locality in which the place of work is situated in respect of any meal for which he/she can reasonably go home.

(c) If an employee to whom subparagraph (i) of paragraph (b) of this subclause applies has, as a consequence of the notification referred to in that subparagraph, provided himself/herself with a meal or meals and is not required to work overtime or is required to work less overtime than the period notified, he/she shall be paid, for each meal provided and not required, the appropriate amount prescribed in paragraph (a) of this subclause.

2. Clause 8. – Wages: Delete subclause (6) of this Clause and insert the following in lieu thereof—

(6) Leading Hands: In addition to the wage prescribed in subclause (2) hereof a leading hand shall be paid:-

		$
(a)	if placed in charge of not less than three and not more than ten other employees	21.20
(b)	if placed in charge of more than ten and not more than 20 other employees	32.55
(c)	if placed in charge of more than 20 other employees	41.90

2002 WAIRC 04601

MISCELLANEOUS WORKERS' (ACTIV FOUNDATION) AWARD

No. A20 of 1980

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	AUSTRALIAN LIQUOR, HOSPITALITY AND MISCELLANEOUS WORKERS UNION, WESTERN AUSTRALIAN BRANCH, APPLICANT
	v.
	ACTIV FOUNDATION (INC), RESPONDENT
CORAM	CHIEF COMMISSIONER W S COLEMAN
DELIVERED	TUESDAY, 8 JANUARY 2002
FILE NO/S.	APPLA 981 OF 2001
CITATION NO.	2002 WAIRC 04601

Result Award varied

Order

HAVING heard Ms D MacTiernan on behalf of the applicant and Mr L Joyce on behalf of the respondent, and by consent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders—

THAT the Miscellaneous Workers' (Activ Foundation) Award (No. A 20 of 1980) be varied in accordance with the following schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after the 8th day of January 2002.

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

SCHEDULE

1. Clause 8. – Shift Work: Delete paragraph (a) of subclause (1) of this Clause and insert the following in lieu thereof—

(1) (a) The loading on the ordinary rates of pay for an afternoon or night shift shall be $1.61 per hour or part thereof.

2. Clause 9. – Meal Money: Delete subclause (1) of this Clause and insert the following in lieu thereof—

(1) An employee required to work overtime before or after his ordinary working hours on any day, shall, when such additional duty necessitates taking a meal away from his usual place of residence, be supplied by his employer with any meal required or be reimbursed for each meal purchased at the rate of $7.50 for breakfast, $9.25 for the midday meal, and $11.15 for the evening meal: Provided that the overtime worked before or after the meal break totals not less than two hours. Such reimbursement shall be in addition to any payment for overtime to which he is entitled.

3. Clause 18. – Car Allowance: Delete subclause (5) of this Clause and insert the following in lieu thereof—

(5) Rates of allowance for use of employee's own vehicle on employer's business

Schedule 1 - Motor Vehicle Allowances

Area and Details	Engine Displacement (in cubic centimetres)		
	Over 2600cc	Over 1600cc -2600cc	1600 cc & Under
	Rate per kilometre (Cents)		
Metropolitan Area	69.2	60.2	53.2
South West Land Division	71.1	61.7	54.9
North of 23.5° South Latitude	78.0	68.1	60.6
Rest of the State	73.5	63.8	56.6

Schedule 2 - Motor Cycles Allowances

Distance Travelled During a Year on Official Business	Rate per Kilometre (Cents)
All Areas of State	23.9

Motor vehicles with rotary engines are to be included in the 1600-2600cc.

4. Clause 25. – Dirty Work: Delete this Clause and insert the following in lieu thereof—

In addition to any other payment prescribed by this award—

(1) An employee handling foul linen shall receive $2.19 per day;

(2) An employee other than one to whom paragraph (1) applies, shall receive 40 cents per hour for work of an unusually dirty nature.

2002 WAIRC 04576

MOTEL, HOSTEL, SERVICE FLATS AND BOARDING HOUSE WORKERS' AWARD, 1976

No. 29 of 1974

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	AUSTRALIAN LIQUOR, HOSPITALITY AND MISCELLANEOUS WORKERS UNION, WESTERN AUSTRALIAN BRANCH, APPLICANT
	v.
	BELMONT PARK MOTEL & OTHERS, RESPONDENTS
CORAM	CHIEF COMMISSIONER W S COLEMAN
DELIVERED	TUESDAY, 8 JANUARY 2002
FILE NO/S.	APPLICATION 1028 OF 2001
CITATION NO.	2002 WAIRC 04576

Result Award varied

Order

Having heard Ms D MacTiernan on behalf of the applicant and Mr D Crowe and Mr L Joyce on behalf of the respondents, and by consent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders—

THAT the Motel, Hostel, Service Flats and Boarding House Workers' Award, 1976 (No. 29 of 1974) be varied in accordance with the following schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after the 8th day of January 2002.

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

SCHEDULE

1. Clause 9. – Additional Rates for Ordinary Hours: Delete this Clause and insert the following in lieu thereof—

9. – ADDITIONAL RATES FOR ORDINARY HOURS

(1) An employee who is required to work any ordinary hours prior to 7.00 am or after 7.00 pm on any day Monday to Friday, both inclusive, shall be paid at the rate of an extra $1.30 per hour for each such hour, or part thereof worked. Provided that any employee who works the majority of his/her ordinary hours between midnight and 7.00 am shall be paid $1.36 per hour extra for each such hour, or part thereof worked.

(2) All time worked during the ordinary hours of work on Saturdays and Sundays shall be paid for at the rate of time and a half.

(3) An employee who is required to work any of his/her ordinary hours on any day in more than one period of employment, other than for meal breaks as prescribed in accordance with the provisions of Clause 13. - Meal Breaks of this Award, shall be paid an allowance of $2.14 per day, for such broken work period worked.

(4) The provisions of subclauses (1) and (2) hereof shall not apply to any work performed on a holiday and to which the provisions of subclause (2) of Clause 17. - Holidays are applicable.

(5) The provisions of this clause shall not apply to casual employees.

2. Clause 14. – Meal Money: Delete this Clause and insert the following in lieu thereof—

14. – MEAL MONEY

Any employee who is required to work overtime for two hours or more on any day, without being notified on the previous day or earlier, that he or she will be so required to work such overtime, will either be supplied with a substantial meal by the employer or be paid $8.60 meal money.

3. Clause 26. – Uniforms and Laundering: Delete subclauses (2) & (3) this Clause and insert the following in lieu thereof—

(2) Subject to subclause (3) hereof, an employer requiring any of the articles of clothing to be worn as described in subclause (1) of this clause, shall cause such clothing to be laundered at his/her own expense or otherwise shall pay to the employee concerned $5.55 per fortnight worked as a laundry allowance. The allowance provided herein shall be halved for employees who work less than thirty-eight ordinary hours each fortnight.

(3) Where a cook wears the ordinary apparel usually worn by cooks such as black and white check trousers, white shirt, white apron and cap, such garments shall be laundered at the employer's expense or otherwise the employee shall be paid $8.40 per fortnight worked as a laundry allowance. The allowance provided herein shall be halved for employees who work less than thirty-eight ordinary hours each fortnight.

4. Clause 27. – Protective Clothing: Delete subclauses (1) this Clause and insert the following in lieu thereof—

(1) Employees who are required to wash dishes, clean toilets or otherwise handle detergents, acids, soaps or any injurious substances, shall be supplied with rubber gloves free of charge by the employer, or be paid, in lieu, an allowance of $2.96 per fortnight worked. The allowance provided herein shall be halved for employees who work less than thirty-eight ordinary hours each fortnight.

5. Clause 28. – Employee Equipment: Delete this Clause and insert the following in lieu thereof—

28. - EMPLOYEE EQUIPMENT

All knives, choppers, tools, brushes, towels and other utensils, implements and material which may be required to be-used by the employee for the purpose of carrying out his/her duties, shall be supplied by the employer free Of charge. Provided that where an employee is required by the employer to use his/her own knives he shall be paid an allowance of $11.30 per fortnight worked. The allowance provided herein shall be halved for employees who work less than thirty-eight ordinary hours each fortnight.

2002 WAIRC 04533

OPTICAL MECHANICS' AWARD, 1971

No. 9 of 1970

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	AUSTRALIAN LIQUOR, HOSPITALITY AND MISCELLANEOUS WORKERS UNION, WESTERN AUSTRALIAN BRANCH, APPLICANT
	v.
	LAUBMAN & PANK (WA) PTY LTD AND OTHERS, RESPONDENTS
CORAM	CHIEF COMMISSIONER W S COLEMAN
DELIVERED	TUESDAY, 8 JANUARY 2002
FILE NO.	APPLICATION 985 OF 2001
CITATION NO.	2002 WAIRC 04533

Result Award varied

Order

HAVING heard Ms D MacTiernan on behalf of the applicant and Mr L Joyce on behalf of the respondents, and by consent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders—

THAT the Optical Mechanics' Award, 1971 (No. 9 of 1970) be varied in accordance with the following schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after the 8th day of January 2002.

(Sgd.) W. S. COLEMAN,
Chief Commissioner.

[L.S.]

SCHEDULE

1. Clause 12. – Meal Money: Delete subclause (1) of this Clause and insert the following in lieu thereof—

(1) Subject to the provisions of subclause (2) of this clause an employee, required to work overtime for more than two hours, shall be supplied with a meal by the employer or be paid $6.90 for a meal and, if owing to the amount of overtime worked, a second or subsequent meal is required the employee shall be supplied with such meal by the employer or paid $4.70 for each meal so required.

2. Clause 24. – Wages: Delete subclause (1) of this Clause and insert the following in lieu thereof—

(4) Leading Hands: In addition to the appropriate rate prescribed in subclause (1) of this clause a leading hand shall be paid—

		$ Per Week
(a)	if placed in charge of not less than 3 and not more than 10 other employees	20.70
(b)	if placed in charge of more than 10 and not more than 20 other employees	31.15
(c)	if placed in charge of more than 20 other employees	40.95

2002 WAIRC 04532

PAINT AND VARNISH MAKERS' AWARD

No. 22 of 1957

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	AUSTRALIAN LIQUOR, HOSPITALITY AND MISCELLANEOUS WORKERS UNION, WESTERN AUSTRALIAN BRANCH, APPLICANT
	v.
	DULUX AUSTRALIA LTD, RESPONDENT
CORAM	CHIEF COMMISSIONER W S COLEMAN
DELIVERED	TUESDAY, 8 JANUARY 2002
FILE NO.	APPLICATION 984 OF 2001
CITATION NO.	2002 WAIRC 04532

Result Award varied

Order

HAVING heard Ms D MacTiernan on behalf of the applicant and Mr l Joyce on behalf of the respondent, and by consent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders—

THAT the Paint and Varnish Makers' Award No. 22 of 1957 be varied in accordance with the following schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after the 8th day of January 2002.

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

SCHEDULE

1. Clause 6. – Meal Money: Delete this Clause and insert the following in lieu thereof—

(1) An employee required to work overtime for more than two hours without being notified on the previous day or earlier that he/she will be required to work, shall be supplied with a meal by the employer or paid $8.50 for a meal.

(2) If the amount of overtime required to be worked necessitates a second or subsequent meal, the employer shall, unless he/she has notified the employees concerned on the previous day or earlier that such second or subsequent meal will also be required, provide such meals or pay an amount of $8.50 for each second or subsequent meal.

(3) No such payments need be made to employees living in the same locality as their workshops who can reasonably return home for such meals.

(4) If an employee in consequence of receiving such notice has provided him/herself with a meal or meals and is not required to work overtime or is required to work less overtime than notified, he/she shall be paid the amounts above prescribed in respect of the meals not then required.

2. Clause 8. – Leading Hands: Delete this Clause and insert the following in lieu thereof—

In addition to the rates prescribed in Clause 22. - Rates of Pay of this award any worker placed by the employer in charge of three or more workers shall be paid a weekly amount of $23.70.

3. Clause 22. – Rates of Pay: Delete subclause (3) of this Clause and insert the following in lieu thereof—

(3) In addition to the wage rates shown in subclause (1) hereof, an employee shall be paid, in lieu of all other disability allowances, an industry allowance of $15.90 per week and this allowance shall be for all purposes of the Award.

2002 WAIRC 04619

PARLIAMENTARY EMPLOYEES AWARD 1989

Nos. A15 of 1987, A4 of 1988, A7 of 1988 and A7 of 1989

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	AUSTRALIAN LIQUOR, HOSPITALITY AND MISCELLANEOUS WORKERS UNION, WESTERN AUSTRALIAN BRANCH, APPLICANT
	v.
	THE SPEAKER OF THE LEGISLATIVE ASSEMBLY & OTHERS, RESPONDENTS
CORAM	CHIEF COMMISSIONER W S COLEMAN
DELIVERED	TUESDAY, 8 JANUARY 2002
FILE NO/S.	APPLICATION 964 OF 2001
CITATION NO.	2002 WAIRC 04619

Result Award varied

Order

Having heard Ms D MacTiernan on behalf of the applicant and Mr J Lange on behalf of the respondents, and by consent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders—

THAT the Parliamentary Employees Award 1989 (No.s A 15 of 1987, A 4 of 1988, A 7 of 1988 and A 7 of 1989) be varied in accordance with the following schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after the 7th day of January 2002.

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

SCHEDULE

1. Clause 25. – Parliamentary and Support Services Employees Wages: Delete subclauses (1) & (4) of this Clause and insert the following in lieu thereof—

(3) The following allowances shall be paid to Parliamentary Support Services Employees indexed according to State Wage decisions and shall be:-

(a)	Chef	
	1st year	$97.05 per fortnight
	2nd year	$194.20 per fortnight
(b)	Tradesperson Cook (Sous Chef)	
	1st year	$ 63.10 per fortnight
	2nd year	$ 97.05 per fortnight
(c)	Stewards to Speaker and President	$ 48.40 per fortnight

(4) An allowance of $28.15 per fortnight shall be paid to all Parliamentary Support Services Employees employed in the kitchen, dining room and bar areas.

2. Clause 28. – Uniforms and Clothing: Delete subclause (2) of this Clause and insert the following in lieu thereof—

(2) Such uniforms supplied shall be laundered and/or dry cleaned by the employer and remain the property of the employer, provided that in lieu of the employer laundering and/or dry cleaning same, an employee shall be paid $5.60 per week for such laundering and/or dry cleaning, excepting any person employed as a Cook who shall be paid $8.50 per week for laundering and/or dry cleaning.

2002 WAIRC 04526

PASTRYCOOKS' AWARD

No. 24 of 1981

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	AUSTRALIAN LIQUOR, HOSPITALITY AND MISCELLANEOUS WORKERS UNION, WESTERN AUSTRALIAN BRANCH, APPLICANT
	v.
	BAKEWELL PIES (1978) PTY LTD & OTHERS, RESPONDENTS
CORAM	CHIEF COMMISSIONER W S COLEMAN
DELIVERED	TUESDAY, 8 JANUARY 2002
FILE NO/S.	APPLICATION 963 OF 2001
CITATION NO.	2002 WAIRC 04526

Result Award varied

Order

Having heard Ms D MacTiernan on behalf of the applicant and Mr L Joyce on behalf of the respondents, and by consent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders—

THAT the Pastrycooks' Award (No. 24 of 1981) be varied in accordance with the following schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after the 8th day of January 2002.

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

SCHEDULE

1. Clause 8. – Overtime: Delete subclause (4) of this Clause and insert the following in lieu thereof—

(4) When a employee, without being notified on the previous day or earlier, is required to continue working after the usual knock-off time for more than two hours, he shall be provided with any meal required, or shall be paid $8.45 in lieu thereof. Provided that this subclause shall not apply in the case of a worker living in the same locality as his place of employment who can reasonably return home for a meal.

2. Clause 10. – Wages: Delete subclause (5) of this Clause and insert the following in lieu thereof—

(5) Leading Hand: In addition to the rates prescribed by this clause a leading hand shall be paid per week if placed in charge of—

		Rate per Week $
(a)	Less than four other employees	12.75
(b)	Four or more but not more than ten other employees	20.15
(c)	More than ten but not more than 20 other employees	30.90
(d)	More than 20 other employees	39.75

2002 WAIRC 04525

PHOTOGRAPHIC INDUSTRY AWARD 1980

No. A9 of 1980

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	AUSTRALIAN LIQUOR, HOSPITALITY AND MISCELLANEOUS WORKERS UNION, WESTERN AUSTRALIAN BRANCH, APPLICANT
	v.
	ILLUSTRATIONS PTY LTD & OTHERS, RESPONDENTS
CORAM	CHIEF COMMISSIONER W S COLEMAN
DELIVERED	TUESDAY, 8 JANUARY 2002
FILE NO/S.	APPLICATION 962 OF 2001
CITATION NO.	2002 WAIRC 04525

Result Award varied

Order

Having heard Ms D MacTiernan on behalf of the applicant and Mr L Joyce on behalf of the respondents, and by consent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders—

THAT the Photographic Industry Award, 1980 (No. A 9 of 1980) be varied in accordance with the following schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after the 8th day of January 2002.

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

SCHEDULE

1. Clause 12. – Wages: Delete subclause (3) of this Clause and insert the following in lieu thereof—

(3) LEADING HANDS—

In addition to the rates prescribed herein, any employee appointed by the employer as a leading hand and placed in charge of not less than 3 and not more than 10 other employees, shall be paid $20.45 per week.

In addition to the rates prescribed herein, a leading hand placed in charge of more than 10 and not more than 20 other employees shall be paid $31.20 per week.

2. Clause 13. – Meal Allowance: Delete subclauses (1) & (4) of this Clause and insert the following in lieu thereof—

(1) Subject to the provisions of subclause (2) of this clause an employee, required to work overtime for more than two hours, shall be supplied with a meal by the employer or be paid $6.90 for a meal and, if owing to the amount of overtime worked, a second or subsequent meal is required the employee shall be supplied with such meal by the employer or paid $4.70 for each meal so required.

(4) Late Night Trading Meal Allowance—

An employee who commences work prior to 4.30 p.m. on the day of late night trading and is required to work beyond 7.00 p.m. on that day, shall be paid a meal allowance of $6.90.

3. Clause 21. – Vehicle Allowance: Delete subclause (2)(c) of this Clause and insert the following in lieu thereof—

(2) (c) A year for the purpose of this clause shall commence on the 1st day of July and end on the 30th day of June next following.

Rates of hire for use of employee's own vehicle on employer's business—

Schedule 1 - Motor Vehicle Allowance

Area and Details	Engine Displacement (in cubic centimetres)		
	Over 2600cc	Over 1600cc-& 2600cc	1600 cc Under
	Rate per kilometre (Cents)		
Metropolitan Area	69.2	60.2	53.2
South West Land Division	71.1	61.7	54.8
North of 23.5^{O} South Latitude	78.0	68.1	60.6
Rest of the State	73.5	63.8	56.6

Schedule 2 - Motor Cycle Allowance

Distance Travelled During a Year on Official Business	Rate ¢/km
Rate per kilometre	23.9

Motor vehicles with rotary engines are to be included in the 1600-2600cc

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2002 WAIRC 04582

PLASTIC MANUFACTURING AWARD 1977

No. 5 of 1977

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	AUSTRALIAN LIQUOR, HOSPITALITY AND MISCELLANEOUS WORKERS UNION, WESTERN AUSTRALIAN BRANCH, APPLICANT
	v.
	JAYLON INDUSTRIES PTY LTD AND OTHERS, RESPONDENTS
CORAM	CHIEF COMMISSIONER W S COLEMAN
DELIVERED	TUESDAY, 8 JANUARY 2002
FILE NO.	APPLICATION 972 OF 2001
CITATION NO.	2002 WAIRC 04582

Result Award varied

Order

HAVING heard Ms D MacTiernan on behalf of the applicant and Mr L Joyce on behalf of the respondents, and by consent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders—

THAT the Plastic Manufacturing Award 1977 (No. 5 of 1977) be varied in accordance with the following schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after the 8th day of January 2002.

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

SCHEDULE

1. Clause 12. – Meal Money: Delete this Clause and insert the following in lieu thereof—

(1) A worker required to work overtime for more than two hours, without being notified on the previous day or earlier that he/she will be so required to work, shall be supplied with a meal by the employer or paid $7.40 for a meal.

(2) If the amount of overtime required to be worked necessitates a second or subsequent meal, the employer shall, unless he/she has notified the workers concerned on the previous day or earlier that such a second or subsequent meal will also be required, provide such meals or pay an amount of $5.05 for each second or subsequent meal.

(3) No such payments need be made to workers living in the same locality as their workshops who can reasonably return home for such meals.

(4) If a worker in consequence of receiving such notice has provided himself/herself with a meal or meals and is not required to work overtime or is required to work less overtime than notified, he/she shall be paid the amounts above prescribed in respect of the meals not then required.

2. Clause 22. – Classification Structure and Rates of Pay: Delete subclause (5) of this Clause and insert the following in lieu thereof—

(5) Leading Hands

In addition to the rates prescribed in subclause (2) of this clause a leading hand shall be paid—

		$ Per Week
(a)	If placed in charge of not less than three and not more than ten other employees	20.15
(b)	If placed in charge of more than ten and not more than 20 other employees	30.80
(c)	If placed in charge of more than 20 other employees	39.40

3. Clause 23. – Extra Rates and Conditions: Delete this Clause and insert the following in lieu thereof—

(1) Workers handling carbon black before processing, and workers engaged in processing free carbon black, shall be paid the sum of 40 cents per hour in addition to the rate herein fixed for the class of work performed.

(2) Workers engaged on weighing, packing and mixing in the powder room shall be paid the sum of 40 cents per hour in addition to the rate herein fixed for the class of work performed.

(3) Workers engaged in work on a construction site other than the normal place of work shall be paid an allowance at the rate of $18.20 per week for each hour or part thereof worked.

4. Clause 31. – Travelling Allowance: Delete paragraph (c) of subclause (2) this Clause and insert the following in lieu thereof—

(c) A year for the purpose of this clause shall commence on the 1st day of July and end on the 30th day of June next following.

Rates of hire for use of employee's own vehicle on employer's business—

Schedule 1 - Motor Vehicle Allowance

Area and Details	Engine Displacement (in cubic centimetres)		
	Over 2600cc	Over 1600cc-& 2600cc	1600 cc Under
	Rate per kilometre (Cents)		
Metropolitan Area	69.2	60.2	53.2
South West Land Division	71.1	61.7	54.9
North of 23.5^{o} South Latitude	78.0	68.1	60.6
Rest of the State	73.5	63.8	56.6

Schedule 2 - Motor Cycle Allowance

Distance Travelled During a Year on Official Business	Rate per Kilometre (Cents)
All areas of State	23.9

Motor vehicles with rotary engines are to be included in the 1600-2600cc

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2002 WAIRC 04527

POULTRY BREEDING FARM & HATCHERY WORKERS' AWARD 1976

No. R20 of 1976

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	AUSTRALIAN LIQUOR, HOSPITALITY AND MISCELLANEOUS WORKERS UNION, WESTERN AUSTRALIAN BRANCH, APPLICANT
	v.
	HAMPTON HATCHERIES & OTHERS, RESPONDENTS
CORAM	CHIEF COMMISSIONER W S COLEMAN
DELIVERED	TUESDAY, 8 JANUARY 2002
FILE NO/S.	APPLICATION 967 OF 2001
CITATION NO.	2002 WAIRC 04527

Result Award variation

Order

Having heard Ms D MacTiernan on behalf of the applicant and Mr L Joyce on behalf of the respondents, and by consent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders—

THAT the Poultry Breeding Farm and Hatchery Workers' Award 1976 (No. R 20 of 1976) be varied in accordance with the following schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after the 8th day of January 2002.

(Sgd.) W. S. COLEMAN,
Chief Commissioner.

[L.S.]

SCHEDULE

1. Clause 8. – Overtime - Meals: Delete subclause (3)(c)(i) & (ii) of this Clause and insert the following in lieu thereof—

(3) (c) (i) An employee required to work overtime for more than two hours, without being notified on the previous day or earlier that he/she will be so required to work, shall be supplied with a meal by the employer or paid $8.25 for a meal.

(ii) If the amount of overtime required to be worked necessitates a second or subsequent meal, the employer shall, unless he/she has notified the employees concerned on the previous day or earlier, that such a second or subsequent meal will also be required, provide such meals or pay an amount of $7.40 for each second or subsequent meal.

2. Clause 9. – Wages: Delete subclause (4) of this Clause and insert the following in lieu thereof—

(4) Leading Hands

	$
In addition to the ordinary rate of pay, an employee placed in charge of more than 3 other employees shall receive	20.50

2002 WAIRC 04592

PRIVATE HOSPITAL EMPLOYEES' AWARD, 1972

No. 27 of 1971

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	AUSTRALIAN LIQUOR, HOSPITALITY AND MISCELLANEOUS WORKERS UNION, WESTERN AUSTRALIAN BRANCH, APPLICANT
	v.
	ST JOHN OF GOD HOSPITAL AND OTHERS, RESPONDENTS
CORAM	CHIEF COMMISSIONER W S COLEMAN
DELIVERED	TUESDAY, 8 JANUARY 2002
FILE NO.	APPLICATION 1020 OF 2001
CITATION NO.	2002 WAIRC 04592

Result Award varied

Order

HAVING heard Ms D MacTiernan on behalf of the applicant and Mr L Joyce on behalf of the respondents and by consent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders—

THAT the Private Hospital Employees' Award, 1972 (No. 27 of 1971) be varied in accordance with the following schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after the 8th day of January 2002.

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

SCHEDULE

1. Clause 9. – Allowances and Special Provisions: Delete subclause (1) of this Clause and insert the following in lieu thereof—

(1) Orderlies assisting in autopsy - $26.95 per cadaver.

2. Clause 10. – Overtime: Delete subclause (4) of this Clause and insert the following in lieu thereof—

(4) Where an employee is required to work overtime and such overtime is worked for a period of at least two hours in excess of the required daily hours of work the employee shall be provided with a meal free of cost or shall be paid the sum of $7.00 as meal money.

3. Clause 13. – Fares and Motor Vehicle Allowances: Delete paragraph (c) of subclause (2) of this Clause and insert the following in lieu thereof—

(c) A year for the purpose of this clause shall commence on the 1st day of July and end on the 30th day of June next following.

Rates of hire for use of employee's own vehicle on employer's business:

Schedule 1 - Motor Vehicle Allowances

Area and Details	Engine Displacement (in cubic centimetres)		
	Over 2600cc	Over 1600cc -2600cc	1600 cc & Under
	Rate per Kilometre (Cents)		
Metropolitan Area	69.2	60.2	53.2
South West Land Division	71.1	61.7	54.9
North of 23.5° South Latitude	78.0	68.1	60.6
Rest of the State	73.5	63.8	56.6

Schedule 2 - Motor Cycle Allowances

Distance Travelled During a Year on Official Business	Rate per Kilometre ¢/km
All Areas of State	23.9

Motor vehicles with rotary engines are to be included in the 1600-2600cc.

4. Clause 20. – Laundry: Delete subclause (2) of this Clause and insert the following in lieu thereof—

(2) Where the uniform of any employee cannot be laundered at the hospital an allowance of $1.25 per week shall be paid to the employee.

5. Clause 34. – Wages: Delete paragraph (a) of subclause (4) of this Clause and insert the following in lieu thereof—

(a) The ordinary wages of any employee, placed in charge of three or more employees, shall be increased by $16.95 per week.

2002 WAIRC 04571

QUADRIPLEGIC CENTRE AWARD.

No. A1 of 1993.

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	AUSTRALIAN LIQUOR, HOSPITALITY AND MISCELLANEOUS WORKERS UNION, WESTERN AUSTRALIAN BRANCH, APPLICANT
	v.
	THE BOARD OF MANAGEMENT QUADRIPLEGIC CENTRE, RESPONDENT
CORAM	CHIEF COMMISSIONER W S COLEMAN
DELIVERED	TUESDAY, 8 JANUARY 2002
FILE NO/S.	APPLICATION 965 OF 2001
CITATION NO.	2002 WAIRC 04571

Result Award variation

Order

Having heard Ms D MacTiernan on behalf of the applicant and Mr L Joyce on behalf of the respondents, and by consent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders—

THAT the Quadriplegic Centre Award (No. A 1 of 1993) be varied in accordance with the following schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after the 8th day of January 2002.

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

SCHEDULE

1. Clause 14. – Overtime: Delete subclause (5) in Part A & subclause (4) in Part B of this Clause and insert the following in lieu thereof—

PART A

(5) Where an employee has not been notified the previous day or earlier that he/she is required to work overtime the employer shall ensure that employees working such overtime for an hour or more shall be provided with any of the usual meals occurring during such overtime or be paid $6.78 each meal.

PART B

(4) Where an employee is required to work overtime and such overtime is worked for a period of at least two hours in excess of the required daily hours of work, the employee shall be provided with a meal free of cost, or shall be paid the sum of $6.78 as meal money.

This subclause shall not apply where the employee has been advised of the necessity to work overtime on the previous day.

2. Clause 15. – Shift Work: Delete subclause (1)(a), (2)(a), (3)(a) & (b) in Part B of this Clause and insert the following in lieu thereof—

(1) (a) Subject to subclause (2) of this clause where on any day an employee commences his/her ordinary hours of work before 4.00 am or after 12 noon, he/she shall be paid a loading of $1.73 per hour or pro rata for part thereof in addition to his/her ordinary rate of wage.

(2) (a) A loading of $2.59 per hour or pro rata for part thereof shall be paid to an employee in addition to his/her ordinary rate of wage for time worked on permanent afternoon or night shift.

(3) Subject to the provisions of subclause (5) of this clause work performed during ordinary hours on the weekend shall in addition to the ordinary rate of wage attract a loading as follows—

(a) Saturday - $6.89 per hour or pro rata for part thereof;

(b) Sunday - $13.78 per hour or pro rata for part thereof;

3. Clause 17. – Public Holidays: Delete subclause (4)(a) & (b) in Part B of this Clause and insert the following in lieu thereof—

(4) (a) An Enrolled Nurse or Nursing Assistant who works on any public holiday named herein shall be paid a loading of $6.89 per hour or pro rata for part thereof in addition to his/her ordinary rate of wage for the time worked in ordinary hours on that day.

(b) Any other employee who is required to work on a day observed as a public holiday shall be paid a loading of $20.67 per hour or pro rata for part thereof in addition to his/her ordinary rate of wage or if the employee agrees be paid a loading of $6.89 per hour or pro rata for part thereof in addition to his/her ordinary rate of wage and be entitled to observe the holiday on a day mutually acceptable to the employer and employee.

4. Clause 27. – Wages – Part A: Delete subclause (4)(c) of this Clause and insert the following in lieu thereof—

(4) (c) The ordinary rate of wage prescribed for an Enrolled Nurse in this clause shall be increased by $9.79 per week when a Registered Enrolled Nurse has obtained a second post basic certificate approved by the Nurses' Board of WA, and he/she is required to use the knowledge gained in that certificate as part of his/her employment.

5. Clause 27. – Wages – Part C: Delete subclause (1)(b)(i), (ii) & (iii) of this Clause and insert the following in lieu thereof—

(1) (b) Except where this clause specifies classifications which require the employee to be in charge of other employees, any employee who is placed in charge of—

(i) not less than three and not more than 10 other employees shall be paid $16.80 per week in addition to the ordinary wage prescribed by this clause;

(ii) more than 10 and not more than 20 other employees shall be paid $25.15 per week in addition to the ordinary wage prescribed by this clause;

(iii) more than 20 other employees shall be paid $33.55 per week in addition to the ordinary wage prescribed by this clause.

2002 WAIRC 04625

RECREATION CAMPS (DEPARTMENT FOR SPORT AND RECREATION) AWARD

No. A28 of 1985

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	AUSTRALIAN LIQUOR, HOSPITALITY AND MISCELLANEOUS WORKERS UNION, WESTERN AUSTRALIAN BRANCH, APPLICANT
	v.
	THE HON MINISTER FOR SPORT & RECREATION, RESPONDENT
CORAM	CHIEF COMMISSIONER W S COLEMAN
DELIVERED	TUESDAY, 8 JANUARY 2002
FILE NO/S.	APPLICATION 1018 OF 2001
CITATION NO.	2002 WAIRC 04625

Result Award varied

Order

Having heard Ms D MacTiernan on behalf of the applicant and Mr J Lange on behalf of the respondents, and by consent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders—

THAT the Recreation Camps (Department for Sport and Recreation) Award (No. A 28 of 1985) be varied in accordance with the following schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after the 7th day of January 2002.

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

SCHEDULE

1. Clause 8. – Overtime: Delete subclauses (9)(a) & (d) of this Clause and insert the following in lieu thereof—

(9) (a) An employee required to work continuous overtime for more than one hour shall be supplied with a meal by the employer or be paid $8.15 for a meal, and if owing to the amount of overtime worked, a second or subsequent meal is required the employee shall be supplied with such meal by the employer or be paid $4.75 for each meal so required.

(d) An employee required to work continuously from midnight to 6.30 a.m. and ordered back to work at 8.00 a.m. on the same day shall be paid $4.20 for breakfast.

2. Clause 15. – Wages: Delete subclause (3) of this Clause and insert the following in lieu thereof—

(3) Supervision Allowance

Employees placed in charge of other employees shall be paid the following weekly allowance, or part thereof, in addition to the rate prescribed for the employee's class of work

	$ Per Week
1 to 5 employees	7.80
6 to 10 employees	14.00

	$ Per Week
11 to 15 employees	17.45
16 to 20 employees	23.70
over 20 (for each additional employee)	0.28

3. Clause 17. – Special Rates and Conditions: Delete subclauses (1), (2) & (4) of this Clause and insert the following in lieu thereof—

(1) All employees called upon to clean toilet closets shall receive an allowance of 55 cents per closet per week and for these purposes, one metre of urinal shall count as one closet and three urinal stalls shall count as one closet.

(2) An employee who is the holder of an approved First Aid Certificate shall in addition to their normal rate of pay be paid an additional allowance of $1.91 per week.

(4) Mobile Wardens shall in addition to their normal rate of pay be paid an allowance of $69.22 per week to offset the costs associated with living in and maintaining a caravan. This allowance shall be reviewed on the 31st December each year. The adjustment to the rates shall be effective from the beginning of the first pay period to commence on or after the first day of January in each year.

2002 WAIRC 04577

RESTAURANT, TEAROOM AND CATERING WORKERS' AWARD, 1979

No. R48 of 1978

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	AUSTRALIAN LIQUOR, HOSPITALITY AND MISCELLANEOUS WORKERS UNION, WESTERN AUSTRALIAN BRANCH, APPLICANT
	v.
	EL SOMBRERO RESTAURANT & OTHERS, RESPONDENT
CORAM	CHIEF COMMISSIONER W S COLEMAN
DELIVERED	TUESDAY, 8 JANUARY 2002
FILE NO/S.	APPLICATION 1029 OF 2001
CITATION NO.	2002 WAIRC 04577

Result Award varied

Order

Having heard Ms D MacTiernan on behalf of the applicant and Mr D Crowe and Mr L Joyce on behalf of the respondents, and by consent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders—

THAT the Restaurant, Tearoom and Catering Workers' Award, 1979 (No. 48 of 1978) be varied in accordance with the following schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after the 8th day of January 2002.

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

SCHEDULE

1. Clause 9. – Additional Rates for Ordinary Hours: Delete this Clause and insert the following in lieu thereof—

9. – ADDITIONAL RATES FOR ORDINARY HOURS

(1) An employee who is required to work any ordinary hours prior to 7.00 am or after 7.00 pm on any day Monday to Friday, both inclusive, shall be paid at the rate of an extra $1.30 per hour for each such hour, or part thereof worked. Provided that any employee who works the majority of his/her ordinary hours between midnight and 7.00 am shall be paid $1.36 per hour extra for each such hour, or part thereof worked.

(2) All time worked during the ordinary hours of work on Saturdays and Sundays shall be paid for at the rate of time and a half.

(3) An employee who is required to work any of his/her ordinary hours on any day in more than one period of employment, other than for meal breaks as prescribed in accordance with the provisions of Clause 13. - Meal Breaks of this Award, shall be paid an allowance of $2.14 per day, for such broken work period worked.

(4) The provisions of subclauses (1) and (2) hereof shall not apply to any work performed on a holiday and to which the provisions of subclause (2) of Clause 17. - Holidays are applicable.

(5) The provisions of this clause shall not apply to casual employees.

2. Clause 14. – Meal Money: Delete this Clause and insert the following in lieu thereof—

14. – MEAL MONEY

Any employee who is required to work overtime for two hours or more on any day, without being notified on the previous day or earlier, that he or she will be so required to work such overtime, will either be supplied with a substantial meal by the employer or be paid $8.60 meal money.

3. Clause 26. – Uniforms and Laundering: Delete subclauses (2) & (3) this Clause and insert the following in lieu thereof—

(2) Subject to subclause (3) hereof, an employer requiring any of the articles of clothing to be worn as described in subclause (1) of this clause, shall cause such clothing to be laundered at his/her own expense or otherwise shall pay to the employee concerned $5.55 per fortnight worked as a laundry allowance. The allowance provided herein shall be halved for employees who work less than thirty-eight ordinary hours each fortnight.

(3) Where a cook wears the ordinary apparel usually worn by cooks such as black and white check trousers, white shirt, white apron and cap, such garments shall be laundered at the employer's expense or otherwise the employee shall be paid $8.40 per fortnight worked as a laundry allowance. The allowance provided herein shall be halved for employees who work less than thirty-eight ordinary hours each fortnight.

4. Clause 27. – Protective Clothing: Delete subclauses (1) this Clause and insert the following in lieu thereof—

(1) Employees who are required to wash dishes, clean toilets or otherwise handle detergents, acids, soaps or any injurious substances, shall be supplied with rubber gloves free of charge by the employer, or be paid, in lieu, an allowance of $2.96 per fortnight worked. The allowance provided herein shall be halved for employees who work less than thirty-eight ordinary hours each fortnight.

5. Clause 28. – Workers' Equipment: Delete this Clause and insert the following in lieu thereof—

28. – WORKERS' EQUIPMENT

All knives, choppers, tools, brushes, towels and other utensils, implements and material which may be required to be-used by the employee for the purpose of carrying out his/her duties, shall be supplied by the employer free Of charge. Provided that where an employee is required by the employer to use his/her own knives he shall be paid an allowance of $11.30 per fortnight worked. The allowance provided herein shall be halved for employees who work less than thirty-eight ordinary hours each fortnight.

2002 WAIRC 04565

ROPE AND TWINE WORKERS' AWARD.

No. 11 of 1963

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	AUSTRALIAN LIQUOR, HOSPITALITY AND MISCELLANEOUS WORKERS UNION, WESTERN AUSTRALIAN BRANCH, APPLICANT
	v.
	W.A. ROPE & TWINE COMPANY PTY LTD, RESPONDENT
CORAM	CHIEF COMMISSIONER W S COLEMAN
DELIVERED	TUESDAY, 8 JANUARY 2002
FILE NO.	APPLICATION 973 OF 2001
CITATION NO.	2002 WAIRC 04565

Result Award varied

Order

HAVING heard Ms D MacTiernan on behalf of the applicant and there being no appearance on behalf of the respondent, and by consent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders—

THAT the Rope and Twine Workers' Award (No. 11 of 1963) be varied in accordance with the following schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after the 8th day of January 2002.

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

SCHEDULE

1. Clause 17. – Meal Money: Delete subclause (1) of this Clause and insert the following in lieu thereof—

(1) Subject to the provisions of subclause (2) of this clause an employee, required to work overtime for more than two hours, shall be supplied with a meal by the employer or be paid $7.05 for a meal and, if owing to the amount of overtime worked, a second or subsequent meal is required the employee shall be supplied with such meal by the employer or paid $4.85 for each meal so required.

2. Clause 19. – Wages: Delete the preamble and subclause (1) of this Clause and insert the following in lieu thereof—

The rates of pay in this award include arbitrated safety net adjustments available since December 1993, under the Arbitrated Safety Net Adjustment Principle.

These arbitrated safety net adjustments may be offset against any equivalent amount in the rate of pay received by employees since 1 November 1991 above the rate prescribed in the Award, except where such absorption is contrary to the terms of an industrial agreement.

Increases in rates of pay otherwise made under the State Wage Case Principles, excepting those resulting from enterprise agreements, are not to be used to offset arbitrated safety net adjustments.

The minimum weekly rate of wage payable to employees covered by this award shall be —

		Rate	Arbitrated Safety Net Adjustment	Total Rate
		$	$	$
(1)	Adult Employees			
	Rope layer on heavy type strand machine	313.70	88.00	401.70
	Rope layer (other) in walk with traveller	308.50	88.00	396.50
	Rope splicer on driving ropes and springs	305.40	88.00	393.40
	Combination spinning and spooling machine operator	305.40	88.00	393.40
	Rope house machinist	300.80	88.00	388.80
	Feeder on first spreader	302.40	88.00	390.40
	Oiler and/or belt repairer	302.40	88.00	390.40
	Employees lumping, loading and unloading hemp	302.40	88.00	390.40
	All other machine operators or employees feeding or taking from machines	300.80	88.00	388.80
	All others	296.90	88.00	384.90

3. Clause 20. – Leading Hands: Delete this Clause and insert the following in lieu thereof—

Any employee placed by the employer in charge of three or more other employees shall be paid $19.42 per week in addition to the weekly rates prescribed by this award.

4. Clause 24. – Dirt Money: Delete subclause (1) of this Clause and insert the following in lieu thereof—

(1) 37¢ per hour extra shall be paid to employees when engaged in work of an unusually dirty nature where clothes are necessarily unduly soiled or injured or boots are injured by the nature of the work done.

2002 WAIRC 04550

SADDLERS AND LEATHERWORKERS' AWARD

No. 7 of 1062

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	AUSTRALIAN LIQUOR, HOSPITALITY AND MISCELLANEOUS WORKERS UNION, WESTERN AUSTRALIAN BRANCH, APPLICANT
	v.
	MALLABONES, RESPONDENT
CORAM	CHIEF COMMISSIONER W S COLEMAN
DELIVERED	TUESDAY, 8 JANUARY 2002
FILE NO.	APPLICATION 1017 OF 2001
CITATION NO.	2002 WAIRC 04550

Result Award varied

Order

HAVING heard Ms D MacTiernan on behalf of the applicant and Ms N Thomson on behalf of the respondent and by consent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders—

THAT the Saddlers and Leatherworkers' Award (No. 7 of 1962) be varied in accordance with the following schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after the 8th day of January 2002.

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

SCHEDULE

1. Clause 8. – Meal Money: Delete this Clause and insert the following in lieu thereof—

(1) A worker required to work overtime for more than two hours without being notified on the previous day or earlier, that he/she will be so required to work, shall be supplied with any meal required by the employer or paid $7.75 for such meal.

(2) If the amount of overtime required to be worked necessitates a second or subsequent meal, the employer shall, unless he/she has notified the workers concerned on the previous day or earlier, that such a second or subsequent meal will also be required, provide such meals or pay an amount of $6.50 for each second or subsequent meal.

(3) No such payments need be made to workers living in the same locality as their workshops who can reasonably return home for such meals.

(4) If a worker in consequence of receiving such notice has provided him/herself with a meal or meals and is not required to work overtime, or is required to work less overtime than notified, he/she shall be paid the amount above prescribed in respect of the meals not then required.

2. Clause 23. – Leading Hands: Delete this Clause and insert the following in lieu thereof—

Any worker placed by the employer in charge of other workers shall be paid the following rates in addition to their ordinary rates of wages—

	$
In charge of 1 - 5 employees	19.40
In charge of 6 - 10 employees	24.45
In charge of 11 or more employees	33.45

3. Clause 24. – Special Rates: Delete this Clause and insert the following in lieu thereof—

Any worker required to repair goods which are of an unusually dirty or offensive nature shall be paid 34 cents per hour in addition to the ordinary rate.

2002 WAIRC 04522

SCHOOL EMPLOYEES (INDEPENDENT DAY & BOARDING SCHOOLS) AWARD, 1980

No. R7 of 1979

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	AUSTRALIAN LIQUOR, HOSPITALITY AND MISCELLANEOUS WORKERS UNION, WESTERN AUSTRALIAN BRANCH, APPLICANT *v.* AQUINAS COLLEGE AND OTHERS, RESPONDENTS
CORAM	CHIEF COMMISSIONER W S COLEMAN
DELIVERED	TUESDAY, 8 JANUARY 2002
FILE NO.	APPLICATION 1016 OF 2001
CITATION NO.	2002 WAIRC 04522

Result Award varied

Order

HAVING heard Ms D MacTiernan on behalf of the applicant and Dr I Fraser and Mr L Joyce on behalf of the respondents and by consent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders—

THAT the School Employees (Independent Day & Boarding Schools) Award, 1980 (No. R 7 of 1979) be varied in accordance with the following schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after the 8th day of January 2002.

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

SCHEDULE

1. Clause 11. – Meal Money: Delete subclause (1) of this Clause and insert the following in lieu thereof—

(1) Subject to the provisions of subclause (2) of this clause an employee, required to work overtime for more than two hours, shall be supplied with a meal by the employer or be paid $7.75 for a meal and, if owing to the amount of overtime worked, a second or subsequent meal is required the employee shall be supplied with such meal by the employer or paid $5.30 for each meal so required.

2. Clause 32. – Wages:

A. Delete paragraph (b) subclause (3) of this Clause and insert the following in lieu thereof—

(b) Senior employees other than the Head Groundsperson and leading hands appointed as such by the employer to be in charge of three or more other employees shall be paid $20.15 per week in addition to the rates prescribed herein.

B. Delete subclause (4) of this Clause and insert the following in lieu thereof—

(4) For all work done on any day after a break referred to in subclause (3) of Clause 7. - Hours of this award, the employee shall be paid an allowance of $1.25 per hour for each such hour worked.

3. Clause 33. – Fares and Motor Vehicle Allowances: Delete paragraph (c) of subclause (2) of this Clause and insert the following in lieu thereof—

(c) A year for the purpose of this clause shall commence on the 1st day of July and end on the 30th day of June next following.

Rates of hire for use of employee's own vehicle on employer's business

Schedule 1 - Motor Vehicle Allowances

Area and Details	Engine Displacement (in cubic centimetres)		
	Over 2600cc	Over 1600cc -2600cc	1600 cc & Under
	Rate per Kilometre (Cents)		
Metropolitan Area	69.2	60.2	53.2
South West Land Division	71.1	61.7	54.8
North of 23.5° South Latitude	78.0	68.1	60.6
Rest of the State	73.5	63.8	56.6

Schedule 2 - Motor Cycle Allowances

Distance Travelled During a Year on Official Business	Rate ¢/km
Rate per kilometre	23.9

Motor vehicles with rotary engines are to be included in the 1600-2600cc.

2002 WAIRC 04567

SECURITY OFFICERS AND CLEANERS (WEST AUSTRALIAN NEWSPAPERS) AWARD, 1992

No. A11 of 1991

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	AUSTRALIAN LIQUOR, HOSPITALITY AND MISCELLANEOUS WORKERS UNION, WESTERN AUSTRALIAN BRANCH, APPLICANT
	v.
	WEST AUSTRALIAN NEWSPAPERS LTD, RESPONDENT
CORAM	CHIEF COMMISSIONER W S COLEMAN
DELIVERED	TUESDAY, 8 JANUARY 2002
FILE NO.	APPLICATION 974 OF 2001
CITATION NO.	2002 WAIRC 04567

Result Award varied

Order

HAVING heard Ms D MacTiernan on behalf of the applicant and there being no appearance on behalf of the respondent, and by consent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders—

THAT the Security Officers and Cleaners (West Australian Newspapers) Award, 1992 (No. A 11 of 1991) be varied in accordance with the following schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after the 8th day of January 2002.

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

SCHEDULE

1. Clause 12. – Shift Allowances – Security Officers: Delete paragraph A of subclause (1) of this Clause and insert the following in lieu thereof—

A.

SECURITY OFFICERS	SHIFT ALLOWANCES PER WEEK $
Grade 5 (Trainee)	90.85
Grade 4	90.85
Grade 3	90.85
Grade 2	90.85
Grade 1	90.85

2. Clause 13. – Extra Rates and Allowances: Delete subclause (1) of this Clause and insert the following in lieu thereof—

(1) Except for Security Officer classifications an employee working an afternoon or night shift Monday to Friday shall receive a shift allowance of $90.85 per week or $18.17 per shift when such shifts are worked.

3. Clause 14. – Higher Duties: Delete subclause (1) of this Clause and insert the following in lieu thereof—

(1) An employee who carries out duties applicable to the Grade 1 Security Officer or Grade 1 Cleaner classification for a period of one week or more shall receive a Higher Duties Allowance of $39.63 per week.

3. Clause 15. – Overtime: Delete paragraph (a) of subclause (6) of this Clause and insert the following in lieu thereof—

(a) the employee has worked two hours or more of overtime immediately before any afternoon or night shift or immediately after day shift, the employee will receive at least a 30-minute unpaid meal break and be paid meal money of $7.15.

2002 WAIRC 04528

SECURITY OFFICERS' AWARD

No. A25 of 1981

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	AUSTRALIAN LIQUOR, HOSPITALITY AND MISCELLANEOUS WORKERS UNION, WESTERN AUSTRALIAN BRANCH, APPLICANT
	v.
	CANINE SECURITY AND ALSATION WATCH PATROL AND OTHERS, RESPONDENTS
CORAM	CHIEF COMMISSIONER W S COLEMAN
DELIVERED	TUESDAY, 8 JANUARY 2002
FILE NO.	APPLICATION 975 OF 2001
CITATION NO.	2002 WAIRC 04528

Result Award varied

Order

HAVING heard Ms D MacTiernan on behalf of the applicant and Mr L Joyce on behalf of the respondents, and by consent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders—

THAT the Security Officers' Award (No. A 25 of 1981) be varied in accordance with the following schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after the 8th day of January 2002.

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

SCHEDULE

1. Clause 15. – Overtime: Delete subclause (2) of this Clause and insert the following in lieu thereof—

(2) An officer required to work in excess of one hour after completion of his/her ordinary shift, without being notified before the completion of the previous day or shift, shall be paid a meal allowance of $7.85. A further meal allowance of $5.30 shall be paid on the completion of each additional four hours' overtime worked.

2. Clause 20. – Special Rates and Provisions: Delete subclause (5) of this Clause and insert the following in lieu thereof—

(5) Where an officer is required to carry a torch, a suitable torch shall be provided and maintained in working order by the employer or an allowance of $2.60 per week (or 52 cents per day) shall be paid where a torch is required.

3. Clause 21. – Classification Structure and Wage Rates:

A. Delete subclause (5) of this Clause and insert the following in lieu thereof—

(5) Senior Officials—

Any officer placed in charge of other officers shall be paid in addition to the appropriate wage prescribed, the following—

		Per Week $
(a)	if placed in charge of not less than 3 and not more than 10 other officer	20.50
(b)	if placed in charge of not less than 10 and not more than 20 other officers	31.35
(c)	if placed in charge of more than 20 other officers	40.25

B. Delete subclause (6) of this Clause and insert the following in lieu thereof—

(6) Additional Allowances—

Officers who fulfil certain requirements as directed and use various qualifications in the performance of their duties shall be paid, in addition to the appropriate wage prescribed, the following—

(a) Security Officers and above who are required to possess a recognised first aid certificate as a condition of employment, $8.06 per week extra.

(b) Security Officers required to drive emergency vehicles, $3.39 per day for each day that a vehicle is driven in an emergency situation.

(c) Security Officers who are required to attend and reset alarm panels, $5.06 per week or $1.01 per day in the case of employees who work part-time or casual.

(d) Security Officers who are required to carry firearms in the performance of their duties, $12.58 per week, or $2.51 per day for each day a firearm is carried.

(e) Security Officers required to hold a licence in accordance with the provisions of the Security Agents' Act shall have, in the second and subsequent years of employment 50% of the cost of the licence reimbursed by the employer.

4. Clause 25. – Fares and Travelling: Delete paragraph (c) of subclause (2) of this cause and insert the following in lieu thereof.

(c) A year for the purpose of this clause shall commence on the 1st day of July and end on the 30th day of June next following.

Rates of hire for use of employee's own vehicle on employer's business—

Schedule 1 - Motor Vehicle Allowance

Area and Details	Engine Displacement (in cubic centimetres)		
	Over 2600cc	Over 1600cc-2600cc	1600 cc & Under
	Rate per Kilometre (Cents)		
Metropolitan Area	69.2	60.2	53.2
South West Land Division	71.1	61.7	54.8
North of 23.5^{o} South Latitude	78.0	68.1	60.6
Rest of the State	73.5	63.8	56.6

Schedule 2 - Motor Cycle Allowance

Distance Travelled During a Year on Official Business	Rate per Kilometre (Cents)
All Areas of State	23.9

Motor vehicles with rotary engines are to be included in the 1600-2600cc category.

2002 WAIRC 04581

SOAP AND ALLIED PRODUCTS MANUFACTURING AWARD

No. 25 of 1960

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	AUSTRALIAN LIQUOR, HOSPITALITY AND MISCELLANEOUS WORKERS UNION, WESTERN AUSTRALIAN BRANCH, APPLICANT
	v.
	CANDLE LIGHT CO PTY LTD, RESPONDENT
CORAM	CHIEF COMMISSIONER W S COLEMAN
DELIVERED	TUESDAY, 8 JANUARY 2002
FILE NO.	APPLICATION 979 OF 2001
CITATION NO.	2002 WAIRC 04581

Result Award varied

Order

HAVING heard Ms D MacTiernan on behalf of the applicant and Mr L Joyce on behalf of the respondent, and by consent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders—

THAT the Soap and Allied Products Manufacturing Award (No. 25 of 1960) be varied in accordance with the following schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after the 8th day of January 2002.

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

SCHEDULE

1. Clause 13. – Meal Money: Delete this Clause and insert the following in lieu thereof—

(1) A worker required to work overtime for more than two hours without being notified on the previous day or earlier, that he will be so required to work shall be supplied with a meal by the employer or paid $7.75 for a meal.

(2) If the amount of overtime required to be worked necessitates a second or subsequent meal, the employer shall, unless he has notified the workers concerned on the previous day or earlier that such a second or subsequent meal will also be required, provide such meals or pay an amount of $6.40 for each second or subsequent meal.

(3) If a worker in consequence of receiving such notice has provided himself with a meal or meals and is not required to work overtime, or is required to work less overtime than notified, he shall be paid the amount required.

2. Clause 26. – Leading Hands: Delete this Clause and insert the following in lieu thereof—

In addition to the appropriate total weekly wage prescribed in Clause 25. - Wages of this award a leading hand shall be paid—

		$
(1)	if placed in charge of not less than three and not more than ten other employees	20.60
(2)	if placed in charge of more than ten and not more than 20 other employees	31.90
(3)	if placed in charge of more than 20 other employees	41.00

2002 WAIRC 04574

SOCIAL TRAINERS AND ASSISTANT SUPERVISORS' (ACTIV FOUNDATION) AWARD

No. A15 of 1984

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	AUSTRALIAN LIQUOR, HOSPITALITY AND MISCELLANEOUS WORKERS UNION, WESTERN AUSTRALIAN BRANCH, APPLICANT
	v.
	ACTIV FOUNDATION (INC), RESPONDENT
CORAM	CHIEF COMMISSIONER W S COLEMAN
DELIVERED	TUESDAY, 8 JANUARY 2002
FILE NO/S.	APPLICATION 961 OF 2001
CITATION NO.	2002 WAIRC 04574

Result Award varied

Order

Having heard Ms D MacTiernan on behalf of the applicant and Mr L Joyce on behalf of the respondent, and by consent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders—

THAT the Social Trainers and Assistant Supervisors' (Activ Foundation) Award (No. A 15 of 1985) be varied in accordance with the following schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after the 8th day of January 2002.

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

SCHEDULE

1. Clause 9. – General Conditions: Delete subclause (2)(a), (b) & (c) of this Clause and insert the following in lieu thereof—

(2) (a) An allowance of 40 cents per hour or part thereof shall be paid to employees who are place in charge of a unit during the off shift period of the Senior Social Trainer.

(b) An allowance of 96 cents per hour or part thereof shall be paid to employees who are placed in charge of a unit of 25 and under bed capacity during the off shift period of the Hostel Manager.

(c) An allowance of $1.19 per hour or part thereof shall be paid to employees who are placed in charge of a unit of 26 and over bed capacity during the off shift period of the Hostel Manager.

2. Clause 20. – Motor Vehicle Allowance: Delete subclause (5) of this Clause and insert the following in lieu thereof—

(5) Rates of hire for use of employee's own vehicle on employer's business—

Schedule 1 - Motor Vehicle Allowances

Area and Details	Engine Displacement (in cubic centimetres)		
	Over 2600cc	Over 1600cc -2600cc	1600 cc & Under
	Rate per kilometre (Cents)		
Metropolitan Area	69.2	60.2	53.2
South West Land Division	71.1	61.7	54.9
North of 23.5° South Latitude	78.0	68.1	60.6
Rest of the State	73.5	63.8	56.6

Schedule 2 - Motor Cycles

Distance Travelled During a Year on Official Business	Rate ¢/km
Rate per kilometre	23.9

Motor vehicles with rotary engines are to be included in the 1600-2600cc.

3. Clause 21. – Shift Work: Delete subclause (1) of this Clause and insert the following in lieu thereof—

(1) (a) The loading on the ordinary rates of pay for an afternoon or night shift shall be $1.62 per hour or part thereof.

(b) For the purposes of this subclause—

(i) "Day Shift" shall mean a shift which commences after 6.00am and before 12.00 midday.

(ii) "Afternoon Shift" shall mean a shift which commences at or after 12 midday and before 6.00pm.

(iii) "Night Shift" shall mean a shift which commences at or after 6.00p.m. and before 6.01am."

2002 WAIRC 04530

SOCIAL TRAINERS (NULSEN HAVEN) AWARD

No. A11 of 1985

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	AUSTRALIAN LIQUOR, HOSPITALITY AND MISCELLANEOUS WORKERS UNION, WESTERN AUSTRALIAN BRANCH, APPLICANT
	v.
	NULSEN HAVEN ASSOCIATION (INC), RESPONDENT
CORAM	CHIEF COMMISSIONER W S COLEMAN
DELIVERED	TUESDAY, 8 JANUARY 2002
FILE NO.	APPLICATION 978 OF 2001
CITATION NO.	2002 WAIRC 04530

Result Award varied

Order

HAVING heard Ms D MacTiernan on behalf of the applicant and Mr L Joyce on behalf of the respondent, and by consent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders—

THAT the Social Trainers (Nulsen Haven) Award (No. A 11 of 1985) be varied in accordance with the following schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after the 8th day of January 2002.

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

SCHEDULE

1. Clause 8. – Qualifications Allowance: Delete this Clause and insert the following in lieu thereof—

Employees who have completed the Diploma in Training the Handicapped shall be paid an allowance of $6.50 per week.

2002 WAIRC 04566

TITANIUM OXIDE MANUFACTURING AWARD 1975

No. 8 of 1975

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	AUSTRALIAN LIQUOR, HOSPITALITY AND MISCELLANEOUS WORKERS UNION, WESTERN AUSTRALIAN BRANCH, APPLICANT
	v.
	SCM CHEMICALS LIMITED, RESPONDENT
CORAM	CHIEF COMMISSIONER W S COLEMAN
DELIVERED	TUESDAY, 8 JANUARY 2002
FILE NO.	APPLICATION 971 OF 2001
CITATION NO.	2002 WAIRC 04566

Result Award varied

Order

HAVING heard Ms D MacTiernan on behalf of the applicant and there being no appearance on behalf of the respondent, and by consent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders—

THAT the Titanium Oxide Manufacturing Award 1975 (No. 8 of 1975) be varied in accordance with the following schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after the 8th day of January 2002.

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

SCHEDULE

1. Clause 9. – Meal Money: Delete this Clause and insert the following in lieu thereof—

A worker required to work overtime for more than two hours without being notified on the previous day or earlier that he will be so required to work, shall be provided with any meal required or paid $7.10 in lieu thereof.

If the amount of overtime required to be worked necessitates a second or subsequent meal the employer shall, unless he has previously notified the worker or workers concerned the day before or earlier that such second or subsequent meal will also be required, provide such meal or pay an amount of $5.00 for each second or subsequent meal.

No such payment need be made to workers living in the same locality as their workshops who can reasonably return home for such meals.

If a worker in consequence of receiving such notice, has provided himself with a meal or meals and is not required to work overtime, or is required to work less overtime than notified, he shall be paid the amounts above prescribed in respect of the meals not then required.

2. Clause 16. – Extra Rates and Conditions: Delete subclause (2) of this Clause and insert the following in lieu thereof—

(2) Dirty work: workers engaged on cleaning - from the inside - acid, settling, or agitating tanks, or on work of an unusually dirty or offensive nature shall be paid 31 cents per hour extra.

3. Clause 21. – Wages: Delete subclause (2) of this Clause and insert the following in lieu thereof—

The rates of pay in this award include arbitrated safety net adjustments available since December 1993, under the Arbitrated Safety Net Adjustment Principle.

These arbitrated safety net adjustments may be offset against any equivalent amount in the rate of pay received by employees since 1 November 1991 above the rate prescribed in the Award, except where such absorption is contrary to the terms of an industrial agreement.

Increases in rates of pay otherwise made under the State Wage Case Principles, excepting those resulting from enterprise agreements, are not to be used to offset arbitrated safety net adjustments.

(1) The minimum weekly rates of wage payable to employees covered by this award shall be—

		$ PER WEEK	ASNA	TOTAL
(a)	General Hand:			
	First Year	298.10	88.00	386.10
	Thereafter	301.80	88.00	389.80
(b)	Plant Operators:			
	First Year	298.10	88.00	386.10
	Thereafter	301.80	88.00	389.80
(c)	Mobile Plant Operator:	311.10	88.00	399.10
(d)	Senior Plant Operator:	317.10	88.00	405.10
(e)	Leading Hand Plant Operator:	329.60	88.00	417.60
(f)	Senior Leading Hand:	343.80	88.00	431.80

2002 WAIRC 04545

TRAINING ASSISTANTS' AND COMMUNITY SUPPORT STAFF (CEREBRAL PALSY ASSOCIATION) AWARD 1987

No. A16 of 1986

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	AUSTRALIAN LIQUOR, HOSPITALITY AND MISCELLANEOUS WORKERS UNION, WESTERN AUSTRALIAN BRANCH, APPLICANT
	v.
	CEREBRAL PALSY ASSOCIATION OF WA INC, RESPONDENT
CORAM	CHIEF COMMISSIONER W S COLEMAN
DELIVERED	TUESDAY, 8 JANUARY 2002
FILE NO/S.	APPLICATION 1006 OF 2001
CITATION NO.	2002 WAIRC 04545

Result Award varied

Order

Having heard Ms D MacTiernan on behalf of the applicant and Mr L Joyce on behalf of the respondent, and by consent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders—

THAT the Training Assistants & Community Support Staff (Cerebral Palsy Association) Award 1987 (No. A 16 of 1986) be varied in accordance with the following schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after the 8th day of January 2002.

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

SCHEDULE

1. Clause 8. – Fares and Travelling Time: Delete subclause (2) of this Clause and insert the following in lieu thereof—

(2) A year for the purpose of this clause shall commence on the 1st day of July and end on the 30th day of June next following.

Rates of hire for use of employee's own vehicle on employer's business:

Schedule 1 - Motor Vehicle Allowances

Area and Details	Engine Displacement (in cubic centimetres)		
	Over 2600cc	Over 1600cc -2600cc	1600 cc & Under
	Rate per Kilometre (Cents)		
Metropolitan Area	69.2	60.2	53.2
South West Land Division	71.1	61.7	54.9
North of 23.5° South Latitude	78.0	68.1	60.6
Rest of the State	73.5	63.8	56.6

Schedule 2 - Motor Cycle Allowances

Distance Travelled During a Year on Official Business	Rate ¢/km
Rate per Kilometre	23.9

Motor vehicles with rotary engines are to be included in the 1600 – 2600cc

2. Clause 14. – Wages: Delete subclause (2) of this Clause and insert the following in lieu thereof—

(2) Senior Community Support Staff—

Employees who are required to co-ordinate the activities of Community Support Staff shall be designated as Senior Community Support Staff and they shall be paid an in-charge allowance of $770.55 per annum in addition to the rates of pay specified in subclause (1) of this clause.

2002 WAIRC 04529

UNIVERSITY, COLLEGES AND SWANLEIGH AWARD, 1980

No. R7B of 1979

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	AUSTRALIAN LIQUOR, HOSPITALITY AND MISCELLANEOUS WORKERS UNION, WESTERN AUSTRALIAN BRANCH, APPLICANT
	v.
	ST THOMAS MORE COLLEGE AND OTHERS, RESPONDENTS
CORAM	CHIEF COMMISSIONER W S COLEMAN
DELIVERED	TUESDAY, 8 JANUARY 2002
FILE NO.	APPLICATION 976 OF 2001
CITATION NO.	2002 WAIRC 04529

Result Award varied

Order

HAVING heard Ms D MacTiernan on behalf of the applicant and Mr L Joyce on behalf of the respondents, and by consent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders—

THAT the University, Colleges and Swanleigh Award, 1980 (No. R 7B of 1979) be varied in accordance with the following schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after the 8th day of January 2002.

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

SCHEDULE

1. Clause 11. – Meal Money: Delete subclause (1) of this Clause and insert the following in lieu thereof—

(1) Subject to the provisions of subclause (2) of this clause an employee, required to work overtime for more than two hours, shall be supplied with a meal by the employer or be paid $7.75 for a meal and, if owing to the amount of overtime worked, a second or subsequent meal is required the employee shall be supplied with such meal by the employer or paid $5.30 for each meal so required.

2. Clause 31. – Wages:

A. Delete paragraph (b) of subclause (3) of this Clause and insert the following in lieu thereof—

(b) Senior employees other than the Head Groundsperson and leading hands appointed as such by the employer to be in charge of three or more other employees shall be paid $20.00 per week in addition to the rates prescribed herein.

B. Delete subclause (4) of this Clause and insert the following in lieu thereof—

(4) For all work done on any day after a break referred to in subclause (3) of Clause 7. - Hours of this award, the employee shall be paid an allowance of $1.25 per hour for each such hour worked.

3. Clause 32. – Fares and Motor Vehicle Allowances: Delete paragraph (c) of subclause (2) of this Clause and insert the following in lieu thereof—

(c) A year for the purpose of this clause shall commence on the 1st day of July and end on the 30th day of June next following.

Rates of hire for use of employee's own vehicle on employer's business

Schedule 1 - Motor Vehicle Allowances

Area and Details	Engine Displacement (in cubic centimetres)		
	Over 2600cc	Over 1600cc -2600cc	1600 cc & Under
	Rate per Kilometre (Cents)		
Metropolitan Area	69.2	60.2	53.2
South West Land Division	71.1	61.7	54.8
North of 23.5° South Latitude	78.0	68.1	60.6
Rest of the State	73.5	63.8	56.6

Schedule 2 - Motor Cycle Allowances

Distance Travelled During a Year on Official Business	Rate ¢/km
Rate per kilometre	23.9

Motor vehicles with rotary engines are to be included in the 1600-2600cc.

2002 WAIRC 04591

WATCHMAKERS' AND JEWELLERS' AWARD 1970

No. 10 of 1970

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	AUSTRALIAN LIQUOR, HOSPITALITY AND MISCELLANEOUS WORKERS UNION, WESTERN AUSTRALIAN BRANCH, APPLICANT
	v.
	CARIS BROTHERS LTD AND OTHERS, RESPONDENTS
CORAM	CHIEF COMMISSIONER W S COLEMAN
DELIVERED	TUESDAY, 8 JANUARY 2002
FILE NO.	APPLICATION 1011 OF 2001
CITATION NO.	2002 WAIRC 04591

Result Award varied

Order

HAVING heard Ms D MacTiernan on behalf of the applicant and Mr L Joyce on behalf of the respondents and by consent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders—

THAT the Watchmakers' and Jewellers' Award 1970 (No. 10 of 1970) be varied in accordance with the following schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after the 8th day of January 2002.

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

SCHEDULE

1. Clause 8. – Wages: Delete subclause (4) of this Clause and insert the following in lieu thereof—

(4) Leading Hands—

Any jeweller or watchmaker placed in charge of not more than ten (10) jewellers or watchmakers shall be paid $20.00 per week in addition to the rates of pay prescribed by this award.

2. Clause 11. – Meal Money: Delete this Clause and insert the following in lieu thereof—

(1) Subject to the provisions of subclause (2) of this clause an employee, required to work overtime for more than two hours, shall be supplied with a meal by the employer or be paid $6.80 for a meal and, if owing to the amount of overtime worked, a second or subsequent meal is required the employee shall be supplied with such meal by the employer or paid $4.70 for each meal so required.

(2) The provisions of subclause (1) of this subclause do not apply—

(a) in respect of any period of overtime for which the employee has been notified on the previous day or earlier that he/she will be required; or

(b) to any employee who lives in the locality in which the place of work is situated in respect of any meal for which he/she can reasonably go home.

(3) If an employee to whom paragraph (a) of subclause (2) of this clause applies has, as a consequence of the notification referred to in that paragraph, provided himself with a meal or meals and is not required to work overtime or is required to work less overtime than the period notified, he shall be paid, for each meal provided and not required, the appropriate amount prescribed in subclause (1) of this clause.

(4) Late Night Trading Meal Allowance—

An employee who commences work prior to 4.30 p.m. on the day of late night trading and is required to work beyond 7.00 p.m. on that day, shall be paid a meal allowance of $6.80.

2002 WAIRC 04547

WESTERN AUSTRALIAN MINT SECURITY OFFICERS' AWARD 1988

No. A5 of 1988

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	AUSTRALIAN LIQUOR, HOSPITALITY AND MISCELLANEOUS WORKERS UNION, WESTERN AUSTRALIAN BRANCH, APPLICANT
	v.
	THE WESTERN AUSTRALIAN MINT, RESPONDENT
CORAM	CHIEF COMMISSIONER W S COLEMAN
DELIVERED	TUESDAY, 8 JANUARY 2002
FILE NO/S.	APPLICATION 1010 OF 2001
CITATION NO.	2002 WAIRC 04547

Result Award varied

Order

Having heard Ms D MacTiernan on behalf of the applicant and Mr L Joyce on behalf of the respondent, and by consent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders—

THAT the Western Australian Mint Security Officers' Award, 1988 (No. A 5 of 1988) be varied in accordance with the following schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after the 8th day of January 2002.

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

SCHEDULE

1. Clause 14. – Wages and Allowances: Delete subclauses (3)(a) & (4)(a) of this Clause and insert the following in lieu thereof—

(3) (a) A senior security officer or security officer who has been trained to render first aid and who is a current holder of appropriate first aid qualifications, such as a Senior First Aid Certificate from the St John Ambulance Association, will be paid a first aid allowance of $1.41 per shift with a maximum payment of $6.85 per week.

(4) (a) Where an officer is required to carry a firearm that officer shall be paid an allowance of $1.52 per shift with a maximum payment of $7.39 per week.

1. Clause 16. – Overtime: Delete subclause (2) of this Clause and insert the following in lieu thereof—

(2) An officer required to work in excess of two hours after completion of their ordinary shift, without being notified before the completion of the previous day or shift, shall be paid a meal allowance of $7.75. A further meal allowance of $4.25 shall be paid on the completion of each additional four hours' overtime worked.

2002 WAIRC 04546

WOOL SCOURING AND FELLMONGERY INDUSTRY AWARD

No. 32 of 1959

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	AUSTRALIAN LIQUOR, HOSPITALITY AND MISCELLANEOUS WORKERS UNION, WESTERN AUSTRALIAN BRANCH, APPLICANT
	v.
	JANDAKOT WOOL SCOURING COMPANY PTY LTD AND OTHERS, RESPONDENTS
CORAM	CHIEF COMMISSIONER W S COLEMAN
DELIVERED	TUESDAY, 8 JANUARY 2002
FILE NO.	APPLICATION 1009 OF 2001
CITATION NO.	2002 WAIRC 04546

Result Award varied

Order

HAVING heard Ms D MacTiernan on behalf of the applicant and Mr L Joyce on behalf of the respondents and by consent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders—

THAT the Wool Scouring and Fellmongery Industry Award No. 32 of 1959 be varied in accordance with the following schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after the 8th day of January 2002.

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

SCHEDULE

1. Clause 16. – Meal Allowance: Delete subclause (1) of this Clause and insert the following in lieu thereof—

(1) Subject to the provisions of subclause (2) of this clause an employee, required to work overtime for more than two hours, shall be supplied with a meal by the employer or be paid $6.80 for a meal and, if owing to the amount of overtime worked, a second or subsequent meal is required the employee shall be supplied with such meal by the employer or paid $4.70 for each meal so required.

2. Clause 21. – Special Rates and Provisions: Delete this Clause and insert the following in lieu thereof—

(1) All employees handling greasy dead wool from bales for treatment shall be paid in addition to their ordinary rate of pay $1.65 per bale so handled.

(2) All employees engaged in handling dag wool shall be paid 63¢ per hour extra whilst so engaged.

(3) Ankle rubber boots shall be provided for centre men on scouring machines and workers on greasy auto feed boxes.

(4) Goggles shall be supplied to drying machine hands.

(5) A set of goggles and aprons shall be supplied for each treatment.

(6) All workers in the fellmongery section except those classing and handling dry sheep-skins, shall be supplied with gloves, waterproof aprons, knee high rubber boots, thigh boots (for pit workers if necessary).

(7) All employees handling pied wool (from the tanks before washing) shall be paid 63¢ per hour whilst so engaged.

(8) Pullers classing to quality and pickles pelt classers shall be paid $1.02 per hour extra whilst so engaged.

2002 WAIRC 04624

ZOOLOGICAL GARDENS EMPLOYEES AWARD 1969

No. 29 of 1969

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	AUSTRALIAN LIQUOR, HOSPITALITY AND MISCELLANEOUS WORKERS UNION, WESTERN AUSTRALIAN BRANCH, APPLICANT
	v.
	ZOOLOGICAL GARDENS BOARD, RESPONDENT
CORAM	CHIEF COMMISSIONER W S COLEMAN
DELIVERED	TUESDAY, 8 JANUARY 2002
FILE NO/S.	APPLICATION 1008 OF 2001
CITATION NO.	2002 WAIRC 04624

Result Award varied

Order

Having heard Ms D MacTiernan on behalf of the applicant and Mr J Lange on behalf of the respondents, and by consent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders—

THAT the Zoological Gardens Employees Award 1969 (No. 29 of 1969) be varied in accordance with the following schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after the 7th day of January 2002.

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

SCHEDULE

1. Clause 8. – Overtime: Delete subclause (5)(a) of this Clause and insert the following in lieu thereof—

(5) (a) An employee required to work continuous overtime for more than one and a half hours shall be supplied with a meal by the employer or be paid $8.15 for a meal, and if, owing to the amount of overtime worked, a second or subsequent meal is required they shall be supplied with each such meal by the employer or be paid $4.75 for each meal so required.

PUBLIC SERVICE ARBITRATOR—Matters Dealt With—

2002 WAIRC 04609

DISPUTE RE TRANSFER TO A FULL TIME POSITION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED, APPLICANT
	v.
	CHIEF EXECUTIVE OFFICER FAMILY AND CHILDREN'S SERVICES, RESPONDENT
CORAM	COMMISSIONER P E SCOTT
	PUBLIC SERVICE ARBITRATOR
DELIVERED	FRIDAY, 11 JANUARY 2002
FILE NO.	P 12 OF 2001
CITATION NO.	2002 WAIRC 04609

Result	Declaration issued that Ms Evans is eligible to apply and be considered for transfer
Representation	
Applicant	Mr M Amati
Respondent	Mr B Beaton

Reasons for Decision

1 Ms Hazel Evans is a part-time employee of the respondent. She has held the position of Family Resource Worker ("FRW") for over 11 years. The applicant seeks an order that Ms Evans be transferred to a full-time permanent position as Customer Service Officer ("CSO") in accordance with Clause 24(3)(c) of the Family and Children's Services Enterprise Bargaining Agreement 2000, ("the EBA").

2 The parties submitted a Statement of Agreed Facts that:

> "1) From the 9 September 1989 to the present, Ms Hazel Evans has been employed by the Director General, Family & Children Services, in a "Family Resource Worker", Level 1 position; carrying out the duties of the position to the satisfaction of the Respondent.
>
> 2) From the 9 September 1989 to the 15 November 1991, Ms Evans was employed on a casual basis. Since the 15 November 1991, Ms Evans has been working on a permanent part-time basis for sixty-hours per four-week cycle; that is, for fifteen hours per week.
>
> 3) The conditions of employment under which Ms Evans is currently working are in accordance with both the "*Department for Community Development (Family Resource Workers, Welfare Assistants and Parent Helpers) Award, 1990* (Award No. PSA A1 of 1989) and the *Family & Children's Services Enterprise Agreement, 2000* (PSG AG 2 of 2000).
>
> 4) That the policy procedures for the recruitment **all** (sic) of entry-level officers, notwithstanding their specific duties, are in accordance with the policy document "*1.3.12 – Recruitment of Entry Level Officers (Permanent, Contract and Casual)*; and that such a policy applies across the Department of Family & Children's Services.
>
> 5) That Ms Evans employment is subject to Part 3 of the *Public Sector Management Act, 1994*
>
> 6) That the Director General of Family & Children's Services, pursuant to Section 65 of the Public Sector Management Act, 1994, has the statutory power to transfer public service officers, likewise Ms Evans, intra-departmentally."

3 By advice dated 5 November 2001, the applicant advised that a further fact was agreed between the parties being—

> "That both public service officers appointed to Level 1 positions – covered by the "Public Service Award" – and, on the other hand, those appointed to Family Resource Workers position – covered by "Department for Community Development (Family Resource Workers, Welfare Assistants and Parent Helpers) Award" – receive the same level of hourly remuneration."

4 The applicant says that the respondent's decision to deny Ms Evans a transfer to a full-time CSO entry level position in Katanning is both contrary to the industrial instruments applying to her employment and to the public sector generally, and is arbitrary and capricious. The applicant says that Clause 24(3)(c) of the EBA provides "a right of conversion to full-time employment for part-time employees in addition to the existing right of reversion". (transcript page 4)

5 The applicant says that the enterprise bargaining negotiations between the parties, while not specifically clarifying the issue concerned, intended that there be improvements in part-time conditions. The improvements included the ability for part-timers to take on full-time employment. It is interesting to note however, that the evidence called by the applicant in relation to enterprise bargaining negotiations did not relate to the most recent enterprise bargaining agreement and the conditions contained therein. The evidence of Owen James Wood, an industrial organiser with the applicant, did not assist in elaborating on the specific outcomes of the negotiations for the EBA as they affect this matter, or confirming the applicant's assertion in that regard, but merely referred to general agreement being reached to improve the conditions for part-timers.

6 The evidence of Ms Evans is that whilst she has been engaged as a FRW with the respondent since September 1989, she has a desire to undertake full-time work. However, it would appear that this work is not available as a FRW because of the requirements of that position. Ms Evans says that she had not previously asked the respondent to provide her with full-time FRW opportunities, however, she did apply for transfer to the positions of CSO in both the Narrogin and Katanning offices of the respondent. She does not know of other FRWs who have been transferred into full-time CSO positions. Ms Evans has acted in CSO positions for periods of between 4 and 6 weeks totalling 16 weeks during the last 18 months. Ms Evans says that the position which she seeks to transfer into is that of CSO at the Katanning office of the respondent and this was the subject of an advertised vacancy as "Level 1 Appointment/Transfer Opportunities".

7 The applicant also refers to the Premier's Circular No. 7/01 dated 18 May 2001 which provided for the conversion of entry level contract officers to permanent status and set out certain criteria for their conversion to permanent officer status.

8 The respondent says that the movement from part-time to full-time employment contained within the EBA relates to a "right of reversion" and applies where a part-time officer who was previously a full-time officer desires to revert back to full-time employment, and that this is subject to certain conditions. The respondent says that the award applicable to Ms Evans current employment provides no right of reversion. Both the Public Service Award 1992 and the Government Officers Salaries, Allowances and Conditions Award 1989 state—

> "(c) A part-time officer who was previously a full-time officer within the organisation who occupies a part-time office which was the initiative of the employer and who desires to revert to full-time employment will be required to seek promotion or transfer to a full-time position by—
>
> (i) application for advertised vacancies; and/or
>
> (ii) by notification in writing to the employer of his or her desire to revert to full-time employment."
>
> (Clause 9(7) of the Public Service Award 1992 and Clause 9(11) of the Government Officers Salaries, Allowances and Conditions Award 1989)

9 Ms Evans does not occupy a part-time office which was previously full-time and made part-time therefore there is no right to "reversion" as such.

10 Further, the respondent says that its Human Resources Best Practice Manual entry 1.4.47 provides that part-time work does not apply to FRW and parent helpers.

11 The respondent also argues that the transfer to a CSO on a full-time basis would constitute a promotion because Ms Evans would gain the benefits of the Public Service Award 1992 and also be eligible to transfer across organisations in accordance with that Award. Further, the respondent says that under the award which covers her current employment there is no automatic entitlement to transfer to other award positions. The improvement in conditions which would apply to Ms Evans, should she be successful in this application, would constitute an improvement in conditions which must be achieved through a merit based selection process in accordance with s.8(1)(a) of the Public Sector Management Act 1994 which provides—

> **"8. General principles of human resource management**
>
> (1) The principles of human resource management that are to be observed in and in relation to the Public Sector are that —
>
> (a) all selection processes are to be directed towards, and based on, a proper assessment of merit and equity;"

12 The respondent rejects the applicant's argument that s.65(1) of the Public Sector Management Act 1994 allows the application to be granted. It says that s.65(1) of the Public Sector Management Act 1994 requires consideration of the interests of the department, the qualifications of the public service officer and the functions assigned.

13 The respondent says that it has identified that FRWs are required as an occupational group within the organisation to be part-time positions. There is no full-time work in those positions. The respondent says that the FRW and CSO positions constitute different roles within the organisation. Further, the respondent says that for officers to be appointed as a public service officer, the employing authority must operate in accordance with approved procedures (sections 64(1) and (2)(a) of the Public Service Management Act 1994). FRW "positions throughout the Department have historically been part-time positions with the ordinary working hours as specified in the award not exceeding 60 hours per four weekly cycles" (transcript page 29). The primary role of the FRW is "the provision of advice and support to customers in practical parenting skills and related life skills; assisting case managers in maintaining contact with and providing practical skills to customers; assisting to identify community needs and developing and providing information on community resources to Family and Children's Services and transporting customers" (transcript page 29).

14 On the other hand, the role of a full-time Level 1 CSO is to "undertake telephonist duties for the service delivery office; provide information and advice to departmental customers; perform clerical tasks such as filing and word processing; maintain office processes and procedures and enter information on departmental data basis as required" (transcript page 29).

15 The respondent says that there would be a flow on effect if Ms Evans' request is granted that she be placed into a full-time CSO position as there are approximately 80 FRW positions all of which are part-time.

16 The respondent says that the FRW positions are contract based and therefore there is no permanent tenure as there is with the public service officer. There is no capacity to transfer them between other agencies and that there is a distinction between public servants and public sector employees generally.

17 I have considered all of the evidence and submissions in this matter. At this point, prior to reaching conclusions regarding the parties' respective arguments I note the difficulty which has arisen in considering this matter due to the conflict which seems apparent between two of the Agreed Facts and specific submissions of the parties. The first is Agreed Fact 2 which refers to Ms Evans as being permanent part-time. If so, then Ms Evans does not have a contract position which would be subject to the Premier's Circular No. 7/01 which deals with contract positions. It is also in conflict with the respondent's submission that FRW positions are contract positions with no permanent tenure. There was no evidence to support this assertion, other than a reference to the award which covers her employment stating that employment is on a monthly basis. This does not make those positions fixed term contract positions as envisaged by the Premier's Circular No. 7/01.

18 The other issue of conflict between the Agreed Facts and the parties' submissions concerns Agreed Facts 5 and 6. This last argument appears to be somewhat difficult to comprehend on the basis that the parties agreed in point 6 of their summary of agreed facts "that the Director General of Family and Children's Services, pursuant to s.65 of the Public Sector Management Act 1994, has statutory power to transfer public service officers, likewise Ms Evans, intra-departmentally". It is also agreed between the parties that Ms Evans employment is subject to Part 3 of the Public Sector Management Act 1994. The Public Sector Management Act 1994, Part 3 deals with the Public Service. Therefore, it is difficult to comprehend the respondent's arguments which suggest that Ms Evans is not a public service officer.

19 In regard to these two issues of conflict between the Agreed Facts and the parties' submissions, I have proceeded on the basis that the former are correct. If that is not so, then this may affect the conclusions I have reached. Accordingly, I have presumed that there would appear to be no impediment to a transfer simply on the basis that Ms Evans is a public service officer and is entitled to the tenure which goes with that. However, her employment is not covered by the Public Service Award 1992 but rather by a specific work group award and enterprise bargaining agreement.

20 The first issue for consideration is whether Clause 24(3)(c) of the EBA requires the respondent to transfer Ms Evans to a full-time permanent position in another calling, i.e. a CSO, where her terms and conditions of employment may be affected by different industrial instruments to those which already apply.

21 Clause 24 of the EBA provides—

"24. PART-TIME WORK

24.1 The following provisions shall be read in conjunction with the existing part-time provisions in the relevant parent awards that apply to the parties covered by this agreement.

24.2 Definitions—

a) Part-time work is defined as work that is regularly undertaken for less than designated full-time hours and is between 15 hours 12 minutes and 30 hours 24 minutes (that is between 2 and 4 working days) per week and does not attract a casual loading. This provision does not apply to Family Resource Workers and Parent Helpers, see Clause 25 of this Agreement.

24.3 Part-time Agreement—

a) Where a right of reversion exists in the parent award but part-time work within an employee's substantive position is not feasible, the employer may facilitate a temporary transfer of the employee to a part-time position of similar duties and classification.

b) Preference will be given in allocating part-time work to those employees returning to work from periods of leave who seek to convert from full-time to part-time employment based on their circumstances, which may include parental leave, extended sick leave or carers leave.

c) A part-time employee (whether engaged directly as a part-time employee or who has converted from a full-time position to a permanent part-time position) who wishes to become a full-time employee will be required to seek promotion or transfer to a full-time position by application for advertised vacancies and/or by notification in writing to the employer of the desire to convert to full-time employment. The employer will facilitate that conversion as and when the opportunity to do so arises.

24.4 Hours of Duty—

a) If agreement is reached in writing to a variation of an employee's working hours time worked up to 7.6 hours on any day is not to be regarded as overtime but as an extension of the contract hours for that day and should be paid at the normal rate of pay.

24.5 Salary and Related Matters—

a) An employee employed on a part-time basis shall be paid a proportion of the appropriate full-time salary dependent on time worked. The salary shall be calculated in the following manner:-

$$\frac{\text{Hours worked per fortnight}}{76} \times \frac{\text{Full-time fortnightly salary}}{1}$$

b) A part-time employee will be entitled to the same leave and conditions prescribed in the relevant Award for full-time employees with the following variations:

(i) Part-time employees are entitled to Special Leave, on a pro rata basis calculated as follows:

$$\frac{\text{Hours worked per fortnight}}{76} \times \frac{22.8 \text{ hours}}{1}$$

(ii) Part-time employees are entitled to District Allowance on a pro rata basis calculated as follows:

$$\frac{\text{Hours worked per fortnight}}{76} \times \frac{\text{Appropriate District Allowance}}{1}$$

24.6 Training—

a) Part-time employees will have the same access to training, promotion and staff development opportunities as full-time employees.

24.7 Communication and Consultation—

a) Communication and consultation mechanisms will be examined to ensure that part-time employees are fully informed and involved in decision making and the general operation of the section and department."

22 Clause 25 of the EBA deals specifically with the provisions as they relate to FRWs of which Ms Evans is one. This clause provides as follows—

"25. FAMILY RESOURCE WORKERS AND PARENT HELPERS

25.1 From the date of registration of this Agreement the provisions of the Department for Community Development (Family Resource Workers, Welfare Assistants and Parent Helpers) Award 1990, will continue to apply except to the extent that they are inconsistent with the following provisions—

25.2 Hours—

a) The ordinary working hours for employees shall be sixty hours per four week cycle except where agreement in writing is reached between the employee and the manager to vary the hours worked and shall be worked as determined by the employer between the hours of 7.00 am and 6.00 pm on any days per week Monday to Friday.

b) The employer shall give an employee one (1) month's notice of any proposed variation to that employee's ordinary working hours, provided that the employer shall not vary the employee's total weekly hours of duty without the employee's prior written consent, a copy of which shall be forwarded to the Union.

c) Notwithstanding paragraph (b) of this sub-clause whenever agreement in writing is reached for a temporary variation to an employee's ordinary working hours—

(i) Time worked up to 7.6 hours on any day, within ordinary working hours, is not to be regarded as overtime but an extension of the contract hours for that day and should be paid at the normal rate of pay.

(ii) Additional days worked, up to a total of five (5) days per week, within ordinary working hours, are also regarded as an extension of the contract and should be paid at the normal rate of pay.

d) The provisions of Clause 18, Overtime, of the GOSAC Award shall apply to all time worked outside the ordinary working hours prescribed by paragraph (a) of this subclause unless an arrangement pursuant to paragraph (c) of this sub-clause is in place.

e) The provisions of Clause 17, Shiftwork, of the GOSAC Award shall apply."

23 Accordingly, the EBA provides that part-time work is—

(a) less than full-time;

(b) between 15 hours 12 minutes and 30 hours 24 minutes, ie between 2 and 4 working days; and

(c) does not attract a casual loading.

24 However, that definition of part-time work does not apply to FRW and parent helpers. The provision refers to Clause 25 of the agreement for the purpose of defining part-time work regarding FRW and the Parent Helpers.

25 Clause 25 – Family Resource Workers and Parent Helpers sets out that the Department of Community Development (Family Resource Workers, Welfare Assistants and Parent Helpers) Award 1990 continues to apply except to the extent that that Award is inconsistent with the terms of Clause 25 of the EBA. Clause 25 sets out that the hours of work for FRWs and parent helpers are 60 hours per week over a 4 week cycle (except by agreement between the employee and the manager) and are to be worked as determined by the employer between the hours of 7.00am and 6.00pm on any of the days Monday to Friday. The remainder of the clause deals with the rates of pay to apply to particular hours.

26 The definition of part-time work contained within Clause 24.2 of the EBA says that it does not apply to FRWs. The remainder of the part-time clause applies. It is only the definition which does not apply to FRWs. Clause 25 sets out the definition of part-time work for the purposes of FRWs and Parent Helpers.

27 The remainder of Clause 24. – Part-Time Workers of the EBA sets out a number of conditions. Subclause (3) deals with part-timers being allocated full-time positions and visa versa. Paragraph (a) of that subclause specifies that where a "right of reversion" exists in the parent award and where part-time work is not feasible within the employee's substantive position, the employer is to facilitate a temporary transfer to a part-time position of similar duties and classification. However, this assumes two things: the first is that the award covering Ms Evan's employment contains a right of revision from full-time to part-time work, and secondly that the employee is full-time. As this provision deals with full-time to temporary part-time by transfer, it is not relevant to Ms Evans' situation as she is part-time and seeks to be full-time. Further, does the Department for Community Development (Family Resource Workers, Welfare Assistants and Parent Helpers) Award 1990 contain a right of reversion? What is a right of reversion? Both the Public Service Award 1992 and the Government Officers Salaries, Allowances and Conditions Award 1989 contain provisions which deal with reverting to full-time employment. They each provide—

"(c) A part-time officer who was previously a full-time officer within the organisation who occupies a part-time office which was the initiative of the employer and who desires to revert to full-time employment will be required to seek promotion or transfer to a full-time position by—

(i) application for advertised vacancies; and/or

(ii) by notification in writing to the employer of his or her desire to revert to full-time employment."

(Clause 9(7) of the Public Service Award 1992 and Clause 9(11) of the Government Officers Salaries, Allowances and Conditions Award 1989)

28 The EBA sets out the part-time work conditions for FRWs, as noted above. These conditions contain no particular reference to "reverting". The parent award for FRWs sets out the provisions for part-time employment in Clause 9. – Part-Time Employment. This clause provides no right of reversion to full-time employment. Further, it would be surprising if it did considering that the whole basis of a FRW's engagement is that it is not to exceed 60 hours per four week cycle.

29 Therefore, the provisions of paragraph (a) of Clause 24(3) do not apply to Ms Evans because she does not seek to "revert" to part-time work but seeks full-time work, and there is no right of reversion in her parent award.

30 One other matter associated with paragraph (a) which might assist in the context of dealing with this matter is that the temporary transfer to a part-time position is reliant upon there being similar duties and classifications, however I shall deal with this later.

31 Paragraph (b) of subclause (3) is, once again, concerned with the availability of the conversion from full-time to part-time work and again not relevant to Ms Evans. It would also appear that paragraph (b) is to be read in conjunction with paragraph (a).

32 Paragraph (c) provides that a part-time employee including one who was "engaged directly as a part-time employee" who wishes to become full-time "will be required to seek promotion or transfer to a full-time position by application for advertised vacancies and or by notification in writing to the employer the desire to convert to full-time employment. The employer *will* facilitate that conversion as and when the opportunity to do so arises." (emphasis added) This provision appears to match Ms Evans' circumstances in that she was directly engaged as a part-time employee. She wishes to become full-time. This provision does not seem to require that the parent award contain any right of reversion or of conversion, for that matter. The provision requires her to apply for an advertised vacancy and/or notify her employer in writing of the desire to convert. The provision states that her employer is to facilitate the conversion to full-time as and when the opportunity to do so arises. Has such an opportunity arisen?

33 Ms Evans seeks not only full-time work but full-time work in a different capacity – ie not in her capacity as a FRW but in a capacity of a CSO. I note that the provision does not specify that conversion from full-time to part-time may be from one calling to another. The provision is contained within the EBA which covers all employees of the respondent covered by a number of awards. Those awards are the Public Service Award 1992; the Government Officers Salaries, Allowances and Conditions Award 1989; the Department for Community Development (Family Resource Workers, Welfare Assistants and Parent Helpers) Award 1990; Catering Employees and Tea Attendants (Government) Award 1982; Gardeners (Government) 1986 Award No. 16 of 1983; Community Welfare Department Hostels Award 1983; Cleaners and Caretakers (Government) Award, 1975; and the Miscellaneous Government Conditions and Allowances Award No. A 4 of 1992.

34 It must be borne in mind that industrial instruments such as enterprise bargaining agreements are not necessarily drafted by those skilled in that area but are drafted by the parties to the agreement to reflect, as best they are able, the terms of their agreement.

35 One must assume that the enterprise bargaining agreement would not envisage an automatic transfer of an employee from one calling to another without some provision for assessment of job requirements and the skills of the employee, even at entry level. As noted, the EBA deals with employees covered by a range of awards and one might assume that where an employee was covered by the Catering Employees and Tea Attendants (Government) Award 1982 (No. A 34 of 1981) or was employed as a gardener or caretaker covered by the relevant parent awards, that there would not be an automatic right to transfer to a position appropriately covered by, say, the Public Service Award 1992 and visa versa without there being some form of assessment as to the position's requirements and the employee's ability to perform the role requirements satisfactorily.

36 Therefore, it is appropriate to consider the terms of Clause 24(3)(c) in the context of the parent awards, and the human resource principles applicable to public sector employment, and the respondent's policies, and to make a practical application. Both the FRW and the CSO positions are defined by the respondent's "Best Practice Manual" in respect of recruitment procedures as Entry Level Positions (Exhibit D). The "General Principles" provide that—

> "● all appointees will be selected on merit, i.e. selection of all available person for the job on the basis of job related criteria, from a pool of applicants in an open competition.
>
> …
>
> ● compliance with Public Sector Standards in Human Resource Management – Recruitment Selection Appointment Secondment, Transfer and Redeployment 'must' occur".

37 The Public Sector Standards in Human Resource Management - Recruitment, Selection, Appointment, Secondment, Transfer and Redeployment, provides in respect of Transfer as follows—

> **"Outcome**
>
> Transfer decisions are equitable and take into account the participating organisation's work-related requirements and employee interests.
>
> **The Standard**
>
> The minimum standard of merit, equity and probity is met for transfer if—
>
> - Decisions are based on a proper assessment of the work-related requirements of the public sector bodies involved and identified employee interests.
> - Employment conditions are comparable.
> - Decisions are impartial, transparent and capable of review."

38 Following the hearing of this matter, an examination of Exhibit D, the extract from the respondent's Human Resources Best Practice Manual as it dealt with Recruitment of Entry Level Officers, it was clear that there exists a related policy, "1.3.17 Transfer and Job Rotation" which was not before the Arbitrator. As the matter before the Commission relates directly to the question of transfer, it seemed appropriate to examine this policy and ascertain its relevance, if any, to this matter. The Commission requested that the respondent provide a copy of the Best Practice Manual as it related to transfers and this was provided. The parties were advised of the Commission's intention to consider this part of the document and, in accordance with the requirements of s.26(3) of the Industrial Relations Act, 1979, were invited to make submissions regarding that matter by no later than 9 January 2001.

39 The respondent's Human Resources Best Practice Manual, 1.3.17 Transfer and Job Rotation is to be received into evidence and will become Exhibit 5.

40 Exhibit 5 defines Transfer as "the permanent movement of an officer from one position to another with comparable employment conditions."

41 Paragraph 1.3.17.1 under the heading of "Procedures" deals with "Employee Referred Transfers (Inter and Intra Directorate) – All Positions Level 5 and Below." The "Key Component" regarding Transfer is that "All officers Level 5 and below who have completed two years' service in the current substantive position may register an interest to be considered for transfer."

42 This situation clearly relates to the matter before the Commission in that the applicant, on behalf of Ms Evans, seeks a transfer from a particular part-time position to a different full-time permanent position.

43 The Procedure sets out that an officer wishing to transfer, "subject to meeting two year eligibility requirement and the selection criteria for their position of interest", is to complete a certain application form and forward it to an appropriate person. There then follows specified steps to be applied to the processing and assessment of the application. Therefore, it seems that a number of requirements in accordance with the respondent's transfer policy need to be met. They are—

1. That the position which Ms Evans seeks to transfer to is to have comparable employment conditions with that which she currently occupies.
2. That she has completed two years' service in her current substantive position.
3. That she complete a certain application form and undertake the appropriate procedures.

44 On this basis she could then be considered for transfer. It has not been suggested that this process is unfair or unreasonable in any way.

45 The major objection which appears to arise on the part of the respondent is that Ms Evans is not seeking to transfer to a position with comparable employment conditions. The essential objection in that regard is that part-time to full-time provides Ms Evans with a promotion, with improved conditions of employment. This argument is not sustainable. Part-time employment involves the employee receiving payment and conditions of employment which are the same as those of a full-time employee except to the extent that the person receives those on a proportionate basis according to the number of hours worked. In this case, Clauses 24 and 25 of the EBA, read with the Department for Community Development (Family Resource Workers, Welfare Assistants and Parent Helpers) Award 1990, the Public Service Award and the Government Officers Salaries, Allowances and Conditions Award 1989, demonstrate this to be the case. A part-time employee engaged in the same calling as a full-timer is not of a lesser status, but is simply working less hours and receiving the same hourly rate, and proportionate benefits according to the number of hours worked.

46 On the other hand, promotion assumes movement to a position requiring a different level of skill and responsibility, and different duties, usually of a higher order. Therefore, I conclude that by Ms Evans seeking to move from part-time to full-time, she is not seeking promotion as such.

47 It has not been suggested by the respondent that there would be any other lack of comparability in the conditions enjoyed by Ms Evans compared with those of the new position in which she is interested, except by general reference to Ms Evans being subject to the Public Service Award and receiving certain benefits arising from that. The Commission has not undertaken an

assessment of the conditions applicable under the award and enterprise bargaining agreement which apply to her current employment as opposed to those which would apply under her proposed employment. Neither party has raised this as an issue.

48 In summary then, I conclude that:

1. In respect of Clause 24.2 of the EBA, the exclusion specified in respect of FRWs is in relation to the definition of part-time work contained in that provision. The definition to be applied to FRWs is that contained in Clause 25 of the EBA. The remainder of the provisions of Clause 24 apply to FRWs.
2. In respect of Clause 24.3, paragraphs (a) and (b) are not relevant to Ms Evans as they refer to the right to transfer to a part-time position from a full-time one, and refer to there being a right of reversion contained in the parent award. No such right arises in Ms Evans' parent award.
3. Paragraph (c) of Clause 24.3 deals with the situation of a part-timer seeking to become full-time and specifies how this is to occur.
4. Paragraph (c) does not provide a right to an employee to transfer from a part-time position to any full-time position of his or her choosing without consideration of the nature of the position held and the requirements of that position compared with those of the full-time position to which the employee seeks to transfer.
5. Transfer from a part-time position to a full-time position of the same nature, involving similar skills, responsibilities and outcomes may be what paragraph (c) contemplates.
6. A transfer from a part-time position to a full-time position in the same calling and at the same level does not constitute a promotion.
7. Any decision to transfer requires assessment of the requirements of the public service body involved and the employee's interests.
8. An assessment needs to be undertaken to ascertain whether the employment conditions of the two positions are comparable.

49 In all the circumstances, I conclude that while Ms Evans has no automatic right to transfer to a full-time position of her choosing, there should be no impediment to Ms Evans applying for a full-time permanent position as a CSO provided that she meets the criteria set out within the Human Resources Best Practice Manual as it relates to Transfer, and the Transfer standard of the Public Sector Standards in Human Resource Management. Provided that she meets those criteria, her application ought be considered along with any other applications.

50 As to the issue of flow-on raised by the respondent, as I have concluded that Ms Evans is eligible to apply and be considered for transfer rather than that she has an automatic right of transfer, any concern in this regard ought not arise.

51 Accordingly, while the application as filed will not be granted, an order shall issue that Ms Evans be entitled to apply and be considered for transfer to the full-time CSO position in which she has indicated an interest. Her conditions of employment for the purposes of meeting the definition of Transfer are to be considered comparable in regard to the question of part-time versus full-time permanent employment. The conditions she enjoys under the industrial instruments which relate to her employment as a FRW are to be assessed by reference to those which apply in respect of the CSO position to determine whether those conditions are comparable for the purposes of meeting the comparability test set out in the Best Practice Manual and the Transfer standard.

2002 WAIRC 04669

DISPUTE RE TRANSFER TO A FULL TIME POSITION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED, APPLICANT
	v.
	CHIEF EXECUTIVE OFFICER FAMILY AND CHILDREN'S SERVICES, RESPONDENT
CORAM	COMMISSIONER P E SCOTT
	PUBLIC SERVICE ARBITRATOR
DELIVERED	FRIDAY, 18 JANUARY 2002
FILE NO.	P 12 OF 2001
CITATION NO.	2002 WAIRC 04669

Result Declaration issued that Ms Evans is eligible to apply and be considered for transfer

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Order

HAVING heard Mr M Amati on behalf of the applicant and Mr B Beaton on behalf of the respondent, the Public Service Arbitrator, pursuant to the powers conferred under the Industrial Relations Act 1979, hereby—

Declares—

THAT Ms Hazel Evans is entitled to apply and be considered for transfer to the full-time Customer Service Officer position at Katanning in which she has indicated an interest.

Orders—

1. That upon Ms Hazel Evans completing and submitting the appropriate application form for transfer in accordance with the respondent's established procedures, her application be given proper assessment and consideration in accordance with the Human Resource Management Standards and Policies which it is bound to apply.
2. That the fact that Ms Evans' current position is part-time and the position to which she seeks transfer is full-time shall not be an issue for consideration as to the comparability of those positions.

[L.S.]

(Sgd.) P. E. SCOTT,
Commissioner.
Public Service Arbitrator.

2002 WAIRC 04670

RESTRUCTURING ACTIVITIES BEING IMPLEMENTED BY THE POLICE

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED, APPLICANT
	v.
	COMMISSIONER OF POLICE, RESPONDENT
CORAM	COMMISSIONER P E SCOTT
	PUBLIC SERVICE ARBITRATOR
DELIVERED	MONDAY, 21 JANUARY 2002
FILE NO.	PSAC 21 OF 2001
CITATION NO.	2002 WAIRC 04670

Result Recommendation issued

Recommendation

WHEREAS this is an application pursuant to Sections 44 and 80E of the Industrial Relations Act 1979; and

WHEREAS at the conclusion of a conference between the parties on the 21st day of December 2001 the Public Service Arbitrator issued Recommendations ("the Recommendations); and

WHEREAS on Monday 14 January 2002, the applicant advised the Commission that a dispute had arisen between the parties as to the application of those Recommendations; and

WHEREAS a conference was convened on the 18th day of January 2002 for the purpose of conciliating between the parties; and

WHEREAS at that conference the Applicant advised that it had raised with the Respondent, in accordance with Recommendation 2 of the Recommendations, a particularised concern, being the decision to abolish a Level 1 Child Abuse Investigation Unit position substantively occupied by Ms Lita Fernie ("the position"). The Respondent advised that the decision to abolish the position had been implemented following an assessment, discussions between the parties and a review of the decision as to which of two such positions was to be abolished, that the respondent had decided that the position held by Ms Fernie was the appropriate position to be abolished, and had transferred Ms Fernie to a vacant position in another unit. The Applicant sought a pause of the implementation of the decision to abolish that position pending consultation between the parties; and

WHEREAS the Respondent advised that it had not yet received the applicant's advice of the particularised concern; and

WHEREAS the Commission expressed the view that upon receipt of the applicant's advice, the respondent was obliged by Recommendation 3 of the Recommendations to pause the implementation of the decision to abolish the position and further that a pause of the implementation process requires that Ms Fernie return to her substantive position until the consultation process has been completed in accordance with Recommendation 3 of the Recommendations; and

WHEREAS at the conclusion of the conference on the 18th day of January 2002 the Commission issued a Recommendation;

NOW THEREFORE, the Commission, pursuant to the powers conferred under the Industrial Relations Act 1979, hereby recommends—

> THAT Ms Lita Fernie be returned to the Level 1 position, in the Child Abuse Investigation Unit until such time as the consultation process, referred to in Recommendation 3 of the Recommendations that issued on the 21st day of December 2001, is complete.

[L.S.]

(Sgd.) P. E. SCOTT,
Commissioner.
Public Service Arbitrator.

2002 WAIRC 04734

DISPUTE RE: GROUPWORKERS' COMMUTED SHIFT ALLOWANCE

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA (INCORPORATED) , APPLICANT
	v.
	DEPARTMENT OF JUSTICE, & DIRECTOR GENERAL, MINISTRY OF JUSTICE , RESPONDENT
CORAM	COMMISSIONER P E SCOTT
	PUBLIC SERVICE ARBITRATOR
DELIVERED	MONDAY, 4 FEBRUARY 2002
FILE NO.	P 9 OF 2001, P 38 OF 2001
CITATION NO.	2002 WAIRC 04734

Result Applications pursuant to s.80E –consent order issued

Order

WHEREAS these are applications made pursuant to Section 80E of the Industrial Relations Act 1979; and

WHEREAS the Public Service Arbitrator convened various conferences between the parties for the purposes of conciliation; and

WHEREAS the parties reached agreement in relation to the applications and sought to have that agreement reflected in an order;

NOW THEREFORE, the Public Service Arbitrator, pursuant to the powers conferred under the Industrial Relations Act, 1979, by consent, hereby orders—

1. THAT Group Workers, Unit Managers and Senior Officers employed pursuant to the Institution Officers' Allowances and Conditions Award 1977, No 3 of 1977 ("Award") and the Ministry of Justice Enterprise Agreement 2000 ("Agreement") who occupy designated shift positions and who actually perform shift work shall be paid a 16% commuted shift work allowance instead of the current 14 per cent commuted shift work allowance.
2. THAT the commuted shift work allowance is in lieu of all shift and weekend penalties that may be payable to Group Workers, Unit Managers and Senior Officers under the Award or Agreement.
3. THAT the payment of the 16% commuted shift work allowance shall be effective from the first full pay period after 1 July 2001.
4. THAT the 16% commuted allowance is not applicable to non-shift Group Workers, Unit Managers and Senior Officers.

5.1 The Respondent will no longer follow the consent Order of the Western Australian Industrial Relations Commission in matter PSA CR 11 of 1989 dated 19 October 1989, to which the Respondent is not a named party.

5.2 However, the preservation, for workers employed prior to 25 April 1989, of arrangements regarding work on public holidays will be maintained. This means that employees engaged prior to 25 April 1989 receive ten additional days leave in recognition of working public holidays in accordance with the roster and employees engaged on or after 25 April 1989 receive five additional days leave in recognition of working public holidays in accordance with the roster. These days are taken in conjunction with annual leave.

6. That Group Workers, Unit Managers and Senior Officers employed pursuant to the Award and the Agreement located at Rangeview Remand Centre agree to now work shifts of 12 continuous ordinary hours the same as Group Workers, Unit Managers and Senior Officers located at the Banksia Hill Juvenile Detention Centre.
7. That Group Workers, Unit Managers and Senior Officers located at Rangeview Remand Centre will work 12 hour shifts effective from 31 December 2001.
8. That the interim order issued on 12 November 2001 in relation to Application P 38 of 2001 is hereby cancelled.
9. That Applications P 9 of 2001 and P 38 of 2001 be, and are hereby otherwise discontinued.

This Order shall operate on and from the 31st day of December 2001.

[L.S.]

(Sgd.) P. E. SCOTT,
Commissioner.
Public Service Arbitrator.

INDUSTRIAL MAGISTRATE—Complaints before—

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

Claim No. M 120 of 2001

Date Heard: 13 and 19 December 2001

Date Decision Delivered: 10 January 2002

BEFORE: WG. Tarr I.M.

B E T W E E N :

John Birighitti
Claimant

and

United Construction Pty Ltd
Respondent

Appearances—

Mr G McCorry of *Labourline – The Employment Law Specialists* appeared on behalf of the Claimant.

Mr T Caspersz (of Counsel) instructed by *Blake Dawson Waldron, Lawyers,* appeared on behalf of the Respondent.

Reasons for Decision.

HIS WORSHIP: The Claimant, John Birighitti, has brought an action against the respondent, United Construction Pty Ltd, seeking the payment of long service leave entitlements pursuant to the provisions of the Long Service Leave Act 1958 (the Act).

It is not in dispute that the Claimant was employed by the Respondent from July 1982 until his termination in May 2000, however the Respondent claims that from July 1988 until about October 1992 the Claimant was employed as a sub-contractor and that period of employment was not a qualifying period for the purpose of long service leave entitlements.

In July 1988 the Claimant entered into an arrangement with the Respondent whereby he would be paid an hourly rate following the submission of monthly invoices.

The Respondent was invoiced by J & L Birighitti Engineering, a business name registered with the Australian Securities and Investments Commission.

The Business Names Extract produced shows the Claimant and his wife, Lucy, as the registered proprietors of J & L Birighitti Engineering.

The invoices presented each month, in the main, included an amount for hours worked by both the Claimant and Mrs Birighitti.

The issue left for me to decide is whether or not the Claimant was an employee or a sub-contractor for the period during which he was paid as a result of the submission of invoices.

It is not in dispute that prior to July 1988 and after October 1992 the Claimant was paid wages or a salary, received all the normal entitlements of an employee, including leave and received a group certificate for each financial year.

During the disputed period the Claimant did not receive the normal leave entitlements, was paid at an hourly rate, had tax deducted under the Prescribed Payments System and lodged Partnership Income Tax Returns. On those returns the partnership business was described as Engineering Sub-Contractors.

It is well established law that the test of the true relationship between parties in an employment situation relies on more than the label used. There are a number of other relevant matters as determined by the Full Bench of the Western Australian Industrial Relations Commission in *The Western Australian Builders' Labourers, Painters and Plasterers Union v RB Exclusive Pools Pty Ltd trading as Florida Exclusive Pools*

77 WAIG 231. One of those is Mode of Remuneration. The Claimant's mode of remuneration and the taxation arrangements were consistent with him being a sub-contractor, however, there are the other well known tests to be applied.

The evidence before me generally is that the relationship between the parties continued on without any other change after July 1988. The Claimant continued performing the same duties he had performed for the Respondent as a Senior Supervisor. In 1987 he had been sent to the Alcoa site by the Respondent as Site Supervisor, initially with 4 or 5 builder welders. As he said in evidence the site became busier and the number of employees increased. The only change in July 1988 was the introduction of the invoice system and the consequential changes to his taxation status.

In July 1999, his wife, Lucy, was transferred to Alcoa to look after the site office. I will refer to her again later.

Mr Santino Castelli, a director of the Respondent, gave evidence that he was a founder of the Respondent company. He employed the Claimant into the Respondent company. It was he who sent the Claimant to the Alcoa site in 1987 as the Site Supervisor. In cross-examination he admitted that there was no changes in the Claimant's duties while on the Alcoa site apart from the general increase in work. It was he who directed the Claimant to other sites including the Rankin A oil rig after Alcoa and then Gove, before being sent to the Worsley Alumina site as Construction Manager. He later returned to the Respondent's workshop until he was made redundant.

There is no evidence that the Claimant was running a business or that he was free to work for anyone else without resigning from the Respondent company. In fact, the Claimant's evidence is that he never contemplated working for anyone else. His tools and work clothing were provided by the Respondent as was a motor vehicle. It is clear that he was an integral employee in the Respondent's organisation.

It is the Respondent's argument that the Claimant's wife was his partner and was employed by J & L Birighitti Engineering. Her evidence is not in dispute. After her children had reached an age where she could return to the workforce she telephoned Mr Castelli in May 1998 seeking employment and was given a position as a courier. In July 1999, when the Alcoa site work had increased she was asked by Mr Castelli to go to the Alcoa site to work in the office. She did so and took over some of the office work which had been done by the Claimant. He, as the Site Supervisor, was also in charge of her. In 1990 she was transferred to the company stores office where she worked as a computer operator. She later worked in the pay office.

To suggest she was not controlled by the Respondent and that she was a sub-contractor is without merit. She was clearly an employee and that weakens the Respondent's case that the Claimant was a sub-contractor.

Although the Respondent claims it was the Claimant who initiated the change in the system of remuneration there was an obvious benefit to both at the time and I find, particularly in view of Mr Anthony Carmignani's evidence, that the Respondent was keen to introduce the tax minimisation scheme. There is no doubt that it was the Respondent that ceased the arrangement in 1992 after receiving legal advice.

If the Claimant was truly a sub-contractor the Respondent could not have unilaterally made him an employee.

I have no hesitation in finding that the change in the method of remuneration made in July 1988 was for the purpose of expediency on the part of the Respondent and for tax minimisation on the part of the Claimant and, although the Claimant was for that purpose described as a sub-contractor, he remained, in fact, an employee and was so for the duration of his employment with the Respondent.

The Claimant is, therefore, entitled to long service leave pursuant to the Act.

W. G. TARR,
Industrial Magistrate

IN THE INDUSTRIAL MAGISTRATES')
COURT OF WESTERN AUSTRALIA)
HELD AT PERTH)

Complaint No. 306 of 2000

Submissions: 23 October 2001 – Defendant
20 November 2001 – Complainant
17 December 2001 – Reply

Delivered: 24 January 2002

BEFORE: Mr G. Cicchini I.M.

BETWEEN:

Construction, Mining, Energy, Timberyards, Sawmills and Woodworkers' Union of Australia – Western Australian Branch
Complainant
and
Pace Constructions Pty Ltd T/as Pace and Brine Master Builders
Defendant

Appearances:

Ms E Peak instructed by *Messrs Slater & Gordon, Solicitors*, appeared for the Complainant.

Mr M Hotchkin instructed by Messrs *Hotchkin Hanly, Barristers & Solicitors*, appeared for the Defendant.

Reasons for Decision.

Complaint

On 5 December 2000 the Complainant filed a complaint alleging that between 2 December 1994 and 18 September 1997 the Defendant committed 306 separate breaches of the *Building Trades (Construction) Award 1987* (the award) with respect to its employee David Beeck. The complaint is brought pursuant to section 83(1) of the *Industrial Relations Act 1979* (*the IR Act*). On 8 August 2001 the Complainant filed further and better particulars of claim, which set out the basis for the Complainant's contention that Mr Beeck was at all material times the Defendant's employee.

Defence

On 11 October 2001 the Defendant filed its particulars of defence. The Defendant denies that Mr Beeck was its employee. The Defendant says that it engaged Mr Beeck to undertake maintenance work for it under a contract for services. It contends that Mr Beeck carried out such work as part of his business under the registered business name of *"Beeck for Building Maintenance"*. The Defendant contends that Mr Beeck orally agreed, or alternatively, orally represented to the Defendant that he would provide services as a subcontractor. The Defendant pleads that it acted in reliance upon, and was induced by the agreement or representation. The Defendant says that the Complainant is now accordingly estopped from asserting Mr Beeck's rights. Further, and in the alternative, the Defendant seeks to set-off any payment ordered by the Court against any amount paid in excess of the award on account of the fact that such money was paid under a mistake of fact and/or law.

Application

On 23 October 2001 the Defendant made an application that the hearing of this matter be limited to one issue only, that being whether Mr David Beeck was at all material times an employee of the Defendant. The application is opposed.

Submissions

Defendant:

The Defendant contends that this Court should not move to consider and determine the equitable relief pleaded by the Defendant in its claim for set-off and in its counterclaim.

The Defendant suggests that that approach be taken by virtue of the fact that there is very considerable doubt about this Court's jurisdiction to grant equitable relief.

In that regard the Defendant has taken me to the statutory scheme dealing with jurisdiction. I was firstly taken to section 81CA(1) of the *IR Act,* which provides inter alia:

> 81CA. Procedure, enforcement etc.
>
> (1) In this section —
>
> "general jurisdiction" means the jurisdiction of an industrial magistrate's court under —
>
> (a) section 77, 80(1) and (2), 83, 84K, 96J, 97U, 110, 111 or 112;
>
> (b) Part IV of the *Long Service Leave Act 1958*; or
>
> (c) Division 1 of Part 5 of the *Workplace Agreements Act 1993*;

I was then taken to section 83(1) of the *IR Act*, which provides:

> 83. Enforcement of awards and orders of Commission
>
> (1) Subject to this Act, where a person contravenes or fails to comply with any provision of an award, industrial agreement or order, other than an order made under section 32, 44(6) or 66 —
>
> (a) the Registrar or a Deputy Registrar;
>
> (b) an Industrial Inspector;
>
> (c) any organization or association named as a party to the award or employer bound by the award, industrial agreement or order; or
>
> (d) any person on his own behalf to whom the award, industrial agreement or order applies,
>
> may apply in the prescribed manner to an industrial magistrate's court for the enforcement of the award, industrial agreement or order.

The Defendant argues that it is clear from those provisions that the general jurisdiction of this Court is very much limited to what is set out in those specific statutory provisions. In this matter the relevant provision is section 83 of the *IR Act*.

The Defendant also took me to consider section 81CA(2) of the *IR Act*, which provides:

> (2) Except as otherwise prescribed by or under this Act or another law —
>
> (a) the powers of an industrial magistrate's court; and
>
> (b) the practice and procedure to be observed by an industrial magistrate's 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.

The Defendant submits that section 81CA(2) of the *IR Act* does not enable the granting of equitable relief notwithstanding its importation of powers provided by the *Local Courts Act 1904*.

Sections 32 and 33 of the *Local Courts Act 1904* provide:

> Equitable claims
>
> 32. In any case in which a person has an equitable claim or demand against another person in respect of which the only relief sought is the recovery of a sum of money or of damages, whether liquidated or unliquidated, and the amount claimed is not more than $25 000, the person seeking to enforce the claim or demand may sue for and recover it in a Local Court.
>
> Powers of Court
>
> 33. A Local Court shall, as regards all causes of action within its jurisdiction, have power to grant, in any proceeding before such court, such relief, redress, or remedy, and in every such proceeding to give such and the like effect to every ground of defence or counterclaim, equitable or legal (subject to the provision next hereunder contained) in as full and ample a manner as might be done in the like case by the Supreme Court.

The Defendant argues that there is a distinction between this Court's jurisdiction and its powers. It says that the power conferred by section 33 of the *Local Courts Act 1904* is ancillary to claims within that Court's jurisdiction. Section 81CA(2) of the *IR Act* does not operate to expand the jurisdiction of this Court. The Defendant says that it is obvious having regard to the statutory framework that this Court's jurisdiction is not expanded by any power contained in the *Local Courts Act 1904* so as to allow for the determination of the issue of promissory estoppel raised by the Defendant. The Defendant suggests that support for that proposition is found in the decisions of Kirby J in *Taylor Farms (Australia) Pty Ltd v A Calkos Pty Ltd and Others* [1999] NSWSC 186 and Yeats DCJ in *Commodore Homes (WA) Pty Ltd v Standley* [2001] WADC 89. In each matter the Court considered whether a tribunal had jurisdiction to entertain a defence based in equitable estoppel. In each instance it was found that the tribunal had no power to consider and award equitable relief. Jurisdiction was in each instance circumscribed to that conferred by statute.

The Defendant also submits that there is support for its argument to be found in the recent decision of the Supreme Court of Western Australia by His Honour Pullin J in *The Lunching Pad Pty Ltd v Minister for Culture and the Arts & Anor* [2001] WASC 299 delivered on 2 November 2001. In that matter His Honour considered sections 32, 33 and 34 of the *Local Courts Act 1904*. At paragraph 14 of his judgment he said:

> "Section 33 of Local Courts Act does not purport to confer jurisdiction. It assumes that resort will be had to that section only if jurisdiction can be established under some other section in the Act. Once the Local Court has jurisdiction under some other provision in the Act, the section then states what powers the Court shall have in relation to the relief, redress or remedy to be ordered or decreed. The power conferred by this section has been described 'in the nature of an ancillary or auxiliary power to be exercised in the determination of claims otherwise within the jurisdiction of the Court'. See Commercial Developments Pty Ltd (trading as Don Rodgers Motors Pty Ltd) v Mercantile Mutual Insurance (Worker's Compensation) Ltd (1951) 5 WAR 208 @ 217 per Malcolm CJ."

The Defendant maintains that section 33 of the *Local Courts Act 1904* is not available to the Industrial Magistrate's Court to confer power to grant equitable remedies.

In consequence, the Defendant wants this Court not to determine any factual or legal issues going to promissory estoppel or other equitable defences raised. It says that the Court should split the issues and determine at this stage only the pivotal issue as to whether or not Mr Beeck was at all material times an employee of the Defendant.

The Defendant is concerned that if that not be done then it faces the prospect of being put to considerable effort and expense in preparing and arguing its case in relation to equitable relief which may not be within the jurisdiction of this Court.

Having said that, the Defendant is fully cognizant of the difficulty in persuading me that I should accede to its application. In that regard I was referred to the High Court decision of *Tepko Pty Ltd and Others v Water Board* [2001] 178 ALR 634, in which their Honours Kirby and Callinan JJ said at paragraph 168:

> "Single-issue trials should, in our opinion, only be embarked upon when their utility, economy, and fairness to the parties are beyond question."

The Defendant is well aware of the hurdle it has to overcome in order to persuade me that its application meets such criteria. Indeed as their Honours said in *Tepko*:

> "The attractions of trials of issues rather than of cases in their totality, are often more chimerical than real. Common experience demonstrates that savings in time and expense are often illusory, particularly when the parties have, as here, had the necessity of making full preparation and the factual matters relevant to one issue are relevant to others, and they all overlap."

Complainant:

The Complainant argues that this Court has the ability to determine the matters raised by the Defendant in its pleadings. In that regard the Complainant points out that the Defendant has pleaded that Mr Beeck is not an employee but rather a subcontractor. Additionally the Defendant has pleaded by way of defence, estoppel and mistake of law and/or fact. The Complainant submits that the Defendant has not, however, raised any issue about the ability of the Industrial Magistrate's Court's jurisdiction to hear and determine the defences pleaded.

The Complainant says that both estoppel and mistake have been pleaded by way of defence and not counterclaim. In each instance the defences are raised as a shield and not a sword. A consideration of the distinction between a defence and a counterclaim is crucial to the ultimate determination of the issues raised by the Defendant in this application. The Complainant submits that the defence raised is only a response to the Complainant's claim.` It only has the potential to nullify part or the whole of the claim. A counterclaim is never a defence but an entirely independent action brought by a Defendant. In the context of the pleadings in this matter estoppel is clearly pleaded as a defence. A claim of estoppel cannot therefore exist independently of the Complainant's claim. It is pleaded to meet and extinguish the Complainant's claim.

Further the Complainant contends that mistake of law and/or fact, as pleaded by way of set-off, is a defence based in law and not in equity. Irrespective of its foundation, what is clear is that it is pleaded as a set-off and not a counterclaim, a shield and not a sword. It is submitted that nowhere within the pleadings is the word "counterclaim" used. The Defendant has failed to expressly plead a counterclaim. Accordingly the matters raised by the Defendant only go to meet and answer the Complainant's claim.

The Defendant argues that the defence and set-off pleaded by the Defendant do not require this Court to hear a claim that is beyond its power. The claim brought by the Complainant is clearly within jurisdiction. The Complainant submits that in the course of hearing the claim this Court has power to consider the Defendant's defence and set-off to determine whether or not the complaint is successful; partially successful or whether it should be dismissed. The remedies sought do not go beyond the jurisdiction of this Court.

In the circumstances it is not necessary to consider whether or not the Industrial Magistrate's Court has jurisdiction to hear equitable or other claims.

The Complainant contends that the powers conferred on the Industrial Magistrate's Court by virtue of the importation of powers contained in sections 33 and 34 of the *Local Courts Act 1904* are all that is necessary to enable this Court to competently hear all of the matters in controversy relating to the Complainant's claim. The Complainant points out that section 34 of the *Local Courts Act 1904* expressly provides that "regardless" of whether the Court has jurisdiction in relation to a defence or counterclaim this does not affect the competence, and indeed the duty of the Court to hear the whole matter in controversy so far as it relates to the Complainant's demand. It would follow that the defence and set-off pleaded by the Defendant can be heard by this Court when hearing this claim brought by the Complainant.

Consideration

At paragraph 2 of the Defendant's reply filed 17 December 2001 the Defendant submitted:

> "The instant claim has been brought pursuant to section 83 (c) (sic) of the Industrial Relations Act 1979. By virtue of section 81CA(1)(a) of the Industrial Relations Act 1979, the Court exercises its general jurisdiction (as defined) when hearing an application made pursuant to section 83 of the Act. This complaint is not a cause of action within the jurisdiction of the Local Court. Because the claim is outside the Local Courts' jurisdiction section 33 does not confer power to decree the equitable relief set out in the Defendant's counterclaim."

The Defendant by such submission, and also by the oral submissions made, contends that this Court is dealing with the Defendant's counterclaim. With due respect to the Defendant's Counsel, there is nothing in the papers filed in this action which would support such a contention. It appears that the matters raised by the Defendant in its pleadings amount to a defence and set-off. The Defendant simply seeks to shield the claim rather than pursue any claim by way of counterclaim against the Complainant. The defence serves only to nullify wholly or partially the claim of the Complainant. This Court is not called upon to issue a separate judgment providing relief in favour of the Defendant.

Even if it could be said that the Defendant's pleadings amounted to a counterclaim, the situation does not alter. This matter, in that regard, is not dissimilar to the situation in *Matthews v Bayview Holiday Village Pty Ltd* (1989) 2 WAR 167 which was referred to by His Honour Pullin J in *The Lunching Pad Pty Ltd v Minister for Culture and the Arts & Anor* (supra) in which he said at paragraph 16:

> "In *Matthews v Bayview Holiday Village Pty Ltd* (1989) 2 WAR 167, an application was made to the Supreme Court for an order to transfer District Court proceedings to the Supreme Court. The plaintiffs had claimed possession of rented premises. The defendants had filed a defence and counterclaim seeking a declaration that they were lawfully in possession of the premises and claiming relief against forfeiture. As I read the decision of Master White (as he then was), in the last three paragraphs of his reasons on page 170 he decided that the counterclaim for a declaration and relief against forfeiture, could be decreed by reason of the provisions of s 58(1) of the *District Court of Western Australia Act*, which is similar in effect to s 34(1) of the *Local Courts Act*. The counterclaims in *Matthews v Bayview Holiday Village Pty Ltd* (supra) were counterclaims which, if they succeeded, merely met and answered the plaintiff's claim, and so it was correct in those circumstances to conclude that the District Court had jurisdiction."

Section 34 of the *Local Courts Act 1904* provides:

> 34. Counterclaims
>
> (1) Where any defence or counterclaim of the defendant involves matter beyond the jurisdiction of the court, such defence or counterclaim shall not affect the competence or the duty of the court to dispose of the whole matter in controversy so far as relates to the demand of the plaintiff and the defence thereto, but, except as provided in subsection (2), no relief exceeding that which the court has jurisdiction to administer shall be given to the defendant upon any such counterclaim.
>
> Provided always, that in such case it shall be lawful for the Supreme Court or a Judge thereof, if it is thought fit, on the application of any party to the proceeding, to order that the whole proceeding be transferred to the Supreme Court; and in such case the record in such proceeding shall be transmitted by the clerk to the Supreme Court; and the same shall thenceforth be continued and prosecuted in the Supreme Court as if it had been originally commenced therein.
>
> (2) The jurisdiction of a Local Court, in cases of counterclaim, shall not be excluded by reason —
>
> (a) that, where the counterclaim involves more than one cause of action, as to each of which the defendant might have maintained a separate action, each such cause of action being within the jurisdiction of the court, the aggregate amount of the counterclaim exceeds the jurisdiction of the court; or
>
> (b) that the counterclaim is for an amount of money exceeding the jurisdiction of the court, provided that the plaintiff does not object in writing, within the prescribed time, to the court giving relief exceeding that which the court would otherwise have jurisdiction to administer.
>
> (3) In any case where the counterclaim involves matter beyond the jurisdiction of the court, notwithstanding the provisions of this section, the court may, on such terms (if any) as the court thinks just, either adjourn the hearing of the case, or stay execution on the judgment, for such time as may be necessary to enable any party to apply to remove the proceedings into the Supreme Court or to enable the defendant to prosecute in that court an action for the purpose of establishing his counterclaim; and in default of any such application being made, or action brought, the court shall, after the expiration of the time limited, have jurisdiction to hear and determine the whole matter in controversy, to the same extent as if all parties had consented thereto.

As was the case in *Matthews v Bayview Holiday Village Pty Ltd* (supra) the defence and set-off raised by the Defendant in this matter only go to meet and answer the Complainant's claim. Accordingly this Court has the ability to deal with all matters in controversy raised in the pleadings by virtue of the powers contained in sections 32, 33 and 34 of the *Local Courts Act 1904* as applied by force of section 81CA(2) of the *IR Act*. I am persuaded that the Complainant's argument is correct.

This Court has the jurisdiction to deal with the enforcement of the award pursuant to section 83 of the *IR Act*. The Court's jurisdiction in that regard is within its "general jurisdiction" as provided for by section 81CA(1) of the *IR Act*. The enforcement of the award is the subject matter within which the Complainant's claim falls. What the Court can do within that jurisdiction, or, put another way, the Court's empowerment within that framework is that provided by the *Local Courts Act 1904* as if the proceedings were an action within the meaning of that Act (see section 81CA(2) of the *IR Act*).

Conclusion

By reason of the aforementioned it appears to me that there is no reason to conclude that I am without jurisdiction to consider and determine the defences and set-off raised by the Defendant, which remain in controversy. In those circumstances it would be inappropriate to split the issues and have separate hearings in relation to award coverage and the other matters. The issues overlap. The witnesses overlap. This Court can determine all matters in controversy in this matter. There is nothing to be served by segmenting the hearing of this matter. I do not propose to accede to the Defendant's application.

G CICCHINI,
Industrial Magistrate.

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

Claims Nos M 169 and M 170 of 2001

Dates Heard: 6 September 2001;
18 October 2001; and
19 October 2001

Date Delivered: 20 December 2001

BEFORE: WG.Tarr I.M.

BETWEEN:

Tara Jane Zeid
Department of Productivity and Labour Relations
Claimant

and

New Wave Nominees Pty Ltd trading as New Wave Hair Care Unisex
Respondent

Appearances:

Mr J Lukey appeared as agent for the Claimant.

Mr M Segler appeared as Counsel for the Respondent.

Reasons for Decision.

The actions herein were commenced by way of claims in relation to the employment of Parise Phatouros (M 169 of 2001) and Luisa Filipponi (M 170 of 2001) as hairdressers by the respondent company.

The claims allege that: -

1. In the period between 6 July 1996 and 4 January 1997 and; in the period between 20 July 1997 and 30 June 2000, the Defendant (sic) failed to maintain a time and wages record pertaining to the employment of Parise Phatouros, in accordance with Clause 17(1) Time and Wages Record of Award No A 32 of 1988.

and

2. In the period between 2 July 1996 and 31 May 1998 and; in the period between 8 August 1999 and 30 June 2000, the Defendant (sic) failed to maintain a time and wages record pertaining to the employment of Luisa Filipponi, in accordance with Clause 17(1) Time and Wages Record of Award No A 32 of 1988.

There is no issue taken with the evidence that both employees completed their apprenticeships with the Respondent and, in the case of Ms Phatouros, continued on as a senior hairdresser. Ms Phatouros was employed from some time in 1985 until she resigned in August 2000 and Ms Filipponi from 2 July 1996 until 8 July 2000.

Both were employed and subject to the Hairdressers Award No A 32 of 1988, as amended.

Clause 17 of the award provides for the keeping of a time and wages record. Subclause (1) of that clause reads as follows: -

(1) Each employer bound by this award shall maintain a record containing the following information relating to each employee.

(a) the name and address given by the employee,

(b) the age of apprentices,

(c) the classification of the employee and whether the employee is full-time, part-time or casual,

(d) the commencing and finishing times of each period of work each day,

(e) the number of ordinary hours and the number of overtime hours worked each day and the totals for each pay period,

(f) the wages and any allowances paid to the employee each pay period and any deductions made therefrom.

Clause 13(3)(d) provides for the record to be available for inspection by a duly authorized official of the union during the normal hours of business of the employer, subject to certain conditions.

The award also provides for hours of work in clause 6 as follows: -

(1) Ordinary Hours

The ordinary hours of work shall be 38 per week or 76 hours every two consecutive weeks, to be worked between 8.00am and 6.00pm Monday to Friday and 8.00am to 5.00pm on Saturdays and between 6.00pm and 9.00pm for the purpose of late night trading, with not more than ten work commencements in each roster period of two weeks.

Clause 8 provides for the payment of overtime where more than 38 ordinary hours are worked in any week.

Clause 15 makes provision for meal times and break periods as follows: -

(1) Meal Breaks shall be of a duration of not more than one hour and not less than half an hour and shall be granted and taken in one continuous period.

(2) …

(3) …

(4) From Monday to Saturday inclusive the lunch period may be taken between the hours of 11.00am and 3.00pm.

There is an obligation on an employer to pay wages to an employee based on the hourly rate provided in the award depending on the employee's level and classification for the ordinary hours worked each week or fortnight and for hours worked in excess of their ordinary hours at the overtime rate provided.

It must follow therefore that the keeping of time and wages records is a fundamental requirement of any employer, not only to ensure that an employee is paid his or her entitlements but to demonstrate to anyone inspecting the records that it has been done.

It must also follow that the records kept must contain the information set out in clause 17(1) of the award and, more importantly, that information must be a true and accurate record of that information.

It is my view that the issues in the cases before me are not complex. The allegation is that time and wages records for a number of periods were not kept and normally it should not be a difficult matter to establish that they were or were not kept.

Unfortunately in this case the waters have been muddied and, as I pored my way through the transcript, and in hindsight, it became obvious that a lot of time was wasted on matters which were irrelevant.

In all matters brought in the general jurisdiction of the Industrial Magistrates Court the Claimant has the onus of proof to satisfy the Court, on the balance of probabilities, that the claims should succeed. That is best done by firstly clearly identifying the elements of the alleged breaches, then by adducing clear, concise and credible evidence in an orderly and structured manner to prove those elements to satisfy the evidentiary onus.

It is my view that both parties could have done more to keep the evidence given in these matters on track and reduce the time the hearing has taken by more than one half.

It appears from what was said during the hearing that the matters before me have been pursued in an attempt to obtain some payments for the two employees by way of penalties to compensate them for underpayments of wages, overtime, annual leave and other allowances.

As I have said the issues are clear. Did the respondent maintain time and wages records for the employee Parise Phatouros for the periods 6 July 1996 to 4 January 1997 and 20 July 1997 to 30 June 2000 and for Luisa Filipponi for the periods 2 July 1996 to 31 May 1998 and 8 August 1999 to 30 June 2000?

It is the evidence of Ms Phatouros that she was employed by the Respondent company starting as an apprentice hairdresser in 1985 and resigned in 2000.

She gave evidence that time and wages records were maintained by her completing the time and wages records in a printed book provided by her employer until her last entry for the week ending 6 July 1996. That evidence was supported by Exhibit G1 being the 7 Day Time and Wage Book. The reason she gave for her decision to cease making entries was: -

"Because the times that I did work was always overtime. We were told to write 9.00 to 5.00, never to add a lunch break. We never proved at the end of the week when we did get our pay how many hours we did so I just thought that was incorrect so I stopped signing the time book, because the hours that I wrote down wasn't the hours that I worked."

(Transcript page 22)

She resumed completing the time and wages records the week ending 11 January 1997 and continued until the week ending 19 July 1999. That was the last week she made entries in the time and wages record. Her reason for not completing the records the second time was similar to the first: -

"Because we never received payment for not having a lunch hour and that we had to write down that we did have a lunch hour, and I just found that if we worked overtime it never was written down correctly. I worked very long hours and just finding out – getting paid at the end of the week and not showing how many hours I did work for the correct pay, so I refused to write something which is not right and sign for it."

(Transcript page 28)

Mario Pratico, the director of the Respondent, gave evidence that he provided a time and wages book for the periods in issue. He did say in evidence that the time book had no effect on the earnings of his employees as the wages were calculated on his computer at home.

The evidence generally before the Court is that both employees were paid an amount each and every week based on their entitlement under the award for a 38 hour week. The amounts paid each week did not vary, however, there is evidence supporting the claims that commissions or bonuses were paid from time to time.

The foregoing supports the evidence that the time and wages records were not relied on.

Mr Pratico could not deny the evidence of Ms Phatouros that she did not complete the records for the periods in the claim and that evidence is supported by the documentary evidence.

He also suggests in his evidence that he relied on his employees to complete the records. The obligation is clearly on the Respondent to ensure the records are maintained, and with the ultimate authority an employer has over his employees, if the records are not kept he is in breach of the award.

I find, in relation to Ms Phatouros, that the records were not kept for the periods in the claim.

In relation to Ms Filipponi, I have no difficulty in finding that the records were not maintained for the period 8 August 1999 to 30 June 2000. Mr Pratico, in evidence, said he knew she was not completing the records for the last 12 months of her employment and that he "reminded her of that consistently".

My earlier criticism of the way the evidence was presented was mainly in relation to Ms Filipponi's evidence. I am left with some confusion as to whether or not records were maintained from her commencement in 1996. Exhibit G6 is evidence that she completed the time and wages records from the week ending 10 October 1998 until the week ending 7 August 1999. The information for that period was transcribed into a time and wages book she kept at home and which she maintained until she went on holidays on 8 July 2000, after which her employment was terminated. That record, of course, was not maintained by her employer and it cannot be used to satisfy that obligation.

Ms Filipponi, in cross examination, admitted that she completed time and wages records in an exercise book at the North Perth salon and that those records were correct.

When she commenced at the Morley salon in June 1998 she completed the book in that store as evidenced by exhibit G2. The last entries in that book were made on Tuesday of the week ending 5 September 1998.

Her evidence regarding the first period was confusing and conflicting. Whether she understood what was being put to her in cross examination I cannot be certain, however, the doubts raised were not clarified in re-examination.

I have already stated that the onus of proof lies with the Claimant and although there is no documentary evidence supporting her claim for the first period I cannot be satisfied on the balance of probabilities that records were not maintained.

The claim for the first period therefore fails, however, as I have mentioned, I find the Respondent did not maintain records for the period from 8 August 1999 to 30 June 2000.

WG Tarr,
Industrial Magistrate.

UNFAIR DISMISSAL/CONTRACTUAL ENTITLEMENTS—

2002 WAIRC 04671

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	JOHN CALHOUN, APPLICANT
	v.
	GEMBUSH PTY LTD, RESPONDENT
CORAM	COMMISSIONER J H SMITH
DELIVERED	MONDAY, 21 JANUARY 2002
FILE NO/S.	APPLICATION 154 OF 2001
CITATION NO.	2002 WAIRC 04671

Result	Amend name of Respondent
Representation	
Applicant	Mr G McCorry as agent
Respondent	Mr R Castiglione of counsel

Order

HAVING heard Mr McCorry on behalf of the Applicant and Mr Castiglione on behalf of the Respondent, by consent, the Commission pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders—

THAT leave be and is hereby granted to amend the name of the Respondent to Sanitaire Pty Ltd.

(Sgd.) J. H. SMITH,
[L.S.] Commissioner.

2002 WAIRC 04721

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	KARAN CHOPRA, APPLICANT
	v.
	KWIK & SWIFT CO PTY LTD TRADING AS KWIK & SWIFT COURIERS, RESPONDENT
CORAM	COMMISSIONER J H SMITH
DELIVERED	FRIDAY, 1 FEBRUARY 2002
FILE NO.	APPLICATION 1813 OF 2000
CITATION NO.	2002 WAIRC 04721

Result	Applicant unfairly dismissed. Order made that the Respondent pay the Applicant $13,650.00 compensation.
Representation	
Applicant	Mr B F Stokes (as agent)
Respondent	In person

Reasons for Decision

1 Mr Karan Chopra ("the Applicant") made an application under s.29 (1) (b) (i) of *the Industrial Relations Act 1979* ("the Act") for orders pursuant to s.23A of the Act. The Applicant claims that he was harshly, oppressively or unfairly dismissed by Kwik & Swift Co Pty Ltd trading as Kwik & Swift Couriers ("the Respondent"). The Applicant was employed as a dock supervisor by the Respondent when his employment was terminated. The Respondent contends that it did not unfairly, harshly or oppressively dismiss the Applicant. It says that it dismissed him because of his poor performance and because it lost a major contract which required the Respondent to reduce its number of employees.

2 The Applicant says that his employment was terminated on 20 October 2000, whereas the Respondent says his employment was terminated on 18 October 2000. The Applicant first commenced employment with the Respondent on 11 November 1999. The Applicant came to work for the Respondent after one of his former work colleagues, Mr Allan Shawyer, the Respondent's Operations Manager, approached him and asked him whether he would like to work for the Respondent. The Applicant had previously worked with Mr Shawyer whilst working for another transport company. Initially the Applicant was engaged by the Respondent as a storeman. In about February 2000, the Applicant was appointed as a dock supervisor of the Respondent's upper dock. His pay then increased by $50.00 per week to $525.00 per week. The Applicant's duties generally were to oversee drivers, ensure that each driver took out a full load, sort out freight to the eastern states, process drivers' timesheets and provide customer service. It was one of the Applicant's duties to provide the drivers with job manifests. The manifests contained detail of items to be delivered and to be picked up. He was also required to ensure that there was no freight carry over. The Respondent had a policy of carrying out two deliveries a day within 30 kilometres of the General Post Office. Within that area, if freight was picked up in the morning it was to be delivered in the afternoon. If it was picked up in the afternoon it was to be delivered the next morning. However the Applicant contended that in practice, not all suburbs were covered by two runs a day each day if there were too many pick-ups.

3 One of the Respondent's major clients was a stationery supplies business, Boise Cascade. The Respondent would send a semi-trailer to Boise Cascade every afternoon and pick up approximately 16 pallets of cartons of goods to be delivered to schools, other government agencies and private businesses. The Boise Cascade work accounted for 60% to 70% of the Respondent's parcel delivery work. It was also part of the contract to pick up goods from clients of Boise Cascade if for some reason the client wanted to return the goods. Returns accounted for about 10% of the Boise Cascade work.

The Applicant's Evidence

4 The Applicant says that when he commenced work as dock supervisor his hours of work were 6.00am to 4.00pm with half an hour for lunch, from Monday to Friday. The Applicant says that when he was offered the position he was promised that if he proved himself as a dock supervisor he would be provided with a further pay increase of another $50.00 per week in six months' time. The Applicant says he took over the position as dock supervisor from Mr Shawyer and initially he got on well with the Respondent's owner and General Manager, Mr Craig Hughes. The Applicant however said that until mid September 2000 Mr Shawyer was responsible for the Boise Cascade returns.

5 The Applicant said that in late August 2000 he asked Mr Shawyer for the further pay increase of $50.00 per week because he had been in the position for six months. The Applicant said that Mr Shawyer told him he would talk to Mr Hughes. The next day Mr Shawyer informed the Applicant that he would not be receiving a pay increase and that he (Mr Shawyer) was fighting to keep his (the Applicant's) job because there had been a problem with a missing parcel. When asked about what had occurred in respect to a missing parcel, the Applicant said that a customer, Gepro, who was a reasonably large client of the Respondent, had complained because their parcel had not been delivered. The Applicant said that he checked with Ian, the driver, who said that he had not seen the parcel. He also said that he (the Applicant) searched Ian's van to no avail. However, the day after the complaint was made by Gepro, the parcel turned up on the dock. The Applicant said he arranged for Ian to take the parcel to a country carrier in Welshpool, which cost the Respondent freight charges. The Applicant said that Gepro had had problems with delay of their parcels before but they had not had a problem with him. Mr Shawyer informed him that Mr Hughes was not happy and that he was of the view that he (the Applicant) could not handle his job and they were giving him (the Applicant) one week's notice.

6 The Applicant said he went and saw Mr Hughes and said, "This is not fair, I can handle my job. Give me a chance. Give me to the end of the week and I will prove myself to you." The Applicant gave uncontradicted evidence that at the end of the week Mr Shawyer and Mr Hughes came to see him on the top dock and gave him an envelope. Mr Shawyer said to him that it had not worked out and then Mr Hughes asked him (the Applicant) to open the envelope. The Applicant said he opened the envelope and it was empty and they laughed. Mr Hughes then said, "Keep up the good work." and Mr Shawyer said, "Don't slack off." The Applicant said that he did not ask for the increase in pay. The Applicant said that he was angry because other employees, Mr Dave Clarkson and Mr Allan Shawyer's brother, Mr Ian Shawyer "bludged" all day and they were never disciplined about inattention to their work. Further, he did not accept that Gepro's dissatisfaction was due to his performance. Although he was very angry he said he did not take the issue up as through their (Mr Shawyer's and Mr Hughes') eyes he was "skating on thin ice".

7 The Applicant said that about four weeks before his employment was terminated Mr Shawyer allocated to him the duty of being responsible for the Boise Cascade returns.

8 The Applicant testified that Mr Shawyer had been responsible for the Boise Cascade returns up until four weeks before his employment was terminated. When asked what was involved in the returns, he said that you make a notation on the manifest of the quantity of the goods, photocopy the manifest, put the manifest in a cage together with the goods and arrange for a driver to return the goods to Boise Cascade. He said when Mr Shawyer was responsible for the returns Mr Shawyer would give him the returns, and then he (the Applicant) would photocopy the manifest and put the manifest in an envelope and place it with the goods. He, however, maintained that it was Mr Shawyer who gave the drivers their copies of the manifest. He testified that when he was assigned the duty of being responsible for the Boise Cascade returns there was about two cages full of returns to be returned. These goods had not been processed for four to five days. The Applicant said that he processed the two cages of goods and then ensured the returns were kept up to date. The Applicant says that about this time his relationship with Mr Hughes changed and Mr Hughes gave him work which he considered to be demeaning and was not required to be done by the other supervisors. He said he had to sweep the dock, do some weeding and rake up leaves near the warehouse and outside the toilets. He said he complained to Mr Shawyer about Ian and Dave not pulling their weight and he also complained about the fact that he had not received his $50.00 pay rise. The Applicant says that Mr Shawyer told him to write down all of the jobs he did each day. He did so for two days and showed the list to Mr Shawyer. He said that Mr Shawyer marked the list with a pen and made a number of notations on the list stating "this is not your job". Mr Shawyer also told him that customer service was to be dealt with by the office.

9 The Applicant testified that about two weeks after Mr Shawyer handed over the Boise Cascade returns to him, he (Mr Shawyer) came on to the dock and said that someone from Boise Cascade was coming over to look at what was on the dock. Mr Shawyer told him to find all the Boise Cascade cartons, stack them on a pallet, shrink-wrap them and hide them. He said he

did that and someone came from Boise Cascade to inspect the dock. He said that after the person from Boise Cascade left Mr Shawyer told him to bring the pallet of goods back up on the dock and put it on the run ready for the next metropolitan delivery.

10 A few days before the Applicant's employment was terminated the Applicant said that Mr Shawyer came to him and told him he could not handle his job, that there had been a complaint by a customer, Party Supplies, who had sent four empty crates which had no delivery address on the crates. The Applicant said he had told the driver, Tiffany, to take them back to Party Supplies to get a delivery address. He said that she did that and came back and said that Party Supplies did not know anything about the crates. He then rang Party Supplies and spoke to someone at that company and was informed that they did not know anything about the crates so he explained to that person from Party Supplies that he would leave them next to his desk until someone from their company asked for them to be delivered. He said that the crates may have belonged to a different branch. The crates remained next to his desk for about four days. The Applicant said that Mr Shawyer informed him that Mr Hughes had seen the green crates next to his desk and informed him (Mr Shawyer) that the Applicant could not handle his job, and he was to finish up the week. The Applicant then said he was taken off the supervisor's job for that week. Arrangements were made by the Respondent for another worker named Mal to take over the Applicant's position. The Applicant testified that Mal and Ian Shawyer had been employed after he commenced work with the Respondent.

11 The Applicant was given a separation certificate dated 25 October 2000, which stated that the reason for termination was a shortage of work. The Applicant said that he spoke to Mr Shawyer about this and told him that was not correct and he wanted the real reason stated on the separation certificate, which was that he could not handle his job. The Applicant said that Mr Shawyer said to him that the separation certificate stated "a shortage of work" so it was easier for him to get another job.

12 The Applicant said he was not paid any pay in lieu of notice, however, pay records were produced by the Respondent, which indicated the Applicant's employment was terminated on 18 October 2000 and that he was paid until 18 October 2000. On 24 October 2000, he was paid one-week's pay in lieu of notice together with a payment for accrued annual leave.

13 Copies of two unsigned letters to the Applicant from Mr Shawyer were shown to the Applicant. The first letter, dated 19 September 2000, stated as follows—

> "Dear Ricky
>
> Please find attached memo from Noel Collier as per previous verbal advise(sic) it is your responsibility to check these off within the time frame.
>
> Once again your performance is not up to expectations and as such this is your second warning on performance not being adhered too (sic).
>
> Regards
>
> Allan Shawyer"

14 The attached memorandum referred to in the unsigned letter was from Mr Collier on Boise Cascade letterhead. The memorandum was dated 18 September 2000 and stated—

> "Craig
>
> The attachment to this memo indicates the outstanding credit/returns allocated to Kwik and Swift for pick up.
>
> It is Boise Cascade policy that these are actioned within five days, as you can see Kwik and Swift is not adhering to this policy.
>
> I would like you to make every effort to firstly bring this up to date and secondly to keep it this way.
>
> If you have any problems or queries regarding this, please contact me as soon as possible. This is a very serious issue which is currently affecting our customer service levels and I would like to resolve this as soon as possible.
>
> We have indicated to Allan that we would like returns delivered back to us on a daily basis, not held back until you have a cage of full product.
>
> Regards
>
> Noel Collier"

15 The list attached to Mr Collier's memorandum contained a list of over 150 returns that were outstanding from 28 July 2000 until 14 September 2000.

16 The Applicant testified that he had not seen either memorandum prior to the hearing of this Application. A second letter, addressed to the Applicant that purported to state the reasons for his termination, was also shown to the Applicant. The copy of the unsigned letter was dated 18 October 2000 and stated—

> "Dear Ricky
>
> This is to confirm your termination of employment because of unsatisfactory work performance.
>
> Re customer Gepro their green plastic crates were left by your desk for the last five days unaddressed and you have not contacted the client to confirm where they were to be delivered.
>
> Boise have again complained about returns taking too long nad(sic) have now started doing more of there(sic) deliveries themselves and building their fleet. This will have direct effect on our staffing requirements for the dock.
>
> Yours faithfully
>
> Allan Shawyer"

17 The Applicant denied that he was terminated because of shortage of work. He said that there was not a shortage of work at all, although he did concede that prior to his termination there was a "bit of a decline in the work". The Applicant also conceded that he had been told that his job was in jeopardy if he did not lift his game but not because of the Boise Cascade returns. In cross-examination the Applicant conceded that when Mr Shawyer took up his position in the office that he did not have a lot to do with the running of the dock. However, he said that Mr Shawyer did keep an eye on the dock. When asked how the Respondent's drivers knew when to do a pick up of a Boise Cascade return, the Applicant said the manifests were put in the drivers' pigeonholes. When it was put to him that it was always one of his duties to give the manifests to the drivers he said, "No, it was Mr Shawyer's job. Mr Shawyer would put the manifests into the pigeon holes." I understood this evidence to mean this was what occurred, prior to the Applicant becoming responsible for the returns. When asked why he would shrink-wrap and hide a pallet of goods when those goods should have been delivered, the Applicant said some of those goods were for schools, whose staff were on holidays, so they could not do a delivery. He was asked why, if he had a good reason for not doing a delivery, he should have to hide the goods, he said he did not know, he said he was simply told to hide the goods by Mr Shawyer. He also conceded that the Respondent had not fulfilled its contractual obligations to Boise Cascade.

The Respondent's Evidence

18 Mr Craig Hughes testified that he offered the Applicant work as a storeman on the recommendation of Mr Shawyer. He said Mr Shawyer was too busy to be on the dock supervising the drivers, so the Applicant was given the title of dock supervisor in February 2000 and a pay rise of $50.00 per week. He said the Applicant was already doing the majority of the supervisory work but did not have the respect of the drivers so the idea was to give him a title, so the drivers knew they were answerable to the Applicant. Mr Hughes strongly denied that a further $50.00 per week pay was promised to the Applicant.

19 Mr Hughes said he would walk onto the dock four or five times a day and that if there were any problems they would always end up with him, so that when Boise Cascade became dissatisfied with their service, they contacted him (Mr Hughes). He said that sometime prior to 19 September 2000, Mr Noel Collier from Boise Cascade called into the depot and began checking his company's deliveries against a manifest and queried why goods were there if they appeared to be sitting on the dock for longer than two days. Mr Hughes said he then had numerous discussions with the Applicant and Mr Shawyer in which he (Mr Hughes) informed them that they (the Respondent) were not performing to the terms of the agreement with Boise Cascade. He then received the copy of the memorandum from Mr Collier set out in paragraph 14 of these reasons. He walked out onto the dock and saw a large majority of the returns (listed in the Boise Cascade list attached to the memorandum) sitting in the drivers' pigeon holes on the Applicant's desk. He said this was unacceptable. He said he was going to terminate the Applicant "on the spot" but that Mr Shawyer persuaded him not to do so. He advised Mr Shawyer that he should issue the Applicant with a notice of warning. He said that Mr Shawyer always stood up for the Applicant and said "Give him a go. Keep going. He'll get there. He'll develop." Mr Hughes said he did not see Mr Shawyer hand over the warning letter dated 19 September 2000, however, he (Mr Hughes) did have a discussion with the Applicant about the memorandum received from Mr Collier dated 18 September 2000. He said that he sat down with the Applicant and Mr Shawyer in Mr Shawyer's office to discuss the returns. He said he had prepared a spreadsheet with all of the returns on them in order to analyse why they had been sitting on the dock for such a long time. After analysing the spreadsheets Mr Hughes said he had a discussion with Boise Cascade a few days after 25 or 26 September 2000 and he admitted to them that they (the Respondent) were not performing in accordance with their agreement. As a result he was informed by Boise Cascade that they were very disappointed with the Respondent's performance and they were ready to look at alternatives or take their business elsewhere.

20 About a week before the Applicant's employment was terminated, Mr Hughes was informed by Boise Cascade that as of November 2000 they were going to employ their own drivers. He said that at about that time he saw the green crates which he had believed belonged to the client Gepro, sitting by the Applicant's desk with no delivery address on them. He said he asked the Applicant where they were from and said he thought the Applicant replied that he had them under control and was chasing up the address. However, four days later the crates were still sitting by his desk. He said the Applicant should not have instructed the driver to chase up a delivery address, that this was the Applicant's role and when goods sit on a dock they tend to get damaged and lost. He said that after seeing the crates still sitting by the Applicants' desk he decided to terminate the Applicant's employment and he instructed Mr Shawyer to give the Applicant a termination notice. He said, however, he did not see the notice being handed to the Applicant. He said that it was not all down to the Applicant that they had lost Boise Cascade as a client but a fair percentage of the blame could be laid at his door and he informed the Applicant of that. When asked why he ticked the box "shortage of work" on the separation certificate, Mr Hughes said that the Respondent's revenues had just gone down by some 60% to 70% and that initially he had filled out a separation certificate which stated "unsatisfactory performance" but that Mr Shawyer asked him to change the separation certificate because the reason why the Applicant was terminated was because a combination of a shortage of work and performance.

21 As at the end of October 2000 Boise Cascade terminated their contract. Mr Hughes said he had some serious discussions about closing down the Respondents' parcel division as they had lost over half their business. He said he terminated the nightshift and that Mal, an employee who was working on his nightshift, took over the Applicant's position of dock supervisor. He said that Mal had had previous supervisory experience in the army as a store person. He agreed that Mal had been employed for a shorter period of time than the Applicant. He said he also laid off casual employees and part-time workers on the nightshift and put off a semi-trailer driver who used to go to Boise Cascade each day to collect goods.

22 When cross-examined Mr Hughes said that Mal worked as supervisor after the Applicants' employment terminated for six to eight weeks and then left because he had some family problems. Mr Ian Shawyer then took over the position of dock supervisor. When it was put to Mr Hughes that it was the responsibility of Mr Shawyer to do the Boise Cascade returns, Mr Hughes said that he believed that when the Applicant was appointed as dock supervisor, it was his responsibility to deal with the Boise Cascade returns. When asked in cross-examination whether Mr Hughes had put to Mr Shawyer that the Boise Cascade contract was his (Mr Shawyer's) responsibility and that he (Mr Hughes) wanted the problem solved, Mr Hughes said that Mr Shawyer believed it was the Applicant's role but that Mr Shawyer took the responsibility of fixing the problem with the contract. When asked what the Applicant's response to the problem had been, he said the Applicant had informed him that the drivers were not paying attention or would not listen to his instructions. Mr Hughes said that it was his view that part of the problem was that the Applicant did not enforce the clearing out the drivers' pigeon holes every day.

23 Ms Alicia Mann gave evidence that she is employed by the Respondent as office clerk and a two-way radio operator. She said that when the Applicant was employed by the Respondent she gave him a lift home every day. She said she initially worked from 7.00am to 4.00pm and then her hours changed to 9.00am until 6.00pm. She said that even when she finished at 6.00pm she still gave him a lift home. Ms Mann said she became aware that the Applicant had received a warning for his work performance because he had told her that he was "on his last chance". She said she could not remember whether or not he said he had received written or verbal warnings but she recalled that he was worried.

24 During the course of the hearing the Commission advised Mr Hughes that the Respondent should take steps to call Mr Shawyer to give evidence. The Commission was informed by Mr Hughes that he had contacted Mr Shawyer but that Mr Shawyer was now working for another company and he (Mr Shawyer) did not feel it was worth his time to attend the Commission to give evidence.

Submissions

25 Mr Hughes, on behalf of the Respondent, submitted that the Applicant was not unfairly dismissed, that the Applicant had admitted that he had been warned about his work performance and conceded that he was "skating on thin ice". The Respondent submitted that the Applicant had had numerous warnings about his performance and was given every opportunity to improve his performance but with the loss of the Boise Cascade work the Respondent was required to close the nightshift and reduce staff.

26 Mr Stokes, on behalf of the Applicant, submitted that the termination was unfair. It was contended that it was only when the Applicant asked for his further $50.00 per week increase that he was then warned about his performance and from that time onwards Mr Hughes' treatment of the Applicant changed. Further, that Mr Hughes was unable to contradict the Applicant's evidence that it was Mr Shawyer's job to put the manifests for the Boise Cascade returns in the drivers' pigeon holes, prior to four weeks before the Applicant's employment was terminated. In particular, that the Applicant's evidence should be accepted

that when he took over the responsibility for the returns, he cleared the returns on a daily basis. It was also contended that the Respondent was unable to prove the allegation that the Applicant was responsible for and caused the loss of the Boise Cascade business. Further that the Applicant's evidence established that Mr Shawyer instructed him to shrink-wrap and hide the Boise Cascade goods. In addition, the Applicant had adequately explained why there were Boise Cascade goods outstanding for delivery two weeks before his employment was terminated.

27 In the alternative, it is submitted on behalf of the Applicant that if the Commission was to accept that the reason for termination was that the Applicant's poor performance caused the loss of the Boise Cascade business, that the Applicant should not have been selected for redundancy. He said that the Applicant gave uncontradicted evidence that he was a harder worker than others, including Mr Ian Shawyer, and both Ian Shawyer and Mal had been employed by the Respondent after he (the Applicant) was engaged.

Failure to call Mr Allan Shawyer to give evidence

28 The onus is on the Applicant to prove that he was unfairly dismissed. The question to be determined by the Commission is whether the legal right of the Respondent to dismiss the Applicant has been exercised harshly or oppressively against the employee so as to amount to an abuse of that right (*Ronald David Miles, Norma Shirley Miles, 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 at 386). Having heard the evidence of the Applicant I prefer his evidence to that of Mr Hughes, where their evidence differs. I found the Applicant to be an honest witness who gave his evidence in a straightforward manner and whose evidence was not shaken in cross-examination.

29 Having considered the principles set out in the High Court in *Jones v Dunkel* (1959) 101 CLR 298 the Commission is entitled to take into consideration that where there is one person who could have given evidence to refute the Applicant's evidence and that person has not been called by the Respondent, the Commission is entitled to draw the inference that that person's evidence would not have assisted the Respondent's case. In the absence of evidence from Mr Shawyer, I accept the Applicant's evidence that four weeks prior to his employment being terminated, Mr Shawyer was responsible for the Boise Cascade returns. Although Mr Hughes has given evidence that it was his view that the Applicant was responsible for the Boise Cascade returns, he was unable to give any direct evidence on this point. His evidence, at its highest, was simply that he believed the Applicant was responsible for the Boise Cascade returns from February 2000. It is apparent from all of the evidence that by the time the Applicant was required to process two large cages of Boise Cascade returns and keep the returns up to date, the Respondent had already failed to comply with the terms of its contract with Boise Cascade. The Applicant's employment terminated on either 18 or 20 October 2000. The Applicant says that Mr Shawyer requested him to shrink-wrap the Boise Cascade goods two weeks prior to his employment being terminated which was during a period of school holidays. The Commission has taken judicial notice of the fact that school holidays in Western Australia commenced on Friday, 22 September 2000 and schools resumed on Monday, 9 October 2000. Accordingly, I accept the Applicant's evidence that the reason why some of the Boise Cascade goods were standing on the dock was because the goods were for the schools that were not open for delivery. Whilst I accept that the outcome of the decision of Boise Cascade to withdraw from the contract meant that the Respondent had to downsize and re-structure its workforce, I do not accept that the Applicant should have been dismissed. It is apparent that Boise Cascade were not satisfied with the service they received prior to the Applicant becoming responsible for the returns. The Applicant has given uncontradicted evidence that there were other employees who had been engaged by the Respondent for a shorter period of time than he (the Applicant) had been engaged. As to the undelivered crates sitting by the Applicant's desk, I do not accept the fact that the crates had not been delivered showed that the Applicant's performance was poor.

30 Accordingly, I find that the Respondent unfairly dismissed the Applicant.

Mitigation

31 The Applicant is not seeking reinstatement. He commenced full-time employment with another employer on 13 August 2001 and since that time has earnt more pay than he was receiving whilst employed by the Respondent.

32 The duty to mitigate requires a claimant to diligently seek suitable alternate employment and the onus of proof of failure to mitigate loss is on the Respondent (see *Brace v Calder* [1895] 2 QB 253 applied by the Full Bench in *Growers Market Butchers v Backman* (1999) 79 WAIG 1313 at 1316).

33 The Applicant testified that after his employment was terminated he looked in Wednesday's papers (the West Australian) and the Sunday Times for work. He said he also visited the Canning Vale industrial area and handed out his resume to a number of places. Prior to his employment with the Respondent the Applicant only had experience working as a storeman and purchasing officer. He said that he attempted to improve his prospects for work by carrying out work experience as a salesperson, selling mobile phones and accessories for a communications company. He also did work experience in selling retail clothing and furniture. The Applicant said he obtained this work experience through family and friends. The Applicant registered for unemployment benefit in March 2001. He said that prior to this time he lived off his savings which he had in his bank. Once registered with Centrelink he sought to obtain work through the Centrelink job system. Although Mr Hughes, on behalf of the Respondent, contended that the Applicant had not mitigated his loss, in that he (the Applicant), did not produce any documentary evidence to show that he had made any job applications prior to March 2001, I do not accept the Respondent's submission. The Applicant has given uncontradicted evidence that he immediately sought work by looking at job advertisements in the paper and canvassed for work in the Canning Vale area.

34 Having heard the Applicant's evidence I am of the view that he has diligently sought alternative employment. Accordingly, I will make the award sought by the Applicant, that is, I will make an award of 26 weeks' remuneration at the rate of $525.00 per week which is a gross amount of $13,650.00.

2002 WAIRC 04749

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	KARAN CHOPRA, APPLICANT
	v.
	KWIK & SWIFT CO PTY LTD TRADING AS KWIK & SWIFT COURIERS, RESPONDENT
CORAM	COMMISSIONER J H SMITH
DELIVERED	5 FEBRUARY 2002
FILE NO/S.	APPLICATION 1813 OF 2000
CITATION NO.	2002 WAIRC 04749

Result	Applicant unfairly dismissed. Order made that the Respondent pay the Applicant $13,650.00 compensation.
Representation	
Applicant	Mr B F Stokes (as agent)
Respondent	In person

Order

Having heard Mr B F Stokes as agent on behalf of the Applicant and the Respondent in person, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979* hereby—

1 Declares that Karan Chopra was unfairly dismissed by Kwik & Swift Co Pty Ltd Trading as Kwik & Swift Couriers;

2 Declares that it is impracticable to reinstate the Applicant to his former position;

3 Orders that the Respondent pay the Applicant within 10 days of the date of this Order $13,650.00 as compensation.

(Sgd.) J. H. SMITH,
[L.S.] Commissioner.

2002 WAIRC 04659

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	GRAEME DAVIES, APPLICANT
	v.
	ITRANEX PTY LTD, RESPONDENT
CORAM	CHIEF COMMISSIONER W S COLEMAN
DELIVERED	WEDNESDAY, 16 JANUARY 2002
FILE NO/S.	APPLICATION 1924 OF 2001
CITATION NO.	2002 WAIRC 04659

Result	Order issued
Representation	
Applicant	Mr G Davies
Respondent	Mr D Mann

Order

WHEREAS a meeting of the parties was held before Deputy Registrar Lovegrove on 9 January 2002; and

WHEREAS by consent, the parties agreed that an order of the Commission should issue in the terms identified in Schedule A to this order.

NOW THEREFORE pursuant to the powers vested in it by the *Industrial Relations Act*, 1979, the Commission hereby orders—

THAT the Respondent pay to the Applicant the amounts identified in Schedule A by no later than 20 February 2002.

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

SCHEDULE A

September		
$75 000 p.a. / 12	=	$6250.00/month
$6250.00 / 30 (days in Sep) =		$208.30/day
16 days at full rate =	$3333.33	
14 days at $50k pro rata	=	$1944.44
		$5277.77 (gross)
Less tax of $1512.00	=	**$3765.77 (net)**
October (includes holiday pay)		
Salary		
$50 000 p.a. / 12	=	$4166.66/month
$4166.66/31 (days in Oct) =		$134.41/day
19 days	=	$2553.76 (gross)
Holiday Pay		
36 weeks / 52	=	0.69 of a year
4 weeks x 0.69	=	2.77 weeks owed
8 days leave taken	=	1.6 weeks taken
12/04/01 – 17/04/01 (2)		
16/07/01 – 20/07/01 (5)		

12/09/01 – 14/09/01 (1)	=	1.17 weeks owed in total
$75 000 / 52	=	$1442.31 / week
$1442.31 x 1.17	=	$1687.50
Holiday pay + October Salary		
$2553.76+ $1687.50	=	$4241.26 (gross)
Less tax of $1049.00	=	**$3192.26 (net)**

Superannuation

12/02/01 – 31/08/01	=	$3500.00
1/09/01 – 19/10/0 1	=	$791.52 (includes holiday pay)
Total Super owing	=	**$4261.52**

Total funds owed for superannuation, wages and holiday pay = **$11 219.55**

In terms of your employment, shares (at pro-rata) to the value of $19 000 will be afforded to you. Your forbearance in this matter is appreciated. Upon receipt of major funding, (AUD$1m) we will look to offering you a buy-back at a premium should you wish.

Rest assured, our commitment to endeavour to pay your monies owed as soon as possible remains.

1. Your initial pay in February was paid from 1/02/2001 and not from 12/02/2001 affording you an additional $2455.36 already paid.
2. Your holiday pay (and weeks owing) have been calculated at the rate of $75000 p.a. for the full period and not reduced during your part-time payment period i.e. $221.15 in your favour.

2002 WAIRC 04760

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	AMY LEA GREEN, APPLICANT
	v.
	BALLAJURA PROPERTIES PTY LTD t/a GRANGER CLARK (BALLAJURA), RESPONDENT
CORAM	COMMISSIONER A R BEECH
DELIVERED	THURSDAY, 7 FEBRUARY 2002
FILE NO.	APPLICATION 1454 OF 2001
CITATION NO.	2002 WAIRC 04760

Result	Application alleging unfair dismissal dismissed.
Representation	
Applicant	Ms A. Green
Respondent	Mr D. Brown

Reasons for Decision

1 Amy Green was employed as a Property Manager's Assistant on 5 June 2001. She had been employed on a probationary period of three months which would have expired on 4 September 2001. On 25 July 2001 she was spoken to on the telephone by Mr Brown, the Principal of the respondent, who told her he was accepting her resignation. Her employment finished on that day and she claims that she was dismissed and that it was harsh, oppressive or unfair.

2 The respondent's Property Manager is Ms Martinez. Ms Martinez arranged for the employment of Ms Green who had been a student in Ms Martinez's REIWA class. Ms Green therefore did not have any previous experience in the position and she was employed on that understanding.

3 Ms Green's evidence, which I accept, is that after approximately two weeks' employment she began to notice a change in Ms Martinez's attitude towards her. She thought Ms Martinez's expectations of her were too high and that Ms Martinez seemed somewhat impatient, as if Ms Green was questioning her. She found that Ms Martinez did not tend to explain why something needed to be done, but rather just required her to do it. In Ms Green's opinion, the relationship between her and Ms Martinez became more and more uncomfortable.

4 On 3 July 2001 an argument occurred in the office between Ms Green and Ms Martinez. Although Ms Martinez was called to give evidence in these proceedings, she was not asked for her understanding of the altercation and I therefore have only the evidence of Ms Green in relation to it. I am satisfied, however, that both Ms Green and Ms Martinez raised their voices to each other in a public area of the respondent's office.

5 Mr Brown came into the office at the end of this argument. He subsequently asked to speak with Ms Green. I am satisfied from the evidence, that Mr Brown asked Ms Green for a commitment that there would be no further outburst from her in the manner that he had just witnessed no matter what the circumstances. I am also satisfied that Ms Green did not give that commitment. Rather, Ms Green wanted Mr Brown to have a meeting between her and Ms Martinez in order to resolve any issues between them. This Mr Brown refused to do unless he received a commitment from Ms Green in the manner he described. At the end of the discussion, Ms Green wrote out a resignation. A copy of the resignation was tendered in evidence and I am satisfied that it does not have a date in the top right hand corner as Ms Green had recalled. However, in my view nothing turns upon this.

6 I have found two matters of relevance in the resignation. Firstly, although Ms Green had just had an altercation with Ms Martinez, the letter of resignation is worded in such a way as to show that Ms Green's decision was not based only upon that argument. Ms Green wrote in part—

> "At the date of this letter I wish to terminate my employment with Granger Clark Ballajura. This comes as a result of a difference in opinion with senior staff and management alike regarding management styles and dealing with staff, along with a marked personality clash with the senior property manager."

7 Those words reveal that Ms Green had a difference of opinion not just with Ms Martinez but also with at least Mr Brown regarding his, or their, management styles and dealing with staff. I will return to this subsequently.

8 Secondly, I am not satisfied from the evidence, particularly of Mr Brown himself, that Ms Green was left with no alternative other than to resign. This is an important issue because of her claim that her resignation is really a constructive dismissal. Mr Brown's evidence does not suggest that Ms Green was left with no alternative and furthermore Ms Green's own evidence is that although she felt she had no option, she understood that she could "put up with it" or resign. I am far from convinced, therefore, that Ms Green's resignation was because she had no alternative. She could have put up with it. Indeed, she did "put up with it". It is her evidence that for the next two weeks the relationship between her and Ms Martinez improved. I am quite persuaded that Ms Green had an alternative to resignation if she chose. However, she chose to resign. That resignation, however, was not a constructive dismissal.

9 As a matter of fact, once Ms Martinez discovered that Ms Green had written out a resignation, she approached Ms Green. She apologised for having spoken to Ms Green in that manner in a public area of the office. She and Ms Green reached an understanding that if Mr Brown was prepared to "hold on" to the resignation for two weeks and not act upon it during that time, then if either party was not happy at the end of that time the resignation could then be accepted. If the parties were happy at the end of that time, then the working relationship would continue.

10 I find from the evidence that the respondent was not happy at the end of the two week period and further that it had a reasonable basis for reaching that conclusion. I find particularly from the evidence of Ms Martinez, evidence which I have no hesitation in accepting, that although the working relationship between her and Ms Green had improved, it had not done so to the standard which she would have liked. In particular, she found that Ms Green's attitude, including her attitude towards clients had not improved. During that period, Ms Martinez had received a complaint from a tenant who had indicated to Ms Martinez that he no longer wished to deal with Ms Green. In Ms Martinez's evidence, Ms Green needed to adapt more because it is not merely other staff who have to adapt to Ms Green's attitude but also clients who have to adapt and that is not practicable. In effect, Ms Martinez noticed no significant change in Ms Green's work ethic.

11 For his part, Mr Brown had reached a similar conclusion because during that two week period he had observed Ms Green having breakfast at her desk after she had commenced work. Whilst that issue of itself was minor, it, together with the views of Ms Martinez, persuaded Mr Brown that Ms Green was unsuited to the type of work and also to this particular place of work. For that reason, he decided on or about the expiry of the two week period that he would accept the resignation.

12 As a matter of fact, due in part to Ms Green's absence due to illness on the afternoon of 23 July 2001, and then 24 and 25 July 2001, on which date Mr Brown spoke to her by telephone, Ms Green's actual dismissal occurred after the expiry of the two week period on 18 July 2001. Indeed, on 18 July 2001 Ms Martinez herself was not at work and this also contributed to the delay. Nevertheless, I am quite satisfied from Mr Brown's evidence that it was his intention at the conclusion of the two week period to accept Ms Green's resignation and that it was merely the particular circumstances which led to his decision not being implemented until after the two week period had elapsed. I am also quite satisfied from my observation of Mr Brown that he did not prefer to terminate Ms Green's employment over the telephone but because Ms Green was not at work on that day, and he was conscious of the passage of time, he nevertheless did so.

13 I turn now to consider the reasons put forward by Ms Green in support of her claim of unfair dismissal. Ms Green has argued that she was unaware until the hearing that she was considered to be unsuitable by Mr Brown. This had not been put to her during her employment. Rather, she believed that her dismissal was, related, as the respondent's Notice of Answer and Counter Proposal indicated, to her attitude or punctuality during the "two to three weeks" of the "on hold" period. In my view, Ms Green is quite correct in her assertion that she was punctual during this period of time. Indeed, on the evidence, there were only two occasions when she was not punctual. On those occasions, she apologised for being late and indicated the reasons for it and I am satisfied that these were isolated examples. Mr Brown's letter attached to the Notice of Answer and Counter Proposal is therefore inaccurate and I am of the view that this inaccuracy has in part contributed to Ms Green's determination to proceed with this matter. After all, if the respondent indicates that one of the reasons for dismissal was unpunctuality when in fact Ms Green had not been unpunctual, one can understand her determination to proceed with this application.

14 Nevertheless, even though I find that Mr Brown's letter of explanation attached to the Notice of Answer and Counter Proposal was inaccurate in this regard, the evidence overall, particularly from Ms Martinez that she noticed no significant change in Ms Green's attitude at work, is compelling. Further, I am unable to conclude that even if Ms Green had been told there was a need for her to change her attitude, this would have resulted in such a change on Ms Green's part that her employment would not have been terminated. In part, as Ms Green herself has admitted, her personality is her personality.

15 Ms Green also states that to be dismissed over the telephone is unfair of itself. She has referred to a particular court case in support of her contention (although I have been unable to find the court case to which she has referred). In general, the dismissal of an employee over the telephone may well be unfair because the medium does not permit a proper meeting between the parties which might allow the employee to respond to any issues. On the evidence before me in this matter, however, I cannot conclude that even if Mr Brown had dismissed Ms Green in a face-to-face meeting, a different result would have occurred. I reach this conclusion in part due to my observation of the cross-examination of Mr Brown by Ms Green. At one stage the questioning merely confirmed each person's respective position and the issue became rather a circular one. I think it is unlikely that in a face-to-face meeting a positive outcome would have occurred.

16 I am also satisfied that Mr Brown stated during the telephone conversation that the respondent did not have the time to give Ms Green the training which she needed. Ms Green is correct to state that if the respondent had employed her knowing she would need training, it is curious, at least, for the respondent then to say it did not have the time to give her the training she required. However, in part, the training which needed to be given cannot be divorced from its context. In particular, the evidence of Ms Martinez and Mr Brown suggests strongly that Ms Green's attitude towards the respondent might well be that they were, in Ms Green's words, "old fashioned". I am left with the impression that if further training had been offered by the respondent, it nevertheless would have not have made Ms Green's attitude towards the "management style and dealing with staff" referred to in her letter of resignation any more positive.

17 This is not to be critical of Ms Green. Indeed, Ms Green presented most credibly and honestly in her evidence. It is the case, nevertheless, that Ms Green's evidence overall showed that she did not believe Ms Martinez and Mr Brown had the correct attitude towards training her, that they did not have the right management style and further that there was, at least until the "on hold" period, a personality clash with Ms Martinez herself.

18 It is this conclusion which brings into focus the fact that Ms Green was on a period of probation. A period of probation is a period for at least the evaluation of the employee by the employer, and correspondingly of the employer by the employee. It is a period when either side is able to make an assessment of the suitability of the other for the purposes of employment. In the conclusion to which I have come, the issues which were referred to by each of the witnesses in their evidence are the issues which properly occur during a period of probation. I am left with the conclusion that it is unlikely that Ms Green would have remained employed by the respondent for a great deal of time after the "on hold" period in any event.

19 But ultimately, in my view Ms Green's application fails for the direct reason that her resignation was not a constructive dismissal and that she agreed it could be put "on hold" for a two week period at the conclusion of which the respondent could, if it wished accept it. In my view, the fact that the acceptance occurred five working days after the conclusion of the two weeks in circumstances where firstly Ms Martinez was absent, and secondly when Ms Green was absent for the last two and a half days, does not in my view alter the essential fact that Mr Brown accepted the resignation on or about the expiry of that time. In any event, if I am wrong in that conclusion and the termination of Ms Green's employment actually came about by Mr Brown dismissing her, Ms Green's evidence has not persuaded me that the dismissal was unfair when she herself had sought to end her employment on 4 July 2001, and she had given the respondent until 18 July 2001 to make its own decision whether to accept her resignation.

20 For all of those reasons, Ms Green's application is now dismissed.

21 Order accordingly.

2002 WAIRC 04761

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	AMY LEA GREEN, APPLICANT
	v.
	BALLAJURA PROPERTIES PTY LTD T/A GRANGER CLARK (BALLAJURA), RESPONDENT
CORAM	COMMISSIONER A R BEECH
DELIVERED	THURSDAY, 7 FEBRUARY 2002
FILE NO.	APPLICATION 1454 OF 2001
CITATION NO.	2002 WAIRC 04761

Result	Application alleging unfair dismissal dismissed
Representation	
Applicant	Ms A. Green
Respondent	Mr D. Brown

Order

HAVING HEARD Ms A. Green on her own behalf as the applicant and Mr D. Brown 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 dismissed.

(Sgd.) A. R. BEECH,
[L.S.] Commissioner.

2002 WAIRC 04731

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CRAIG JOHN HASTIE, APPLICANT
	v.
	MR UMBERTO FIORE, CAMERA LAND CAMERA HOUSE, RESPONDENT
CORAM	COMMISSIONER A R BEECH
DELIVERED	WEDNESDAY, 23 JANUARY 2002
FILE NO.	APPLICATION 1154 OF 2001
CITATION NO.	2002 WAIRC 04731

Result	Application alleging unfair dismissal dismissed.
Representation	
Applicant	Mr C. Hastie
Respondent	Mr U. Fiore

Reasons for Decision
(Extemporaneous)

1 Mr Hastie has lodged a claim of unfair dismissal in the Commission. He was employed from 19 March 2001 until 10 June 2001, a period of slightly less than three months. He was employed as a sales assistant, and he was employed on the understanding that there would be a two-month probationary period, and he had completed that required two-month probationary period when he was dismissed.

2 According to Mr Hastie's application, and his evidence this morning, he says that his dismissal was unfair because he was given no indication or warning, whether oral or in writing, that his performance was unsatisfactory and that he would be dismissed if his performance did not improve.

3 The task of the Commission is to assess the fairness of what occurred, that is, the employer has the right to dismiss an employee, but the issue is whether the right of dismissal is exercised so harshly or oppressively towards the employee that it amounts to an abuse of that right. It has been described as giving a "fair go". A "fair go" has to be seen from the point of view of both the employee and the employer. Giving an employee a formal warning, whether it be verbal or in writing, does ensure

that an employee gets a "fair go". But when there has not been a formal warning, it does not always mean that the dismissal is unfair. Rather, whether a dismissal is unfair will depend upon all of the circumstances.

4 In this case, the circumstances include the fact that, according to Mr Fiore's evidence, the business is a small business, he has been in business for approximately 16 years, he employs only two sales representatives and he does not operate in a formal way by, I think he said, pointing his finger to make a point, but rather, he operates in a more informal way.

5 It is also important to note that it is up to Mr Hastie to prove that his dismissal is unfair. It is not up to Mr Fiore to prove that it was not. In this case, Mr Hastie has given evidence, and Mr Fiore has given evidence. There are no independent witnesses to say, where there is a conflict, whose evidence is to be preferred, so I have the evidence on the one hand of Mr Hastie, and the evidence on the other hand of Mr Fiore.

6 In this case, neither of them have chosen to cross-examine the other on their evidence, which makes it somewhat more difficult for me as well, because I was not there, whereas both of you gentlemen were. Therefore, for example, if I was to accept Mr Hastie's evidence, he would say his dismissal is unfair, and here I put words in his mouth, but he says his dismissal was unfair because if he had been given a formal warning he would have improved his performance, and he therefore would not have been dismissed.

7 Whereas, if I accept Mr Fiore's evidence, Mr Fiore's evidence is that, in summary form, he believed Mr Hastie's attitude was such that it was unlikely that he would improve, and again, I put words in his mouth and that, therefore, the dismissal was not unfair.

8 I have now had an opportunity, then, to consider both the evidence of Mr Hastie and the evidence of Mr Fiore. My decision in this matter has been approached on the following basis It is true that no oral or written warnings were given to Mr Hastie.

9 However, Mr Fiore has nevertheless stated that, for example, he did tell Mr Hastie that he wanted Mr Hastie to smile more often, and not to put his foot on the counter. And yet his evidence is that Mr Hastie did not comply with either of those requests. In my view, these are small matters, not the kind of matters which would warrant a formal warning. However, after thinking of the evidence, I am inclined to think that those two small matters did occur as Mr Fiore mentioned. That being the case, it makes Mr Fiore's evidence that Mr Hastie's attitude was a problem to him somewhat more believable. Mr Fiore has also given evidence of at least two customers who expressed dissatisfaction with Mr Hastie, and of the reaction of other customers later.

10 I do not believe Mr Fiore is making his evidence up, and I do not understand Mr Hastie to be accusing Mr Fiore of fabricating his evidence. Therefore I accept that these things did occur as Mr Fiore has given evidence. Therefore, on balance, the evidence tends to confirm Mr Fiore's position rather than Mr Hastie's.

11 I am left with the impression that if Mr Hastie did not improve in those two small matters I have mentioned, then, even if Mr Fiore had given a more formal warning in relation to other matters, I am not certain that it would have made a significant difference to the circumstances in any event.

12 Mr Hastie was within less than three months of starting new employment, he was at the beginning of the working relationship. It is not, for example, a situation where Mr Hastie had been employed for a long period of time with a long, stable working relationship that would indicate that there was a likelihood that it would continue. I suspect from the balance of the evidence that Mr Fiore's impressions of Mr Hastie, whether correct or incorrect, meant that the working relationship did not have a likelihood of a long term prospect, and I do not believe that it would have continued for much longer anyway, even if a warning had been given, as Mr Hastie complains.

13 I am to assess the fairness of what occurred from the point of view of both the employer and the employee, and it is up to Mr Hastie to persuade me, on balance, that his dismissal was unfair. I have not been able to find that his evidence has carried the day, his evidence has been matched by that of Mr Fiore.

14 And if Mr Hastie has not proven on his evidence that the dismissal was unfair, then there is no basis upon which I can uphold his claim, and accordingly my decision is, and for those reasons, that Mr Hastie's claim is dismissed.

15 Order accordingly.

2002 WAIRC 04693

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CRAIG JOHN HASTIE, APPLICANT
	v.
	MR UMBERTO FIORE, CAMERA LAND CAMERA HOUSE, RESPONDENT
CORAM	COMMISSIONER A R BEECH
DELIVERED	WEDNESDAY, 23 JANUARY 2002
FILE NO.	APPLICATION 1154 OF 2001
CITATION NO.	2002 WAIRC 04693

Result	Application alleging unfair dismissal dismissed.
Representation	
Applicant	Mr C. Hastie
Respondent	Mr U. Fiore

Order

HAVING HEARD Mr C. Hastie on his own behalf as the applicant and Mr U. Fiore on his own behalf, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979* hereby orders—

THAT the application be dismissed.

(Sgd.) A. R. BEECH,
[L.S.] Commissioner.

2002 WAIRC 04719

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ROGER JEEVES, APPLICANT
	v.
	BRETT MARTIN PLASTICS PTY LTD, RESPONDENT
CORAM	COMMISSIONER A R BEECH
DELIVERED	WEDNESDAY, 30 JANUARY 2002
FILE NO.	APPLICATION 1370 OF 2001
CITATION NO.	2002 WAIRC 04719

Result	Application for adjournment – granted in part.
Representation	
Applicant	Mr A. Auguste (of counsel)
Respondent	Mr S. Mulhall (of counsel)

Reasons for Decision

(Extemporaneous)

1 The claim by Mr Jeeves that he has been unfairly dismissed and that he has been denied certain benefits under his contract of employment is set down to commence today. This morning, Mr Jeeves gave notice that he seeks to have the hearing adjourned. He is not in attendance this afternoon and presents his submission through his counsel Mr Auguste who is appearing only for this limited purpose.

2 The test of whether an adjournment should be granted is where the refusal of the adjournment would result in a serious injustice to one party then an adjournment should be granted unless in turn this would mean serious injustice to the other party (*Myers v Myers* [1969] WAR 19). I will not repeat the grounds that Mr Jeeves sets out in his Notice of Application, they have been stated. They are part of the record and they have been stated by Mr Auguste.

3 In assessing whether the refusal of an adjournment would result in serious injustice to Mr Jeeves, I take the following into account. As to the issue of whether Mr Jeeves is competent to conduct his own case, that he cannot afford to engage a solicitor to conduct his case and that he therefore wishes to apply for legal aid, they are matters which Mr Jeeves either knew or ought to have known at least by 12 December 2001 if not before when, on the information before me, he advised that he was no longer going to be represented. The record indicates that Mr Jeeves appointed a legal practitioner as his representative when he lodged his Notice of Application. Indeed Mr Jeeves was legally represented at the conference that was held in the Commission on 3 October 2001. In my view, Mr Jeeves had the ability then to make an assessment, based upon the representation he had received, on the issues that were discussed in the conciliation conference, whether or not he wished to continue to be represented when those same issues were dealt with in a more formal hearing today.

4 I have taken into account also that Mr Jeeves has tertiary education and that as late as last week when he appeared together with Mr Mulhall before me in Chambers, and as late as yesterday at least by telephone advice to my Associate, there had been no suggestion from him that he felt he was not competent to conduct his own case or that he was otherwise in jeopardy of some injustice if he did so.

5 For those reasons, I attach little weight to the submission that is now put on his behalf that if an adjournment is not granted he will suffer a serious injustice. In doing so, I also put on the record the matters that I have raised during this brief hearing. This Commission is a tribunal and not a court as such, the distinction being that the Commission is to act with a minimum of legal form and technicality, and unrepresented parties frequently appear in the Commission. All of the Commissioners are quite used to dealing with applicants in person, as well as respondents who appear in person, and this frequently occurs.

6 The Commission is bound to act according to the principles of natural justice and in the context of appearances in the Commission the observance of natural justice does not require that a party be legally represented. What is fair in a given situation depends upon the circumstances. An unrepresented party and certainly in this Commission, is entitled to receive advice and assistance from the Commissioner in order to diminish as far as possible the disadvantage which he or she would ordinarily suffer when faced with by a lawyer on the other side while not conferring on that unrepresented party a positive advantage over the represented opponent (*Davidson v Aboriginal & Islander Child Care Agency* (1998) 105 IR 1 at 6 per Ross VP).

7 While Mr Jeeves himself may not prepare his case with the method, and perhaps the practice, of a legal practitioner, he is in no different a position from the many unrepresented parties who appear in the Commission and do so without any suggestion of prejudice on their part for being unrepresented. Furthermore Mr Jeeves has together with his education, which is an advantage in a person who is unrepresented, the direct knowledge of his participation in all of the events which are to be the subject of this hearing. In that regard, I can at least pass this observation: the Reply which was filed by Mr Jeeves in response to the Respondent's Further and Better Particulars addresses, at least in my preliminary observation, reasonably comprehensively and with some knowledge on his part the events and the issues that were raised in the Further and Better Particulars. Certainly my reading of that document does not suggest to me that Mr Jeeves will suffer a serious injustice if the adjournment was not granted and he represented himself.

8 I might add that this hearing involves an allegation of misconduct on the part of Mr Jeeves and thus the respondent will be presenting its evidence first and Mr Jeeves will be replying. If it became apparent during the course of the proceedings that the fact that Mr Jeeves is unrepresented has meant that he had misunderstood an issue, or if I formed the opinion that his inexperience has meant that he was not in a position to complete the presentation of his evidence, then an adjournment of perhaps a short duration to suit the circumstances might then be considered to allow him some time in order to compose his reply, provided that that in turn does not cause some irreparable substantive or procedural injustice to the respondent (*Titan v Babic* (1994) 126 ALR 455 at 464). That would be a matter of fairness to be considered at the time.

9 As to the prejudice to the respondent if the adjournment is granted, the respondent submits that the injustice to it arises from the inconvenience, to which Mr Mulhall referred, and also the question of cost which has been described as a significant cost. The injustice to the respondent, to the extent that it is measurable, is something which is able to be met by the Commission ordering Mr Jeeves to pay costs and in this case, in the context of an adjournment, the costs thrown away by the respondent resulting directly from the late notice of the adjournment. I note, however, that in the submission that was put on his behalf this

afternoon Mr Jeeves describes himself as unemployed and impecunious. Whether that has any implication for an Order for costs is perhaps debateable but nevertheless in balancing the issues of whether there is a serious injustice to Mr Jeeves if the adjournment is not granted and the serious injustice to the respondent if it is, the injustice to the respondent can at least in principle be met by an Order for costs in favour of the respondent.

10 If the matter was to end there, I would form the conclusion on the grounds as I have spoken of them so far, that I would not be satisfied that Mr Jeeves would suffer a serious injustice that is greater than the serious injustice to the respondent. I will, however, now turn to two other matters.

11 In my view, Mr Jeeves is on somewhat stronger ground in relation to the prejudice said to be suffered by him due to the two month delay by the respondent in providing discovery of documents. It is said that this precluded Mr Jeeves from properly considering the documents even if he was competent to do so. I can understand that, in principle, if the reason for the respondent's delay in providing discovery was because there is a significant volume of documents, then equally it might be said that to provide discovery within a week of the commencement of the hearing would cause an injustice to the applicant which could only really be met by an adjournment to allow him a proper opportunity to examine the documents. Nevertheless, I return to the comments that I made earlier that in my view, and with due respect to the submissions of Mr Auguste, Mr Jeeves is the best judge of what is in the discovered documents and as of yesterday, and indeed in the proceedings before me last week in Chambers, he did not raise any issue of prejudice from the volume of the documents. I would at least have expected him to have stated that there is a large volume there to look at even if, on the submission of Mr Auguste, he was unaware of precisely what it is that he might wish to do with the documents. I therefore do not attach a great weight at least for the purposes of prejudice to the Respondent's late discovery.

12 The remaining matter however, is something which has caused me concern and that is the issue of Mr Jeeves' stated illness this afternoon. As I put to Mr Mulhall, all of us can become indisposed at critical times. I note the comment, perhaps not directly but indirectly, of Mr Mulhall regarding the respondent not accepting that the stated illness is genuine, however, there has been nothing in the conduct of Mr Jeeves in the Commission's proceedings which would lead me to conclude that I should not accept the submission that is made on his behalf that he is ill this afternoon.

13 I would therefore grant the adjournment at least for this afternoon because I do not believe we should go ahead in his absence. I also accept, to the extent that it was offered, the offer that Mr Jeeves present a medical certificate to the Commission, with a copy to the respondent, for his indisposition this afternoon.

14 If this hearing was set down just for this one day, Mr Jeeves would have achieved the adjournment he seeks for at least that reason although, I hasten to add, not for the other reasons that he has put forward.

15 That however then brings into focus what is to happen from here because tomorrow and the following day are also set aside for the hearing. This is not a matter that either of you have directly addressed, however, my present intention would be this. Having granted the adjournment on the basis that Mr Jeeves is indisposed this afternoon, I would nevertheless intend to reconvene tomorrow. My suggestion would be that I request Mr Jeeves to notify the Commission and the respondent by 9:30 am tomorrow whether he is able to attend. If he is able to attend then it would be my intention to commence the hearing which would of course be the commencement of the respondent's case. If Mr Jeeves advises that he is not available, then the hearing would not go ahead, because we would be tomorrow in the same position as we are in this afternoon. However, I foreshadow then that I will require a medical certificate from him with a copy to the respondent. Further, I would reserve to the respondent the right to claim an Order for costs thrown away if this matter does not proceed tomorrow.

16 I do so for reasons of caution, I suspect in this sense. If Mr Jeeves is genuinely ill and it is something that came across him in the way that all of us from time to time become ill, then I would not necessarily see an application for an Order for costs succeeding on that basis, but I would not in any sense prevent an argument being put because there may well be issues that I have not taken into account. If however the illness, or the stated reason for illness, is challenged by the respondent and it forms an issue of itself then certainly an application for an Order for costs is able to be pursued, within the limits of the legislation, by the respondent.

17 Decision accordingly.

2002 WAIRC 04694

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MARK JOSEPH JOLLY, APPLICANT
	v.
	ABA AUTOMATIC GATES (W.A.), RESPONDENT
CORAM	COMMISSIONER A R BEECH
DELIVERED	TUESDAY, 22 JANUARY 2002
FILE NO.	APPLICATION 839 OF 2001
CITATION NO.	2002 WAIRC 04694

Result	Application alleging unfair dismissal dismissed.
Representation	
Applicant	Mr M. Jolly
Respondent	Mr D. Jones (as agent)

Reasons for Decision

(Extemporaneous)

1 Mr Mark Jolly claims that he was dismissed on 20 April 2001 and in his Notice of Application he states in Attachment A, that "To be dismissed on the spot the way I was for what Toni (the boss) assumed was a mistake I had made while connecting an intercom as instructed. I feel this to be totally unfair."

2 In my view, the evidence shows that the intercom was burnt out on that day and that it did indeed lead to Mr Jolly's dismissal. It did so, because as Mr Henger says, on that day he telephoned his wife to say "I cannot work with Mr Jolly anymore, give him notice" and Mrs Henger says that she did so. So whether Mr Jolly was dismissed "on the spot" as he says or whether he was given notice on the day, he was dismissed on that day.

3 It also seems to me that the vast bulk of the reason why the dismissal occurred are the events of that day. The events of the day include the burnt intercom incident and on Mr Henger's evidence also, the language that was used by Mr Jolly at the time (which Mr Jolly admits that he used) and also him throwing tools. Mr Jolly admits that he threw tools although he says they are his own and he merely threw them into the tool box. That is the dismissal which occurred and whether it was unfair, in my view, depends upon the reason for the intercom being burnt out.

4 It is Mr Henger's evidence that it was incorrectly wired by Mr Jolly. I have no reason not to accept Mr Henger's evidence. He was the person who oversaw its repair and its re-installation and he was cross-examined by Mr Jolly and in my view his evidence stood up to the cross-examination. Therefore, on the evidence that I have before me, even if Mr Jolly does not accept it himself, on the evidence that I have before me, the reason for the intercom being burnt out was that it was incorrectly wired by Mr Jolly. The evidence also is that the burning of the intercom was a serious matter in the sense that it took time for the repair to occur and as a result it had an adverse effect on the business of the employer. That is clear directly from Ms Mitchell's evidence and also indirectly from Mr Henger's evidence, he being aware that his business was not asked to tender for the balance of the fencing work. Therefore, Mr Jolly's action led to a serious detriment to his employer's business.

5 As to the bad language that was used, that then brings into focus when the dismissal occurred. I am not persuaded from all of the evidence that Mr Jolly's admitted bad language occurred after the dismissal. In my view, it occurred whilst he was still employed. My assessment of the evidence is that it is far more likely that Mr Jolly used the language that he did when Mr Henger said "it looks like you have burnt out the intercom and I want you to leave". That is in part because my understanding of the language that was used, deleting the expletives, was that Mr Jolly was upset that he was being accused of the fault and being blamed whenever anything went wrong. It therefore seems to me, on the evidence, likely that when Mr Henger said "it looks like you have burnt out the intercom", that is when Mr Jolly used the language that he did and I suspect also then threw the tools that he did.

6 I also tend to prefer Mr Henger's evidence that Mr Jolly was not dismissed at that time. I accept that Mr Henger telephoned Mrs Henger after the incident, as he and she have both described, and that it was during that conversation that Mr Henger stated that he wanted Mr Jolly to be given a week's notice. I do not think he would have said so had he already in his own mind dismissed Mr Jolly. Also, in my assessment there is the evidence from Ms Mitchell that she recalls Mr Henger saying that he had "sent Mr Jolly off" and I do not interpret her words to mean that Mr Henger was saying that he had dismissed Mr Jolly. So, on the evidence I find it far more likely that Mr Jolly was dismissed by Mrs Henger giving one week's notice to him when he returned to the workshop and the office.

7 In my assessment therefore, given the reason why the intercom was burnt out, the use of the bad language towards Mr Henger and the issue of the throwing of tools (whether his own or his employer's tools does not seem to matter to me, it was merely the gesture) then I think Mr Jolly would face great difficulty in showing that his dismissal was unfair.

8 Even if, as Mr Jolly alleges, it was a summary dismissal on the spot, then similarly I suspect it was not unfair if, on the evidence, it was Mr Jolly that burnt out the intercom through his actions together with the other parts of that particular incident.

9 I am also not persuaded, despite Attachment A, that Mr Jolly's contribution to the business was as good as he states and that is in part because of the evidence of the broken monitor in the workshop whilst Mr Jolly was wearing thongs. Even though he says there was no direct contribution of the thongs to his tripping over the cables, it is at the very least not helpful to Mr Jolly's argument that he was wearing thongs at the time even if he had a medical reason for doing so. The monitor was dragged off by him tripping on the cables and there is evidence of the two other faults which came to light after his dismissal.

10 In a matter of this nature when there is a claim of unfair dismissal, fairness is not just to be looked at from one side but rather it is a view of both sides and Mr Jolly has not persuaded me on the evidence that it was unfair to dismiss him when these things had occurred in the first weeks of his employment. So for those reasons Mr Jolly, I am going to dismiss your claim.

11 Order accordingly.

2002 WAIRC 04696

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MARK JOSEPH JOLLY, APPLICANT *v.* ABA AUTOMATIC GATES (W.A.), RESPONDENT
CORAM	COMMISSIONER A R BEECH
DELIVERED	WEDNESDAY, 23 JANUARY 2002
FILE NO.	APPLICATION 839 OF 2001
CITATION NO.	2002 WAIRC 04696

Result	Application alleging unfair dismissal dismissed.
Representation	
Applicant	Mr M. Jolly
Respondent	Mr D. Jones (as agent)

Order

HAVING HEARD Mr M. Jolly on his own behalf as the applicant and Mr D. Jones (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 dismissed.

(Sgd.) A. R. BEECH,
Commissioner.

[L.S.]

2002 WAIRC 04666

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	SUSAN MCCASKIE, APPLICANT
	v.
	JOBS SOUTH WEST, RESPONDENT
CORAM	COMMISSIONER S WOOD
DELIVERED	FRIDAY, 18 JANUARY 2002
FILE NO.	APPLICATION 871 OF 2001
CITATION NO.	2002 WAIRC 04666

Result	Application dismissed for want of jurisdiction
Representation	
Applicant	Mr G McCorry as agent
Respondent	Mr K Godfrey as agent

Reasons for Decision

1 This is an application made pursuant to section 29(1)(b)(i) of the *Industrial Relations Act, 1979* (the Act). The applicant Ms Susan McCaskie applied to the Commission on 22 May 2001 alleging that she was harshly, unfairly or oppressively terminated from her employment on 1 May 2001. The applicant at that time was employed by Jobs South West (the respondent) as a Senior Employment Consultant. The applicant in her claim stated, "I would be seeking compensation for all of the above which has cost me both physically, monetry & mentally"

2 In the notice of answer and counterproposal filed in the Commission on 5 June 2001, the respondent claimed that the Commission is without jurisdiction to deal with the matter as the applicant tendered her resignation and therefore no termination occurred at the initiative of the employer.

3 At hearing Mr McCorry, agent for the applicant, sought orders from the Commission that reinstatement was impracticable and that the respondent should pay to the applicant six months compensation being $24,922.00, comprised of the following amounts—

- $5,000 loss of salary per annum
- $10,000 loss of the use of a motor vehicle
- $7,762.50 loss of wages before reemployment of 9 weeks at the rate of $862.50 per week
- $17,160.00 additional motor vehicle expenses involved in the applicant travelling to her new employment ($110 per week multiplied by 156 weeks, the 3 year term of the new contract)

The figure used by the applicant for remuneration purposes was a salary of $44,850 per annum plus the use of the motor vehicle valued at $10,000 per annum, giving an annual package of $54,850. The claim for motor vehicle was later deleted leaving a claim for $22,425. The issue of whether Ms McCaskie's employment status was casual was not pursued at hearing by the respondent.

4 Evidence at the hearing was given by the applicant Ms Susan Anne McCaskie and on behalf of the respondent by Ms Alison Palmer, the Executive Officer and Mr Andrew Warren, the Employment Division Manager.

5 Ms McCaskie's evidence is that she commenced employment with Jobs South-West as a receptionist/administration officer. Her initial employment was as a casual and she was subsequently made an employment consultant. Her original contract is [Exhibit SAM1] and she says that there were no changes to that contract other than her pay increased and her job title and duties changed when she was promoted to senior employment consultant in May 2000.

6 In March 2001 she says that she was placed on casual employment by Mr Warren, her direct supervisor. He telephoned her to advise her that as there was no further funding from Government at that time, the business having filled the number of jobs allocated in their contract. She would have to change to casual until further funding (ie job placement targets) was received. Ms McCaskie says that her wage then increased to $23 per hour and her duties and hours (37.5 hours per week) remained the same. She says that past that date she was paid some sick leave and annual leave absences on entitlements which had accrued previously, but was not paid for public holidays.

7 Ms McCaskie's line of supervision was to Mr Warren, as employment director, and then to Ms Palmer. She says that her work relationship with Mr Warren was good and that she helped him learn the systems of Jobs South-West when he came in October 2000. Her work relationship with Ms Palmer was distant as she did not have much contact with her. Neither superior made any complaints to Ms McCaskie about her performance.

8 On 24 April 2001 Mr Warren asked Ms McCaskie to attend a meeting with Ms Palmer and himself at 4.00pm on 1 May 2001 to discuss some changes in the management of Jobs South West. She asked him, "Is it going to be constructive" and he replied, "I will make sure its constructive". She says she asked the question as he had not supplied much detail about the meeting.

9 Ms McCaskie says that she was called into Ms Palmer's office at 3.30 pm on 1 May 2001, and was told by Ms Palmer that they were going to discuss her performance. Ms McCaskie was asked to describe her duties as senior employment consultant. Ms McCaskie explained her duties, Ms Palmer agreed with the description and then Mr Warren stated that he had some difficulties with Ms McCaskie's performance. He accussed her of undermining his position as manager with other staff at some drinks following a meeting of employment consultants on 19 April 2001. Ms McCaskie says that she never attended such a meeting. At that time she had to be driven home from work by her partner due to a recent operation. She advised Mr Warren that she was not at the meeting.

10 Mr Warren also alleged that Ms McCaskie had wrongly submitted claims for job placements. She advised that the timing of the claims did not matter. He alleged also that she had missed two claims, but did not give her the details. He accused her of mistaking some interview dates. This was the same interview which Mr Warren had assisted her with that day and about which he had made no comment.

11 Ms McCaskie says that—

> "I got to a point where I didn't really feel that the meeting was going anywhere productive, so I made a comment and I said, "Is there anything constructive going to come out of this meeting?" which was my point at the beginning and I was told, "No, we were going to dismiss you today. You will leave today." (Transcript p16)

12 Ms McCaskie asked for her union representative, and she says Ms Palmer stated—

> "Well, you realise if you bring the union into this you'll have to disprove everything that we're saying here today and that could be hard. It would be better if you resigned because in the industry like this it would look better for you if you resigned."

Ms McCaskie said, "I don't want to resign. That would be a lie." (Transcript p16)

13 Ms McCaskie says that she was distraught, wanted to leave and was not permitted to do so, but finally they allowed her a ten minutes break in the office while they went outside and had a cigarette. She was crying and Mark Kain, another employment consultant, came in and asked what had happened. She told him she had been asked to resign or be sacked and he left when she indicated that there was nothing he could assist with.

14 On their return Ms Palmer ripped off a piece of paper and threw it across the table with a pen and dictated to Ms McCaskie a resignation statement for her to write and sign. She wrote it out, signed it but cannot remember whether she dated it. Mr Warren said they would pay her two weeks notice and provide a reference. She left the office, packed her goods and rang her partner to collect her. She says that she signed the letter under duress and because she wanted to get out of the room and wanted to leave as she was being treated like an animal not a human being.

15 Under cross-examination Ms McCaskie confirmed that her gross annual salary from 18 May 2000 to 28 February 2001 as a senior employment consultant was $35,723 [Exhibit R1]. As part of her responsibilities she had to control and monitor all job vacancies and claims through the integrated employment system.

16 On 31 January 2001 she had a discussion with Ms Danissa Konency, the Centre Manager of the Busselton branch of Jobs South West who said that she was giving Ms McCaskie a verbal warning. The warning was for Ms McCaskie to alter her behaviour relating to resolving her grievances through inappropriate means, which negatively reflected on staff attitudes and perpetuated incorrect information. Ms McCaskie did not think any of that was relevant and walked out of the room. Ms McCaskie says there were no other discussions or warnings about her performance other than a meeting with Penny Crittell on 3 November 1999 when she went through a list of items compiled by Jenny Cruickshank of tasks she had missed. Ms McCaskie went through these, crossed most out, initialled it to say that it was not true and that was the end of that.

17 She also had a meeting with Ms Palmer on 12 May 1999 where Ms Palmer complained that staff would leave the Busselton office due to the sub-culture forming there. Ms McCaskie asked that the problems be addressed to her and a meeting was to occur which never happened.

18 Ms McCaskie says that at the meeting on 1 May 2001 she was asked about staff follow-up and support to other staff, but not about time recording or lateness or previous formal warnings.

19 Ms McCaskie is currently employed as an Employment Consultant with Employment National in Bunbury. She has been in that position since 1 July 2001 and receives a salary of $39,000 per annum. She was not employed between the time of dismissal and this new job. She applied unsuccessfully for two jobs in Mandurah and two jobs in Perth as an employment consultant during this period. She received unemployment benefits totalling $760.

20 Ms Alison Palmer gave evidence that she has been the executive officer at Jobs South West since its inception, ie May 1998. She says that supervisors on several occasions brought to her attention serious concerns about Ms McCaskie's performance. These concerns related to—

> "…talking about other staff members in a derogatory way, undermining staff morale, issues about other people's performance, issues related to Sue's back-up and support of her other staff, basically not being there on time, not doing things, having late lunches, going out for hair appointments and getting her nails done. Things like that." (Transcript p38)

21 She says that Ms McCaskie was paid the casual equivalent of her salary as a senior employment consultant at the time of her departure and her remuneration did not include the use of a motor vehicle.

22 As to the meeting of 1 May 2001 Ms Palmer says that she was informed by Mr Warren of the meeting. He wanted her there and he intended to address a number of grievances about performance with her. She advised Ms McCaskie that the meeting was to discuss aspects of her performance and asked her to state what were her main duties. Ms McCaskie said she did her job very well and gave good support to other staff. Ms Palmer said she had had numerous complaints concerning Ms McCaskie and invited Mr Warren to comment. Mr Warren covered problems with time-keeping, lack of following procedure for claims for placements and the undermining of Mr Warren at a meeting of staff.

23 Ms Palmer says that Ms McCaskie became agitated and very upset. Ms McCaskie refuted any complaints about her. She refused to enter into any conversations about performance and preferred to talk about friendships within the organisation. She accused Ms Palmer of never liking her and told Mr Warren, "I thought you were my friend". Ms McCaskie denied being at the meeting of 19 April 2001 and Mr Warren said he would follow-up to get written statements from the other staff members. Ms McCaskie asked for legal or union representation, was granted her request and then declined to telephone anyone. Ms Palmer says that Mr Warren and she offered to stop the meeting and Ms McCaskie said she would continue with the meeting. Ms Palmer's evidence is—

> "We offered the opportunity to stop so she could call and see if her - - the person she wanted to be there could be there and she said, "No, it's all right. I'll continue on." So we did. Then I think Sue turned to Andy and said, "Are you going to dismiss me?" and Andy said, "It may come to that" or words to that effect. And at that point I said, "We have options" and I said to Sue that she also had options, one of which, of course, was the option to resign. I did say that she ought to consider her future; that it - - that her opportunities for future employment may be better that way. (Transcript p.45)

24 Ms Palmer says the applicant asked for some time to think about things and Mr Warren and Mr Palmer agreed to leave her for 10 to 15 minutes. They saw Mr Kain speaking to Ms McCaskie but could not hear the conversation. When they returned to the office Ms McCaskie said, "Okay, then I'll resign". Ms McCaskie said she did not know how to resign. Ms Palmer says that she told her the procedure but did not dictate the words. Ms Palmer read the resignation, accepted it and asked Ms McCaskie to pack up her belongings and leave.

25 Mr Warren suggested that Ms McCaskie be paid for two weeks in lieu of notice. Ms Palmer says that she did not intend to dismiss Ms McCaskie at the meeting; her intention was to investigate the complaints concerning the staff meeting and the incorrect claims. She was to go through the grievance procedure and there was to be a further investigation.

26 Ms Palmer says that she made notes of the meeting that night. The meeting lasted over two hours until almost 6pm. Ms McCaskie was told by Ms Palmer that she wanted to know by the end of the day what her choice was concerning the options outlined to her; one of the options was that Ms McCaskie be suspended pending further investigation.

27 Mr Andrew Warren, the employment division manager for Jobs South West, gave evidence that he was Ms McCaskie's direct supervisor from October 2000 until 1 May 2001. He arranged the meeting with Ms McCaskie and Ms Palmer and advised Ms McCaskie that it concerned performance matters. At the meeting on 1 May 2001 Ms Palmer advised Ms McCaskie as to the intent of the meeting, asked about her duties and about her dealings with other staff. Mr Warren then spoke to Ms McCaskie about timekeeping and his concerns about a meeting of staff. Ms McCaskie said that she was not present at that meeting and Mr Warren stated that he would investigate further with other staff. He then discussed the placement claim procedure and produced printouts from the system. Ms McCaskie did not respond to much that was put to her and became fairly upset. The applicant said that she wanted a representative present but then declined when advised that the meeting could be adjourned for her to obtain representation. Ms McCaskie asked for time to think about resigning. Ms Palmer and Mr Warren left the room for 15 minutes and Mr Kain joined Ms McCaskie for about 5 minutes. On return to the office Ms McCaskie said that she had decided she would resign. Ms Palmer gave the applicant some advice on resigning but did not dictate the words.

28 Mr Warren says that there was no intention to dismiss Ms McCaskie. He had intended to undertake further investigation and perhaps disciplinary action. Mr Warren made a list of items to go through at the meeting and then made a detailed note of the meeting that night which he typed the next day. Mr Warren says that none of the three issues that were discussed with Ms McCaskie were dismissible offences either taken separately or together.

29 I doubt the reliability of Ms McCaskie's evidence especially, in her view, the absence of any real, legitimate complaint about her performance. Her own evidence on this was at best reluctant and at times contradictory. Under re-examination Ms McCaskie had recall of a meeting with Ms Konency on 16 February 2001 which she previously denied had occurred. Her evidence was that staff had no confidence in Ms Konency as Centre Manager. She gave evidence that she had little to do with Ms Palmer, yet she also said under cross-examination that Ms Palmer, in relation to a job matching reconciliation task that she says was making her physically sick, "still kept pounding them into me and telling me I had to do them". Ms Palmer gave evidence that there was not much contact between Ms McCaskie and her. I was left with little confidence in Ms McCaskie's evidence.

30 I have greater confidence in the evidence given by Ms Palmer and Mr Warren. Mr Warren says that he suffers from short-term memory loss and did not recall various details. My impression of his evidence is that he on occasion did not understand the question put to him and hesitated in that respect. Nevertheless I have confidence that the account he gave of the meeting was reliable and accurate from his perspective. I also consider that Ms Palmer gave a direct and credible account of matters from her point of view. I would prefer the evidence of Ms Palmer and Mr Warren to that of the applicant.

31 The matter rests on who terminated the contract of employment (*Attorney General v Western Australian Prison Officer's Union* 75 WAIG 3166). Did Ms McCaskie resign or did the respondent effect the termination under duress by having Ms McCaskie write out her letter of resignation? The only evidence brought forward is that of the three members of staff who attended the interview. The other person who could have given evidence was apparently Mr Kain who was not called to give evidence. The evidence of Ms McCaskie is that she was under such pressure, and simply wanted to get out of the room, that she wrote out a letter of resignation dictated to her by Ms Palmer. I take from her evidence that on a number of occasions previously, when other supervisors had raised queries with her about her work, she was not so reticent. She had variously corrected a list of complaints, queried whether a written or formal warning was given and on more than one occasion walked out of the discussion. In her evidence she was somewhat dismissive of any previous attempts to query her work. I did not get the impression that she was easily pressured, rather my impression from her evidence was that she was perfectly capable of expressing her opinion and sticking up for herself. My impression also was that her approach to criticism was to deny faults in her work or attitude and to blame others.

32 In short form I find that Ms McCaskie resigned her employment at the meeting of 1 May 2001 and was not dismissed by the employer or constructively dismissed (as covered in the respondent's submissions). She was not pushed from her job. I consider this to be the more probable scenario for the following reasons. I find as follows. Mr Warren and Ms Palmer clearly had performance issues with Ms McCaskie and established a meeting to address these. Ms McCaskie may not have been aware of the detail of these concerns but was aware in my view that the discussion was to be about her performance. Ms McCaskie was counselled on previous occasions about her attitude to staff and handling of job placement claims. Her attitude at the meeting on 1 May 2001, as had occurred previously was to deny or fail to address the concerns. Ms McCaskie became very upset at the challenge to her performance. Mr Warren was to undertake further investigation of other staff. The investigation was to determine whether Ms McCaskie attended an earlier meeting of staff and spoke so as to undermine Mr Warren's authority. Ms McCaskie wanted to know what were her options and was advised by Ms Palmer that one option was to resign. Alternatively, she was to be suspended pending further investigation. Ms McCaskie was to provide an answer that day. Ms McCaskie asked for a break in the meeting to consider her position, was granted a break, spoke to Mr Kain and decided to resign. I can only speculate as to why Ms McCaskie chose that course and I expect that it is because she did not want further investigation. Her evidence is that she was under duress, had little choice other than to resign or be sacked that day and I simply do not accept this as plausible. Her suspension and further investigation was to be undertaken.

33 Ms McCaskie did not give me the impression that she was easily pressured, either from the direct evidence she gave as to how she treated earlier discussions about performance or from viewing her give evidence. I have little doubt that she could deal with such a meeting quite competently, albeit she was upset at that meeting. Likewise Mr Warren in particular did not leave me with an impression of someone drawn to pressurising one of his staff to resign. Similarly I do not accept as plausible the evidence of Ms McCaskie that Ms Palmer dictated the words of what was a very simple resignation letter to Ms McCaskie for her to simply passively accept and write out. Again if Ms McCaskie's motivation at that point was to get out of the room she could just have left. I do not accept either that if she did not present the letter then and there that she was going to be dismissed. Mr Warren gave very credible evidence, consistent with that of Ms Palmer, that he wanted to check with other staff Ms McCaskie's claim that she had not attended the staff discussion on 19 April 2001 and that the problems encountered with Ms McCaskie were not dismissible matters. Ms Palmer had a potentially different view.

34 Mr McCorry on behalf of the applicant sought to challenge the conduct of the respondent's case for what he says was the failure to produce contemporaneous notes. He says that this should bring into doubt the reliability of the notes and the witnesses. Further he maintains that Ms Palmer read from the notes [Exhibit AP2] in giving her evidence in chief. None of these contentions have any substance. Ms Palmer's evidence is consistent with [Exhibit AP2]. Leaving aside the fact that she referred to these notes during her evidence but did not read from them, she was prevented by the Commission from further referring to them. There was no reluctance by the respondent to produce the notes and there was no verbatim report of the notes. Indeed the sequence of events in the notes and Ms Palmer's evidence vary somewhat, but not for any matter of significance. Discovery of documents was not pursued by the applicant prior to hearing and in the case of Mr Warren was not followed up at the hearing. The applicant did not object to Ms Palmer's notes being tendered as an exhibit and then sought to

rely on them. It is understandable why, as they would form the strongest part of the applicant's case if parts were read in isolation. Put simply Ms Palmer states that she put Ms McCaskie on notice that she could not remain in her position, she presented the option to resign and wanted an answer that day. In other words Ms McCaskie was in a difficult situation. I consider [Exhibit AP2] to be a reliable account of what transpired at the meeting of 1 May 2001. Read in its full context it leads me also to the conclusion that it was Ms McCaskie who terminated the contract of employment. The notes also include the following in reference to Ms McCaskie—

> "Sue was indicating signs of being both tearful and angry; however, there was little by way of disputing the evidence before her, rather all responses were centred towards either blaming other staff of deflecting the issue away from the evidence in favour of trying to point the problems to issues of personal relationships."

My assessment of Ms McCaskie's evidence leaves me with the same impression.

35 Mr McCorry also submits that the respondent failed to put much of the case against McCaskie to her in their questioning and hence offended the principle in *Browne v Dunn [1894]* 6 R 67. This argument has no real substance in my view. Finally, it is said on behalf of the applicant that the discipline procedure contained in paragraphs 20 and 22 of the applicant's contract was not followed. The applicant was not given written notice of the intention to initiate disciplinary procedures or the substance of the grievances. This submission has merit in that neither Ms Palmer nor Mr Warren followed the correct procedure as stipulated in the contract. The respondent did not really challenge this, but it is but one factor to consider. I balance this against the fact that in my view Ms McCaskie knew that the meeting with Ms Palmer and Mr Warren was to discuss her performance and did not challenge the process in the course of the discussion, she simply rejected the claims of her supervisors. I do not find that this lack of application of the contract of itself sufficient to somehow then conclude that there was a dismissal and that dismissal was unfair. That would be, in my view, a wrong conclusion from the facts of the meeting.

36 Given my conclusion that Ms McCaskie resigned her employment of her own volition I would dismiss the application for want of prosecution.

2002 WAIRC 04667

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	SUSAN MCCASKIE, APPLICANT
	v.
	JOBS SOUTH WEST, RESPONDENT
CORAM	COMMISSIONER S WOOD
DELIVERED	FRIDAY, 18 JANUARY 2002
FILE NO.	APPLICATION 871 OF 2001
CITATION NO.	2002 WAIRC 04667

Result	Application dismissed for want of jurisdiction
Representation	
Applicant	Mr G McCorry as agent
Respondent	Mr K Godfrey as agent

Order

HAVING heard Mr G McCorry on behalf of the applicant and Mr K Godfrey 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.

2002 WAIRC 04613

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	JENNIFER SUSAN MONTEITH, APPLICANT
	v.
	SARUMAN HOLDINGS PTY LTD, VALHALLA HOLDINGS PTY LTD TRADING AS OCEANUS RESTAURANT, RESPONDENT
CORAM	COMMISSIONER S WOOD
DELIVERED	FRIDAY, 11 JANUARY 2002
FILE NO.	APPLICATION 1285 OF 2001
CITATION NO.	2002 WAIRC 04613

Result	Application dismissed
Representation	
Applicant	Mr T Lyons of Counsel
Respondent	Ms K Vernon of Counsel

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 Ms Jennifer Monteith alleges that she was dismissed unfairly on 14 June 2001 by Mr Michael Cutler, a director of Saruman Holdings, one of the respondent companies. The parties are in dispute about a number of issues but the key issues being the commencement date of Ms Monteith's employment, her employment status at time of termination (ie whether she was casual or full time) and whether she effectively resigned or was dismissed.

2 The respondents operate a new restaurant venture, Oceanus at City Beach, which opened formally on 24 May 2001. Prior to that date it had been trading since 3 May 2001 and it had catered for a wedding on 24 April 2001. The applicant says she was employed in February 2001 as the Restaurant Manager on a package of $50,000 per year. The package included $45,000 per annum in salary, $5000 per annum for food and beverage expenses and superannuation. The applicant says she was involved heavily in the setting up of the restaurant as she was approached by Mr Cutler in January 2001 to assist with the new venture. Co-owners of the new venture were Tom and Helen Galopoulos, who were directors of the other respondent company, Valhalla Holdings. Ms Monteith says she met Mr Galopoulos in late January early February at Oceanus. He showed her around the site. Mr Galopoulos went overseas in late May 2001 and following his departure conflict arose between Mrs Galopoulos and the applicant which, at the applicant's request, finally led to a meeting of the directors of the respondent companies on 14 June 2001, following which the applicant's services were terminated.

3 The applicant's evidence is that she shared a restaurant venture with Mr Cutler between 1992 and 2000. It is on the basis of this relationship that he approached her in January 2001 to assist with the Oceanus restaurant. She was involved in writing advertisements, hiring staff, writing an induction manual and assistance with a wide range of tasks in setting up the restaurant. These tasks included meeting with the interior designer to view tiles, tables, carpets and furnishings. In conjunction with Mrs Galopoulos the applicant went shopping for equipment for the restaurant. On 26 March 2001 having worked for the respondent and not received any monies, she asked Mr Cutler for payment. It was agreed she would be paid $400 per week, then and a salary of $45,000 per annum from the time the restaurant opened. She says as a result of the engagement of the Executive Chef, Mr Andrew Main and his salary being $55,000 she queried Mr Cutler about her salary and was advised that it would be reviewed 3-6 months from commencement of the restaurant.

4 Ms Monteith discussed her title with Mr Cutler which had been Restaurant Manager/Operations Manager. She says on the week of the opening Mr Cutler suggested she be called Restaurant Manager as Operations Manager did not sound appropriate. He was the General Manager of the restaurant. Her position was to be full time and it was not to be a probationary appointment. The restaurant, on formal opening, traded very well and she worked long hours, six days a week. On Sunday, 28 May 2001 she was due at the restaurant at 11am, could not attend due to her son, and arrived late at approximately noon. She rang to advise Mr Galopoulos of this. On that day she says she had a heated exchange with Mr Cutler as certain things had not been done due to her late arrival. The next day she met with Mr Galopoulos and Mr Cutler to discuss the issue. The applicant says Mr Galopoulos showed her a letter that had been written to a staff member at another business (presumably owned by him) and told Ms Monteith she could not be late. She was offended by this as she says she had worked very long hours and thought his comment was unfair. Apart from this exchange she says the meeting was a normal meeting to discuss the operations of the restaurant.

5 Following Mr Galopoulos' departure overseas, Ms Monteith says that her relationship with Mrs Galopoulos deteriorated. Her relationship with Mr Galopoulos she says had been "absolutely fine". Mrs Galopoulos increased her attendance at the restaurant and she seemed to ignore Ms Monteith. On one occasion Mrs Galopoulos had a guest with her, Vince, and in front of the applicant discussed aspects of the applicant's job with Vince to Ms Monteith's embarrassment. The tenor of this evidence is that Mrs Galopoulos was critical of Ms Monteith, which she found strange, as Vince was very positive about the restaurant. Ms Monteith says that Mrs Galopoulos avoided her and she was not clear as to why. The applicant says she approached Mrs Galopoulos to discuss the issue. Her reply was that she was not here to make friends. Mrs Galopoulos complained to the applicant that things were not being completed.

6 Ms Monteith says she raised daily with Mr Cutler the problems she was incurring with Mrs Galopoulos. Mr Cutler was very busy and did not address the issue however, staff were starting to notice and the applicant decided she wanted resolution of the issue. She asked Mr Cutler to call a meeting between Mrs Galopoulos, Mr Arthur Glassby (who at that stage was a director of Valhalla) and himself. At the conclusion of a one hour meeting, Mrs Galopoulos and Mr Glassby walked passed the applicant who was on the floor of the restaurant. The applicant went to see Mr Cutler to ascertain what had been said. Ms Monteith commented that "she doesn't want me here", and Mr Cutler replied, "yes". He stated that Mrs Galopoulos had lost confidence in the applicant and he did not know why but it was personal. Ms Monteith says that Mr Cutler was upset and said that he was sorry. Mr Cutler and Ms Monteith then sat in the restaurant, shared a bottle of wine and had a discussion for about two hours.

7 The week before the termination Ms Monteith said she spoke with Mr Cutler about making changes to her hours. She worked Wednesday to Sunday and attempted to have Monday and Tuesday off. She wanted Sunday off to spend time with her 14 year old son. She says she had been working long hours as the restaurant was very busy. Ms Monteith says that nothing was resolved from the discussion with Mr Cutler, Mr Cutler did mention casual employment but nothing was agreed.

8 Ms Monteith says that after her dismissal she was shell shocked for eight weeks. In August 2001 she registered with Integrated Employment, a placement agency. She found it difficult to gain employment. She secured 3 days employment through this agency. In September 2001 she applied for a job as Events Co-ordinator at Burswood Casino and was not successful. She also registered with another employment agency as she did not believe the previous agency had been very useful.

9 Ms Monteith gave evidence that she had not seen the payroll advice [Exhibit JSM 8] prior to the hearing. She could not really explain the payments contained therein. She says on 26 June 2001 Mr Cutler rang her to see whether she had received payment for two weeks notice and some other monies. She received an abusive call from Mr Galopoulos on 17 July 2001. Mr Cutler followed up with a call and there was an exchange of correspondence [Exhibit JSM 5]. Mr Cutler delivered the letter to Ms Monteith in person.

10 Under cross-examination the applicant says that she wrote her own job description [Exhibit R1]. She denies that when she was employed by Mr Cutler he said that she would not get wages until the restaurant opened. She denies that Mr Galopoulos ever told her that she was subject to three months probation. She commenced discussions with Mr Cutler about the restaurant in January 2001 and believes her employment started about 13 February 2001. She cannot recall when Mr Galopoulos said that she had the job. She says it would have been before 17 February 2001. She denies that she started work when she commenced doing the interviews for floor staff. She denies that she agreed to be casual in discussion on 10 June 2001. She did not want to reduce her hours, she wanted to change her hours so that she could spend one Sunday with her son. She denies saying to Mr Cutler that if everyone was unhappy then she would leave. She denies that Mr Cutler said to her on the evening of 14 June 2001 that they had accepted her offer to resign. She spent about two hours discussing matters with Mr Cutler over a bottle of wine. She must have referred to Mrs Galopoulos as a "fucking bitch" and said, "doesn't she know how much I have done".

11 Ms Monteith gave evidence about receiving single parent benefit with a family supplement. She says she called Centrelink in May 2001 to advise them she had full time employment and hence to cease the payment. She believes she may have to repay some money.

12 The evidence of Mr Cutler is that he became interested in the restaurant venture in January 2001 and assisted with the tender process. In February 2001 he decided he was in a position to take a financial stake in the venture and hence began as General Manager. He had been a partner with Ms Monteith in Vultures Restaurant. That partnership ceased on 30 June 2000. He approached the applicant in January 2001 and discussed her possible involvement in Oceanus Restaurant. In the week of 13 February 2001 he says he discussed with Ms Monteith her employment. He says both companies agreed some two weeks later to employ her, and her duties were agreed in principle as per the job description. Salary was agreed at $45,000 per annum to be reviewed after 3 months and to commence when the restaurant opened. At that stage they did not know the date of the opening. The applicant prior to the opening, rendered some assistance on a day to day basis and it was fairly unstructured. All final decisions were made by Mr Galopoulos or Mr Cutler. Ms Monteith did the interviews for the floor staff. Mr Cutler did the interviews for the kitchen staff. They together interviewed one of the applicants for Executive Chef. He agreed to pay her for four weeks prior to the opening at $500 per week. This was a gross figure and he says the figures in [Exhibit JSM8] are wrong. He says the accountant made a mistake and paid the applicant $500 net. He wrote a cheque for her for $800 out of his own account being two weeks payment. He took $100 out per week for tax. The restaurant traded 7 days a week from 10am until the last customer. They tended to give staff two consecutive days off. Mrs Galopoulos helped around the restaurant and did PR work talking to customers as did Mr Galopoulos.

13 Mr Cutler says Ms Monteith approached him regarding problems with hours and duties. The restaurant was very busy at that time and Ms Monteith had difficulty completing the rosters. Mr Cutler took these over. Ms Monteith's concerns about her wages were largely not acted upon by Mr Cutler as he was too busy. The matter of salary was eventually discussed and Ms Monteith agreed to leave it for 3 months. In relation to Ms Monteith's concern about weekend work, he just 'ran with it' as the restaurant was too busy and could not do much about it. He says Ms Monteith battled to perform her duties adequately. However, no director indicated to him that they had a problem with the applicant. Ms Monteith averaged about 50 hours per week. In the final week Ms Monteith went on casual wages. She had approached him the week before regarding her ability to do the job at the level required in terms of hours and weekend work. He says Ms Monteith suggested she go on casual and she would help Mr Cutler out with the shifts. Mr Cutler agreed to this.

14 Ms Monteith asked Mr Cutler to organise the meeting with Mrs Galopoulos and Mr Glassby. The applicant was not to attend. He says Ms Monteith had made it clear to him that she was happy to leave if everyone was not happy with her. At that meeting on 14 June 2001 with Mrs Galopoulos, Mr Glassby and Mr Cutler, they discussed whether the applicant was coping and decided to take up the applicant's offer to leave. Mr Cutler says following that meeting he wanted to collect his thoughts and make some notes prior to talking to the applicant. Ms Monteith, he says, stormed through the door and asked him what had happened. Mr Cutler said it was not good news, they had lost confidence in her ability to do the job and she could not continue. Mr Cutler says that Ms Monteith was very angry, swearing and abusing Mrs Galopoulos. Mr Cutler embraced her and said he was sorry; they went to the restaurant and shared a bottle of wine. He decided it was best for applicant not to continue working.

15 At the meeting with Mrs Galopoulos and Mr Glassby they discussed paying the applicant holiday pay and three weeks for her initial work at $500 per week plus some reimbursement for candles. He did not intend to dismiss the applicant and had not decided to dismiss her.

16 He says the letter which he had delivered to the applicant [Exhibit JSM 6] is an accurate record of what happened.

17 Mr Cutler says any duties that Ms Monteith performed between 13 February 2001 and 26 March 2001 were purely because she was interested. Her first payments for salary were made on 6 May 2001 and were backdated for two weeks to cover the wedding of 22 April 2001. Ms Monteith asked initially for $50,000 in salary. Mr Cutler after discussion with Mr Glassby advised her that she would be paid $45,000. This was to be paid when the restaurant opened. The initial wedding was a success. They commenced a "soft opening" on 3 May 2001 and commenced formal opening on 24 May 2001 and were trading successfully.

18 Mr Cutler says Ms Monteith asked him, via the meeting of 14 June 2001, to find out whether the problem with Mrs Galopoulos was resolvable and whether she should stay on. He did not know whether Ms Monteith knew what the problem was and he did not know what it was. The directors discussed whether Ms Monteith was coping and whether she could cope in the future. Mrs Galopoulos said that the applicant was stressed and staff and clients had commented on it. Mr Cutler says that staff and clients had not commented in similar terms to him. They discussed the applicant's decision to go casual and had concerns about hours and her unhappiness with the salary package. Her dress standards were mentioned as a concern of Mr and Mrs Galopoulos. They reached a decision that the applicant did not want to continue and accepted that offer.

19 Mr Cutler says he did not have a problem with Ms Monteith although parts of her performance were good and parts were not. Under cross-examination he says that he did not approach the applicant immediately after the directors discussion on 14 June 2001 as he wanted to get his facts together. He says the applicant knew that she might not have a job anymore. He was not looking forward to talking to her. The purpose of the meeting was to see whether the differences were resolvable. He thought Ms Monteith was upset when he advised her of the result of the meeting as the reality of the situation had set in. The decision to accept her offer had been made and the applicant had told him that she would accept the decision. He says her agreement to work casual was from 10 June 2001. He says Ms Monteith worked the Wednesday and Thursday of the following week as a casual.

20 Evidence was given by Mrs Galopoulos that she used to do the banking and help out where she could behind the bar and by talking to customers and the like. She used to go to the restaurant most days and when Mr Galopoulos went overseas she went more frequently. Mr Galopoulos and she had concerns about the applicant and discussed these with each other. She did go shopping with Ms Monteith on one occasion for equipment for the restaurant. Mrs Galopoulos gave evidence that the Sunday prior to 14 June 2001, the applicant approached her and asked how she had performed that day. Mrs Galopoulos said that they were busy yet the applicant remained at a table talking to her friends. She says the applicant indicated that if Mrs Galopoulos was not happy then she would leave. Mrs Galopoulos said the applicant never asked to discuss any problems with her and she would have discussed these if asked. She did have a discussion with the applicant on one day when she expressed the view that she was there to run the restaurant not to make friends. Mrs Galopoulos said that Mr Galopoulos asked her to keep an eye on Ms Monteith whilst he was away overseas. Mr Cutler called the meeting because Ms Monteith had asked him to ascertain the problem. Mrs Galopoulos says that Mr Cutler indicated the applicant had said that she would go if they wanted her to. She says if they had not had this offer they would not have dismissed her. In relation to the discussion with Vince she does not recall discussing the applicant's performance with Vince. She felt the applicant was not coping well with the restaurant. She thought Ms Monteith was a fairly intense person. She was happy with the applicant's performance at the wedding and had given her a gift to say thank you.

21 The evidence of Mr Glassby was that he was a retired bank officer having spent 42 years in banking most lately as Senior Manager in Bankwest. At the time of discussion on 14 June 2001 he was a director of Valhalla as Mr Galopoulos was overseas. He assisted Mr and Mrs Galopoulos with their businesses and with advice on staffing. He says the meeting on 14 June 2001 was called to discuss the applicant's position and other minor matters. He was advised of the meeting by Mrs Galopoulos, she asked him to attend. At the meeting Mr Cutler said that Ms Monteith had asked for the meeting to discuss matters regarding her performance. If her performance was questioned she would resign. He says Ms Monteith had asked to go on to casual staff. They decided to accept her resignation. He says she would not have been terminated otherwise.

22 Under cross-examination Mr Glassby said the deliberations were based on what Mr Cutler had advised. He says he did not know about Ms Monteith's performance and was not in a position to assess it. He says they did not want her even as a casual on reduced hours as she was prepared to leave. He suggested that she be paid 3 weeks for her earlier work as a gesture.

23 This matter depends in part on credibility of witnesses and in part on inferences to be drawn from the evidence. I do not have a difficulty with the evidence given by Mr Glassby. He was quite straightforward and his evidence in brief is that he relied upon what Mr Cutler put to him. Mrs Galopoulos I would describe as cautious in giving her evidence, she appeared reserved albeit credible. I have difficulty though with the evidence of both Ms Monteith and Mr Cutler. In both cases my overriding impression is that they did not provide a full and frank account on what had occurred in their discussions. Both at times appeared reluctant to the point of being evasive on occasion.

24 In addressing the issues of contention between the parties, I go firstly to the issue of probation. I find it highly improbable that Ms Monteith was put on any formal probation. The common evidence is that Ms Monteith and Mr Cutler had a good partnership in Vultures restaurant for approximately 8 years. This ceased on 30 June 2000. On Mr Cutler's evidence he struck the employment relationship with Ms Monteith albeit he had to discuss it with Mr Galopoulos. He approached her in January 2001 and discussed the new restaurant venture. The prospect of a position started to firm in mid February. Whilst Ms Monteith was not working full time for the restaurant she did a range of tasks including hiring all the floor staff. She was paid $800 by Mr Cutler for work she had performed. The whole tenor of the way the matters developed is inconsistent with an offer of probationary employment. Mr Cutler sought out Ms Monteith, he knew her capabilities, she was assisting of her own volition, work that she performed was later paid for as wages on two occasions, and Mr Galopoulos confirmed with Ms Monteith that she had the job. However, against this backdrop the respondent would have the Commission believe that Ms Monteith was placed on 3 months probation to test her worth and suitability. I would add that my impression of Ms Monteith is that such a suggestion to her would have been offensive. This is not her evidence. Her evidence is that probation was not discussed. However, she clearly had a great interest in the restaurant, was clearly involved in its set-up and was keen to take a management position in the restaurant in concert with Mr Cutler. Mr Cutler in his evidence did not mention probation or a probationary period. He mentioned a review of salary after three months. I do not find that Ms Monteith was on probationary employment.

25 Of concern also is a variation of dates supplied by the respondent. Albeit the employment relationship was loose as a new venture was being commenced. Mr Cutler's evidence is that Ms Monteith really commenced employment when she commenced interviews for the floor staff. Counsel for the respondent says that employment commenced in about mid April and hence the applicant would have still been under probationary employment. Payments outlined in [Exhibit JSM 8] would take payment of wages back four weeks from 27 April 2001, that is 30 March 2001. Mr Glassby says that Ms Monteith was paid an extra 3 weeks for her earlier work. This would seemly take the payment back to 9 March 2001. Mr Cutler paid Ms Monteith 2 weeks wages out of his own account. This would take the payment back to 23 February 2001. These payment arrangements have also caused me to greatly doubt that any probationary period was ever instituted. I do not make any finding as to the actual commencement date of employment, which clearly was not full time initially and later became so. What date this occurred is simply unclear.

26 The next issue is the issue of Ms Monteith's status of employment at the time of termination. The respondent says she was casual. This arrangement was made approximately 10 June 2001. Mr Cutler says he remembers the discussion being on a Wednesday. He is quite clear about this, the rosters having already been made and could not be changed. The rosters were made a week in advance. The 10th day of June 2001 was a Sunday. Ms Monteith did not work the Monday or Tuesday. She worked the Wednesday and Thursday. All the evidence is the restaurant was very busy at that time. Mr Cutler says they tried to give staff two consecutive days off. This did not necessarily happen. Ms Monteith wanted time on a Sunday to see her son. She was also jaded by being criticised for turning up an hour late to work on a Sunday when she had been putting in considerable hours. Mr Cutler had discussed her concerns with her and as they were busy he let these concerns "ride". He then says there was an agreement made for her to go casual. This was to reduce her hours and pay her at $16 per hour the same as the supervisors. Given Mr Cutler's evidence that Ms Monteith worked for about 50 hours per week and on a salary of about $45,000, this would have effectively reduced Ms Monteith's hourly rate by about $1.30 and also reduced her status. Once again I consider this highly improbable. Having witnessed Ms Monteith give evidence I do not believe she would have agreed to a reduction in status and payment. Put differently I do not find that the change of contract to casual was agreed, albeit casual employment was mentioned. The payment for casual hours was only instituted after the applicant's employment ceased. She is said to have worked 11 hours as a casual.

27 The key point in contention is whether the applicant resigned her employment or her services were terminated. The respondent on all the evidence says they took the decision to accept her offer to resign. But for that offer they would not have terminated her services. The evidence of Mrs Galopoulos and Mr Glassby is that Mr Cutler advised them that Ms Monteith had offered to leave if they were not happy with her. The context of this being if the apparent grievance that Mrs Galopoulos had with Ms Monteith could not be resolved she would leave. Mrs Galopoulos also gave direct evidence that Ms Monteith had advised her directly at one point that she would leave if so desired. I have taken no account of this as it was a matter of clear significance that was not put to Ms Monteith under cross-examination. Likewise I denied the submission of counsel for the respondent to recall Ms Monteith to have that matter put to her. Whether this was due to oversight by counsel or otherwise may be relevant. However, Ms Monteith gave clear evidence that she did not offer to resign albeit she had written a resignation letter at one stage but had not given it to the respondent.

28 The central point in my view is that Mr Cutler conveyed to the meeting that Ms Monteith had said to him that if the directors or Mrs Galopoulos were not happy with her then she was quite happy to leave of her own accord (Transcript p.71a). In the meeting that followed between Mr Cutler and Ms Monteith it is Mr Cutler's evidence that he said, in response to Ms Monteith's query as to what happened that—

> "Jen, it's not good news. Basically, the group have lost confidence in your ability to manage the restaurant and the decision has been made that we don't think you can do that anymore." (Transcript p.72)

This drew a very angry response from Ms Monteith. The focus of her anger being Mrs Galopoulos.

29 At the earlier meeting involving Mr Cutler, Mrs Galopoulos and Mr Glassby, Mr Cutler says that it was decided that—

> "we felt that Jen wasn't going to continue in the role, had decided that she didn't want to continue in the role and probably wasn't capable of continuing ongoing employment because of her inability to do the job." (Transcript p.89)

30 Yet Mr Cutler indicated that he did not have any problems with her and that the directors had not indicated previously that they had any problems with her. He says that Ms Monteith knew that a possible outcome from that meeting was that she might not have a job. He was not looking forward to having the discussion with her. Ms Monteith after that meeting did not have a choice to stay on. Mr Cutler describes the decision to leave as mutual.

31 The issue of whether Ms Monteith offered to resign is separate and distinct from whether she did in fact resign. The evidence leads to a finding that it was the employer's decision to terminate the services of Ms Monteith. In other words the employer dismissed Ms Monteith. The directors of the two respondent companies took a clear decision that her employment was not to continue. That is the evidence of all witnesses for the respondent. Their evidence is not that Ms Monteith tendered her resignation and left. It is that Ms Monteith would leave if they decided that she should. I find on this basis that Ms Monteith was dismissed by Mr Cutler.

32 The next issue is whether Ms Monteith offered to resign. I find that she did offer to resign. To find otherwise I would have to conclude that all witnesses for the respondent have concocted this point as a defence to the claim for unfair dismissal. This would sit directly at odds with my view of the credibility of Mr Glassby and Mrs Galopoulos, in particular Mr Glassby's evidence. Alternatively, I would have to conclude that Mr Cutler misled his fellow directors at their meeting on 14 June 2001. I can find no persuasive reason for adopting such a view. I accept Mr Cutler's evidence in preference to Ms Monteith's evidence in that respect. It seems more probable to me that such an offer was made by Ms Monteith. I find his evidence to be more probable against a backdrop where Ms Monteith had previously considered resigning, she had difficulties with the hours of work, she was unhappy about her salary, she was unhappy about Mrs Galopoulos and she had approached Mr Cutler on a number of occasions with her complaints. Equally, my clear impression of Ms Monteith is that she was keen to affirm her importance and work at the restaurant as a professional restaurant manager and took some affront at Ms Galopoulos' interference. Finally she asked Mr Cutler to arrange the meeting to address her concerns about Mrs Galopoulos and on this occasion he acted on her request. Against that backdrop I find it hard to accept Ms Monteith's evidence over that of Mr Cutler and I find that she did offer to leave if the directors decided that she should.

33 It is true that this offer to leave was not the sole reason for the directors deciding that Ms Monteith's employment could not continue, but their evidence was that it was a pivotal reason. Mr Cutler and Mrs Galopoulos had concerns about Ms Monteith's performance and these were largely not addressed with Ms Monteith or mentioned. It is equally true that these privately held concerns were not the driving force behind the discussion of Ms Monteith's future. They became a factor upon Ms Monteith's desire for a meeting to resolve the problem she encountered with Mrs Galopoulos. They were part of the consideration by the directors along with Ms Monteith's offer to depart. On the basis of all of those factors the directors decided it was in the best interests of the business that Ms Monteith leave.

34 There having been a termination of employment by the employer the test for the Commission to apply is well known. In *Undercliffe Nursing Home –v- Federated Miscellaneous Workers' Union of Australia, Hospital, Service and Miscellaneous, WA Branch* 65 WAIG 385 the principle of a fair go all round is adopted and applies to the employer and the employee. It is clear in my mind that, but for the actions of Ms Monteith in offering to leave her employment and in demanding the meeting to address the problem she perceived existed with Mrs Galopoulos, Ms Monteith's employment would not have been terminated at that time. This is the consistent evidence of the witnesses for the respondent and I accept this point. It may be that her employment may not have lasted much longer anyway, either through a resignation by her or action by the employer; as on the evidence of Mr Cutler he was not content with her performance. Clearly if Mr Cutler acted to terminate Ms Monteith's employment based on concerns over inadequate performance without having first discussed this with her, there would be a difficulty. These are not the actual circumstances though; he acted at Ms Monteith's behest.

35 In terms of what actually happened the two key matters in my mind are that the employer decided the employment of Ms Monteith should end; therefore she was dismissed and did not effect her own resignation. Secondly, but for her own actions in offering to leave and seeking the meeting she would not have lost her employment at that time. In these circumstances I consider it difficult to then substantiate a claim for harsh, oppressive or unfair termination. Ms Monteith clearly feels aggrieved by what happened and understandably so. She had put a considerable effort in to the new venture and clearly blamed Mrs Galopoulos for not recognising and appreciating those efforts. Having said this, the fact is also that Ms Monteith must take responsibility for her own actions and the employer is entitled to rely on those actions in coming to the decision that they did. The employer has a right to terminate an employees services and the Commission should not intervene unless that right is applied in a manner which is harsh, unfair or oppressive. I cannot in the circumstances of this termination come to the conclusion that the respondent has acted unfairly.

36 In coming to this conclusion I have also considered whether the termination was unfair due to the absence of notice paid to Ms Monteith. She was paid three weeks wages but this, on the evidence of Mr Glassby, was for previous work and was paid as a goodwill gesture. I likewise do not consider this to be unfair in the circumstances. I am guided in this conclusion by a view that Ms Monteith must have known that the meeting could have produced a negative result or a positive result. In other words the directors could have decided that everything was alright or could be resolved and she should remain; or that the contrary was true as indeed happened. The meeting was no ordinary meeting. The problem with Mrs Galopoulos, on Ms Monteith's evidence, had been occurring for a while. Ms Monteith wanted the problem addressed. However, she wanted it addressed not through direct dialogue with Mrs Galopoulos and herself. She wanted all the directors to discuss the issue and presumably come to a conclusion. Put differently she wanted the matter to be brought to a head and resolved, but not with her direct input. Mr Cutler was asked to arrange the meeting and put the problem to the directors. On the evidence before me, I cannot see how in those circumstances that Ms Monteith could not have expected either a negative or a positive result. There is little by way of evidence about the long conversation between Mr Cutler and Ms Monteith following the directors' meeting. The evidence simply goes to the facts that Ms Monteith was upset and angry, she blamed Mrs Galopoulos and Mr Cutler attempted to comfort her. The evidence is also that Ms Monteith was anxious to know what had transpired and that Mr Cutler wanted to get his thoughts together before he spoke to her. He knew she would not be happy. Yet they had a long and presumably civil conversation thereafter. There is nothing in this evidence which leads me to a different conclusion, in fact quite the contrary. Counsel for the applicant submitted that as there was no evidence that Ms Monteith was looking for another job then it was not likely that she had offered to resign. While such a connection may seem logical, I do not accept that it necessarily follows and it does not lead me to a different conclusion as to whether Ms Monteith offered to leave. I consider that an alternate view is more probable in this case. Ms Monteith, in my view, thought that her worth and efforts would be recognised, and that Mr Cutler would sort it out, if she took the course that she pursued. This did not happen.

37 For the above reasons I do not find the dismissal to be unfair, harsh or oppressive and I would dismiss the application.

2002 WAIRC 04614

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	JENNIFER SUSAN MONTEITH, APPLICANT *v.* SARUMAN HOLDINGS PTY LTD, VALHALLA HOLDINGS PTY LTD TRADING AS OCEANUS RESTAURANT, RESPONDENT
CORAM	COMMISSIONER S WOOD
DELIVERED	FRIDAY, 11 JANUARY 2002
FILE NO.	APPLICATION 1285 OF 2001
CITATION NO.	2002 WAIRC 04614

Result	Application dismissed
Representation	
Applicant	Mr T Lyons of Counsel
Respondent	Ms K Vernon of Counsel

Order

HAVING heard Mr T Lyons of counsel on behalf of the applicant and Ms K Vernon 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.) S. WOOD,
[L.S.] Commissioner.

2002 WAIRC 04658

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	GAVIN WAYNE PARKER, APPLICANT *v.* ITRANEX LTD, RESPONDENT
CORAM	CHIEF COMMISSIONER W S COLEMAN
DELIVERED	WEDNESDAY, 16 JANUARY 2002
FILE NO/S.	APPLICATION 1920 OF 2001
CITATION NO.	2002 WAIRC 04658

Result	Order issued
Representation	
Applicant	Mr G Parker
Respondent	Mr D Mann

Order

WHEREAS a meeting of the parties was held before Deputy Registrar Lovegrove on 9 January 2002; and

WHEREAS by consent, the parties agreed that an order of the Commission should issue in the terms identified in Schedule A to this order.

NOW THEREFORE pursuant to the powers vested in it by the *Industrial Relations Act*, 1979, the Commission hereby orders—

THAT the Respondent pay to the Applicant the amounts identified in Schedule A by no later than 20 February 2002.

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

SCHEDULE A

September		
\$60 000 p.a. / 12	=	\$5000.00/month
Less tax of \$1378.00	=	**\$3622.00 (net)**
October (includes holiday pay)		
Salary		
\$60 000 p.a. / 12	=	\$5000.00/month
\$5000.00/31 (days in Oct)	=	\$161.29/day
19 days	=	\$3064.52 (gross)

Holiday Pay		
37 weeks / 52	=	0.71 of a year
4 weeks x 0.71	=	2.84 weeks owed
4 days leave taken	=	0.8 weeks taken
(9/10/01 – 12/10/01)	=	2.04 weeks owed in total
$60 000 / 52	=	$1153.85 / week
$1153.85 x 2.04	=	$2353.85
Holiday pay + October Salary		
$3064.52 + $2353.85	=	$5418.37 (gross)
Less tax of $1582.00	=	**$3836.37 (net)**
Superannuation		
5/02/01 – 30/09/01	=	$4000.00 (includes superannuation on cash bonus)
1/10/01 – 19/10/01	=	$433.47 (includes holiday pay)
Total Super owing	=	**$4433.47**
Quarterly Bonuses		
2 x quarters @ $5000	=	**$10 000** (G.P. agreed to take shares to this amount)

Total funds owed for superannuation, wages and holiday pay = **$11 891.74**

Notwithstanding prior Company policy to not pay bonuses until the Company was clearly in a position to do so, in terms of our exit discussions, shares to the value of $10 000 will be issued. Your forbearance in this matter is appreciated. Upon receipt of major funding, (AUD$1m) we will look to offering you a buy-back at a premium should you wish.

Rest assured, our commitment to endeavour to pay your monies owed as soon as possible remains.

2001 WAIRC 02677

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	NARSEY POLRA, APPLICANT
	v.
	CHESTERFIELD CHILD CARE CENTRE PTY LTD, RESPONDENT
CORAM	COMMISSIONER P E SCOTT
DELIVERED	THURSDAY, 3 MAY 2001
FILE NO.	APPLICATION 1016 OF 1999
CITATION NO.	2001 WAIRC 02677

Result	Jurisdiction found
Representation	
Applicant	Mr L Margaretic (of counsel)
Respondent	Mr T Mijatovic (of counsel)

Reasons for Decision

1 This application was filed on 25 June 1999. It was not served upon the respondent until 4 August 1999, following correspondence from the Commission, dated 7 July 1999, directing the applicant to serve the application. On 10 August 1999, the respondent wrote to the Commission indicating its position of opposition to the claim and that a detailed response would be filed. The respondent challenged that the applicant had been an employee and said that the application was out of time based on the date of the purported employment coming to an end.

2 The Commission directed the applicant to respond to the issues raised by the respondent by 25 August 1999. On 26 August 1999, the applicant's solicitors responded saying that they had difficulty in contacting the applicant to take instructions.

3 A conference was scheduled for 9 September 1999. At the conclusion of that conference the applicant sought time to consider his position. He was to advise the Commission of his intentions regarding the application within 1 month. On 11 October 1999, the applicant's solicitors wrote to the Commission noting that they had not been able to advise the Commission of the applicant's intention because of the respondent's failure to respond to correspondence dealing with the matter.

4 The Commission scheduled a further conference for 25 January 2000 in the hope of progressing the matter. At this time, Mr Malhotra was representing the applicant. Mr Malhotra failed to attend the conference. When enquiries were made as to his non-attendance, he indicated that he had forgotten. The conference was rescheduled.

5 On 31 January 2000, the conference was convened. The date of the conference took into account that the applicant was leaving for India on 1 February 2000. At this conference the applicant was represented by another solicitor from the firm of solicitors acting for him, the solicitor in attendance was Mr W Vogt. Mr Vogt was unable to advise what remedy the applicant was seeking and other details regarding his claim. The Commission indicated that in light of the delays in this matter, if the applicant's position was not clarified within 28 days, the Commission might entertain a claim for the matter to be struck out. More than one month later, on 2 March 2000, the respondent's solicitors advised the Commission that they had not heard from the applicant and accordingly applied for the application to be struck out. This application was confirmed in writing on 3 March 2000. On 10 March 2000, the Commission convened a hearing for the applicant to show cause why the application should be not dismissed. Mr Vogt appeared for the applicant and advised that his client's wife had recently died of cancer and that the applicant had been away in India with his family but was now back in the country. Mr Vogt indicated that he had been able to obtain most of the information sought by the respondent and would file particulars that day. However, he sought 7 days in which to provide the remainder of the information to the respondent saying that he was having some difficulty obtaining information from the applicant's accountant but 7 days should be sufficient to obtain the information.

6 In the circumstances, the Commission decided not to strike out the application but on the basis of Mr Vogt's undertakings to provide the information adjourned the matter. The applicant's particulars of claim were filed on 10 March 2000.

7 On 28 March 2000, the Commission contacted the parties to ascertain what they believed was the appropriate next step and they agreed that a further conference may be of some assistance.

8 On 5 April 2000, the respondent's solicitor advised that its employee, Mr T Mijatovic, who had handled the matter to date, was no longer an employee of the firm and that they anticipated that their client would instruct Mr Mijatovic to move the file to his new firm and anticipated that the hearing set down for 6 April 2000 may need to be adjourned. In fact, a conference had been scheduled for 6 April 2000. The conference proceeded and at the conclusion of the conference it was agreed that within 14 days the respondent would file a request for further particulars of the applicant's claim and in 14 days of receipt of that the applicant would respond. At this conference, the Commission indicated that there were a number of issues which the parties should address during the hearing and suggested that the parties pursue those things over the next month between themselves because they appeared not to have been addressed to that point.

9 There was then a considerable amount of correspondence between the parties.

10 The matter was listed for hearing for 6 June 2000 for the applicant to once again show cause why the application should not be dismissed. This was in response to the respondent's new solicitors claiming that the request for further and better particulars of claim was served on the applicant's solicitors on 20 April 2000 by facsimile, and noting that the Commission had directed that the request for particulars be answered 14 days after service, being 5 May 2000, it noted that the applicant had then had over 6 weeks for the reply to the request for particulars. On this basis, the respondent requested that the matter be struck out, and the application for strike out was listed for hearing. On 6 June 2000, Mr Vogt appeared for the applicant. On the basis of his undertakings the Commission directed that by the close of business on 9 June 2000 the applicant was to file and serve on the respondent further and better particulars requested by the respondent on 20 April 2000 and that if he had not done so by that time the application would be dismissed.

11 On 9 June 2000 at 3.00pm, the applicant filed the further and better particulars of claim.

12 On 13 June 2000, the applicant confirmed that he wished to proceed to hearing. On this basis a scheduling conference was set down for 21 July 2000. At this conference directions were issued as to how the matter should proceed. The Commission also indicated concern at the processes being applied by both parties, and that in the circumstances of this case the Commission may consider taking the somewhat unusual step in this jurisdiction of awarding costs.

13 The matter was set down for hearing but not without further correspondence between the parties and the Commission, and between the parties. The preliminary matters dealing with jurisdiction were heard on 24, 25, 26 and 27 October 2000, on 1 December 2000 and on 7 February 2001. It is noted that the hearing scheduled for 1 December 2000 did not proceed. On 30 November 2000, Mr Mijatovic, then a sole practitioner representing the respondent, advised the Commission that he had been called to the Supreme Court for a matter which ought to be brief and requested, with the consent of the applicant's solicitor, that the next day's hearing be stood down from 10.30am to 11.15am. However, the matter before the Supreme Court went considerably longer than Mr Mijatovic had anticipated. Accordingly, the hearing scheduled for 1 December 2000 did not proceed at all. This final hearing date was intended to be for the purpose of the parties speaking to submissions however, in the interim, between the final days of hearing and 7 February 2001, the respondent provided additional evidence to clarify other evidence and to deal with other matters which had been raised earlier in the hearing. This evidence was then subject to cross examination which went to other matters some of which were of a repetitive nature.

14 As can be seen from the recitation of the history of this matter, the parties and their solicitors have each taken the opportunity to make this hearing as difficult for the other as possible and as a consequence a considerable amount of the Commission's time has been taken up in dealing with the parties' issues and the issues between the solicitors. At various points the applicant has failed to comply with reasonable requirements, some of this failure has been due to the applicant's unavailability. The respondent has also conducted itself in a most uncooperative and unhelpful manner. Neither the parties nor their solicitors can take any pride in their conduct in this matter.

15 It is noted that during the course of this matter progressing there appears to have been action between the parties' solicitors addressed to the Legal Practice Board regarding the conduct of the matter.

16 The applicant claims that he has been harshly, oppressively and unfairly dismissed from his employment with the respondent and he seeks compensation. The purpose of a preliminary hearing was to deal with issues raised by the respondent, firstly, that the application was filed out of time and secondly that the applicant was not an employee of the respondent but rather at all times performed duties as a director of the respondent.

17 The Commission heard evidence from the applicant; Narendra Shah, Director and majority share holder of the respondent; Guiseppe Calabro, an accountant and CPPA; Basil Antonio Giorgio, a public accountant who was the accountant for the respondent from 1996 until September 1999; Stephen Raymond Fidock, a solicitor; Graeme Leonard Pitchers, a bank officer with Challenge Bank; Sandy Hunter, an Assistant Child Care Giver employed with the respondent from February 1997, and Kalpana Shah, currently the Director of the Child Care Centre operated by the respondent and daughter of Narendra Shah.

18 I do not intend to recite all of the evidence of each of the witnesses but to summarise the background to this claim in light of all the evidence.

19 Prior to 1995, the applicant and Narendra Shah had some commercial dealings. In 1995, the applicant and Mr Shah agreed that they would set up a child care centre together. The applicant was to undertake the work associated with establishing a child care centre and looking for suitable premises. It was agreed that the cost of setting up the child care centre together would be approximately $40,000. Mr Shah's family trust would hold 60 per cent of the ownership of the business having invested its money in the business, and the applicant would hold a 40 per cent share on account of his work for the business, although he invested no funds. The applicant drafted a document which he says reflected the agreement between the parties. He says that he believed this document was signed by himself and Mr Shah. Although no signed copy of the documents was produced to the Commission, the draft the applicant prepared was received into evidence.

20 The applicant commenced looking for appropriate premises and he found them, at the Scooby Doo Child Care Centre. Mr Shah put forward his house as security for funds, and the applicant prepared a business plan and this was submitted to Westpac Bank which provided the funds on the basis of Mr Shah's house being security. Directors' personal guarantees were also required as security against the loan. The premises required refurbishment and refurnishing and the applicant commenced arrangements for this. The applicant set about obtaining all of the relevant approvals, negotiated a lease and obtained necessary information from the appropriate statutory bodies. Following the applicant's supervision of the refurbishment and refurnishing of the centre, the business commenced operation in April 1996. It appears that originally the applicant and Mr Shah were to undertake the operation of the business in the name of Scooby Doo Child Care Centre Pty Ltd. The applicant and Mr Shah became Directors of the company. However, for reasons unrelated to this matter, they changed the name of the company to the Chesterfield Child Care Centre Pty Ltd.

21 There appears to be no contention between the parties that the applicant was to undertake day-to-day management of the child care centre and at the time, Mr Shah was engaged in other business activities.

22 The applicant undertook the day-to-day operation of the centre including liaising with Government departments, interviewing parents, hiring and firing and directing staff in their work, relieving staff during the lunch break in looking after children, signing the employment agreements with the employees of the centre and generally acting as the Manager or Director of the Child Care Centre. For the first 6 months of the operation of the Centre, until it became profitable, it was agreed that he would take no income. However, in approximately October 1996, the applicant and Mr Shah discussed what payment was to be made to the applicant and it was agreed that he be paid $700.00 per fortnight. At this point, the applicant was the only one of the owners of the business who was involved in the day-to-day operation of the centre. However, according to the applicant within 2 weeks of the applicant commencing to draw a regular amount of money from the operation, Mr Shah started working there also. The applicant says that Mr Shah wrote cheques to back pay himself to cover that period.

23 There is dispute as to whether or not the applicant ever completed and lodged an employment declaration form with the Australian Taxation Office. He says that he completed such a form and believed that he provided that to the business's accountant for lodgement. However, there is no evidence of the Australian Taxation Office having received such a document. Exhibit 18 contains the respondent's copies of all of its employees' Employment Declaration forms, and among them is one for Mr Shah, which indicates that he was employed full-time by the respondent.

24 The pay records of the business to be relied upon are in contention. The applicant says that a spreadsheet of wages payments (Exhibit 4) prepared by him constitutes the wages records whereas the respondent says that the wages records are those contained in a Wages Book (Exhibit 20). The applicant says that the Wages Book was merely used for recording the presence of staff in case of inspection by the Child Care Centre Board.

25 The applicant produced a taxation return for 1998 which included a group certificate listing his employer as the respondent, and he produced Westscheme Benefits Statements showing superannuation contributions made on his behalf.

26 There is no dispute between the parties that the applicant undertook work as a director of the company. However, there is dispute as to whether or not he was an employee of the company.

27 The applicant says that in March 1999 he relinquished responsibility as a signatory to the respondent's cheque account on the basis that Mr Shah agreed to pay certain amounts due to him. The applicant claims that by March 1999, he had been injured at work when he collided with part of an office desk. His wife was ill around that time and at Easter 1999, his wife was taken into hospital. The applicant says that he consulted a doctor about his own injury but due to his wife's illness he took the matter no further at that time. However, he completed a workers' compensation application which he presented to Mr Shah. He says that Mr Shah signed that workers' compensation application form. Mr Shah says that the applicant relinquished authority to sign cheques because the applicant was going to be away for some time due to his wife's illness.

28 In April 1999, Mr Basil Giorgio the business's then accountant, became concerned that the business may be insolvent and a meeting of the directors was called. This meeting took place on 17 April 1999 in Mr Giorgio's office. In attendance were the applicant, Mr Giorgio, Mr Shah and Mr Stephen Fidock a solicitor who was representing Mr Shah. There is a number of accounts of the meeting however, it is clear that the applicant was concerned at Mr Shah attending with his solicitor and also, as the applicant told the meeting that his wife was on her death bed and he did not wish to proceed with the meeting, he left after less than 5 minutes. At this point there is a significant divergence in the evidence as to whether or not Mr Basil Giorgio, purportedly on behalf of the applicant, indicated the applicant's agreement to withdraw from the day-to-day management of the business. The applicant says that prior to this meeting no such agreement was reached, and Mr Giorgio's evidence supports this. Mr Giorgio also says that he had no authority to commit the applicant to such a course of action during this meeting. Mr Fidock says that he had understood that there had been some previous agreement reached and he had believed that Mr Giorgio was acting on the applicant's behalf in reference to that agreement. In any event, Mr Fidock wrote a memorandum dated 25 May 1999 addressed to Mr Shah confirming that he had attended the meeting and that he recalled Mr Shah speaking with Mr Giorgio about the applicant's level of involvement in the business and recalled Mr Giorgio saying that the applicant had previously agreed with Mr Shah and Mr Giorgio that the applicant would not have anything to do with the day-to-day running of the child care centre and was prepared to leave it to Mr Shah. In his evidence, Mr Fidock said that he did not think anything was determined on 17 April 1999, and that he had no first hand knowledge of any previous agreement by the applicant about him relinquishing day-to-day involvement. In summary, there is dispute between the parties as to whether, on or prior to 17 April 1999, the applicant had agreed to withdraw from the day-to-day running of the business in favour of Mr Shah, in response to and as a condition precedent to Mr Shah being prepared to invest further funds in the business.

29 After the meeting, the applicant was provided with a copy of a debenture dealing with an increase in the overdraft for his signature. He did not wish to sign this without advice.

30 The applicant says that on 20 April 1999 he was on sick leave, was still an employee of the centre and had never resigned.

31 On 12 May 1999 the applicant sent a memorandum to Mr Shah enclosing a doctor's certificate for his workers' compensation claim. In this memorandum he expressed surprise that he had not been paid for some time and sought payment. He received no reply to his letter. On 16 May 1999, the applicant sent another memorandum to Mr Shah further expressing his concerns about the lack of payment. On this day he went to the Child Care Centre to resolve a dispute about a complaint to the Child Care Board and he says that he attended for two or three hours. Mr Shah was present at the time that the applicant attended at the Centre and did not advise him that he should not be there.

32 On 23 May 1999, the applicant again attended the Centre to deal with the dispute involving the Child Care Board and found that the alarm system had been turned on and the locks had been changed. He was unable to gain access to the Centre and so rang Mr Shah. Mr Shah's wife answered the telephone. The applicant says that Mr Shah's wife abused him. The applicant says that he told her that he was the licensee, an employee and a director of the child care centre and was entitled to access the premises. She told him that he was not so entitled. The applicant immediately drafted a letter requesting access to the premises.

33 The applicant says that on 29 May 1999, he received a letter from Murie and Edward, solicitors for the respondent, dated 27 May 1999. The relevant parts of this letter state—

"LETTER OF DEMAND

CHESTERFIELD CHILD CARE CENTRE PTY LTD v POLRA AND ORS

We act for the Chesterfield Child Care Centre Pty Ltd and Mr Narendra Shah and his family who have taken over the management and administration of this company.

The company owns the child care licence and Mr Shah is the managing director, secretary and majority shareholder of the same. We attach an Australian Securities Commission search confirming this.

We ask you to refrain from calling yourself the "owner" of the company as this is quite wrong in law and fact. We are instructed that you agreed that Mr Shah would take over all the debts and assets of the company and its business after you

abandoned the company with substantial debts and liabilities. Mr Shah has invested a substantial amount of capital into the company so as to enable it to carry on its business as a going concern.

We are instructed that you failed to pay tax liabilities, superannuation, failed to keep proper records and timesheets, books and accounts during your period of management of the company business. Our client is in the process of auditing the accounts of the company and instructs us that a sum of over $50,000.00 has been overpaid to various employees including your deceased wife, Taruna Polra and Santosh Kumari. Investigations and the audit of other overpayments is continuing. These losses of the company were in breach of your fiduciary and director's duties owed to the company, its creditors and shareholders including Mr Shah. We are instructed to commence legal proceedings against you for such losses.

We are instructed that equipment including a scanner is missing and that you are in possession of the same. All equipment and property of the company must be returned by you immediately.

As to access to the premises from which the company trades, we request that you refrain from seeking access to the business premises or communicating with any individuals working therefrom. No keys or security codes will be provided to you. All requests for information or documentation may be made through our office acting on behalf of the company to comply with the Corporations Law.

We are further instructed that you threatened Mrs Shah and attempted to breach the peace in a disorderly manner at your last presence at the premises. Our client is considering obtaining a restraining order against you considering such action is clearly in breach of the peace and adversely affects the business of the company. The terms of such order may prevent you from attending within 50 metres of the premises.

We are instructed that substantial payments were made to Taruna Polra, your deceased wife, and we request that you account for the same as executor and major beneficiary of her estate. Our clients calculate that a sum of $31,411.63 was paid to Taruna Polra for the period between 1996-1998 which was in excess of the award applicable at the time as Mrs Polra had no registered work place agreement with the company.

In respect of your claim for wages, the board of directors of the company have never authorised any director to be an employee or be paid wages. If this had occurred, Mr Shah would also have been entitled to wages for the substantial work he has done.

We are instructed that you made numerous drawings which were not authorised by the company or its board of directors. A director who is (sic) pays himself wages without approval from the board of directors acts in breach of his duty to the company. Such resolution could only be made without a vote by you. Consequently we request that you account for all payments of wages made to you or drawings made by you from the company's accounts.

We understand that there are criminal proceedings underway in respect of the alleged forgery of a diploma by Santosh Kumari and the police are investigating other criminal matters in respect of your actions. This is an independent matter and our client instructs us to assist the authorities by all available means.

In the meantime, we suggest that you itemise all payments received by yourself, your deceased wife and provide us with any other timesheets, company equipment or records.

Yours faithfully"

34 The applicant says that he read this letter and went to seek advice from a solicitor and, believing that his employment had been terminated, filed his application 2 days before the expiration of the 28 day time limit applicable to applications claiming unfair dismissal.

35 The respondent says that the applicant had agreed to relinquish day-to-day involvement in the business and therefore, had he been an employee, this agreement came into effect on 17 April 1999, following the meeting in Mr Giorgio's office. Alternatively, the respondent says that termination occurred with the letter of 27 May 1999. The applicant says that there was no agreement on his part to relinquish the day-to-day running of the Child Care Centre, rather he was on leave associated with his injury and also associated with his wife's illness. There was no intention that he would not return to work and his correspondence to the respondent confirmed this. He says in respect of the letter from the respondent dated 27 May 1999, that he did not receive that until 29 May 1999 which is within the statutory time limit to filing such applications.

36 I have considered all of the evidence before the Commission. Having observed each of the witnesses, I prefer the evidence of the applicant and of Mr Giorgio where there is otherwise conflict in the evidence. As to the evidence of Mr Shah, he appeared to be either not concentrating on the questions asked of him or to not comprehend a number of things put to him. I am unsure as to whether there was a problem with language comprehension or some other difficulty, or whether Mr Shah was deliberately evasive and unhelpful in his evidence. I conclude that Mr Shah's evidence is not to be relied upon. As to Kalpana Shah's evidence, a good deal of it related to her suppositions about the issues concerned, conclusions she had reached based on her own opinions and her views of fairness, and of what appears to be a genuinely held belief that her father was not fairly treated in his dealings with the applicant. Some of her evidence was not full and frank and was equivocal. Much of her evidence appeared to be based on a desire to support her father's position. I would not rely upon her evidence as to matters related to the records particularly of payments and tax deductions.

37 The evidence given by Mr Pitchers was credible evidence which can be accepted by the Commission.

38 Based on all of the evidence I make the following findings. Firstly, I find that payments made to the applicant were wages. A number of different records of payments made to the applicant were received into evidence. Exhibit 4 is a spreadsheet prepared by the applicant which covers the period 3 July 1998 to 25 October 1998. The second is Exhibit 20 which is the Wages Book, which the applicant says was not the proper record of pay and deductions, but rather was used as a record in case of inspection by the Child Care Centre Board. This covers payments made to the applicant for the period 12 September 1997 to 13 March 1998. The third document is a volume of timesheets and schedules. These schedules basically constitute the instructions to the bank as to which amounts were to be paid into which bank accounts for the purpose of staff receiving their pay (Exhibit 47).

39 I will deal with the last document first. The schedules contain reference to bank account details and it is noted that there is no bank account detail for the applicant. Rather there is reference to a bank account in the name of Taruna Polra. The amounts are recorded for the purposes of payment into Taruna Polra's account and they are not consistent with other records of payment to the applicant. Further, the schedules do not record gross amounts, but record net amounts only, they do not record the calculations or components of the payments, nor do they record whether any payments were made into that account as monies due to the applicant, or for work done by Taruna Polra, or both. I conclude that this exhibit is of least value of the three payment records.

40 As to Exhibit 4, the spreadsheet, this records that from 3 July 1998 until 25 September 1998 inclusive, both the applicant and Narendra Shah received $1,900.00 per fortnight, and an mount of $400.00 is shown as relating to tax each fortnight. In the periods 9 October 1998 and 25 October 1998, the spreadsheet shows amounts of $2,223.30 to each of the applicant and Mr Shah, with tax of $723.30 each per fortnight.

41 The Wages Book (Exhibit 20) shows that for the periods from 12 September 1997 to 18 December 1997, the applicant and Mr Shah were each paid the amount of $700.00 (with tax shown as $113.00) per fortnight and from 2 January 1998 to 27 February 1998, each was paid $1,000 (and $165.00 tax) per fortnight. On 13 March 1998, each was paid $1,500.00, and this record does not note any tax for this period.

42 Based on these pay records and the evidence before the Commission, I conclude that for the period 12 September 1997 to 25 October 1998, the applicant and Mr Shah were paid the same amounts each fortnight, that it was intended that tax was to be payable on these amounts. They were paid $700.00 per fortnight each, which increased over time to $1,000.00 then to $1,500.00, to $1,900.00 and finally to $2,223.30. These were regular amounts. They each received the same amount. Had the amounts been distributions of profits, one would have anticipated that Mr Shah would have received more than the applicant. He did not. It is most likely that amounts paid to them constituted wages to compensate them for the work they performed in running the Child Care Centre, and that payments ceased at a particular point is more reflective of the financial difficulties experienced by the business than of any change in the status of the applicant.

43 Secondly, I find that the applicant was engaged in two capacities, one as a Director of the company and another as an employee of the company engaged as the Manager of the Child Care Centre. This is based on the evidence that the applicant worked regular hours each day, for a great period of the time he received a regular amount of pay which could not be described as drawings or disbursement of profit, but was wages. Tax was deducted from those payments and some superannuation contributions were made on his behalf, although not with a great degree of consistency or regularity. I accept that he acted as the employer of the staff but in the capacity as the Manager of the business not as one of the two Directors. Both he and Mr Shah had each other sign appropriate documents relating to their status as employees. Notwithstanding that there is no record of the applicant completing an employment declaration, I do not find this negates his status as an employee. On the contrary, it would seem to have been lost or its lack of lodgement with the Australian Taxation Office was an oversight. I reach this conclusion on the basis that the other director of the company, Mr Shah, signed an Employee Declaration. On the balance of probabilities, I find that the applicant also completed such a form.

44 The applicant accepted and was susceptible to the direction of the Board of Directors being himself and Mr Shah, and that whilst the Board did not meet on a formal basis, as noted by Mr Giorgio, as occurs in many small businesses where the directors work together and deal with each other on a day-to-day basis, decisions were taken on an informal and regular basis. Those decisions involved the two Directors, and the applicant in his capacity as an employee, carried out those decisions. Mr Shah also appeared to have been an employee in the same way as the applicant was, as he was also paid a regular amount and was recorded in a number of the business records as an employee.

45 I note that the workers' compensation documentation records the applicant as Director however, I am not satisfied that this denies the applicant's status as an employee, as he was also a director.

46 I have considered the various arrangements regarding pay being made to Taruna Polra's account, the changes in taxation deduction arrangements and superannuation payments and am satisfied that they do not reflect any change to the applicant's employment status, but like other matters associated with the applicant's and Mr Shah's involvement with this business, there were certain arrangements made for the applicant's and Mr Shah's benefit which appear to be irregular compared with normal business practice or the law. They do not alter the essential nature of the applicant's relationship with the respondent as both an employee and a director.

47 I am satisfied on the basis of *Lee v Lee's Air Farming Ltd 1961* [AC 12]; *Robert Eaton Limited v. Secretary of State for Employment 1988* [IRLR 83], *Lincoln Mills (Aust.) Ltd v. Gough 1964* [VR 193 at 197-198] and *Macken, McCarry and Sappideen's "The Law of Employment" Fourth Edition* that the applicant was involved in two functions and two capacities with the respondent, he was both a director and an employee.

48 As to the question whether the application is out of time, I find that until the letter from Murie and Edward, dated 27 May 1999 and received by the applicant on 29 May 1999, the applicant had neither relinquished his position as an employee of the company nor had his employment been terminated.

49 I conclude, based on Mr Giorgio's evidence and to some extent Mr Fidock's evidence, that no agreement was reached during discussions following the applicant's exit from the meeting of 17 April 1999 for the applicant to withdraw from the day-to-day running of the Child Care Centre and I accept the applicant's and Mr Giorgio's evidence that there was no prior arrangement for this to occur.

50 From around March 1999 up until the time he received the letter dated 27 May 1999 the applicant could reasonably have considered himself to be on leave either associated with his leg injury and/or his wife's illness. His own correspondence to Mr Shah regarding claims for payment demonstrate his intention to return and are quite inconsistent with any agreement having been reached for him to relinquish his involvement with the management of the business. I accept that it may have been Mr Shah's desire to have the applicant removed from both the day-to-day operation of the Child Care Centre and from any involvement in the company, and that Mr Shah's investment in the businesses may have been in some jeopardy. However, until the letter of 27 May 1999, there was no decision conveyed to the applicant that his position as Manager of the Centre had been relinquished regardless of his status as a director of the company.

51 It is not accepted, if it be so argued, that in the telephone conversation with Mrs Shah on the 23 May 1999 when the applicant telephoned to speak to Mr Shah having found himself excluded from the premises, that she advised the applicant that he was no longer an employee of the company. There is no indication that she had authority to advise him that his employment was terminated.

52 Therefore, the termination of employment could not have occurred before the letter of 27 May 1999. I am satisfied that this was received by the applicant on 29 May 1999, having accepted the applicant's evidence in this regard. As the application was filed on 25 June 1999, it is within the 28 day time limit set by s.29(2) of the Industrial Relations Act 1979.

53 In all of the circumstances, I find that as a matter of fact and law, the applicant held the positions of both director and employee of the respondent. He is not excluded from making an application to the Commission on that basis. His application is within time. Accordingly, the Commission will convene to hear the parties as to the substance of the claim of unfair dismissal.

2002 WAIRC 04703

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	NARSEY POLRA, APPLICANT
	v.
	CHESTERFIELD CHILD CARE CENTRE PTY LTD, RESPONDENT
CORAM	COMMISSIONER P E SCOTT
DELIVERED	FRIDAY, 25 JANUARY 2002
FILE NO.	APPLICATION 1016 OF 1999
CITATION NO.	2002 WAIRC 04703

Result	Application for alleged unfair dismissal upheld Application for alleged contractual benefits dismissed
Representation	
Applicant	Mr L Margaretic (of Counsel)
Respondent	Mr T Mijatovic (of Counsel)

Reasons for Decision

1 The Commission issued Reasons for Decision in respect of preliminary matters of jurisdiction on 3 May 2001. Those Reasons for Decision set out the sequence of events culminating in the dismissal of the applicant by the respondent by letter dated 27 May 1999 (Exhibit 12) received by the applicant on 29 May 1999. The terms of that letter are set out in those Reasons for Decision.

2 The applicant claims that he was harshly, oppressively and unfairly dismissed from his employment with the respondent. He also claims that he has been denied certain contractual benefits. The Amended Further and Better Particulars of the application provided to the Commission on 23 November 2001 set out in paragraph 27 the remedies sought. They are:

"27. **The Plaintiff claims—**

a)	Unpaid superannuation for the period 1 November 1995 to 30 October 1996 at that rate of 6%.	$1,776.84
b)	Unpaid wages for the period of 1 November 1995 to 16 August 1996 at $569.50 per week.	$26,679.00
c)	Unpaid annual leave of four weeks at $569.50 per week for 1995/1996 financial period.	$2,278.00
d)	Unpaid annual leave of four weeks at $569.50 per week for 1996/1997 financial period.	$2,278.00
e)	The amount of $219.50 being the difference of $569.50 and $350.00 per week the difference arising from a short fall in wages from 30 August 1996 to 30 December 1997.	$13,609.00
f)	Unpaid wages for the period 1 April 1999 to 1 October 1999 at $1,111.65 per week.	$26,679.60
g)	Unpaid annual leave of four weeks at $1,111.65 per week for the 1997/1998 financial period.	$4,446.60
h)	Seven (7) days of annual leave at one weeks rate of $1,111.65 for 1998/1999 financial period.	$1,111.65
i)	Unpaid superannuation for the period of 1 April 1999 and 1 October 1999 at 7%.	$1867.57
j)	Total entitlements.	$80,726.26
k)	Interest pursuant to Section 32 of the Supreme Court Act 1935 (as amended) at the rate of 6% per annum, until payment.	
l)	Costs"	

3 I intend to deal with the question of the alleged harsh, oppressive or unfair nature of the dismissal of the applicant as the first matter. Having observed the witnesses as they gave their evidence, and as I noted in my Reasons of 3 May 2001, I again prefer the evidence of the applicant to that of Mr Shah where their evidence conflicts. I found the applicant's evidence to be credible evidence on which I can rely, except in respect of two issues, the first being income received from Waratah Child Care Centre, and the other being the applicant's assertion that he was entitled to set his own rate of pay.

4 The applicant claims that his dismissal was both substantively and procedurally unfair. The respondent says that the applicant misconducted himself and has received substantial warnings as to a number of issues. The respondent says that several warnings and letters were exchanged between the parties and cites Exhibits 9, 10, 11, 12, 16, 22 and 23. Exhibit 9 is the applicant's correspondence to Mr Shah in which he expressed his shock at not having received payment and he also sought the $50.00 per week fuel allowance. Exhibit 10 is the applicant's correspondence to Mr Shah dated 16 May 1999, in which he reiterated those comments contained in Exhibit 9 and again asked when he was going to be paid his wages. In this memorandum he also noted "I am on sick leave until 29 May 1999 and if everything goes well for my knee then I will be back to work there after." Exhibit 11 is a memorandum to Mr Shah from the applicant dated 23 May 1999 in which he expressed his surprise at the alarms and the locks having been changed without his being advised, and again seeking to be paid his wages. He also reiterated that he was on sick leave and he was going for a medical examination on 31 May 1999 with a view to returning to work on 1 June 1999. Exhibit 12 is a letter to the applicant dated 27 May 1999 which the Commission has previously found was the letter of termination. Exhibit 16 is a letter from Bruce Duncan Russell and Associates, Solicitors – Attorneys dated 7 July 1995 dealing with the lease of the premises. Exhibit 22 is a document signed by the applicant dated 24 May 1999. It

deals with the respondent's failure to pay amounts said to be due to the applicant, and refers to the applicant's injury said to have been sustained at work. Exhibit 23 is a letter of 15 February 1999 from Mr Fidock, then solicitor for the respondent, to the applicant which sought a response to particular matters.

5 That letter, the formal parts omitted, reads—

> "I act for Narendra Shah.
>
> Mr Shah has sought my advice on a number of matters in relation to your conduct as a director of Chesterfield Child Care Centre Pty Ltd and in relation to the Community Services Act 1972.
>
> In particular, we seek your response in respect of the following matters.
>
> 1. In October 1996, you wrote to the Child Care Services Board and requested an exemption for Santosh Kumari, yet on 17 October 1998, you state that you employed Ms Kumari in good faith believing that she held the requisite qualifications. You therefore must have known in October 1996 that Ms Kumari did not hold the requisite qualifications. We inquire as to why you requested an exemption for Ms Kumari in October 1996?
> 2. From the pay sheets, you appear to have paid Ms Kumari at qualified rates when you knew or ought to have known that she was not qualified. We calculate that you have overpaid her approximately $6,120.00. Additionally, there are incomplete time sheets amounting to a further $8,194.00. We know (sic) ask for you (sic) explanation of these overpayments.
> 3. I am informed that your wife Taruna last worked at the centre on 5 December 1998(7) (sic). We inquire as to why you continued to pay her until the week ending 13 February 1998? We also inquire as to why she was paid at qualified rates when she is unqualified? We ask further for reasons as to why she was paid an additional $500.00 on 26 March 1997? We estimate the total overpayment by you to your wife may be as high as $15,000.00 plus taxation and superannuation which may not have been payable by the company.
> 4. I am informed that you paid yourself the sum of $1,500.00 by a company cheque and delivered to the company your personal computer which was worth approximately $200.00. The company then spent $685.00 to repair the computer and to purchase a new monitor. It would appear that you have overpaid yourself by approximately $1,300.00 in relation to this computer.
> 5. There appear to be many instances where you have paid wages in the absence of a completed time sheet. This practice makes it difficult to correctly calculate the proper leave and wage entitlements of staff. We ask for an explanation as to why wages have been paid without completed time sheets.
>
> I have advised my client that, inter alia, you may have breached your fiduciary obligations to him as a director of Chesterfield Child Care Centre Pty Ltd. In the absence of full explanations of the above matters, you appear to have overpaid persons with whom you have had some connection or relationship with thereby depriving the company and its shareholders from its property. You have done this knowing that Mr Shah has pledged his home as security for the companies (sic) debts and that you have not.
>
> At this point, we ask for your full written response to all of the matters raised above within 14 days of the date of this letter. If you fail to respond, I am instructed to commence Court proceedings against you without further notice."

6 Other than the last matter, Exhibit 23, it is difficult to comprehend how the respondent could say that those documents constituted any warnings to the applicant that his job was in jeopardy. The letter which is Exhibit 23 is the only letter or document which forewarned the applicant that there were issues which required his attention and that the respondent was seeking answers from him. The only other document of relevance within that group to which the respondent has referred in asserting that those documents demonstrate that the applicant received warnings was the letter from Murie and Edward dated 27 May 1999 which was the letter of termination and could not possibly constitute a warning as such.

7 Mr Shah has also given evidence that he raised a number of the issues contained in Exhibit 23 with the applicant and received no satisfactory response.

8 In any event, the respondent says that based on the issues raised being of a serious nature, and with the applicant having failed to provide a satisfactory response when given the opportunity, that it had no alternative but to bring the relationship to an end.

9 On the other hand, the applicant says that in the circumstances of his wife's illness, and her death on 26 April 1999, and the insolvency of the business being an issue, he told Mr Fidock that he would reply to the letter, but that Mr Fidock indicated that due to the insolvency issue arising, he could deal with it later. The evidence indicates that neither party then raised the matter of the applicant answering the issues contained in the letter before the employment terminated.

10 The circumstances of dismissal set out in my earlier reasons demonstrate that it was a summary dismissal. The respondent says that the dismissal was justified on the grounds of misconduct. The basis upon which a summary dismissal for misconduct, as this would appear to be, is dealt with is set out in a number of decisions of this Commission. That basis is that the employer bears an evidentiary onus to show that insofar as it was within its power before dismissing the employee, it conducted as full and extensive investigation into all of the relevant matters surrounding the alleged misconduct as was reasonable in the circumstances; that it gave the employee every reasonable opportunity and sufficient time to answer all allegations and respond thereto and having done those things, the employer honestly and genuinely believed and had reasonable grounds for believing, on the information available at that time, that the employee was guilty of the misconduct alleged. Then, taking into account any mitigating circumstances either associated with the conduct or the employee's work record that such conduct justified dismissal (see *Western Mining Corporation Ltd v AWU* (1997) 77 WAIG 1985; *Shire of Esperance v Mouritz* (1991) 71 WAIG 891).

11 It will be noted from the sequence of events set out in the Reasons for Decision of 3 May 2001 that during the period immediately prior to Exhibit 23 being issued and up to the time of termination in May 1999, the applicant's wife was terminally ill with cancer and the applicant spent significant time and attention dedicated to her. The applicant also says that he suffered a leg injury around this time. There were also questions arising around that time of the state of the business while he was away from work. The applicant said in his evidence that he spoke to Mr Fidock and in effect received Mr Fidock's approval not to respond to the letter at that point. There appears to have been very little communication between the parties as to the applicant's performance or any other matters relating to sustaining the business at around that time.

12 Having examined Mr Fidock's letter of 15 February 1999, I am not satisfied that it constitutes a warning at all. It does however, raise some serious issues and asks the applicant to respond to the issues contained therein. If he failed to respond, "court proceedings" against him would commence. According to Mr Fidock's letter, these court proceedings related to his fiduciary duty as a Director of the company, not to his conduct as an employee of the business.

13 A warning requires that the employer have reached some conclusion as to the employee's conduct or failings, and having done so, advises that employee that such conduct or failings are unacceptable, and that the employee's future with the employer is in

jeopardy unless the employee remedies the conduct or failings. Such warnings are not always required in cases of misconduct. The letter from Mr Fidock to the applicant could not have constituted a warning as the respondent could not reasonably have reached any objective conclusions as to the applicant's alleged failings without first having considered the applicant's response. This is particularly so given that the applicant had, for the greater part of his employment, until his absence from the Centre, dealt with those administrative matters dealt with in Mr Fidock's letter. If the applicant refused to respond, it is arguable that the employer would be entitled to come to its own conclusion.

14 I accept the applicant's evidence, that he received Mr Fidock's approval not to respond to the issues at that point. The respondent took no further action to attempt to have the applicant address the issues contained in that letter but merely acted in a capricious manner in failing to respond to his requests for payment and in eventually locking him out of the Child Care Centre, as set out in the Reasons for Decision of 3 May 2001.

15 It is quite clear that the management of the Child Care Centre left a great deal to be desired. However, it is clear that from a certain point Mr Shah had a significant amount of involvement in that management, and that the applicant had not been involved to any substantial degree for some months because of his wife's illness. His wife's illness should have been a consideration for the respondent in deciding how to handle the matter and it ought to have done so with some sensitivity. This would not have prevented the respondent from undertaking a proper investigation into the allegations upon which it sought to rely.

16 The respondent has not met the onus borne by it. The respondent acted without providing the applicant with natural justice. The respondent did not conduct any real investigation beyond asking the applicant to respond to issues of concern, and then waived the requirement for an answer at that time. No further approaches were made seeking those answers. In the course of the applicant's wife's illness, the applicant's leg injury, and the insolvency of the business arising, the applicant was not given every reasonable opportunity and sufficient time to answer all allegations. In the circumstances, the respondent could not have had reasonable grounds for any belief as to the applicant's guilt in respect of the matters raised. No consideration was given to any mitigating circumstances before deciding that termination was justified.

17 Accordingly, the respondent has not discharged the onus which falls to it, as specified in *Western Mining Corporation Ltd v AWU* and *Shire of Esperance v Mouritz* (supra).

18 Having come to this conclusion, though, I note that procedural fairness is just one of the considerations to be applied (Kennedy J. *Shire of Esperance v Mouritz* (supra)).

19 As to whether, notwithstanding the denial of natural justice, there was substantive reason to terminate the applicant's employment, the respondent raised a number of matters during the course of the hearing, as well as relying on those matters contained within Exhibit 23, Mr Fidock's letter of 15 February 1999. The additional issues raised during the hearing are related to a number of those contained in the letter, albeit that they are not exactly the same issues. The issues raised in the letter (Exhibit 23) and the hearing are as follows—

1. A number of issues arise regarding Ms Santosh Kumari, as to her being paid as a Qualified Child Care Giver when she was not qualified - that she was overpaid; that the applicant knew she was unqualified and sought an exemption from the Child Care Services Board ("the Board"), yet paid her as if she were qualified; and that he was a friend of hers and was in some way complicit in her fraudulent conduct regarding a certificate.

   The applicant says that Ms Kumari was acting as a Qualified Child Care Giver, that she was performing the duties of that position and was paid as such. He says that he obtained an exemption from the Board which accepted his letter of application for her to be treated as a Qualified Child Care Giver. Ms Kumari became a friend of the applicant's family after she commenced working for the respondent, and the applicant says that she knew Mr Shah before she knew the applicant.

   The applicant seems to have provided some conflicting advice to the Board regarding Ms Kumari's qualifications. The Board noted in its letter of 11 November 1998 addressed to the applicant that—

   > "We are concerned in previous correspondence of October 1996 you applied for an exemption of Santosh Kumari and we have now noted you have stated that you employed her in good faith as a qualified staff member". (Exhibit 86).

   The applicant replied that—

   > "at the time of interview because of the documentation that was given to us by (Ms Kumari) from Torrens Valley Institute and the fact that she was already working as a qualified (sic) at one of the community based Child Care Centres in WA and had only one thirty hours elective to be completed to upgrade her qualifications, I still consulted the Licensing Boards and applied for an exemption to safe guard (sic) the Centre before even employing her" (Exhibit 69).

   The evidence shows that Ms Kumari was convicted of fraud in respect of a certificate which the applicant says he received via Mr Shah.

   I accept the applicant's evidence that Ms Kumari was engaged to work as a Qualified Care Giver and that to ensure that there was no question of her being accorded that status for the purpose of the Centre meeting the staffing levels required in respect of qualified staff, an exemption was sought and was granted. She performed such work and was paid accordingly. Therefore, there is a reasonable explanation as to the exemption being applied for and granted, and to her being paid as if she was qualified. The fact that after her employment commenced, Ms Kumari supplied to her employer a certificate to which she was not entitled does not support a finding that the applicant overpaid her or was in some way involved in her fraudulent conduct. Accordingly, I find that in respect of those issues there is no justification for the respondent's questions in respect of Ms Kumari. They do not justify the applicant's dismissal.

2. As to the staff not completing time sheets and payment being made without completed time sheets, the applicant says that regulations governing child care centres required certain staff-to-children ratios to be adhered to. The applicant says that he and the Co-ordinator, Theresa Bateman, knew which staff were present and which were not, and they made up the pays on Wednesday or Thursday for payment on Friday. Accordingly, they often had to assume that staff were present for 7 and a half hours on the Thursday or the Friday. He and Ms Bateman knew who was not present and who was sick and completed their records accordingly. So that even if the staff member had not signed for all of the hours on those days they were still paid for those hours.

   I accept that this practice was not desirable and could have created problems for the respondent. However, this is a matter for correction and counselling, not of itself justifying termination of employment, particularly not for misconduct in the circumstances as they arose.

3. That the applicant continued to pay Taruna Polra after she ceased working and also overpaid her according to her qualifications.

I accept that payments continued while Mrs Polra's workers' compensation claim was being considered albeit that she performed no work in this time. The applicant says that he was asked about this by Mr Shah, and he undertook to repay any amounts should Mrs Polra's workers' compensation claim be rejected.

If Mr Shah was not happy with the applicant's advice that the money would be repaid if the workers' compensation clam was unsuccessful, he ought to have said so at the time. He did not.

The workers' compensation claim was rejected by letter dated 14 August 1998 (Exhibit 70). However, it appears that those overpayments were not repaid. There is no evidence that that matter was raised with the applicant again until the letter of 15 February 1999. This is a matter which ought to have been put to the applicant at an appropriate time and not simply by a lawyer's letter which letter seems to have been passed by in the process of Mrs Polra's illness, the applicant's injury, the insolvency of the business and the breakdown in the relationship between the parties. It is clear that this is an issue which required some response from the applicant. Had he deliberately overpaid his wife, been directed to cease the payments and/or repay them, and refused to do so, this might constitute conduct which would entitle the respondent to act, provided it did so in a proper manner. There is no evidence of deliberate overpayment beyond that pending the resolution of the workers' compensation claim, there was no direction to cease the payment or to repay it forthwith, and the respondent did not deal with the matter in a proper manner.

Further, it seems that in alleging that overpayments were made to Taruna Polra, the respondent has confused payments made into her bank account but which were wages for both herself and for the applicant.

I am not satisfied that, apart from the payments made pending approval of the workers' compensation claim, there were any overpayments to Mrs Polra by the applicant.

4. As to the question of the personal computer, the applicant provided to the business a computer that he had purchased for his own family's use. The computer was then used by him in the conduct of the respondent's business for some time before payment was made to him by the business. What the applicant did in paying himself for the computer was no different from what Mr Shah did in paying himself in respect of expenditure incurred by him.

   There is no evidence that the value recorded by the applicant and the amount he paid himself for its purchase was incorrect. It is merely asserted by the respondent that it was overvalued.

   Further, the applicant included within the financial records of the respondent the appropriate accounting.

   Once again this is not a matter which the respondent appears to have investigated beyond asking the applicant for his response. Then it appears, in accordance with Mr Fidock's approval to the applicant not to respond at that time, the respondent did not proceed to further investigate.

5. That there were instances of under payments made to staff. This occurred during the early days of implementation of workplace agreements, and was rectified. This underpayment of staff some time before the dismissal cannot now be relied on as an act of misconduct justifying dismissal.

   As to questions of incorrect calculations of rates of pay, failure to pay tax and failure to pay superannuation on the respondent's behalf, it appears that the applicant has made some of these payments and these payments were recorded within the computer records of the respondent. The respondent has refused to accept that there were records within its computer system. I find that the applicant did keep records within the computer system, and although for the purposes of this hearing the respondent has denied that these records existed, I find that such denial is merely a reflection of Mr Shah's unwillingness to accept anything the applicant says, and to attempt to paint the applicant as both incompetent and dishonest.

20 It is true to say that the general management of the business left something to be desired, that there were insufficient funds to pay for superannuation and taxation instalments and that these were outstanding. This does not constitute good management of the business. However, Mr Shah was also responsible for some of these failings. Further, both the applicant and Mr Shah seem to have treated the proper operating of the business in a cavalier manner. They each used its resources for their own and their respective families' benefit. While the applicant may have been lax in his management practices, he conducted himself no differently in that regard than Mr Shah. It seems that in the end, Mr Shah had the major shareholding, and the most to lose. When he and the applicant could no longer work together, when the business got into difficulty, Mr Shah needed to act to protect his investment. He did so by blaming the applicant for what had gone wrong, and in taking a very subjective view of the reasons for the difficulty. He acted in a capricious and malicious manner by the way in which he brought the relationship to an end. The respondent should have dealt with the applicant over these matters in a proper manner. Having reached his conclusions on these matters, Mr Shah then set about excluding the applicant from the premises by changing the locks and security codes without having forewarned the applicant, refusing to answer his correspondence, and finally, instructing that the letter which had the effect of terminating the employment be sent to the applicant.

21 The respondent has not demonstrated that the applicant has misconducted himself in such a way as to justify the termination of his employment. If I am wrong in this and the respondent has so demonstrated, then it is clear that the respondent acted in a harsh and capricious manner in simply locking the applicant out of the premises and changing the security codes without conferring with him, refusing to pay him and refusing to answer his correspondence. This is not a minor technical breach of a fair procedure but substantive unfairness in itself.

22 In all of those circumstances, I find that the respondent has harshly, oppressively and unfairly dismissed the applicant from his employment. In coming to these conclusions, I have taken into account the difficulties which have arisen for the respondent in bringing to an end an employment relationship which was enmeshed in a business relationship. It is clear that the personal, business and work relationship between the applicant and Mr Shah had broken down. I recognise the complexities which would have been inherent in such a breakdown. However, that does not justify the capricious manner in which the respondent brought the relationship to an end, or its unreasonable defence of this claim.

23 The next question which arises is what the appropriate remedy is. It is quite clear that reinstatement would be impracticable because the relationship between the parties has broken down to such a point where there is a good deal of animosity between them. Further, the applicant has been involved in another child care centre operation, albeit not as an employee. Further, too, as at the date of hearing the applicant was still unfit to return to work.

24 It then arises to determine the applicant's loss. The applicant says that he seeks compensation as set out in paragraph (f) of clause 27 of the Further and Better Particulars set out in paragraph 2 of these Reasons. This claim is for "Unpaid wages for the period 1 April 1999 to 1 October 1999 at $1,111.65 per week" totalling $26,679.60. I note a number of matters regarding this claim. The first is that the applicant's employment terminated on 29 May 1999, not 1 April 1999. If he did not receive income from 1 April to 29 May 1999, then that is not a matter for compensation arising from unfairness of the dismissal, but perhaps a claim for denied wages, or sick pay, or workers' compensation. Alternatively, the applicant was on leave without pay. This is merely one example of a lack of clarity in this claim, the Further and Better Particulars of which were redrafted and amended

on at least two occasions following their original filing. The applicant seems to have misconceived the basis for calculation of compensation and the 6 month cap imposed by the Industrial Relations Act 1979.

25 Further, it is clear that the applicant ceased performing any substantial work for the respondent from at least April 1999. Although in his summing up Mr Margaretic, for the applicant, said that the evidence demonstrated that the applicant attended for at least some time every day, I am not satisfied that this is so. He may have attended on an irregular basis but was clearly unfit to undertake the work for which he was engaged.

26 The applicant's own evidence as to his efforts to mitigate his loss after the termination of employment indicate that he has not sought to do so on the basis of his unfitness to work. He has not looked for work, but, some weeks after the termination of his employment, applied for sickness benefits. His workers' compensation claim regarding his injured leg is not resolved.

27 Although Mr Margaretic urged that I draw an inference that the applicant's failure to seek work was on account of the applicant's inability to afford the surgery necessary to repair his injured leg, that was not the evidence of the applicant. His evidence was that he delayed having the operation during the period leading up to his wife's death because of her illness. There was no other evidence of any reason for delay except a reference in Exhibit 22 to stress causing the deferral of his knee operation. I heard no evidence which would allow me to conclude that the applicant had failed to have the operation on the basis that the respondent had denied him income.

28 Further, there is some evidence that the applicant has obtained money by way of loans from the Waratah Child Care Centre part owner, Mr John Silbert, for whom he undertakes some responsibilities which are not time consuming or onerous.

29 At page 30 of the transcript of 3 October 2001, the applicant says that Mr Silbert is "actually the shareholder/partner in my other child care centre, Waratah Child Care Centre". The applicant became involved in that centre in 1997 when it was being built, and at the same time as he was involved with Chesterfield Child Care Centre. He says that he has a forty percent share holding in that centre, he did not pay any money to obtain that shareholding but contributed his expertise when he started that centre. He says that that centre is still loosing money.

30 The evidence of the loans is somewhat incredible, that loans would be made to a person without any indication of when they would be repaid and without there being any particular interest payment allocated to the debt. I conclude that the responsibilities the applicant has undertaken for the Waratah Child Care Centre, and his forty percent shareholding are the basis of the payments made to him. The applicant is involved in a business venture from which he receives regular payments albeit that they are currently theoretically categorised as loans.

31 What was the applicant's loss? The applicant's evidence was that from the time of termination of his employment until the date of hearing he was unfit to work in the capacity in which he was engaged by the respondent. Although Mr Margaretic urged that he may have been fit to do light duties, there was no evidence of this except perhaps by way of inference, that if he has performed some work for the Waratah Child Care Centre, he may have been fit for light duties with the respondent. However, the applicant gave no evidence of the extent to which he may have been fit. His evidence was simply that he was unfit to work. If he was unfit to work then two scenarios arise. One is that his injury was compensable under the workers' compensations regime in which case that would arguably cover any loss which he may have suffered from his inability to work. He has a workers' compensation claim pending resolution. On the other hand, if his injury was not compensable through that regime, then he was simply unfit to perform work, and accordingly, the respondent would not be obliged to pay him for that period other than in accordance with any sick leave entitlements which might arise. There is no claim for sick leave pay.

32 Accordingly, I find that the applicant has not demonstrated that he has suffered a loss of income as a result of his dismissal such as to warrant an order for compensation for that loss. There is no claim for compensation for injury. Accordingly, there is no remedy warranted beyond the declaration that the dismissal was harsh and unfair.

33 As to the remainder of the applicant's claims set out in paragraph 27 of the Further and Better Particulars referred to in paragraph 2 of these Reasons, s.29(1)(b)(ii) of the Industrial Relations Act, 1979 provides an employee with an opportunity to enforce his contractual benefits denied to him by his employer, provided those benefits are not benefits arising under an award or order of the Commission. Further, s.114 of the Industrial Relations Act 1979 provides a prohibition on parties contracting out of awards which would otherwise apply.

34 The question then arises as to whether or not the applicant's employment was covered by an award and his wages and conditions claimed were those set out in that award. The applicant bears the onus to demonstrate that the benefits do not arise from an award. At page 48 of the transcript of 3 October 2001 being the early part of the hearing of the substantive application, when the Commission raised with the applicant the question of whether the applicant was bound by the award, or whether he used it as a guide, Mr Margaretic for the applicant asked "Well, Madam Commissioner, how does one become bound by an award?" It was clear that the applicant's counsel had no particular knowledge of award coverage and the tests to be applied to it. The respondent's counsel's understanding of this issue was also limited.

35 There are two awards which have the potential to apply to the applicant's employment. The Children Services (Private) Award contains Clause 4. – Scope which says:

> "This award shall apply to all employees employed in the classifications set out in Clause 22. - Wages of this award, in private nurseries, private child care or private day care facilities which provide care for children and which do not receive recurrent funding from State or Federal governments."

36 The evidence was that the applicant was employed in a private child care facility i.e. it was owned by private interests being the respondent. The respondent received some of its funds from government sources. The applicant says that the Centre received some parts of its income from Children's Services and from the "migration department" (transcript page 78). I take this to mean that these were government departments which provided some funding to the respondent. When questions of whether or not the company was insolvent arose, the applicant said that the company's records indicated that it was due to receive money from "Community Services" which I take to mean the government department. It is not clear whether the Centre received "recurrent" funding as set out in the scope clause above.

37 However, another award covering child care centres, the Child Care (Subsidised Centres) Award (No. A 26 of 1985) provides that its scope is as follows—

> "This award shall apply to all employees employed in the classifications set out in Clause 11. - Wages in government subsidised nurseries, child care or day care services, excluding persons employed pursuant to the Hospital Workers (Ngal-a) Award, No. 6 A of 1958.
>
> Provided that this award shall not apply to Administrators/Directors who are directly employed by local government authorities."

38 It defines "government subsidised centre" as meaning—

> "a centre which is provided with funding under Children's Services programmes or their successors of the Federal Government or State Government through the Department for Community Development or its successors or which

includes funding for the Family Centres Programme. Provided that any such funding including Fee Relief, which is provided for the operation of centres which are covered by the Children's Services (Private) Award does not render those centres within the scope of this definition".

39 The evidence was that the respondent received some funding from government. However, as a private centre, this funding does not render the Centre subject to the Child Care (Subsidised Centres) Award. It is most likely that it is covered by the Children's Services (Private) Award. This is the award under which the respondent paid its other members of staff and is the award under which the respondent conceded that it underpaid employees who had signed workplace agreements which workplace agreements were never registered.

40 The question then arises as to whether the applicant was an employee included in one of the classifications set out in Clause 22. – Wages of the Children's Services (Private) Award. The applicant said that he set his rate of pay for the purposes of this claim according to the classification of the "Assistant Director Grade 3". That is one of the classifications in Clause 22. – Wages. There is also a classification of Director.

41 The definition of Director is set out in paragraphs (c) and (d) of subclause (3) of Clause 22. – Wages of the Children's Services (Private) Award which reads—

"(c) Within the grades of Director the following categories of progression shall apply—

(i) Director Grade One (as defined in Clause 24 of this award)—

- a Director with two year or three year training, (as defined in paragraph (e) of this subclause)—

  Enters Step I

  Exits Step IV

- a Director with four year training (as defined in paragraph (e) of this subclause)—

  Enters Step II

  Exits Step V

(ii) Director Grade Two (as defined in Clause 24 of this award)—

- a Director with two year or three year training, (as defined in paragraph (e) of this subclause)—

  Enters Step III

  Exits Step VI

- a Director with four year training (as defined in paragraph (e) of this subclause)—

  Enters Step IV

  Exits Step VII

(iii) Director Grade Three (as defined in Clause 24 of this award)—

- a Director with two year or three year training, (as defined in paragraph (e) of this subclause)—

  Enters Step V

  Exits Step VIII

- a Director with four year training (as defined in paragraph (e) of this subclause)—

  Enters Step VI

  Exits Step IX

(d) In addition to the grading, level of training and experience relevant to determining the appropriate rate of pay for a Director an employer may advance a Director beyond the steps/increments provided for, taking into account such factors as—

(i) number of sites supervised, size of centre(s) including number of places centre(s) licensed to cover and/or total number of children taken into care; and/or

(ii) hours of operation of the centre; and/or

(iii) other factors relevant to the exercise of increased skills and responsibilities by the Director."

42 Subclause (5) of Clause 24. – Classification Definitions and Skill Descriptors reads—

"(5) Director

(a) Definition: A Director shall be a person who meets the minimum requirements for a Co-ordinator in accordance with the Community Services (Child Care) Regulations 1988 and who undertakes the duties and responsibilities outlined in paragraph (b) of this clause.

(b) A person appointed as a Director shall be graded as follows—

(i) Director Grade One: a person appointed with overall responsibility for programming who is not directly responsible for the effective supervision of the child care service or, is subject to supervision in the day to day operation of the centre; or

(ii) Director Grade Two: a person who, in addition to the duties and responsibilities of a Director Grade One, may be required to undertake a basic role in financial control on a day to day basis eg. administering fee relief; or

(iii) Director Grade Three: a person who, in additions to the duties and responsibilities of a Director Grade Two, may be required to, in part or in whole—

- Prepare annual budgets;
- Provide reports and policy proposals to Committees of Management;
- Exercise discretion within the budget in operating the service on a day to day basis.

(c) Responsibilities of a Director may include the following—

- Be responsible for the administration and supervision of the service;

- Ensure that a consistently high quality of child care is maintained, through the planning, organisation and implementation of a program that will adequately meet the intellectual, physical, emotional and social needs of children;
- Supervise and appraise staff;
- Select and train staff as required;
- Develop and promote the aims and policies of the service, in conjunction with the service sponsors/management committees/proprietors;
- Maintain personnel records and be responsible for the application of relevant industrial awards and legislation;
- Keep accounts and handle clerical matters, as required;
- Assist the service sponsors/proprietor with financial management, budgeting and planning, as required;
- Ensure that the service adheres to all relevant regulation and meets all accountability requirements;
- Provide reports to the management committee/sponsor/proprietor, as required;
- Provide parents with information relating to the service's operations;
- Ensure that adequate enrolment procedures are established;
- Provide opportunities for staff development;
- Liaise with other associated organisations, agencies and Government departments;
- Co-ordinate and supervise the placement of students within the service."

43 Notwithstanding that the applicant says that he ought to have been paid according to the classification of Assistant Director Grade 3 and that is the basis of his claim of payment, it would appear that many of his duties reflected those of a Director as set out in paragraph (c) of Clause 24(5). There is evidence that a Co-ordinator was also employed, but the ultimate authority in the day to day running of the Centre was with the applicant. There was no evidence as to whether the applicant met "the minimum requirements for a Co-ordinator in accordance with the Community Services (Child Care) Regulations 1998" which forms part of the definition of a Director.

44 If the applicant was not a "Director", he may have been an "Assistant Director" which is defined as—

"(4) Assistant Director

(a) Description: An Assistant Director with qualifications and experience as Qualified Child Care Giver who assists the Director with the administration of the Centre and is appointed as such.

(b) Skill Descriptor: An employee at this level shall be expected to perform skills above and beyond those as Qualified Child Care Giver. That person—

- Performs work under limited supervision either individually or in a team environment;
- Provides guidance and assistance as part of a work team;
- Assists in the provision of on-the-job training to other employees;
- Exercises broad discretion.

(c) An Assistant Director shall be appointed—

(i) Assistant Director Grade One—

A person responsible for the co-ordination of programming within the Centre, or

(ii) Assistant Director Grade Two—

A person who, undertakes, in addition to Grade One responsibilities, administrative and supervisory functions, or

(iii) Assistant Director Grade Three—

A person whose tasks are predominantly non-contact or a person whose Director has responsibilities for more than one Centre."

(Clause 24(4) of the Children's Services (Private) Award (No. A 10 of 1990)

45 There was no evidence as to whether the applicant has qualifications as a Qualified Child Care Giver. The applicant says that when the Chesterfield Child Care Centre commenced operating they planned to have the minimum qualified staff that they were allowed and to have as unqualified persons one "non-contact" Director being himself, and the other two being his wife, Taruna Polra, and Mr Shah's wife. I can only assume that this means that at the time the Centre commenced operating the applicant did not have qualifications as a Qualified Child Care Giver, as required for satisfaction of the definition of Assistant Director. There was no evidence of whether this remained the case for the whole of his employment. However, his responsibilities are reflected in the description of an Assistant Director.

46 The onus is on the applicant to demonstrate that his claims arise from benefits of his contract and do not arise from an award. There is sufficient within the definitions of "Director" and "Assistant Director" when compared with the responsibilities held and the duties performed by the applicant to raise serious questions about whether the applicant was engaged as a Director or Assistant Director which he has not answered. There are questions as to his qualifications and duties, and as to the funding of the Centre. These questions mean that on the balance of probabilities, the Commission is not able to be satisfied that his claim does not relate to benefits arising under an award of this Commission.

47 In all of these circumstances, I am not satisfied that the claims he makes to enforce his contractual entitlements are those which do not arise from an award. Wage rates are set out in the award, as are entitlements to annual leave. The award also provides for superannuation contributions in accordance with the superannuation guarantee levy as it was at the time the clause was inserted into the award.

48 If I am wrong in this and that the applicant's employment was not subject to an award then he must establish that he is entitled to the conditions pursuant to his contract of employment.

49 I do not accept the applicant's argument that because he was the Director of the Child Care Centre and the Director of the company responsible for authorising and setting rates of pay for employees that he was entitled to set his own rates of pay and conditions of employment without reference to his employer who was the respondent. The evidence demonstrates that it was agreed between the applicant and Mr Shah, the majority shareholder in the business, that until the business made a profit, the applicant would not receive payment. This can be read in two ways. One is that he would not receive any payment at all for the period until the business was profitable. Alternatively, once the business was profitable he would be back paid for the period when he had not received payment. Which of the two alternatives is applicable was not clarified between the parties. Further, there was no discussion between the parties as to what rate the applicant would receive once a profit was attained. Neither of those situations was clarified by the applicant's evidence. His evidence in that regard was his interpretation of a vague understanding. I am not satisfied that the applicant was entitled to receive wages for the period prior to any profit being made. The applicant's evidence as to the profitability of the business was conflicting. The applicant says that they were making a profit. A number of the costs incurred in establishing the Centre were able to be written off for tax purposes, I assume on the basis of depreciation, and therefore this would provide a "paper loss" as described by the applicant. Whilst this may be so, it is not clear to me whether the business was making a profit or not. It is clear however, that the parties had not defined what was to be the profit to be achieved for the purpose of determining when the applicant was to receive wages. Was he to be paid wages when profit before tax was achieved, was it to be a profit after tax? The evidence is unclear. However, it would appear that up until July 1996, at least, the company was not making any profit. The financial records before the Commission and the evidence do not allow any conclusion to be reached as to whether a profit was made between the end of July and 16 August 1996, as claimed in paragraph (b). Therefore, the bulk of paragraph (b) of Clause 27 of the Further and Better Particulars of claim, from 1 November 1995 to 16 August 1996 would not be payable.

50 The evidence also demonstrates that once Mr Shah commenced working in the Child Care Centre, he and the applicant between them agreed on the rate of pay that would be applied to them both. That rate changed over time. Until the applicant went to Sydney on holiday at the end of 1998, there was no dispute between the applicant and Mr Shah as to the rate of pay to be paid.

51 Therefore, I conclude firstly that the applicant was not entitled to any wages until a profit was made. This situation was superceded by the agreement between the applicant and Mr Shah once Mr Shah commenced working at the Centre. There can be no dispute that the applicant was paid the wages due under his contract from that point until the applicant went to Sydney in late 1998, because he was responsible for making those payments.

52 The claim the applicant makes for the period 30 August 1996 to 30 December 1997 (paragraph (e)) is for the shortfall between the amounts he was paid and the "guideline" award rate, not for any contracted rates. There is no evidence that this "guideline" rate was agreed between the parties. It was merely an award rate which the applicant used in constructing his claim. There is no claim for any wages outstanding between 30 December 1997 and 1 April 1999.

53 In all of these circumstances, I am not satisfied that the applicant is entitled to any wages as claimed. In summary, this is because the applicant has not discharged the onus he bears to demonstrate that his employment was not the subject of an award and that his claim does not relate to an award benefit. Secondly, he was not entitled to set his own rate of pay. Thirdly, the evidence as to profitability and the basis of a rate of pay once profitability was reached, was unclear. Fourthly, the evidence demonstrates that the applicant and Mr Shah agreed to a rate for them both and this was paid by the applicant to himself. This rate changed over time by agreement between the applicant and Mr Shah.

54 Therefore, paragraphs (b) and (e) of Clause 27 of the claim as set out in the Further and Better Particulars are not demonstrated as being wages due to the applicant.

55 The remainder of the claims deal with superannuation (paragraphs (a) and (i)), and annual leave (paragraphs (c), (d), (g) and (h)).

56 The evidence demonstrated that there was no discussion between the parties as to any annual leave entitlement, any superannuation entitlement or any other conditions of employment. I am not satisfied that the superannuation entitlement arose from any contractual entitlement, but arose from the superannuation guarantee levy. According to *Keane and Lomba Pty Ltd* (1998) 78 WAIG 810 this is not enforceable as a contractual benefit pursuant to s.29(1)(b)(ii) of the Industrial Relations Act 1979.

57 If the applicant's claims in respect of unpaid annual leave arise from the Award then, of course, they are not enforceable in this jurisdiction. Further, there is no evidence that there was any agreement between the parties as to what annual leave entitlement the applicant would have, therefore there is no evidence that the applicant's contract of employment entitled him to any particular annual leave arrangement. If the applicant's entitlement then arises from the provisions of the Minimum Conditions of Employment Act, then that is enforceable in another jurisdiction. Therefore, any claims for payment of annual leave as set out in paragraphs (c), (d), (g) and (h) are not substantiated as arising under the contract of employment.

58 In all of the circumstances then the applicant's claim in respect of contractual benefits is to be dismissed.

59 There remains one further issue to be dealt with and that is the question of costs. Although both parties were represented by counsel, their respective counsel were not familiar with the basis upon which awards of this Commission operate. I believe that this has lead to the claims in respect of contractual benefits being misconceived by the applicant, and a good deal of time being wasted by both parties in the pursuit and defence of the claims. When parties are undertaking the lengthy, time consuming and disruptive proceedings such as these it would be helpful if they were properly advised.

60 Further, I noted in my Reasons of 3 May 2001, that the applicant throughout the course of this application's processing, hearing and determination by the Commission has been less than diligent in his pursuant of the application, has been far from clear in identifying his claims and has put the respondent to considerable inconvenience to identify those claims. The respondent, for its part, has been unhelpful, its witnesses unreliable and its representation difficult, to put it mildly. The parties have both foreshadowed at various stages that they would seek costs. In light of my comments in respect of both the pursuit and defence of this application I can see that neither party would warrant costs being awarded on the basis of the normal considerations of this Commission. The only consideration would be that both parties have wasted considerable time and resources in their pursuit and defence of their respective positions. The applicant, having been found to have been harshly, oppressively and unfairly dismissed gains no remedy other than a declaration that he has been harshly, oppressively and unfairly dismissed. On the other hand, he has spent considerable time and resources pursuing claims for compensation and contractual benefits which are misconceived and unsustainable. The respondent has steadfastly objected to the claims but in some aspects not on rational or objective grounds. Therefore, any applications for costs if made are unlikely to succeed.

———

2002 WAIRC 04704

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	NARSEY POLRA, APPLICANT
	v.
	CHESTERFIELD CHILD CARE CENTRE PTY LTD, RESPONDENT
CORAM	COMMISSIONER P E SCOTT
DELIVERED	FRIDAY, 25 JANUARY 2002
FILE NO.	APPLICATION 1016 OF 1999
CITATION NO.	2002 WAIRC 04704

Result	Application for alleged unfair dismissal upheld Application for alleged contractual benefits dismissed

Order

HAVING heard Mr L Margaretic (of Counsel) on behalf of the applicant and Mr T Mijatovic (of Counsel) on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act 1979, hereby—

Declares—

THAT the applicant was harshly and unfairly dismissed from his employment by the respondent.

Orders:

THAT this application otherwise be, and is hereby dismissed.

(Sgd.) P. E. SCOTT,
[L.S.] Commissioner.

2002 WAIRC 04740

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ELIZABETH WARNER, APPLICANT
	v.
	BURSWOOD HOTEL PTY LTD, RESPONDENT
CORAM	COMMISSIONER S WOOD
DELIVERED	WEDNESDAY, 23 JANUARY 2002
FILE NO.	APPLICATION 1533 OF 2001
CITATION NO.	2002 WAIRC 04740

Result	Application dismissed
Representation	
Applicant	Mr J Rosales Castaneda of Counsel
Respondent	Mr D Jones as agent

Reasons for Decision

(Given extemporaneously and subsequently edited by the Commissioner)

1 The matter before me rests on the adequacy or reasonableness of the redundancy payment to Mrs Warner. I do not recite the agreed facts of the matter between the parties; they are part of the record.

2 The applicant seeks 11.5 weeks additional payment on the basis that three kitchen stewards employed by Burswood Hotel Pty Ltd (BHPL), and made redundant just prior to her, were paid redundancy at the rate of 1.5 weeks per year of service. The respondent paid Mrs Warner 8 weeks redundancy pursuant to the relevant award when she was later made redundant as part of the contracting out of housekeeping at the hotel.

3 The applicant says that equity dictates that Mrs Warner be paid the same as the other three staff, and the precedent to be followed by the Commission is the decision in *Frederick John Rogers v Leighton Contractors* (1999) 79 WAIG 3551. This decision is well known, and the inadequacy of a redundancy payment may lead to a determination of unfairness in section 29 matters.

4 The respondent says an error was made, and the three employees whose payments are represented in [Exhibits 4A, B and C] should not have received these amounts. The respondent also says the Commission should not determine the dismissal as unfair when the employee has been paid their lawful entitlement, and refers to the Full Bench decision in *WA Access Pty Ltd v Mark Robert Vaughan* 81 WAIG 373.

5 The applicant does not challenge that that was the lawful payment; they say simply that there was no error, and in equity Mrs Warner can be paid above the award, and should have been.

6 I do not query the evidence before me in terms of credibility. I accept Ms Drimatis' evidence that an error was made, and Mr Welch was advised of this on 26 July 2001. Ms Drimatis says that [Exhibits A1 and A2] were put on noticeboards or made available to kitchen stewards in Burswood Resort Management Limited (BRML), and does not know if they were made available to hotel kitchen stewards.

7 It is easy to infer that the hotel kitchen stewards may have seen these documents which speak of the casino and the hotel. That, however, is not relevant for my purposes. I have also [Exhibit R1], which expresses Ms Drimatis' intention, and I accept her evidence, that an error has occurred. However, whether a mistake has occurred or not is, I consider, not the defining issue. There is no evidence that Mrs Warner was made an offer, either directly or indirectly, of the severance payment of 1.5 weeks per year of service. Mr Rosales Castaneda says that the employer can offer more than the award. They can, but there is no evidence that they did in this case.

8 I can understand Mrs Warner believing that she was treated unfairly by not getting as much as the other three employees who were made redundant just prior to her, but that is sometimes a feature of redundancy packages dealt with at different times by companies. There was also no policy given to me in evidence of a redundancy payment applying across the board for all employees of 1.5 weeks per year of service.

9 In simple terms, having received no offer of a redundancy package above the award, having received the same package as employees covered by the award and made redundant in housekeeping at the same time, I do not find the adequacy of the redundancy payment to mean that the termination was unfair so as to warrant the intervention of the Commission.

10 I rely, in coming to this conclusion, also on the decision in *WA Access Pty Ltd v Mark Robert Vaughan*; the unanimous decision of the Full Bench. I recite into the record two relevant passages. In paragraph 48 of that decision the President says—

> "In this case, the dismissal by way of redundancy could not be unfair by virtue of the failure to pay the employee a redundancy payment or an adequate redundancy payment when an award which binds the parties does not confer such an entitlement on employees or such an obligation on the employer."

In this particular case there is a redundancy provision in the award that applies, and that redundancy provision has been applied.

11 Further in the decision, at paragraph 57, it says—

> "It should be first observed that, for the reasons which I hereinafter express, the failure to pay a redundancy payment at all was, given the obligations expressed in the award (which did not include an obligation to pay severance pay to an employee of less than twelve months duration), not unfair."

12 For all those reasons as expressed, I would find the termination payment to be fair and I would order that the application be dismissed.

2002 WAIRC 04741

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
PARTIES	ELIZABETH WARNER, APPLICANT
	v.
	BURSWOOD HOTEL PTY LTD, RESPONDENT
CORAM	COMMISSIONER S WOOD
DELIVERED	MONDAY, 4 FEBRUARY 2002
FILE NO.	APPLICATION 1533 OF 2001
CITATION NO.	2002 WAIRC 04741

Result	Application dismissed
Representation	
Applicant	Mr J Rosales Castaneda of Counsel
Respondent	Mr D Jones as agent

Order

HAVING heard Mr J Rosales Castaneda of counsel on behalf of the applicant and Mr D Jones 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.

SECTION 29 (1)(b)—Notation of—

	Parties	Number	Commissioner	Result
Alivojvodic DB	Clough Engineering Limited	1138/2001	GREGOR C	Discontinued
Amis A	Polyaire Pty Ltd	1813/2001	KENNER C	Discontinued
Asic MJ	Anodisers W.A.	1975/2001	WOOD C	Consent Order
Austin RB	Asheli Pty Ltd t/a Renouf Personal Training Centre Claremont	1675/2001	GREGOR C	Order Issued
Berlingieri T	Mayne Nickless Limited ABN 56004 073 410	1691/2001	SCOTT C.	Discontinued

	Parties	Number	Commissioner	Result
Blonk M	The Highlife Co Pty Ltd	1318/2001	BEECH C	Discontinued
Bloomfield C	Chaise Designs Pty Ltd (Focus Designs)	1546/2001	WOOD C	Discontinued
Booth JE	Nationwide Food Brokers Pty Ltd	14/2002	BEECH C	Withdrawn by leave
Burns L	Royal Australian Airforce Association (WA Division) Inc T/A RAAFA Veterans Homes Appeal Fund	1400/2001	GREGOR C	Discontinued
Calhoun J	Sanitaire Pty Ltd	154/2001	SMITH C	Order (Arbitration)
Can SAO	Barry Crommelin Family Trust T/A Crommelin Chemicals	824/2000	SCOTT C.	Discontinued
Carpenter CD	Paul Stravrides – Baitz Confectionary	1633/2001	GREGOR C	Dismissed for want of prosecution
Coleman RJ	R.J. Coleman Holdings Pty Ltd CAN 008692779	950/2001	KENNER C	Order Issued
Coleman RJ	R.J. Coleman Holdings Pty Ltd CAN 008692779	951/2001	KENNER C	Order Issued
Conlin D	Duncraig Beauty Centre	1826/2001	SCOTT C	Dismissed
Czernyszow P	Caldera Nominees t/a Harrington Brokers	1760/2001	SCOTT C	Withdrawn by leave
Davis LD	Blaxland Pty Ltd	1074/2001	GREGOR C	Dismissed
De Groot CR	Ngaanyatjarra Health Services	1757/2001	GREGOR C	Discontinued
Dean J	Australian Timber Products Pty Ltd	1514/2001	BEECH C	Discontinued
Dirou S	Daytrader Hq Ltd	1241/2001	SMITH C	Discontinued
East MJ	Australia Post	1257/2001	GREGOR C	Discontinued
Edwards CJ	M/M Marchioli t/a Skypark Valet Parking	861/2001	SMITH C	Discontinued
Egan MR	ANK Recycles	1807/2001	KENNER C	Discontinued
Ellis MA	Century Drilling Ltd & Century Resources	1365/201	KENNER C	Discontinued
England G	Citysearch Directories Pty Limited	1882/2001	BEECH C	Discontinued
Fagg BAW	Done & Linda Kolichev, Golden Days Pty Ltd t/a Stirling Glass & Aluminium	1378/2001	KENNER C	Dismissed for want of prosecution
Fanchi A	Holden National Leasing Limited	1448/2001	KENNER C	Discontinued
Finnerty RC	Centrepoint Newsagency & Bookshop	2137/2001	SCOTT C.	Discontinued
Gerace D	Frank Keet of Keet & Associates	1761/2001	GREGOR C	Withdrawn
Gilomen KB	John Rando, Rando & Co, Barristers and Solicitors	1368/2001	SCOTT C.	Discontinued
Graham JE	Robert Waters – The Queens Hotel	699/2001	SCOTT C	Dismissed
Green J	Hills Industries Ltd ABN 35 007 573 417	1561/2001	KENNER C	Discontinued
Gregor S	Westco Jeans Pty Ltd	1849/2001	SCOTT C.	Order Issued
Hancock LM	Goundrey Wines Pty Ltd	2142/2001	SCOTT C	Dismissed
Harrison LC	Martin G. Williams	1552/2001	BEECH C	Discontinued
Herbert PS	Bevron Fibreglass	1802/2001	BEECH C	Discontinued
Hill N	Clinical Cell Cellure Pty Ltd CAN090161505	1809/2001	SMITH C	Discontinued
Johnston DE	Australian Medical Procedures Research Foundation	758/2001	SCOTT C.	Discontinued
Kalaitzis P	Method and Madness Pty Ltd	83/2001	SMITH C	Discontinued
Keerthisri H	Challenger TAFE, Fremantle Campus	1371/2001	KENNER C	Discontinued
Laws GA	Rohanna Pty Ltd t/a Skipper Mitsubishi	1791/2001	GREGOR C	Discontinued
Long SM	Gateway Hotel Resort Management	1747/2001	GREGOR C	Discontinued
Lucchesi JMJ	Morrison Engineering	2242/2001	BEECH C	Withdrawn by leave
Mac TT	Kresta Holding	835/2001	SCOTT C.	Discontinued
Malland MD	Australian Capital Equity Pty Ltd	1354/2000	GREGOR C	Discontinued
Manna FP	Markhill Holdings Pty Ltd as Trustee for The Midnight Printing Unit Trust t/as “Midnight Printing”	1751/2000	KENNER C	Order (Arbitration)
Marshall S	Barrymores Pty Ltd	1367/2001	GREGOR C	Discontinued

	Parties	Number	Commissioner	Result
Masoet S	Oz Bricklaying	1929/2001	KENNER C	Discontinued
Matthews SP	Margaret River Real Estate First National	1967/2001	SMITH C	Discontinued
McCulloch PJ	Auto Group Auctions	1862/2001	BEECH C	Discontinued
McHutchinson J	Fidei Corporation Pty Ltd	285/2001	KENNER C	Discontinued
McMaster S	Lorraine Delantye; Demsell Pty Ltd	1273/2001	WOOD C	Dismissed
Mead MD	Barrington Wine Company Ltd	655/2001	SCOTT C	Dismissed
Nguyen LT	Buckeridge Nominees Pty Ltd t/a BGC Windows	1476/1999	SCOTT C	Dismissed
Noble C	Danka Australia Pty Ltd	2114/2001	KENNER C	Discontinued
O'Dwyer FM	Le'Seloivre Pty Ltd	2237/2001	BEECH C	Discontinued
Oakes IL	Ronald Wilkinson Scarth of Wilkinson Marketing	44/2001	KENNER C	Discontinued
Ormonde RA	Stanley Mining Services Pty Ltd	1810/2001	BEECH C	Discontinued
Patricio FM	KC and CC Grant t/a Ampol Gosnells and Ampol Willetton	2026/2001	SCOTT C	Withdrawn by leave
Podger A	National 1 Ltd	1769/2001	BEECH C	Dismissed
Posta GD	Western Power Corporation	1497/2001	SMITH C	Discontinued by leave
Ralph I	Vital Foods Pty Ltd	2164/2001	SCOTT C	Dismissed
Rayment S	Lawcott P/L ACN085 499 645 t/a Assassin Print	944/2000	KENNER C	Discontinued
Robinson PA	Avon Valley Taxi Service	1798/2001	KENNER C	Discontinued
Scarvaci G	The Mount Can, Benjay Pty Ltd CAN 009337231 ATFT, Santi Family Trust T/as	1413/2001	KENNER C	Discontinued
Scott JT	Tennyson Network Pty Ltd	1724/2001	WOOD C	Discontinued
Sharp-Collett CM	Crushing Services International Pty Ltd	2166/2001	KENNER C	Discontinued
Shaw JP	Kundana Gold Pty Ltd	1848/2001	GREGOR C	Discontinued
Shaw RJ	Five Star Security CAN 086 541 157 as Trustee for the Five Star Unit Trust T/AS Five Star Security (Directors-Gary Clark. Tom Delaney)	1346/2001	BEECH C	Discontinued
Shehan A	Education Department of WA	1890/2000	KENNER C	Discontinued
Skilton DK	Mezzonine Café	1992/2001	GREGOR C	Dismissed for want of prosecution
Smalley MJ	Don Stocks – Cable Power	1921/2001	WOOE C	Dismissed
Smith CJ	Australis Panoptic Technologies Pty Ltd	1977/2001	GREGOR C	Discontinued
Stephenson AD	R.A.C. Glass & Security Pty Ltd	1304/2001	BEECH C	Discontinued
Sturman G	Chapmans Barristers & Solicitors	1/2002	SMITH C	Discontinued
Sullivan W	Western Australian Trotting Association	1937/2001	SCOTT C.	Discontinued
Tedeschi SE	Strathfield Car Radio	1582/01	BEECH C	Discontinued
Thomas K	Westco Jeans Co	1674/2001	WOOD C	Dismissed
Wagner W	Jeff & Janette Elix	1811/2001	SCOTT C	Dismissed
Walsh AD	Cognis Australia Pty Ltd	1464/2001	GREGOR C	Discontinued
Wilkie AL	Associated Nursery Traders Pty Ltd t/a Trees Agreen Garden Centre	1892/2001	BEECH C	Discontinued
Williamson N	Supply Direct Pty Ltd	1744/2001	KENNER C	Discontinued
Woodward JP	Johnson & Johnson Vision Care	1788/01	SCOTT C	Dismissed
Wright SG	Sheepo (WA) Pty Ltd	889/2001	GREGOR C	Discontinued

CONFERENCES—Matters arising out of—

2002 WAIRC 04759

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE AUTOMOTIVE, FOOD, METALS, ENGINEERING, PRINTING AND KINDRED INDUSTRIES UNION OF WORKERS - WESTERN AUSTRALIAN BRANCH, APPLICANT
	v.
	BHP BILLITON (BHP IRON ORE), RESPONDENT
CORAM	COMMISSIONER S J KENNER
DELIVERED	TUESDAY, 5 FEBRUARY 2002
FILE NO/S.	C 18 OF 2002
CITATION NO.	2002 WAIRC 04759

Result	Recommendation issued.
Representation	
Applicant	Mr T Kucera of counsel
Respondent	Mr R Lilburne of counsel

Recommendation

WHEREAS on 29 January 2002 the applicant made application for an urgent compulsory conference pursuant to s 44 of the Industrial Relations Act 1979;

AND WHEREAS the Commission convened a compulsory conference between the parties to this application on 5 February 2002;

AND WHEREAS the Commission was advised at the conference that the parties were in dispute as to changes to the start and finish times for maintenance employees at the respondent's Finucane Island operations in Port Hedland;

AND WHEREAS the Commission, after having heard the parties and having endeavoured to assist the parties to reach agreement on the matters in dispute and having considered the issues was of the view that in all the circumstances, it would issue a recommendation to the parties in order to assist in the expeditious resolution of the dispute;

NOW THEREFORE 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 dispute, in accordance with the provisions of the Industrial Relations Act, 1979 hereby recommends—

1. THAT the respondent's proposal for changes to the start and finishing times at Finucane Island for day maintenance employees from 6.00am to 7.00am be implemented.
2. THAT there be a review of the implementation of the changes to the start and finishing times at Finucane Island involving the parties to these proceedings at the end of a two month period from the implementation of the changes.
3. THAT the review referred to in paragraph two above be the subject of a report back conference before the Commission on a date to be fixed, after the conclusion of the two month period, at which time the Commission will deal with any issues arising from the implementation of the change to starting and finishing times.

(Sgd.) S. J. KENNER,
[L.S.] Commissioner.

2002 WAIRC 04739

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE AUTOMOTIVE, FOOD, METALS, ENGINEERING, PRINTING AND KINDRED INDUSTRIES UNION OF WORKERS - WESTERN AUSTRALIAN BRANCH, APPLICANT
	v.
	PHYRNE HOLDINGS PTY LTD T/AS STIRLING BUSINESS MACHINES
	-and-
	DEPUTY REGISTRAR, DARRYL KINGSLEY BUTTAL, RESPONDENTS
CORAM	COMMISSIONER J F GREGOR
DELIVERED	MONDAY, 4 FEBRUARY 2002
FILE NO.	C 298 OF 2001
CITATION NO.	2002 WAIRC 04739

Order

WHEREAS on 4th February 2002 the Commission convened a conference pursuant to s.44 of the *Industrial Relations Act, 1979* (the Act) to deal with a dispute between The Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers - Western Australian Branch and Phyrne Holdings Pty Ltd t/as Stirling Business Machines (the Respondent) relating to the alleged unfair termination of Mr Clive Tolley; and

WHEREAS at the conference it became clear that a crucial issue as to the disposition of the dispute was whether Mr Clive Tolley attended the premises of Total Ceramics Pty Ltd on 30th October 2001; and

WHEREAS the Respondent alleges that Mr Tolley did attend the said premises but Mr Tolley denies that he did; and

WHEREAS in order to resolve the issue the Commission has decided to exercise the powers vested in it under s.33(1)(d) of the Act and made an order for the examination on oath of Mario Chiera and Mario Taddei said to the Principals of Total Ceramics Pty Ltd to establish whether or not Mr Clive Tolley did visit the premises of Total Ceramics on 30th October 2001; and

WHEREAS for this purpose the Commission now orders that Deputy Registrar Darryl Kingsley Buttal being an officer of the Commission examine upon oath Mario Chiera and Mario Taddei for the purpose of ascertaining whether Mr Clive Tolley visited the premises of Total Ceramics Pty Ltd on 30th October 2001; and

WHEREAS Deputy Registrar Buttal is to undertake the examination upon oath and make and file deposition of such examination within seven days hereof or such extended period as is granted by the Commission.

NOW THEREFORE pursuant to the powers vested in the Commission by s.33(1)(d) of the *Industrial Relations Act, 1979* the Commission hereby orders—

THAT Deputy Registrar Darryl Kingsley Buttal examine under oath Mario Chiera and Mario Taddei and make and file deposition of such examination within seven days of the date hereof or such extended period as is granted by the Commission.

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

2002 WAIRC 04606

NEGOTIATION OF NEW INDUSTRIAL AGREEMENT

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE BREWERIES AND BOTTLEYARDS EMPLOYEES' INDUSTRIAL UNION OF WORKERS OF WESTERN AUSTRALIA, APPLICANT
	v.
	KIRIN AUSTRALIA PTY LTD, RESPONDENT
CORAM	COMMISSIONER S WOOD
DELIVERED	THURSDAY, 10 JANUARY 2002
FILE NO.	C 64 OF 2000
CITATION NO.	2002 WAIRC 04606

Result	Consent order
Representation	
Applicant	Mr R Murphy
Respondent	Mr S Heathcote as agent

Order

WHEREAS the parties entered into a consent agreement on 9 November 2000 in matter No C 64 of 2000 entitled the Kirin Australia Enterprise Agreement 2000; and

WHEREAS the agreement stipulated an expiry date of one year from the date of the Commission's order; and

WHEREAS the parties obtained an extension by consent until 31 December 2001; and

WHEREAS the parties by correspondence dated 8 January 2002 sought a consent order to extend the period of operation of the agreement until 30 March 2002;

NOW THEREFORE the Commission, pursuant to the powers conferred on it under section 44(8) of the Industrial Relations Act, 1979, and by consent, hereby orders—

THAT the period of operation be extended, by consent, until 30 March 2002.

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

2002 WAIRC 04772

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ANDERSON FORMRITE PTY LTD, APPLICANT
	v.
	CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS, RESPONDENT
CORAM	COMMISSIONER J F GREGOR
DELIVERED	FRIDAY, 8 FEBRUARY 2002
FILE NO.	C 27 OF 2002
CITATION NO.	2002 WAIRC 04772

Order

WHEREAS Anderson Formrite Pty Ltd (the Applicant) has applied to the Commission for a conference pursuant to s.44 of the *Industrial Relations Act, 1979* (the Act) over a dispute between it and the Construction, Forestry, Mining and Energy Union of Workers (the Union) over stand down arrangements at the Baulderstone Hornybrook Pty Ltd building construction site situated at 240 St George's Terrace, Perth; and

WHEREAS on 7th February 2002 the Commission conducted a conference between the parties in an effort to resolve the dispute; and

WHEREAS the said conference was adjourned for a meeting between the Principal of the Applicant, the Secretary of the Union and the Commission in Chambers on 8th February 2002; and

WHEREAS at that conference the Commission offered the parties a number of options for future disposition of the matter included in which was that the Applicant may ask the Commission to exercise its powers pursuant to s.44(5)(b) & (c) of the Act; and

WHEREAS during the conference it was alleged and confirmed that employees of the

Applicant were not performing work on site at 240 St George's Terrace, Perth and would next meet concerning the future of the dispute on Tuesday, 12th February 2002; and

WHEREAS on 8th February 2002 at 1453 hours the Applicant by letter requested the Commission exercise its powers pursuant to s.44(5)(b) & (c) of the Act; and

WHEREAS despite any other provision of the Act if at or in relation to a conference under s.44 it appears to the Commission that a strike is occurring which constitutes or will constitute a breach of any award, order or agreement to which the organisation of employees by

participating in the strike is a party; or any understanding, undertaking or procedure entered into given or agreed by an organisation of employees whose members are participating in a

strike then the Commission is required to order that organisation and those members to ensure that normal work resumes immediately; and

WHEREAS the Commission has considered the terms of the Applicant's Minute of Proposed Order, received at 1502 hours on 8th February 2002, and has concluded such orders are inconsistent with the purpose and intent of the provisions in s.44(5)(b) & (c) of the Act; and

WHEREAS the Commission has formed the view that a strike matter as defined in s.31(12) of the Act is occurring and the Commission is required to use its best endeavours to ensure that normal work resumes immediately and it has decided that it is required to order the members of the organisation participating in the strike and that organisation to ensure work resumes immediately.

NOW THEREFORE pursuant to the powers vested in it by the *Industrial Relations Act, 1979* the Commission hereby orders—

THAT the Construction, Forestry, Mining and Energy Union of Workers and those of its members employed on the works at 240 St George's Terrace, Perth ensure that normal work resumes immediately.

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

CONFERENCES—Matters referred—

2002 WAIRC 04697

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE AUSTRALIAN WORKERS' UNION, WEST AUSTRALIAN BRANCH, INDUSTRIAL UNION OF WORKERS & OTHERS, APPLICANT
	v.
	DAMPIER SALT PTY LTD, RESPONDENT
CORAM	COMMISSIONER S J KENNER
DELIVERED	MONDAY 21 JANUARY 2002
FILE NO/S.	CR 190 OF 2001
CITATION NO.	2002 WAIRC 04697

Result	Order issued.
Representation	
Applicant	Mr M Llewellyn
Respondent	Ms E Hartley of counsel

Order

HAVING heard Mr M Llewellyn on behalf of the Australian Workers' Union, West Australian Branch, Industrial Union of Workers, the Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers, Western Australian Branch and the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Workers Union of Australia, Engineering and Electrical Division, WA Branch and Ms E Hartley 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 applications 1568 of 2001 and CR 190 of 2001 be and are hereby joined and will be heard and determined together.

(Sgd.) S. J. KENNER,
[L.S.] Commissioner.

2002 WAIRC 04752

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE AUSTRALIAN WORKERS' UNION, WEST AUSTRALIAN BRANCH, INDUSTRIAL UNION OF WORKERS & OTHERS, APPLICANTS
	v.
	DAMPIER SALT PTY LTD, RESPONDENT
PARTIES	DAMPIER SALT PTY LTD, APPLICANT
	v.
	THE AUSTRALIAN WORKERS' UNION, WEST AUSTRALIAN BRANCH, INDUSTRIAL UNION OF WORKERS & OTHERS, RESPONDENTS
CORAM	COMMISSIONER S J KENNER
DELIVERED	MONDAY, 4 FEBRUARY 2002
FILE NO/S.	CR 190 OF 2001, APPLICATION 1568 OF 2001
CITATION NO.	2002 WAIRC 04752

Result	Direction issued.
Representation	
Applicant	Mr M Llewellyn
Respondent	Ms E Hartley of counsel

Direction

HAVING heard Mr M Llewellyn on behalf of the applicants in application No. CR 190 of 2001 and the respondents in application No. 1568 of 2001 and Ms E Hartley of counsel on behalf of the respondent in application No. CR 190 of 2001 and the applicant in application No. 1568 of 2001 the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby directs—

1. THAT application No.'s CR 190 and 1568 of 2001 be joined and heard and determined together.
2. THAT the applicants in application No. CR 190 of 2001 file and serve an outline of submissions in relation to that application by 22 February 2002.
3. 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.
4. THAT the parties file and serve upon one another any signed witness statements upon which they intend to rely no later than 21 days prior to the date of hearing.
5. THAT the parties file and serve upon one another any signed witness statements in reply upon which they intend to rely no later than seven days prior to the date of hearing.
6. THAT the parties give notice to one another of witnesses they require to attend at the proceedings for the purposes of cross-examination no later than five days prior to the date of hearing.
7. THAT subject to paragraph two of these directions the parties file and serve an outline of submissions by no later than three days prior to the hearing.
8. THAT the parties have liberty to apply on short notice.

(Sgd.) S. J. KENNER,
Commissioner.

[L.S.]

CONFERENCES—Notation of—

PARTIES		COMMISSIONER/ CONF. NO.	DATES	MATTER	RESULT
Australian Workers' Union	BDS Recruit	KENNER C. C251/2001	13/12/2001	Unfair dismissal	Concluded
Australian Workers' Union	Goldfields Contractors	WOOD C. C265/2001	15/01/2002	Alleged unfair dismissal and denied contractual entitlements	Referred
Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union	Wynai Pty Ltd t/a George Day Caravans	BEECH C C194/2001	27/08/2001 8/11/2001	Alleged inadequate redundancy	Concluded
Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union	City of Perth	GREGOR C C225/2001	25/09/01	Reclassification	Concluded
Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union	WA Mint	GREGOR C C245/2001	30/10/01	Work Conditions	Concluded
Civil Service Association	Director General, Department of Justice (formerly known as Ministry of Justice)	SCOTT C. PSAC23/2001	3/01/2002	Continuing employment of Ms P Bingham	Concluded

PARTIES		COMMISSIONER/ CONF. NO.	DATES	MATTER	RESULT
Construction, Forestry, Mining and Energy Union	Fieldway Enterprises Pty Ltd	GREGOR C C277/2001	05/12/01	Alleged Termination	Referred
Construction, Forestry, Mining and Energy Union	Hiform Concrete Pty Ltd	GREGOR C C12/2002	22/01/02	Industrial Action	Concluded
Construction, Mining, Energy, Timberyards, Sawmills and Woodworkers Union	BHP Iron Ore Pty Ltd	KENNER C C143/2001	22/06/2001	Dispute re unfair and unwarranted final warning	Concluded
Construction, Mining, Energy, Timberyards, Sawmills and Woodworkers Union	Metropolitan Health Service Board	SCOTT C. C229/2001	5/10/2001 19/10/2001	Dispute over the foreshadowed forced transfer of a carpenter from PMH to KEMH	Referred
Forest Products, Furnishing and Allied Industries Industrial Union	Brown Bros Furniture	BEECH C C289/2001	21/01/2002	Non payment of redundancy	Concluded
Forest Products, Furnishing and Allied Industries Industrial Union	Wesfi Manufacturing Pty Ltd	GREGOR C C279/2001	10/12/2001	Leave entitlements during the Christmas/New Year period	Concluded
Hospital Salaried Officers Association	Armadale Health Service	BEECH C C199/2001	29/08/2001 7/09/2001 10/09/2001 13/09/2001 18/09/2001 20/09/2001	Proposed industrial action	Concluded
Hospital Salaried Officers Association	Metropolitan Health Services at Royal Perth Hospital	SCOTT C. PSAC9/2001	2/08/2001	Removal of written warning from record	Concluded
Liquor, Hospitality and Miscellaneous Workers Union	CSR Building Materials	GREGOR C C230/2001	03/10/2001	regards to alleged unfair dismissal of union member	Concluded
Liquor, Hospitality and Miscellaneous Workers Union	Coles Supermarkets	WOOD C CR151/2001	08/09/00, 10/04/01, 15/01/02	Alleged breach of the Bakers Metropolitan Award	Concluded
Liquor, Hospitality and Miscellaneous Workers Union	Tip Top Bakeries	WOOD C C202/2000	N/A	Dispute in regards to alleged unfair dismissal of union member	Discontinued
Police Union	Commissioner of Police	SCOTT C PSAC20/2001	14/12/2001, 18/12/2001	Dispute regarding alleged breach of promotion procedures	Concluded
State School Teachers Union	Director General Education Department of Western Australia	KENNER C C233/2001	25/10/2001	Dispute over claims of misconduct of Applicant Union's member	Discontinued

CORRECTIONS—

2002 WAIRC 04744

BP REFINERY (KWINANA) (SECURITY OFFICERS') AWARD, 1978

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES AUSTRALIAN LIQUOR, HOSPITALITY AND MISCELLANEOUS WORKERS UNION, WESTERN AUSTRALIAN BRANCH, APPLICANT

v.

BP OIL REFINERY (KWINANA) PTY LTD AND OTHERS, RESPONDENTS

CORAM CHIEF COMMISSIONER W S COLEMAN

DELIVERED THURSDAY, 24 JANUARY 2002

FILE NO/S. APPLICATION 1027 OF 2001

CITATION NO. 2002 WAIRC 04744

Result Correction Order

Representation

Applicant Ms D MacTiernan

Respondent Mr L Joyce

Correction Order

WHEREAS an error occurred in the Order dated 8 January 2002 issued in Application 1027 of 2001, the Commission, in order to correct this error and pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders—

THAT the Schedule attached to the Order dated 8 January 2002 in Application 1027 of 2001 be amended in the terms of the following Schedule.

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

SCHEDULE

1. Clause 15. – Overtime: Delete subclause (2) of this Clause and insert the following in lieu thereof—

(2) An officer required to work in excess of one hour after completion of his/her ordinary shift, without being notified before the completion of the previous day or shift, shall be paid a meal allowance of $7.90. A further meal allowance of $5.35 shall be paid on the completion of each additional four hours' overtime worked.

2002 WAIRC 04685

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	COMMUNICATIONS, ELECTRICAL, ELECTRONIC, ENERGY, INFORMATION, POSTAL, PLUMBING, AND ALLIED WORKERS UNION OF AUSTRALIA, ENGIN & ELECT DIV, WA BRANCH, THE AUTOMOTIVE, FOOD, METALS, ENGINEERING, PRINTING AND KINDRED INDUSTRIES UNION OF WORKERS - WESTERN AUSTRALIAN BRANCH, CONSTRUCTION, MINING, ENERGY, TIMBERYARDS, SAWMILLS AND WOODWORKERS UNION OF AUSTRALIA - WESTERN AUSTRALIAN BRANCH, THE AUSTRALIAN WORKERS' UNION, WEST AUSTRALIAN BRANCH, INDUSTRIAL UNION OF WORKERS, TRANSPORT WORKERS' UNION OF AUSTRALIA, INDUSTRIAL UNION OF WORKERS, WESTERN AUSTRALIAN BRANCH, MERCHANT SERVICE GUILD OF AUSTRALIA, WESTERN AUSTRALIAN BRANCH, UNION OF WORKERS, APPLICANTS
	v.
	COCKBURN CEMENT LTD, RESPONDENT
CORAM	COMMISSIONER J F GREGOR
DELIVERED	WEDNESDAY, 19 DECEMBER 2001
FILE NO.	APPLICATION 462 OF 2001
CITATION NO.	2002 WAIRC 04685

Result Correcting Order

Correction Order

WHEREAS on 11 December 2001, an order in this matter was deposited in the office of the Registrar; and

WHEREAS the said order had an error in Clause 3. – Area and Scope; and

WHEREAS the order should have read—

(1) This Award shall apply to Cockburn Cement Limited, the employees employed in the classifications contained in Clause 5. - Wages of this award at the Main Works in Russell Road and Woodman's 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 Workers Union of Australia, Engineering and Electrical Division (Western Australian Branch);
- The Construction, Mining, Energy, Timberyards, Sawmills and Woodworkers' Union of Australia, Western Australian Branch;
- Merchant Service Guild of Australia, Western Australian Branch, Union of Workers;
- Transport Workers' Union of Australia, Industrial Union of Workers, Western Australian Branch;

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

THAT the order should be corrected as above.

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

2002 WAIRC 04631

JENNY CRAIG EMPLOYEES AWARD, 1995

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	AUSTRALIAN LIQUOR, HOSPITALITY AND MISCELLANEOUS WORKERS UNION, WESTERN AUSTRALIAN BRANCH, APPLICANT
	v.
	JENNY CRAIG WEIGHTLOSS CENTRES, RESPONDENT
CORAM	CHIEF COMMISSIONER W S COLEMAN
DELIVERED	FRIDAY, 11 JANUARY 2002
FILE NO/S.	APPLICATION 1001 OF 2001
CITATION NO.	2002 WAIRC 04631

Result	Correction Order
Representation	
Applicant	Ms D MacTiernan
Respondent	Ms N Thomson

Correction Order

WHEREAS an error occurred in the Order dated 8 January 2002 issued in Application 1001 of 2001, the Commission, in order to correct this error and pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders—

THAT in the Schedule, Item 1 – Clause 9: - Special Rates and Conditions: B. be deleted

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

2002 WAIRC 04630

QUADRIPLEGIC CENTRE AWARD

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	AUSTRALIAN LIQUOR, HOSPITALITY AND MISCELLANEOUS WORKERS UNION, WESTERN AUSTRALIAN BRANCH, APPLICANT
	v.
	THE BOARD OF MANAGEMENT QUADRIPLEGIC CENTRE, RESPONDENT
CORAM	CHIEF COMMISSIONER W S COLEMAN
DELIVERED	MONDAY, 14 JANUARY 2002
FILE NO/S.	APPLICATION 965 OF 2001
CITATION NO.	2002 WAIRC 04630

Result	Correction order
Representation	
Applicant	Ms D MacTiernan
Respondent	Mr L Joyce

Correction Order

WHEREAS errors occurred in the Order dated 8 January 2002 issued in Application 965 of 2001, the Commission, in order to correct these errors and pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders—

1. THAT in the Schedule, Item 2 – Clause 15—

   Clause 15. – Shift Work: Delete subclause (1)(a), (2)(a), (3)(a) & (b) in Part B of this clause and insert the following in lieu thereof: be deleted and replaced with Clause 15. – Shift Work: Delete subclause (1)(a), (2)(a), (3)(a) & (b) of this clause and insert the following in lieu thereof—

2. THAT in the Schedule, Item 3 – Clause 17—

   Clause 17. – Public Holidays: Delete subclause (4)(a) & (b) in Part B of this clause and insert the following in lieu thereof: be deleted and replaced with Clause 17. – Public Holidays: Delete subclause (4)(a) & (b) of this clause and insert the following in lieu thereof—

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

2002 WAIRC 04629

TITANIUM OXIDE MANUFACTURING AWARD 1975

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	AUSTRALIAN LIQUOR, HOSPITALITY AND MISCELLANEOUS WORKERS UNION, WESTERN AUSTRALIAN BRANCH, APPLICANT
	v.
	SCM CHEMICALS LIMITED, RESPONDENT
CORAM	CHIEF COMMISSIONER W S COLEMAN
DELIVERED	MONDAY, 14 JANUARY 2002
FILE NO/S.	APPLICATION 971 OF 2001
CITATION NO.	2002 WAIRC 04629

Result	Correction order
Representation	
Applicant	Ms D MacTiernan
Respondent	No Appearance

Correction Order

WHEREAS an error occurred in the Order dated 8 January 2002 issued in Application 971 of 2001, the Commission, in order to correct this error and pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders—

1. THAT in the Schedule, Item 3 – Clause 21—

Clause 21. – Wages: Delete subclause (2) of this Clause and insert the following in lieu thereof: be deleted and replaced with Clause 21. – Wages: Delete this Clause and insert the following in lieu thereof—

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

2002 WAIRC 04743

WESTERN AUSTRALIAN MINT SECURITY OFFICERS' AWARD 1988

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	AUSTRALIAN LIQUOR, HOSPITALITY AND MISCELLANEOUS WORKERS UNION, WESTERN AUSTRALIAN BRANCH, APPLICANT
	v.
	THE WESTERN AUSTRALIAN MINT, RESPONDENT
CORAM	CHIEF COMMISSIONER W S COLEMAN
DELIVERED	FRIDAY, 25 JANUARY 2002
FILE NO/S.	APPLICATION 1010 OF 2001
CITATION NO.	2002 WAIRC 04743

Result	Correction Order
Representation	
Applicant	Ms D MacTiernan
Respondent	Ms N Thomson

Correction Order

WHEREAS an error occurred in the Order dated 8 January 2002 issued in Application 1010 of 2001, the Commission, in order to correct this error and pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders—

THAT the Schedule attached to the Order dated 8 January 2002 in Application 1010 of 2001 be amended in the terms of the following Schedule.

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

SCHEDULE

1. Clause 14. – Wages and Allowances: Delete subclauses (3)(a) & (4)(a) of this Clause and insert the following in lieu thereof—

(3) (a) A senior security officer or security officer who has been trained to render first aid and who is a current holder of appropriate first aid qualifications, such as a Senior First Aid Certificate from the St John Ambulance Association, will be paid a first aid allowance of $1.41 per shift with a maximum payment of $6.85 per week.

(4) (a) Where an officer is required to carry a firearm that officer shall be paid an allowance of $1.52 per shift with a maximum payment of $7.39 per week.

2. Clause 16. – Overtime: Delete subclause (2) of this Clause and insert the following in lieu thereof—

(2) An officer required to work in excess of two hours after completion of their ordinary shift, without being notified before the completion of the previous day or shift, shall be paid a meal allowance of $7.75. A further meal allowance of $4.70 shall be paid on the completion of each additional four hours' overtime worked.

PROCEDURAL DIRECTIONS AND ORDERS—

2002 WAIRC 04600

MISCELLANEOUS WORKERS' (ACTIV FOUNDATION) AWARD

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	AUSTRALIAN LIQUOR, HOSPITALITY AND MISCELLANEOUS WORKERS UNION, WESTERN AUSTRALIAN BRANCH, APPLICANT
	v.
	ACTIV FOUNDATION (INC), RESPONDENT
CORAM	CHIEF COMMISSIONER W S COLEMAN
DELIVERED	TUESDAY, 8 JANUARY 2002
FILE NO/S.	APPLICATION 981 OF 2001
CITATION NO.	2002 WAIRC 04600

Result	Matter divided
Representation	
Applicant	Ms D MacTiernan
Respondent	Mr L Joyce and with him Ms N Thomson

Order

HAVING HEARD Ms D MacTiernan on behalf of the applicant and Mr L Joyce on behalf of the respondent, and by consent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act 1979, hereby orders—

THAT this matter be divided into Parts A and B pursuant to section 27(1)(s) of the Act.

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

2002 WAIRC 04786

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	OTTO WEINBRECHT, APPLICANT
	v.
	LASERLINE AUSTRALIA PTY LTD, RESPONDENT
CORAM	COMMISSIONER A R BEECH
DELIVERED	TUESDAY, 12 FEBRUARY 2002
FILE NO.	APPLICATION 1545 OF 2001
CITATION NO.	2002 WAIRC 04786

Result	Order for discovery made.
Representation	
Applicant	Mr G. Hocking (of counsel)
Respondent	Mr J. Weekly

Order

WHEREAS an application was lodged in the Commission pursuant to regulation 80 of the *Industrial Relations Commission Regulations 1985*;

AND WHEREAS the parties were heard in chambers on 12 February 2002;

AND HAVING HEARD Mr G. Hocking (of counsel) on behalf of the applicant and Mr J. Weekly on behalf of the respondent;

NOW THEREFORE, I the undersigned, pursuant to the powers conferred on me under the *Industrial Relations Act 1979*, hereby order —

THAT by Tuesday, 26 February 2002 the respondent Laserline Australia Pty Ltd provide to the applicant Otto Weinbrecht—

(1) A list of those documents which detail—

(a) the amounts accrued for the benefit of the Wayco Trust; and

(b) the payments made against those amounts; or

(2) A written statement declaring that there are no such documents in its possession, custody or power.

(Sgd.) A. R. BEECH,
[L.S.] Commissioner.

PUBLIC SERVICE APPEAL BOARD—

2002 WAIRC 04736

PARTIES	TRUDY RUTH CULL, APPELLANT
	v.
	COMMISSIONER, STATE REVENUE DEPARTMENT, RESPONDENT
CORAM	PUBLIC SERVICE APPEAL BOARD
	COMMISSIONER P E SCOTT - CHAIRPERSON
	MS D ROBERTSON – BOARD MEMBER
	MR S YOUNG – BOARD MEMBER
DELIVERED	MONDAY, 4 FEBRUARY 2002
FILE NO.	PSAB 3 OF 2001

Result	Appeal against findings of s.86(4) Inquiry Upheld
Representation	
Appellant	Mr J Ross
Respondent	Mr R Andretich (of Counsel)

Reasons for Decision

1 The appellant is a government officer and she appeals against a decision of the respondent in which she was found to have committed misconduct under s.80(c) of the Public Sector Management Act 1994 ("the PSM Act") and against the penalties imposed upon her being a reprimand and a fine of $155.10.

2 The breaches of discipline alleged to have been committed by the appellant are that she—

"1. Committ(ed) an act of misconduct under Section 80(c) of the Act, in that on or about November or December 1999, during the course of a disagreement with Mr Alan and Mrs Karyn Lacey, of 42 A Williams Road Coolbellup, at their premises (she) made the following remarks: "I can get anyone investigated at anytime as I work for the Internal Revenue Service (sic)".

2. Committ(ed) an act of misconduct under Section 80(c) of the Act, in that on 6 October 2000 (she) made similar remarks to Mrs Lacey during the course of a disagreement stating "I can get anyone investigated and can find out anything about anyone". Later in the conversation (she) said, "I will be seeing Social Security", directing that remark to Mrs Lacey who was visiting Mrs Marie Weeks at 39 Williams Road, Coolbellup. Mrs Marie Weeks and Ms Jannine Jennings were present when these remarks were made."

3 Amongst other things the appellant says that the alleged misconduct, which is denied, was not undertaken in the course of performance of her duties nor was it in any way related to her employment with the respondent. Secondly, and in the alternative, the appellant says that there were a number of flaws within the process, undertaken by and for the respondent, which resulted in the findings made and the penalty imposed. Amongst those flaws are breaches in the process to be applied to the instigation of the investigation, a denial of natural justice in the conduct of the inquiry by Mr Barker on the basis of his conduct during interviews with the appellant and her witness, a denial of procedural fairness in the failure to provide her with appropriate documentation and full disclosure of the details of the allegations, and that the inquiry and report of Mr Barker were incompetent.

4 The respondent denies that there have been the flaws in procedure identified by the appellant and says that the appellant's views of her rights to certain information and in the process are erroneous. The respondent also says that the appellant complains of certain alleged denials of procedural fairness or natural justice, yet under cross examination she has indicated that she was provided with a full opportunity to put her case and to state whatever she wished to during the course of an interview with Mr Barker. The respondent said the same is so of her witness, Mr MacMahon.

5 The respondent also says that although the conduct of which the appellant has been found guilty and for which she has been penalised did not occur during the time the appellant was undertaking duties, nor was she at her workplace or undertaking any particular work related role, the appellant's conduct involved a breach of her contract of employment in that it constituted a breach of an express or implied term of the contract of employment in that she threatened to use her position to obtain personal advantage. While that personal advantage did not constitute personal gain, the respondent says that the conduct was aimed at gaining an advantage in a personal dispute with a neighbour. Therefore, it is conduct which the employer is entitled to deal with.

6 We do not intend to deal with all of the grounds upon which the appellant has raised complaint as to the investigation, the inquiry process or the outcome. In respect of the allegations of a denial of natural justice, it is not required that an employer provide an employee with each and every document that it may have obtained during the course of an investigation, although the provision of appropriate documents is desirable and, in some cases, necessary. Nor is there an obligation on an employer, inquirer or investigator to allow the person the subject of the investigation or inquiry to participate in interviews with other persons or witnesses, including cross examining those persons. The processes of investigation and inquiry do not require such a level of involvement or formality. The employee, the subject of the investigation and/or inquiry, is entitled to know the nature of the complaints or the allegations made against him or her and to be aware of those in particular detail. He or she is required to have an appropriate opportunity to state his or her case and respond to those allegations.

7 However, there are a number of concerns as to the processes of investigation and inquiry undertaken in this case which warrant serious consideration.

8 The appellant argues that the instigation of the investigation was lacking in proper process and natural justice, partly on account of the informal or preliminary investigation undertaken by Mr MacGregor merging with the formal investigation undertaken pursuant to the PSM Act.

9 By letter dated 13 October 2000, the Acting Commissioner of State Revenue wrote to Mr Phillip MacGregor engaging him to conduct "an independent inquiry". The heading on this letter is "Notice of Engagement – Inquiry Suspected Breach of Discipline." The terms of the letter, formal parts omitted, are—

> "Dear Mr. MacGregor
>
> **NOTICE OF ENGAGEMENT – INQUIRY SUSPECTED BREACH OF DISCIPLINE**
>
> This is to confirm your terms of your engagement to conduct an independent inquiry into a telephone complaint lodged by Mr. Alan Lacey of 42A Williams Road Coolbellup.
>
> The complainant has alleged that an officer/s from this Department used threatening remarks to the complainant which has led the complainant to believe that the officer/s has or intends to misuse their position as an officer/s in the Department.
>
> The scope of your inquiry is to—
>
> 1. Interview the complainant and other witnesses.
> 2. Obtain records of interview or witness statements.
> 3. Provide a preliminary report of your findings and appropriate recommendation prior to interviewing the officer/s from this Department.
> 4. If there is any substance in the allegation made by Mr. Lacey, proceed with interviewing any Departmental staff involved in the incident obtaining the necessary statements.
> 5. Prepare a report of your findings reporting any suspected breach of the Public Sector Management Act and recommendation for follow up action.
>
> Mr Peter Dessent, Senior Human Resources Officer from this Department, has been appointed to assist you with the inquiry.
>
> The agreed fee for your services will be as established in the panel contract with the Office of the Public Sector Standards Commissioner (sic)"

10 By letter dated 17 October 2000, the appellant was advised of the allegations against her, but not that the investigation had commenced. It is noted that this letter was not received by the appellant until 18 October in a meeting with the Acting Commissioner. This letter, formal parts omitted, reads—

> "**NOTICE OF ALLEGED BREACH OF DISCIPLINE**
>
> The Department has received a formal complaint from Mr. Alan Lacey of 42A Williams Road Coolbellup regarding a number of incidents which allegedly involve yourself and Mr. and Mrs.Lacey (sic).
>
> It has been alleged that on or about November or December 1999, during the course of a disagreement with Mr. and Mrs.Lacey (sic), you made the following remarks; "I can get any one investigated at any time as I work for the Internal Revenue Service (sic)".
>
> It was further alleged that on 6 October 2000, you again made similar remarks to Mrs. Lacey during the course of a disagreement stating: "I can get anyone investigated and can find out anything about any one". Later in the conversation it was alleged you said, "I will be seeing Social Security", directing that remark to Mrs. Lacey.
>
> As you would be aware, no officer of the public sector may use their position that they hold in any way that may cause the loss of public confidence in the integrity of the public sector, and trust inherent in the office that the employee holds in the public sector.
>
> In order for me to fully consider all the issues relating to this complaint I require you to provide me with a written explanation of your dealings with Mr. and Mrs. Lacey on or about the dates specified above, and your responses to the allegations which have been made. Once I have considered your explanation I will decide what action, if any will follow.
>
> I require this explanation to be provided to me personally on or before the close of business 26 October 2000."

11 Mr MacGregor's report refers to it being a report on the independent investigation for State Revenue Department into alleged breach of discipline by Trudy Cull of Revenue Services, State Revenue Department. In his report headed "Investigation Conducted By: Mr P G MacGregor assisted by Mr P Dessent October/2000" Mr MacGregor notes that he was appointed on 13 October 2000 to conduct an independent inquiry into a telephone complaint lodged by Mr Alan Lacey. It is noted that the details of the allegations were set out in the notice to the appellant dated 17 October 2000.

12 The PSM Act prescribes a detailed procedure in respect of an allegation of a breach of discipline. Although we have omitted sections of the procedure which do not apply in this case, the following provisions in respect of an employee of an employing authority are relevant—

1. The employing authority must have a suspicion that a breach of discipline has occurred (s.81(1));
2. When such a suspicion arises, the employing authority is to give the employee notice in writing of the nature of the suspected breach and give the employee a reasonable opportunity to submit an explanation (s.81(1));
3. After that opportunity for explanation has been given, the employing authority may direct another person to investigate the suspected breach (s.81(2));

4. If, following the investigation a minor breach of discipline has been found, the employing authority may impose a reprimand and/or a fine of a prescribed amount (s.83(1)(a)). If the breach found is serious, then the employee is charged (s.83(1)(b));
5. If the employee objects to the finding or the penalty, "the finding or action is cancelled" by virtue of s.85 and the employee is charged.
6. If the employee admits a charge the employing authority may impose certain penalties (s.86(3));
7. If the employee denies the charge, a disciplinary inquiry into the charge is held by a person directed by the employing authority to conduct such an inquiry (s.86(4));
8. If the disciplinary inquiry finds that the breach of discipline was committed, the inquirer is to submit that finding to the employing authority, and is to recommend to the employing authority that it act as if the employee had admitted the charge – ie to impose the penalties referred in s.86(3), (s.86(8)(a)); and
9. The employing authority is required to accept the inquirer's findings and may act according to the recommendations (s.86(9)).

13 There are procedures set out in the Regulations which detail matters to be complied with in respect of the investigation and inquiry process.

14 Neither the PSM Act nor the Regulations set out the basis on which the employing authority is entitled to have a suspicion that a breach of discipline has occurred. It is, however, clear that the requirement is that before the employing authority undertakes any of the procedures set out in the PSM Act and the Regulations, that a suspicion is to have arisen and the employee is to have had a reasonable opportunity to respond.

15 We note that in this case, by the letter to Mr MacGregor dated 13 October 2000, the employing authority gave direction to the investigator to do a number of things, which appear to fall into two parts. The first part was to interview the complainant and other witnesses and provide a preliminary report of findings and recommendations "prior to interviewing the officer/s (ie the appellant) from this Department." The second part was that "if there (was) any substance in the allegation" to "proceed with interviewing any Departmental staff involved in the incident", then to "prepare a report of (his) findings reporting any suspected breach … and recommendation for follow up action."

16 This letter seems to confuse the process. It appears that based on this letter, it is Mr MacGregor, not the employing authority, who will decide if there is "any substance" to the allegation before proceeding further. This is after he has already undertaken some investigative work. It would appear that the employing authority has abrogated its responsibility, set out in s.81(1) of the PSM Act, for deciding whether it suspects that the employee has committed a breach of discipline. At point 4 of Mr MacGregor's letter of engagement he was instructed to proceed if there was any substance to the allegation. There is no suggestion in the letter that he was to await the employing authority's direction once the employing authority has suspected the breach.

17 The confusion is compounded in that prior to commencing a formal investigation, the respondent engaged Mr MacGregor to undertake what has been described as a preliminary investigation. However, we conclude from the evidence of George Lenyk, the Human Resources Manager for the respondent, and from the letters to Mr MacGregor and to the appellant that what happened was that Mr MacGregor commenced the investigation which ought not have occurred until after the appellant had provided her response. Upon the statements being received from Mr and Mrs Lacey, with the authorisation of the Commissioner, Mr MacGregor was then verbally instructed to "finish" the investigation. The appellant was not advised that the formal investigation had commenced until 1 November 2000.

18 It is quite clear that the investigation which Mr MacGregor finished was commenced prior to the respondent deciding that there was a reasonable suspicion on which to commence such an investigation, and that the process which he commenced simply flowed through from that initial informal investigation through to the formal investigation. This process meant that prior to the appellant being notified of the investigation of the allegations against her, the formal investigation had, in reality, already commenced. By the time she had replied, it had gone a substantial way.

19 There must be some distinction between an informal gathering of an allegation and the investigation process. An employing authority would be entitled, upon receiving a complaint on which a reasonable suspicion could arise, to commence the investigation process under s.81 of the Act. Prior to that point there is no authorisation to undertake informal investigations, to gather evidence or to undertake any function which might be contemplated in an investigation process. Nothing more would be necessary than for the employer to advise any complainant, as in the case of Mr and Mrs Lacey, to formally put any complaint in writing before he would act upon it. It may be that assistance is necessary for a complainant to articulate the complaint. This can be provided. Upon a complaint being provided in writing or in some other form which would enable the employer to examine and consider it, the next step would be the formal investigation. Of course, if the complaint did not raise a genuine issue, or if the employing authority on a reasonable examination of the complaint thought it utterly trivial or highly improbable, it is arguable that the employing authority might conclude that there is no reasonable basis to suspect that a breach of discipline has occurred. Not every complaint, on even a cursory examination requires such an investigation. Where the employing authority does suspect a breach then the process commences by the employee being notified and given a reasonable opportunity to explain.

20 In this case, the process of the investigation has been tainted from the outset by the overlap between the informal or preliminary investigation undertaken by Mr MacGregor, and the formal one which he went on to finish as part of the s.81(2) investigation.

21 Further, but more serious, is the approach taken by Mr Barker in his inquiry. Following Mr MacGregor's findings and report, and the appellant's objection to the findings and the penalties, the respondent directed Mr Barker to formally inquire into the matter.

22 The report provided by Mr MacGregor following the investigation undertaken by him was thorough and detailed. It provided a clear and transparent process of inquiry, assessed the evidence collected and noted the methodology used in that process. Findings were made and reasons for those findings given.

23 However, it is clear from Mr Barker's report and his evidence that he did not make a thorough or independent inquiry. From his evidence and from his report, Mr Barker has made assumptions based on his belief that Mr McGregor carried out a thorough investigation and apart from interviewing the appellant and Mr MacMahon, her witness, and reading the documents they provided to him, he simply adopted the work of Mr McGregor. The scheme of the PSM Act provides for there to be an investigation by the employing authority and this investigation may be conducted by the employing authority or a person directed to undertake that investigation. If the conclusion from that investigation is that there has been a breach of discipline the employing authority is then required to put that to the officer concerned and invite a response. If that response is a denial of the breach then the employing authority is obliged by the legislation to charge the officer and to hold, or direct to be held, a

disciplinary inquiry. That inquiry is not intended to simply be an examination of the investigator's report and an adoption of those views with a perfunctory interview with the officer concerned and any witnesses he or she may wish to bring. Section 85 of the PSM Act says that if the officer objects to the findings or penalties arising out of the investigation, "that finding or action is cancelled by virtue of this section" and the officer may then be charged and a process exists for dealing with that charge. Section 85 makes clear that the two processes, the investigation and the inquiry resulting from the charge, are not simply meant to reinforce or supplement each other. There is to be no assumption in the inquiry process that what went before is a prelude to the inquiry and is simply to be reviewed and adopted. Because s.85 actually cancels the finding or action, and an inquiry is to proceed - it is to be a new process, separate from the investigation.

24 In the circumstances which have arisen in this matter, it is reasonable to assume that instead of the proper inquiry process occurring, the employing authority has been provided with little more than an adoption of someone else's work. This does not meet the requirements of the PSM Act. Albeit that it might technically meet the letter of the law, it certainly does not provide the process intended by the legislation.

25 Further, Mr Barker has not contemplated important considerations in his assessment of the evidence such as whether Mr and Mrs Lacey, in making their complaints, might have been motivated to manufacture complaints in response to the appellant's complaint about their anti-social conduct. He seems to have dismissed this as irrelevant.

26 There are also issues within the statement of one of the witnesses who provided support to Mr Lacey's allegation, Mr Robert McIntyre. On 28 November 2001, Mr McIntyre amended his statement in a significant way, with Mr Barker and Mr Dessent who was appointed to assist Mr Barker in his inquiry, acting as witnesses to that amendment. Both the gathering of this further evidence well after the respondent had made his decision and Mr Barker's and Mr Dessent's involvement in gathering that further evidence is curious if not questionable. In the second paragraph of his original statement dated 27 November 2000 provided to Mr McGregor, Mr McIntyre stated that "Alan and I were sitting in his garage, which was then just a semi enclosed carport." The amendment which he has made to that statement was that "I was behind the wall at the end of the garage and I could not have been seen at that time." There is quite clearly a conflict between his original statement and the amendment which does not simply clarify the original statement. His statement and the evidence of the appellant conflict in that Mr McIntyre says that he was sitting in the garage with Mr Lacey whereas the appellant's evidence is quite clear that when she walked towards the garage she could see Mr Lacey standing at a bench inside the carport at the rear of the carport. It would be very difficult to describe accurately that Mr McIntyre was sitting with Mr Lacey in his garage given the layout of the garage or carport and the attached room. Had Mr Barker examined the issue raised in the new evidence at the time of undertaking his inquiry, he might have come to a different conclusion about Mr McIntyre's evidence.

27 In those circumstances, we conclude that in reaching the decision that the appellant has committed a breach of discipline that the conclusions reached and recommendations made by Mr Barker were unreliable and ought not to have been relied upon by the employing authority.

28 Another matter of concern is the involvement in the process of Mr Peter John Dessent, the Senior Human Resource Officer of the Department of Treasury and Finance. During the course of his inquiry, Mr McGregor was assisted by Mr Dessent. Mr Barker was also assisted by Mr Dessent.

29 In his evidence Mr MacGregor described Mr Dessent's role as to provide him with support, a verifier, a clarifier. He says that Mr Dessent did not participate in the interviews with the appellant and Mr McMahon, her witness, although he did appear to have some involvement in those interviews in respect of the discussion as to Mr McIntyre's presence or otherwise in the garage of the Lacey's house.

30 In his witness statement, Mr Dessent indicated that he was appointed to act as a witness to the investigations carried out in respect of the allegations and was present during the interviews of all witnesses except the telephone interview with Mr McIntyre by Mr MacGregor. He says that when Mr Barker was appointed he was present during all interviews between Mr Barker and the appellant with Mr Cusack, and with Mr McMahon. It was he who arranged the meeting for those interviews and Mr Barker had asked him to be present as his witness during the interviews. However, it is clear from his evidence and from other evidence that Mr Dessent did not restrict himself to that role of being a witness. In his own statement he notes that he sought clarification from Mr McMahon on at least one occasion.

31 Mr Dessent says that his role throughout had been as a witness for the inquirer and the investigator but he says that both the investigator and the inquirer had invited him to participate in the process and that it was with that licence that he sought clarification on certain points during the interviews. He says that he and Mr Barker "were well prepared with questions for the interviews". We take this to mean that not only was Mr Barker prepared with questions, but Mr Dessent also prepared in anticipation of being a participant, not merely a witness.

32 Although, we make no criticism of Mr Dessent for his participation, it would be difficult to conclude that Mr Barker had undertaken a thorough and independent inquiry when he was assisted in that inquiry by Mr Dessent who assisted in the investigation by Mr McGregor. This was not merely administrative assistance, but assistance in inquiring. Mr Dessent's involvement in what ought to have been separate and independent processes has so tainted the whole of that process such as to mean that they cannot be considered to be sound.

33 For the reasons set out above, we conclude that there were a number of significant and substantive flaws in the disciplinary process. They are not merely technical and minor breaches, but are so significant as to bring the whole process into question. In the circumstances, and as findings coming from that process are unsustainable, the appeal ought to be upheld, and the finding of the disciplinary process ought to be quashed, as should the penalty.

2002 WAIRC 04735

AGAINST THE FINDINGS OF THE INQUIRY RELATING TO BREACHES OF DISCIPLINE

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES TRUDY RUTH CULL, APPLICANT

v.

COMMISSIONER, STATE REVENUE DEPARTMENT, RESPONDENT

CORAM PUBLIC SERVICE APPEAL BOARD

COMMISSIONER P E SCOTT – CHAIRPERSON

MS D ROBERTSON – BOARD MEMBER

MR S YOUNG – BOARD MEMBER

DELIVERED	MONDAY, 4 FEBRUARY 2002
FILE NO/S.	PSAB 3 OF 2001
CITATION NO.	2002 WAIRC 04735

Result	Appeal against findings of s.86(4) Inquiry Upheld
Representation	
Appellant	Mr J Ross
Respondent	Mr R Andretich (of Counsel)

Order.

HAVING heard Mr Ross on behalf of the Appellant and Mr Andretich of counsel on behalf of the Respondent the Public Service Appeal Board, pursuant to the powers conferred on it under the *Industrial Relations Act 1979* hereby orders;

(1) That Appeal PSAB No 3 of 2001 be and is hereby upheld; and

(2) That the findings of the disciplinary inquiry and the penalty imposed on Trudy Ruth Cull be quashed.

(Sgd.) P. E. SCOTT,
[L.S.] Commissioner.

COAL INDUSTRY TRIBUNAL—Disputes—Matters referred—

COAL INDUSTRY TRIBUNAL OF WESTERN AUSTRALIA
(Section 12)
Griffin Coal Mining Company Pty Ltd
- and -
Automotive, Food, Metals, Engineering, Printing and Kindred Industries
Union of Workers – Western Australian Branch
(No. 9 of 2001)

MEMORANDUM OF AGREEMENT

WHEREAS a conference between Griffin Coal Mining Company Pty Ltd and Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers – Western Australian Branch was convened by me pursuant to section 12(1) of the Coal Industry Tribunal of Western Australia Act 1992 on 18 December 2001 for the purpose of resolving differences between the parties regarding the terms of an enterprise agreement known as the Griffin Coal (Apprentices) Enterprise Agreement 2001-2006;

AND WHEREAS agreement was subsequently reached between the parties annexed hereto and 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 18th day of December, 2001.

S.J. KENNER
CHAIRMAN
COAL INDUSTRY TRIBUNAL OF WESTERN AUSTRALIA

COAL INDUSTRY TRIBUNAL OF WESTERN AUSTRALIA
(Section 12)
Griffin Coal Mining Company Pty Ltd
- and -
Automotive, Food, Metals, Engineering, Printing and Kindred Industries
Union of Workers – Western Australian Branch
(No. 10 of 2001)

MEMORANDUM OF AGREEMENT

WHEREAS a conference between Griffin Coal Mining Company Pty Ltd and Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers – Western Australian Branch was convened by me pursuant to section 12(1) of the Coal Industry Tribunal of Western Australia Act 1992 on 18 December 2001 for the purpose of resolving differences between the parties regarding the terms of an enterprise agreement to replace the Griffin Coal (Maintenance) Enterprise Agreement 1996-2001;

AND WHEREAS agreement was subsequently reached between the parties annexed hereto and 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 18th day of December, 2001.

S.J. KENNER
CHAIRMAN
COAL INDUSTRY TRIBUNAL OF WESTERN AUSTRALIA

COAL INDUSTRY TRIBUNAL OF WESTERN AUSTRALIA
(Section 12)
Wesfarmers Premier Coal Limited
- and -
The Coal Miners' Industrial Union of Workers of Western Australia, Collie
(No. 7 of 2001)

MEMORANDUM OF AGREEMENT

WHEREAS a conference between Wesfarmers Premier Coal Limited and The Coal Miners' Industrial Union of Workers of Western Australia, Collie was convened by me pursuant to section 12(1) of the Coal Industry Tribunal of Western Australia Act 1992 on 27 November 2001 for the purpose of resolving differences between the parties regarding the terms of an enterprise agreement to replace the Wesfarmers Coal Limited (operations) Enterprise Agreement 1998-2001;

AND WHEREAS agreement was subsequently reached between the parties annexed hereto and 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 Collie this 27th day of November, 2001.

S.J. KENNER
CHAIRMAN
COAL INDUSTRY TRIBUNAL OF WESTERN AUSTRALIA

NOTICES—Union matters—

NOTICE
FBM No. 4 of 2002

NOTICE is given of an application by the Merchant Service Guild of Australia, Western Australian Branch, Union of Workers and The Society of Stevedoring Supervisors of Western Australia (Union of Workers) for the amalgamation of those organisations to form a new organisation to be known as "The Australian Maritime Officers Union – Western Area Union of Workers".

The application is made pursuant to Section 72 of the Industrial Relations Act 1979.

The rules of the proposed new organisation relating to the qualification of persons for membership are set out below –

"5 – ELIGIBILITY FOR MEMBERSHIP

PART 1

The Union will consist of:

Members of Mercantile Marine and dependent services possessed of certificates of competency issued or recognised by the Commonwealth of Australia, or any State thereof, the Board of Trade, or by any British possession or dependency, or possessed of any qualifications entitling him to undertake any duty connected with the navigation of vessels, may be elected as members.

Indentured Shipwrights performing the functions of and who are classified as a shipwright and who form part of the complement of a vessel will be admitted as members.

Marine Engineers (so engaged), including Third Class and Port Engineers and Marine Engine Drivers, may be admitted to membership, provided that this rule as to Engineers will only apply in cases where such engineer is not eligible for membership in or has been rejected by the Australian Institute of Marine and Power Engineers. This part of the rule as to eligibility of Engineers will include Engineers upon vessels owned by the Government, but Engineers who have become Shipowners, superintendents, or who are otherwise acting in the interests of employers, will be strictly debarred from membership. Apprentices who are bound by indenture for sea service to a shipowner or Master (other than engineer apprentices) and cadets may be admitted to membership but will not be entitled to be nominated for or hold office or cast a vote in connection with the affairs of the Union during their apprenticeship or cadetship as the case may be. Together with any other persons employed in the industry of shipping and marine or not who have been or are hereafter elected as officers of the Union and admitted as members thereof.

All persons employed or engaged in the function of ROV Pilot/Technicians in or in association with the operation, utilisation, control, maintenance, installation, repair and service of remotely operated sub sea vehicles and associated equipment will be admitted as members.

Notwithstanding any other provisions of Part 1 of this Rule, the Union will also consist of employees who are employed in or in connection with the recreational diving industry throughout the state of Western Australia who are:-

(i) in command, control, or who supervise or operate vessels including employees described as masters, mates, deck officers and skippers, (other than those employees who are in command or control of small vessels which are operated in or in connection with a Port or adjacent to an offshore facility who are required to possess and use a Coxswain's Certificate or equivalent in such operations),

(ii) marine engineers, however described, but excluding engineers who are members of The Australian Institute of Marine and Power Engineers;

except for employees who are;

(b) solely or predominantly engaged in the sale, reception or delivery of merchandise in a retail outlet operating separately and distinct from the provision of recreational diving services;

(c) solely or predominantly engaged in clerical duties in a retail outlet operating separately and distinct from the provision of recreational diving services.

For the purposes of this Rule an employee will be regarded as employed in or in connection with the recreational diving industry only if the employee is employed by an employer whose sole or predominant business activity consists of either the sale or supply of recreational diving equipment or facilities, the provision of recreational diving services or related underwater services.

Without limiting the generality of the foregoing paragraphs hereof, persons employed as Radio Officers, Radio Operators, Deck Communication Officers and Barge Administrators on a vessel including Mobile Offshore Drilling Units and Floating Production Facilities will be admitted as members.

PART 2

The Union will also consist of the following persons:

An unlimited number of persons employed, or usually employed, in or in connection with the Stevedoring Industry, in or in connection with the following industries and/or industrial pursuits:

(a) wharf superintendents and/or supervisors, cargo superintendents and/or supervisors, traffic superintendents and/or supervisors, stevedoring supervisors (whether in conventional or container stevedoring), however described or styled and such other employees who are required themselves or in conjunction with any other employees to control, plan, co-ordinate or integrate stevedoring operations in connection with vessels allocated to them and where required in relation thereto the work of foreman stevedores, clerks, watchmen, gearmen, waterside workers and mechanical equipment operators, storemen and packers, crane and overhead lifting appliance operators.

PART 3

(a) Without limiting the generality of Part 1 and Part 2 of this Rule, or being limited thereby, the Union will also consist of all employees who are employed in supervisory duties of any nature (other than employees performing the duties of forepersons or leading hands or otherwise who exercise similar and direct supervisory powers over other employees) and employees who possess a Maritime Certificate of Competency where the possession of the certificate is part of the requirement of a classification, and employees who are employed as harbourmasters, port managers, marine pilots, marine surveyors, maintenance technicians, masters and deck officers of vessels, officers of pilot cutters, port control officers, signal station officers, radio officers, superintendents, stevedoring supervisors or who are employed in managerial or professional occupations; or employees of port authorities who perform clerical, administrative, professional, supervisory, and technical duties.

(b) Employees designated as public servants by virtue of the relevant state legislation or who are employed as harbour masters, senior marine pilots, or marine pilots by the Department of Transport (Western Australia) will not be eligible for membership.

PART 4

No restriction or qualification in Part 1 of this rule will apply so as to restrict or qualify Part 2 of this rule and no restriction or qualification in Part 2 of this rule will apply so as to restrict or qualify Part 1 of this rule.

PART 5

Any occupation related to trading where the possession of a Marine Certificate of Competency is a prerequisite qualification will be eligible for membership."

This matter has been listed before the Full Bench on 4 April 2002.

A copy of the application and the rules of the proposed organisation may be inspected at my office, AXA Centre, 16th floor, 111 St George's Terrace, Perth.

Any organisation registered under the Industrial Relations Act 1979, or any person who satisfies the Full Bench that he has a sufficient interest or desires to object to the application may do so by filing a notice of objection in accordance with the Industrial Relations Commission Regulations 1985.

12 February 2002

R. C. LOVEGROVE
Deputy Registrar