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GENERAL ORDERS—

2002 WAIRC 05796

RESCIND GENERAL ORDER No. 718 OF 2001 ON LOCATION ALLOWANCES AND ISSUE A NEW GENERAL ORDER PURSUANT TO SECTION 50 OF THE INDUSTRIAL RELATIONS ACT, 1979

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
ON COMMISSION'S OWN MOTION

CORAM	COMMISSION IN COURT SESSION COMMISSIONER P E SCOTT COMMISSIONER S WOOD COMMISSIONER J L HARRISON
DATE OF ORDER	FRIDAY, 21 JUNE 2002
FILE NO.	APPLICATION 686 OF 2002
CITATION NO.	2002 WAIRC 05796

Result General Order Issued

General Order

HAVING heard Mr D Robinson on behalf of the Trades and Labor Council of Western Australia; Mr G Blyth on behalf of the Chamber of Commerce and Industry of Western Australia; Mr R Gifford on behalf of the Australian Mines and Metals Association (Inc); and Mr P Moss and with him Ms A Hall on behalf of the Honorable Minister for Consumer and Employment Protection.

NOW THEREFORE, the Commission in Court Session, pursuant to the powers conferred on it by the Industrial Relations Act, 1979 hereby orders —

(1) THAT each award, industrial agreement or order cited in Schedule A of this Order be varied by substituting for the location allowances provisions contained in each such award, industrial agreement or order the location allowance provisions in Schedule B of this General Order.

(2) THAT each such variation shall have effect from the beginning of the first pay period to commence on or after the first day of July 2002.

(3) THAT this General Order replace the General Order in Matter No 718 of 2001 which thereby shall be rescinded.

[L.S.]

(Sgd.) P. E. SCOTT,
Commissioner,
for and on behalf of the Commission in Court Session.

SCHEDULE A

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Nurses (Dentists Surgeries) Award 1977	23
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Title of award, industrial agreement or order	Clause No.
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SCHEDULE B

Subject to the provisions of this clause, in addition to the rates prescribed in the wages clause of this award, an employee shall be paid the following weekly allowances when employed in the towns prescribed hereunder. Provided that where the wages are prescribed as fortnightly rates of pay, these allowances shall be shown as fortnightly allowances.

TOWN	PER WEEK
Agnew	$16.60
Argyle	$43.50
Balladonia	$16.60
Barrow Island	$28.30
Boulder	$6.90
Broome	$26.50
Bullfinch	$7.80
Carnarvon	$13.50
Cockatoo Island	$29.10
Coolgardie	$6.90
Cue	$16.90
Dampier	$23.00
Denham	$13.50
Derby	$27.50
Esperance	$5.00
Eucla	$18.50
Exmouth	$23.90
Fitzroy Crossing	$33.30
Goldsworthy	$14.80
Halls Creek	$38.10
Kalbarri	$5.70
Kalgoorlie	$6.90
Kambalda	$6.90
Karratha	$27.30
Koolan Island	$29.10
Koolyanobbing	$7.80
Kununurra	$43.50
Laverton	$16.80
Learmonth	$23.90
Leinster	$16.60
Leonora	$16.80
Madura	$17.60
Marble Bar	$41.70
Meekatharra	$14.60
Mount Magnet	$18.10
Mundrabilla	$18.10
Newman	$15.90
Norseman	$14.20
Nullagine	$41.60
Onslow	$28.30
Pannawonica	$21.50
Paraburdoo	$21.30
Port Hedland	$22.80
Ravensthorpe	$8.80
Roebourne	$31.40
Sandstone	$16.60
Shark Bay	$13.50
Shay Gap	$14.80
Southern Cross	$7.80
Telfer	$38.60
Teutonic Bore	$16.60
Tom Price	$21.30
Whim Creek	$27.10
Wickham	$26.30
Wiluna	$16.80
Wittenoom	$36.90
Wyndham	$41.00

(2) Except as provided in subclause (3) of this clause, an employee who has—

(a) a dependent shall be paid double the allowance prescribed in subclause (1) of this clause;

(b) a partial dependent shall be paid the allowance prescribed in subclause (1) of this clause plus the difference between that rate and the amount such partial dependent is receiving by way of a district or location allowance.

(3) Where an employee—

(a) is provided with board and lodging by his/her employer, free of charge; or

(b) is provided with an allowance in lieu of board and lodging by virtue of the award or an order or agreement made pursuant to the Act;

such employee shall be paid $66^2/_3$ per cent of the allowances prescribed in subclause (1) of this clause.

The provisions of paragraph (b) of this subclause shall have effect on and from the 24th day of July, 1990.

(4) Subject to subclause (2) of this clause, junior employees, casual employees, part time employees, apprentices receiving less than adult rate and employees employed for less than a full week shall receive that proportion of the location allowance as equates with the proportion that their wage for ordinary hours that week is to the adult rate for the work performed.

(5) Where an employee is on annual leave or receives payment in lieu of annual leave he/she shall be paid for the period of such leave the location allowance to which he/she would ordinarily be entitled.

(6) Where an employee is on long service leave or other approved leave with pay (other than annual leave) he/she shall only be paid location allowance for the period of such leave he/she remains in the location in which he/she is employed.

(7) For the purposes of this clause—

(a) "Dependant" shall mean—

(i) a spouse or defacto spouse; or

(ii) a child where there is no spouse or defacto spouse;

who does not receive a location allowance or who, if in receipt of a salary or wage package, receives no consideration for which the location allowance is payable pursuant to the provisions of this clause.

(b) "Partial Dependant" shall mean a "dependent" as prescribed in paragraph (a) of this subclause who receives a location allowance which is less than the location allowance prescribed in subclause (1) of this clause or who, if in receipt of a salary or wage package, receives less than a full consideration for which the location allowance is payable pursuant to the provisions of this clause.

(8) Where an employee is employed in a town or location not specified in this clause the allowance payable for the purpose of subclause (1) of this clause shall be such amount as may be agreed between Australian Mines and Metals Association, the Chamber of Commerce and Industry of Western Australia and the Trades and Labor Council of Western Australia or, failing such agreement, as may be determined by the Commission.

(9) Subject to the making of a General Order pursuant to s.50 of the Act, that part of each location allowance representing prices shall be varied from the beginning of the first pay period commencing on or after the 1st day in July of each year in accordance with the annual percentage change in the Consumer Price Index (excluding housing), for Perth measured to the end of the immediately preceding March quarter, the calculation to be taken to the nearest ten cents.

INDUSTRIAL APPEAL COURT—Appeals against decision of Full Bench—

[2002] WASCA 172

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 172
CORAM	:	SCOTT J (DEPUTY PRESIDING JUDGE) MILLER J EM HEENAN J
HEARD	:	4 JUNE 2002
DELIVERED	:	4 JUNE 2002
PUBLISHED	:	21 JUNE 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 - Industrial organisations and associations - Unfair dismissal - Employee dismissed for 'Non-Harassment Policy' - Allegations of dishonesty in subsequent inquiry - Turns on own facts

Legislation—

Industrial Relations Act 1979, s 23A

Result—

Appeal dismissed

Category: B

Representation—

Counsel—

Appellant	:	Mr H J Dixon & Mr R L Hooker
Respondent	:	Mr D H Schapper

Solicitors—

Appellant	:	Mallesons Stephen Jaques
Respondent	:	Derek Schapper

Case(s) referred to in judgment(s)—

Amalgamated Metal Workers' and Shipwrights Union v Robe River Iron Associates 69 WAIG 985

Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers - Western Australian Branch v BP Iron Ore Pty Ltd (2001) 81 WAIG 1263

Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Workers Union of Australia, Engin & Elect Div, WA Branch v BHP Iron Ore (2000) 81 WAIG 327

Concut Pty Ltd v Worrell (2000) 75 ALJR 312

Case(s) also cited—

Amalgamated Metal Workers' and Shipwrights' Union of Western Australia v Robe River Iron Associates (1989) 69 WAIG 985

Bankstown Foundry Pty Ltd v Braistina (1986) 160 CLR 301

BHP Iron Ore Pty Ltd v Australian Workers' Union (2000) 102 FCR 97

Boston Deep Sea Fishing & Ice Co v Ansell (1888) 39 ChD 339

Byrne & Frew v Australian Airlines Ltd (1995) 185 CLR 410

Gromark Packaging v Federated Miscellaneous Workers' Union of Australia, WA Branch (1992) 73 WAIG 220

Loty and Holloway v Australian Workers Union [1971] AR (NSW) 95

McCasker v Darling Downs Co-op Bacon (1988) 25 IR 107

Metal and Engineering Workers' Union - Western Australia v Hamersley Iron Pty Ltd (1993) 73 WAIG 1088

Minister for Immigration and Multicultural Affairs v Yusuf (2001) 180 ALR 1

O'Brien & Ors v Komesaroff (1982) 150 CLR 310

Police Service of New South Wales v Batton (2000) 98 IR 154

Re Australian Insurance Employees Union; Ex parte Academy Insurance (1988) 62 ALJR 426

Robe Rive Iron Associates v Australian Workers' Union (1987) 67 WAIG 320

Robe River Iron & Associates v Amalgamated Metal Workers' and Shipwrights' Union (1987) 67 WAIG 1097

Robe River Iron Associates v The Construction, Mining and Energy Workers' Union of Australia (WA Branch) (1989) 69 WAIG 1027

Shire of Esperance v Mouritz (No 1) (1991) 71 WAIG 891

Trend Management Ltd v Borg (1996) 72 IR 16

Undercliffe Nursing Home v Federated Miscellaneous Workers' Union of Australia (1985) 65 WAIG 385

Water Board v Moustakas (1988) 180 CLR 491

1 **SCOTT J**: Mr Ray Robinson ("Mr Robinson") was a member of the respondent union employed by the appellant, BHP Billiton Iron Ore Pty Ltd ("BHP"), as a locomotive driver. Mr Robinson had been employed in that capacity since 1996 and for 24 years prior to that had worked for Victorian Railways.

2 On 5 September 2000 Mr Robinson was dismissed as an employee of BHP and received pay in lieu of notice. In the letter dismissing him of 5 September 2000, the Railroad Manager, the author of the letter, referred to an investigation into Mr Robinson's behaviour and concluded by advising him that "he was unsuitable for further employment". That letter, and the significance of it, will be referred to later in these reasons.

3 The present respondent, on behalf of Mr Robinson, brought an application before a single Commissioner of the Industrial Relations Commission seeking reinstatement or compensation for unfair dismissal. The application was heard by S J Kenner C who, in reasons delivered on 8 May 2001, held that the dismissal was unfair and ordered BHP to reinstate Mr Robinson. In addition, Kenner C directed that Mr Robinson receive a written warning arising out of, what was said to be, dishonest answers that he gave at the inquiry into his conduct in the course of the investigation.

4 Both the present appellant and respondents appealed against the decision of Kenner C and those appeals were heard by the Full Bench of the Industrial Relations Commission comprising President Sharkey and Coleman and Smith CC. On 19 November 2001 the Full Bench dismissed the appeal by BHP and upheld the appeal by Mr Robinson deleting from the orders of Kenner C the order that Mr Robinson receive a written warning.

5 BHP appealed to this Court from the decision of the Full Bench. The appeal was heard on 4 June 2002. At the conclusion of the submissions on behalf of the appellant, the Court indicated that the appeal would be dismissed, with reasons to be given later. These are those reasons.

6 The background of the matters giving rise to the application in this appeal are set out in detail in the reasons of the Full Bench. In summary, friction arose amongst employees of BHP at their iron ore shipping operation at Mt Newman (*cf* ***Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers - Western Australian Branch v BP Iron Ore Pty Ltd*** (2001) 81 WAIG 1263; ***Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Workers Union of Australia, Engin & Elect Div, WA Branch v BHP Iron Ore*** (2000) 81 WAIG 327. The Mt Newman mine is linked by rail to Port Hedland, the iron ore port for the produce of the mine.

7 The disharmony amongst the employees of BHP arose out of the fact that BHP was introducing workplace agreements in lieu of award based enterprise bargaining agreements into a number of work sites in the Pilbara. That generated ill-feeling between employees who accepted workplace agreements and those who did not. Mr Robinson did not accept a workplace agreement but other employees, and in particular Mr Anthony Holland, ("Mr Holland) did accept such an agreement.

8 Mr Holland had provided the appellant with an affidavit for the purpose of use in Federal Court proceedings concerning BHP's introduction of workplace agreements.

9 The evidence established that in the early hours of one morning on a day which was not identified, after coming off shift, Mr Robinson saw, in the crib room of BHP's locomotive yard, a pile of affidavits, including a draft one in the name of Mr Holland. That affidavit was unexecuted. Mr Robinson, on reading the document, realised that Mr Holland was providing evidentiary assistance to BHP. It is alleged that Mr Robinson then wrote various offensive words on the draft affidavit. It is not necessary to reproduce those words in the course of these reasons, save to say that they contained demeaning comments about Mr Holland and derogatory remarks about the evidence in the affidavit.

10 After writing on the affidavit, Mr Robinson received a radio call to attend a job and left the crib room. His evidence was that he did not know what happened to the affidavit or the other documents that were in the crib room at the time.

11 Subsequently Mr Robinson was advised that there would be an inquiry into his conduct.

12 The inquiry was conducted into what were alleged to be Mr Robinson's actions in writing the offensive comments on the affidavit. Mr Robinson was shown a copy of the affidavit and asked if he had anything to do with the writing on it. He denied any involvement. Following that denial, Mr Robinson was confronted with a forensic handwriting expert's report which purported to establish that Mr Robinson was the author of the notations. Mr Robinson, however, maintained his denial.

13 The inquiry was held on 4 September 2000 and the following day BHP gave Mr Robinson the letter dismissing him. I have referred to that letter earlier in these reasons.

14 That letter from the Railroad Manager to Mr Robinson provides—

> "I refer to the investigation conducted into breaches of the company's non-harassment policy at our meetings of Monday 4 and Tuesday 5 September 2000.
>
> At those meetings you were asked if you were involved in the distribution of 'scab' stickers, other offensive material and/or marking the affidavit of Anthony Holland with offensive comments.
>
> You denied any involvement in those matters.
>
> It was put to you that the Company has the opinion of a handwriting expert identifying you as the author of a number of offensive comments marked on the affidavit of Anthony Holland and which clearly breach the Company's Non-Harassment Policy.
>
> Notwithstanding the opinion of the handwriting expert you have maintained your denial of involvement in that matter.
>
> Based upon the expert's opinion the Company is of the view that you have breached the Company's Non-Harassment Policy in placing offensive comments on the affidavit of Anthony Holland.
>
> In the circumstances and having considered all matters raised by you the Company considers that you are unsuitable for further employment and that your employment is terminated with a payment in lieu of notice in accordance with clause 5(4) of the Award.
>
> Your sincerely
>
> M Darby
>
> Railroad Manager"

15 Mr Robinson left the site on that day, 5 September 2000.

16 As can be seen from the letter, the termination of Mr Robinson's employment was based upon what was said to be his breach of the appellant's "Non-Harassment Policy" by placing offensive comments on the affidavit of Mr Holland.

17 It is to be noted from the letter that there is no finding that Mr Robinson gave false evidence to the inquiry or misled the inquiry. His dismissal was based upon the finding that he breached the company's Non-Harassment Policy.

18 As I have indicated, the present respondent, on Mr Robinson's behalf, brought an application to the Industrial Relations Commission for various orders arising out of what was claimed to be Mr Robinson's unfair dismissal. In his decision Kenner C referred to the appellant's Non-Harassment Policy. That Policy was reduced to writing in a document which Mr Robinson agreed he was aware of. The document provides—

> "**BHP IRON ORE NON HARASSMENT POLICY**
>
> BHPIO is opposed to all forms of work related harassment including that related to sex, race, membership or non-membership of trade unions and acceptance or non-acceptance of workplace agreements.
>
> Harassment takes many forms but is usually constituted by unwelcome acts or remarks which make the workplace unpleasant or humiliating for the targeted person.
>
> Such harassment may compromise [*sic*] of—
>
> - verbal abuse, including derogatory words;
> - offensive graffiti;
> - intimidating behaviour towards another employee or members of that employee's family; and
> - direct threats
>
> Any employee who believes that they are being subject to harassment, and any employee who observes behaviour which may amount to harassment, should immediately report it to their supervisor or manager.
>
> Work related harassment, including threats and intimidation, is unacceptable to BHPIO and any employees found to have engaged in such behaviour will be subject to disciplinary action up to and including summary dismissal.
>
> Management will ensure that all complaints are treated confidentially, seriously and sympathetically and that appropriate action is taken whenever harassment occurs.
>
> Note that pursuant to the *Workplace Agreements Act 1993 (WA)* ('the WPA') a person must not by threats or intimidation persuade, or attempt to persuade, another person to not enter into (or enter into) workplace agreements.
>
> Further, Section 68(2) of the WPA relevantly provides that a person must not intimidate an employee or threaten, injury or harm to a person or property of an employer because the employee is (or is not) a party to a workplace agreement.
>
> *Original signed by G P Hunt*
>
> G P HUNT
>
> President
>
> December 1999"

19 In dealing with the Non-Harassment Policy Kenner C referred to the shorter Oxford English Dictionary definition of "harass" and the necessity for the person harassed to know of the alleged harassing conduct or communication. Kenner C referred to the evidence of Mr Holland who indicated that he was not aware of, and had never seen, the comments on the affidavit. Mr Holland's concern was not with the comments on the affidavit, but the fact that his draft affidavit had been distributed around the workplace. He made no complaint about Mr Robinson's writing on the affidavit and was not concerned about it.

20 With that background and upon those findings of fact, Kenner C came to the conclusion that the employer's case "falls at the first hurdle". The Commissioner concluded that the Policy did not prohibit the writing of comments on documents *simpliciter*, but that the Policy prohibited conduct that constituted harassment. Mr Robinson's conduct was not in breach of the Policy.

21 Kenner C, however, concluded that whilst Mr Robinson's dismissal was harsh, oppressive and unfair, nonetheless, because he had misled the inquiry, a warning should be placed on Mr Robinson's personal file.

22 It should also be mentioned that just prior to the hearing before Kenner C Mr Robinson amended his application to admit being the author of the comments on the draft affidavit.

23 In the Full Bench of the Industrial Relations Commission, the President and Coleman and Smith CC unanimously dismissed the appeal by BHP and allowed the appeal by the respondent union on behalf of Mr Robinson. In respect of the appeal by Mr Robinson, the Full Bench was of the view that Kenner C had no jurisdiction to direct that a written warning be placed on Mr Robinson's file. Before the Full Bench the appeal by Mr Robinson in that regard was not opposed.

24 In relation to the substantive appeal, the Full Bench held at [66] to [69]—

> "66. We do not agree that, because a person is unaware that verbal abuse has occurred until later, the act is not one of harassment. However, this was not the situation where the derogatory remarks would be, by nature of the document on which they were written, widely published or capable of being widely published.
>
> 67. It was open to find, for those reasons, and the Commissioner should have found, that Mr Robinson, in an angry mood, in the presence of others who were angry for the same reason, wrote derogatory documents on a document which he knew Mr Holland would see and read. There is no doubt that he wanted to convey his anger and contempt. The main derogatory comment was 'scab c…'. We do not think that the mere reference to scab alone was necessarily derogatory. The mere use of the word 'scab', particularly if it is merely abusive and not used in a harassing manner, may not be contrary to the Policy.
>
> 68. However, the victim or alleged targeted person (called on behalf of the CMETSWU), Mr Holland, said quite unequivocally that he was not offended nor, within the terms of the Policy, did he say or complain that he was the target of harassment. We are not persuaded that he was, therefore, harassed.
>
> 69. Within the definition of 'harassment' contained in the Policy, derogatory words or acts constituting harassment must make the workplace unpleasant or humiliating. In the absence of evidence from Mr Holland or anyone else that the workplace was made unpleasant or humiliating for Mr Holland, it was not open to find that Mr Robinson was guilty of harassing behaviour forbidden by the Policy."

25 The Full Bench also said that "the use of some hyperbole, coarse language or straight abuse" at the height of an industrial dispute was not necessarily harassment although it might be.

26 The Full Bench concluded that Mr Robinson had not breached the Policy.

27 In relation to what was said to be Mr Robinson's lies concerning the comments on the draft affidavit, the Full Bench concluded that BHP took no steps to dismiss Mr Robinson for that reason but dismissed him because of his breach of the Non-Harassment Policy. In relation to the lies, as the Full Bench expressed it—

> "In other words, that conduct was condoned or, put another way, the right, if it existed, to dismiss summarily or otherwise was not exercised."

28 It is clear from the reasons of the Full Bench that the Commissioners concluded that the fact that Mr Robinson had given false evidence to the inquiry was an isolated one-off act, in all the circumstances of the case, and not a basis, of itself, to justify his dismissal. In that respect, the Full Bench concluded—

> "… Mr Robinson did subsequently admit what he had done and no penalty was imposed or sought to be imposed for that deceit. The deceit was manifested in panic and for self-preservation, not to derive a benefit. To dismiss him for that would be manifestly unfair."

29 BHP appealed to this Court on the following grounds—

> "1. The Full Bench erred in law in its interpretation of the meaning and effect of the Appellant's Non-Harassment Policy (**Policy**) which proscribed a range of conduct at the Appellant's operations including conduct which makes the workplace unpleasant or humiliating for others and, thereby—
>
> (a) failed to conclude that the established, and later admitted, offensive conduct on the part of Robinson complained of was in breach of the Policy; and
>
> (b) effectively condoned his conduct which occurred in circumstances where the Appellant had warned employees that conduct of the kind under consideration was unacceptable and could result in disciplinary action up to and including termination of employment.
>
> 2. The Full Bench, having correctly concluded that Robinson had been dishonest in his dealings with his employer (the Appellant) in that during an investigation as to the conduct complained of, he had repeatedly, untruthfully and deliberately denied the conduct, erred in law in then concluding—
>
> (a) that such dishonesty was condoned or the right to rely on that dishonesty in whole or in part was not exercised by the Appellant;
>
> (b) that, in the circumstances, dismissal for that dishonesty would be properly characterised as unfair.
>
> 3. The Full Bench erred in law in failing to conclude that the conduct of Robinson including his dishonest conduct, was destructive of and incompatible with the fulfilment of his duty to his employer and the necessary confidence between employer and employee.
>
> 4. The Full Bench erred in law in concluding (and failing to correct the conclusion of the Commission at first instance) that the conduct of Robinson was, in effect, unrelated to his duties and responsibilities to the position in which he was employed by the Appellant.

> 5. The Full Bench erred in law in failing to conclude that the conduct of Robinson, which included his dishonest denial of the conduct, entitled the Appellant, following the conclusion that he was unsuitable for further employment, to terminate his employment by payment in lieu of notice in accordance with clause 5(4) of the Award, without such termination being harsh, oppressive or unfair.
>
> 6. …"

30 Ground six was not pursued before this Court.

31 In developing the grounds of appeal, counsel for the appellant contended that the Full Bench had made errors of law in relation to the proper consideration of what constituted a harsh, oppressive or unfair dismissal under the provisions of s 23A of the *Industrial Relations Act 1979* ("the *Industrial Relations Act*").

32 It was contended that the Full Bench looked at the two aspects of Mr Robinson's conduct in isolation, rather than looking at his conduct globally and then deciding whether, in all of the circumstances, his dismissal was harsh, oppressive or unfair.

33 In dealing with the comments that Mr Robinson wrote on Mr Holland's affidavit, the Full Bench concluded at [72] to [74]—

> "72. Cogently, too, Mr Holland's uncontradicted evidence made it clear that his main concern was his being thought to be the cause of Mr Robinson's dismissal by what Mr Robinson wrote about him.
>
> 73. For those reasons, it was not open to find that Mr Robinson was in breach of the Policy.
>
> 74. Further, in any event, it is not at all clear to me that his act, an angry spontaneous isolated act, warranted summary dismissal within the well known tests (see *Sargant v Lowndes Lambert Australia Pty Ltd* 81 WAIG 1149 (FB) and the cases cited therein), even if it warranted, as it certainly did, some disciplinary action and, even if it did, as it might have, constituted misconduct which was not harassment."

34 The Full Bench then went on to consider the aspect of the alleged dishonesty of Mr Robinson, and referred to the fact that Mr Robinson was not dismissed for dishonesty, but for breach of the Policy. The Full Bench was of the view that, in all the circumstances, the appellant had condoned Mr Robinson's actions in that regard and had not dismissed him on that basis. In addition, the Full Bench was of the view that, even if Mr Robinson's conduct was not condoned then, his isolated act of giving false evidence to the inquiry would not of it self justify dismissal.

35 Importantly, as well, in their final conclusion on the substantive appeal, the Full Bench said at [89]—

> "In the circumstances, the dismissal for that deceit would, for those reasons be properly characterised as unfair".

36 As can be seen from the grounds of appeal, it is contended by counsel for the appellant that the Full Bench dealt with each of the two aspects of the matter without looking at them together. Counsel submitted that both aspects of Mr Robinson's conduct should have been considered and the Full Bench, looking globally at that conduct, should have asked the question as to whether his dismissal was harsh, oppressive or unfair. Counsel referred to the decision of the High Court in ***Concut Pty Ltd v Worrell*** (2000) 75 ALJR 312 and in particular the judgment of Kirby J at 322.

37 The first thing to notice about ***Concut's*** case is that it involved alleged significant misconduct by an employee using, for his own private purposes, the employer's property and the services of its employees. At 321 Kirby J set out what he described as "five basic starting points" and said at point 51.3—

> "The ordinary relationship of employer and employee at common law is one importing implied duties of loyalty, honesty, confidentiality and mutual trust. At common law—
>
> > Conduct which in respect of important matters is incompatible with the fulfilment of an employee's duty, or involves an opposition, or conflict between his interest and his duty to his employer, or impedes the faithful performance of his obligations, or is destructive of the necessary confidence between employer and employee, is a ground of dismissal."

38 Kirby J further said at 322 under point 4—

> "Other exceptions may arise where the breaches are ancient in time and where they may have been waived in the past, although known to the employer. Some breaches may be judged irrelevant to the duties of the particular employee and an ongoing relationship with the employer. But these exceptional cases apart, the establishment of important, relevant instances of misconduct, such as dishonesty on the part of an employee … will normally afford legal justification for summary dismissal. Such a case will be classified as amounting to a relevant repudiation or renunciation by the employee of the employment contract, thus warranting summary dismissal."

39 That case was, of course, very different to this. The only dishonesty alleged against Mr Robinson was his denial at the inquiry that he was the author of the written comments on the draft affidavit of Mr Holland. That was a very different factual situation to that considered by Kirby J in ***Concut's*** case.

40 Counsel for the appellant also maintained that Kenner C was wrong in law in drawing a distinction between Mr Robinson's conduct as an employee of BHP, which was not in issue, and his conduct in giving evidence at the inquiry in a manner that was false. Counsel submitted that Mr Robinson's conduct was not to be excused on that basis and that Kenner C was in error in categorising Mr Robinson's conduct in that way. Counsel relied on the judgment of Kennedy J in ***Amalgamated Metal Workers' and Shipwrights Union v Robe River Iron Associates*** 69 WAIG 985 where his Honour said at 988—

> "By expressing, as he did, the test to be applied as being simply 'current standards of justice and fair play between employer and employee' the Commissioner appears to have been led directly into a consideration of what should have been the fair and reasonable reaction of the company to Mr Stott's conduct. Such an approach appears to me to lead, and I suspect the Commissioner in this case was led, to reviewing the employer's decision and to substituting his own."

41 Counsel for the appellant submitted that the Full Bench was also in error in approaching the matter in the same way.

42 Having reviewed the reasons of the Full Bench and of Kenner C I am not persuaded that this ground of appeal is made out. It was open to Kenner C to conclude, as he did, that Mr Robinson's conduct in denying he was the author of the comments on the draft affidavit "although wrong and a gross error of judgment, arose initially out of a concern to save his employment in a setting in which he felt under threat". That conclusion in my view, was one that was properly open on the evidence.

43 The next aspect of the appeal concerns the nature of the Harassment Policy itself. The Policy, so far as is relevant to this appeal, has been set out earlier in these reasons.

44 The first thing to note about the Policy is that it seeks to prevent the victimisation of employees. By its terms, the Policy refers to complaints being made by employees who consider that they have been harassed. The company gives an undertaking to investigate those complaints. In that respect it is important to recall that Mr Holland made no complaint, nor did he ask for

anything to be investigated on his behalf. He was not threatened, intimidated or harassed, nor was there any unwelcome act or remark which made the workplace unpleasant or humiliating for him. That was so, even although he was, within the terms of the Policy, the "targeted person".

45 In my opinion, it was properly open to Kenner C and the Full Bench to conclude that the writing on the draft affidavit did not constitute harassment within the Policy.

46 For these reasons, I was of the view that none of the grounds of appeal were made out so that the appeal had to be dismissed.

47 **MILLER J**: I have had the opportunity of reading in draft the reasons of the Deputy Presiding Judge and I agree that for those reasons the appeal should be dismissed.

48 **EM HEENAN J**: I have read the reasons of the Hon Justice Scott in draft form and agree with them. There is nothing I wish to add. For the reasons given by his Honour, I too agree that this appeal should be dismissed.

2002 WAIRC 05843

WESTERN AUSTRALIAN INDUSTRIAL APPEAL COURT

PARTIES	BHP IRON ORE PTY LTD, APPELLANT
	v.
	CONSTRUCTION, MINING, ENERGY, RESPONDENT
	TIMBERYARDS, SAWMILLS AND
	WOODWORKERS UNION OF AUSTRALIA
	WESTERN AUSTRALIAN BRANCH
CORAM	SCOTT J (Deputy Presiding Judge)
	MILLER J
	EM HEENAN J
DATE OF ORDER	TUESDAY, 4 JUNE 2002
FILE NO/S.	IAC 10 OF 2001
CITATION NO.	2002 WAIRC 05843

Result	Dismissed
Representation	
Appellant	Mr H J Dixon & Mr R L Hooker (both of Counsel)
Respondent	Mr D H Schapper (of Counsel)

Order

HAVING HEARD Mr H J Dixon and Mr R L Hooker (both of Counsel) for the Appellant and Mr D H Schapper (of Counsel) on behalf of the Respondent, THE COURT HERE BY ORDERS THAT—

The Appeal be dismissed.

JOHN SPURLING,
Clerk of the Court.

[2002] WASCA 161

JURISDICTION	**:**	WESTERN AUSTRALIAN INDUSTRIAL APPEAL COURT
CITATION	**:**	DELLYS V. ELDERSLIE FINANCE CORPORATION LTD [2002] WASCA 161
CORAM	**:**	ANDERSON J (PRESIDING JUDGE)
		SCOTT J
		HASLUCK J
HEARD	**:**	1 MARCH & 13 MAY 2002
DELIVERED	**:**	18 JUNE 2002
FILE NO/S	**:**	IAC 1 OF 2002
BETWEEN	**:**	PETER DELLYS
		Appellant
		AND
		ELDERSLIE FINANCE CORPORATION LTD
		Respondent
FILE NO/S	**:**	IAC 2 OF 2002
BETWEEN	**:**	ELDERSLIE FINANCE CORPORATION LTD
		Appellant
		AND
		PETER DELLYS
		Respondent

Catchwords:

Unfair dismissal - "Procedural" unfairness - "Substantive" unfairness - Remedies - Contractual benefits - Reasonable redundancy payments - Whether term for redundancy payments implied in employment contracts - Assessment of damages - General principles - Inconsistent claims - Employee claiming both "substantive" unfairness and genuine redundancy

Appeals - Full Bench - Powers to vary compensation assessments - Limits

Employment contracts - Wrongful dismissal - Effect of wrongful dismissal on employment relationship - Implied terms - Reasonable notice - Redundancy - Damages - Method of assessment

Legislation:

Industrial Relations Act 1979, s 7, s 23(1), s 23A, s 29

Result:

Appeal and cross-appeal dismissed

Category: A

Representation:

IAC 1 of 2002

Counsel:

Appellant	:	Mr D Howlett
Respondent	:	Mr G E Bull

Solicitors:

Appellant	:	Gadens Lawyers
Respondent	:	Chamber of Commerce and Industry Western Australia

IAC 2 of 2002

Counsel:

Appellant	:	Mr G E Bull
Respondent	:	Mr D Howlett

Solicitors:

Appellant	:	Chamber of Commerce and Industry Western Ausralia
Respondent	:	Gadens Lawyers

Case(s) referred to in judgment(s):

Automatic Fire Sprinklers Ltd v Watson (1946) 72 CLR 435

Barnsley v Taylor (1868) 37 LJQB 39

BP Refinery (Westernport) Pty Ltd v Shire of Hastings (1978) 52 ALJR 20

Byrne & Frew v Australian Airlines Ltd (1995) 185 CLR 410

Coles Myers Ltd v Coppin & Ors (1993) 73 WAIG 1754; (1993) 11 WAR 20

Cousins v YMCA of Perth (2001) 82 WAIG 5

Delaney v Staples (trading as De Montfort Recruitment) [1992] 1 AC 687

Dellys v Elderslie Finance Corporation Ltd [2001] WAIRC 03074

FDR Pty Ltd v Gilmore (1998) 78 WAIG 1099

Gothard v Mirror Group Newspapers Ltd [1988] ICR 729

Gromark Packaging v The Federated Miscellaneous Workers Union of Australia, WA Branch (1992) 73 WAIG 220

Gunton v Richmond-upon-Thames London Borough Council [1981] 1 Ch 448

Hospital Products Ltd v United States Surgical Corporation (1984) 156 CLR 41

J C Williamson Ltd v Lukey (1931) 45 CLR 282

Kilburn v Enzed Precision Products (Australia) Pty Ltd (1988) 4 VIR 31

Ogilvy & Mather (New Zealand) Ltd v Turner [1996] 1 NZLR 641

Quinn v Jack Chia (Australia) Ltd [1992] 1 VR 567

Riverwood International Australia Pty Ltd v McCormick (2000) 177 ALR 193

Robe River Iron Associates v Association of Draughting, Supervisory and Technical Employees of Western Australia (Pepler's Case) (1987) 68 WAIG 11

WA Access Pty Ltd v Vaughan (2000) 81 WAIG 373

White & Carter (Councils) Ltd v McGregor [1962] AC 413

Case(s) also cited:

Ahern v Australian Federation of Totally and Permanently Incapacitated Ex-Service Men and Women (Western Australian Branch) Inc (1998) 78 WAIG 3572

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

Coal and Allied Operations Pty Ltd v Australian Industrial Relations Commission & Ors (2000) 203 CLR 194

Collector of Customs v Agfa Gevaert Ltd (1996) 186 CLR 389

Elliott v Kodak Australasia Pty Ltd (2001) 108 IR 23

Federated Clerks Union of Australia, Industrial Union of Workers WA Branch v George Moss Ltd (1990) 70 WAIG 3040

House v The King (1936) 55 CLR 499

Norbis v Norbis (1986) 161 CLR 513

Qantas Airways Ltd v Christie (1998) 193 CLR 280

Shire of Esperance v Mouritz (1991) 71 WAIG 891

The Minister for Health v The Australian Liquor, Hospitality and Miscellaneous Workers' Union (1996) 76 WAIG 930

Wan v Australian Industrial Relations Commission and Australian Broadcasting Corporation [2001] FCA 1803

Western Australian Builders Labourers, Painters and Plasterers Union of Workers v Clark (1995) 62 IR 334

1 **ANDERSON J (Presiding Judge)**: These are two appeals from a decision of the Full Bench delivered on 17 December 2001 dismissing an appeal from a decision of Wood C in which he awarded to Mr Peter Dellys $26,351.10 as compensation for unfair dismissal from the employment of Elderslie Finance Corporation Ltd. I shall refer to Mr Dellys as the appellant, although he is respondent in appeal number IAC 2 of 2002 and I shall refer to Elderslie Finance Corporation Ltd as the respondent, although it is the appellant in that appeal.

The facts

2 The appellant was dismissed during the mid-afternoon of 14 July 2000 from his position as national agency manager, which he had held since 4 May 1998. On the day in question, the respondent's executive director, Mr Little, told the appellant that his position had been abolished and he had been made redundant, and he should leave his employment that day. He was given a sum of money equivalent to 10 weeks' base salary, of which portion (one month's base salary) was said to be in lieu of notice and the remainder was said to be a severance payment, calculated at three weeks' pay for every completed year of service.

3 The respondent is a finance company which raises money from investors and lends money to borrowers for a fee, or margin on the loans. It carries on business through a number of agencies and the appellant's duties involved co-ordinating and monitoring the work of these agencies.

The proceedings before Commissioner Wood

4 On 2 August 2000, the appellant filed a notice of application in the Commission pursuant to his right to do so under s 29(1)(b) of the *Industrial Relations Act 1979* (WA) which provides:

> "**29. By whom matters may be referred**
>
> (1) An industrial matter may be referred to the Commission —
>
> (a) …
>
> (b) in the case of a claim by an employee —
>
> (i) that he has been harshly, oppressively or unfairly dismissed from his employment; or
>
> (ii) that he has not been allowed by his employer a benefit, not being a benefit under an award or order, to which he is entitled under his contract of service,
>
> by the employee."

5 This is the section which sets out the standing of an employee himself to refer a matter to the Commission and, as can be seen, limits the matters that may be referred by an employee to those which are described in subpars (i) and (ii). It may be observed that s 29 does not confer a separate head of jurisdiction on the Commission in addition to that which is conferred by s 23(1) or expand the powers of the Commission: ***Coles Myers Ltd v Coppin & Ors*** (1993) 73 WAIG 1754; (1993) 11 WAR 20 per Kennedy J at 24. Section 29(1)(b) does, however, confirm that the matters referred to in subpars (i) and (ii) of that subsection are, *prima facie*, industrial matters within the definition of "industrial matter" in s 7. This will be so even when, as here, the employment relationship has ended: s 7(1)(1a)

6 By the notice of application, the appellant stated the grounds upon which his application was made as being "unfair dismissal and denied contractual benefits", thus indicating that the reference was made pursuant to both subpars(i) and (ii) of s 29(1)(b). A number of particulars were given in support of his claim that his dismissal was unfair, the main particulars being that he was summarily dismissed without sufficient payment in lieu of notice and without any prior warning "that his position had been abolished and that he had been made redundant". By way of redress for his unfair dismissal, he claimed to be reinstated. As to the claim for "contractual benefits", his claim was as follows:

> "CONTRACTUAL BENEFITS
>
> | | |
> |---|---|
> | Reasonable Notice | 12 months pay
$76,743.69 |
> | Reasonable Redundancy pay | 12 months pay
$76,743.69 |
> | Commissions forfeited due to summary dismissal (July 2000) | $12,500 |
> | STATUTORY BENEFITS | |
> | Statutory Superannuation entitlements based on 2 years pay or on the amount of reasonable notice and/or reasonable redundancy payment ordered by the Commission | $ 7,693.56 |
> | TOTAL BENEFITS CLAIMED | $173,680.94" |

Commissioner Wood's decision - procedural and substantive unfairness

7 Wood C found that the appellant's dismissal was "both procedurally and substantively unfair". He found that it was "substantively" unfair because it was not a case of genuine redundancy at all and he was dismissed really because of poor performance in circumstances in which it was not fair to dismiss him on that ground. It was "procedurally" unfair because of the manner in which the dismissal was effected; that is, "without any complaint or counselling about his performance, and told to leave that day".

8 The provisions of the *Industrial Relations Act* which refer to harsh, oppressive or unfair dismissal make no distinction between a dismissal which is "substantively" harsh, oppressive or unfair and a dismissal which is "procedurally" harsh, oppressive or unfair. However, it has been the longstanding practice of the Commission to employ the dichotomy as a convenient method of distinguishing between dismissals which are unfair in the sense that there should have been no dismissal at all and dismissals which are unfair in the sense that, although the employer was, broadly speaking, justified in bringing the relationship of master

and servant to an end when he did, the employer went about it harshly, oppressively or unfairly. The distinction is regarded as relevant to the quantification of the compensation to which the employee may be entitled under s 23A(1)(ba). It would appear that the "loss or injury" within the meaning of that subsection is invariably assessed differently, depending on whether the Commission concludes that the employee should not have been dismissed at all, or whether it concludes that it was only the manner of dismissal which was unfair. See, for example, ***WA Access Pty Ltd v Vaughan*** (2000) 81 WAIG 373.

9 Having found that the dismissal in this case was both procedurally and substantively unfair, Wood C considered the appellant's application for reinstatement pursuant to s 23A(1)(b) and decided that reinstatement was not practicable, but that compensation should be awarded. As has been noted, he assessed the amount which the respondent should pay to the appellant for the loss or injury caused by the dismissal at $26,351.10 and ordered that sum to be paid.

10 The sum was arrived at in the following way. The Commissioner found that the appellant had not worked at all since his dismissal, a period of 33 weeks as at the day of assessment. Because the appellant had been paid for 10 weeks of that period, his loss to that date was held to be the equivalent of 23 weeks' salary, plus superannuation entitlements and this was found to come to $26,351.10 (AB 57 par 32).

11 As can be seen, Wood C made no allowance in respect of the claim for "Reasonable Redundancy pay" amounting to $76,743.69.

12 The appellant appealed to the Full Bench against the inadequacy of that award, claiming that certain specific errors had been made in the calculation of it. The respondent did not appeal.

The appeal to the Full Bench

13 The appellant's contentions before the Full Bench essentially were that, in calculating loss, Wood C failed to take into account commissions that the appellant would have earned over and above his base salary during the period of 33 weeks, made an under-calculation of superannuation entitlements and ought not to have deducted the amount paid to the appellant in lieu of notice and for severance. Furthermore, it was contended that, in addition to the other heads of claim, there should have been an award of "a reasonable redundancy payment as an implied term of his contract of employment in addition to a period of reasonable notice".

Redundancy

14 The factual question whether there was or was not a redundancy does not arise for our consideration. The circumstances in which a redundancy will occur include the abolition of the job in question, but redundancy may also occur when a workforce is reduced because there is labour in excess of that reasonably required to perform the work which is the employer's business: ***Gromark Packaging v The Federated Miscellaneous Workers Union of Australia, WA Branch*** (1992) 73 WAIG 220 per Franklyn J at 224.

Is there an implied term for redundancy payments?

15 According to the practice that seems to have developed in the Commission to deal with such disputes as this, if a redundancy occurs, an award may be made to the affected employee under the head of "reasonable redundancy payment" separately from, and it would seem in addition to, any award that may be made in respect of a claim for payment in lieu of reasonable notice; and such an award may be made even when it is found that the employee was given reasonable notice or an appropriate payment in lieu of reasonable notice. As the appellant's grounds of appeal to the Full Bench reflect, the jurisprudential basis for such an award is said to be that it is an amount to which the employee is entitled as a matter of contract, that is, under the employment contract on its proper construction. The Commission holds that such an entitlement exists in virtue of an implied term to that effect in employment contracts. We are not in this case asked to consider the correctness of the proposition that there is to be implied into every contract of service as a matter of law a term that the employee will be paid an amount called "redundancy payment" should he become redundant. I must say, however, that it is a proposition which is most unlikely to be accepted in this Court. The general rule is that courts and tribunals do not impose contractual terms on parties. The requirements that must be satisfied for a term to be implied by law in a contract were laid down by Lord Simon of Glaisdale in ***BP Refinery (Westernport) Pty Ltd v Shire of Hastings*** (1978) 52 ALJR 20 at page 26 as follows:

> "(1) it [the term] must be reasonable and equitable;
> (2) it must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it;
> (3) it must be so obvious that 'it goes without saying';
> (4) it must be capable of clear expression;
> (5) it must not contradict any express term of the contract."

16 These requirements have been acknowledged as correct in Australia and have been applied at the highest level: ***Hospital Products Ltd v United States Surgical Corporation*** (1984) 156 CLR 41 per Deane J at 121. In my respectful opinion, a term that an employer must pay to the employee who becomes redundant a sum of money by way of "reasonable redundancy" as well as give reasonable notice would not satisfy the first three conditions.

17 The question came before this Court in ***Coles Myer Ltd v Coppin & Ors*** (*supra*). In that case, three dismissed employees of the appellant referred a matter to the Commission under s 29(1)(b) in which they claimed "underpayments of benefit under employment contract". Each had been paid salary in lieu of notice and a sum to cover annual leave and long service leave entitlements, and, as well, a redundancy payment calculated according to length of service. The Commissioner found in each case that there was an implied term in each contract of service concerning redundancy and he granted to each of the applicants an increased redundancy payment. The Full Bench dismissed the employer's appeal, upholding the Commissioner's decision that a redundancy clause was implied in the employment contracts and redundancy payments were recoverable as contractual benefits in addition to payments in lieu of reasonable notice. In this Court, the employer's appeal was upheld on the ground that, applying ***Robe River Iron Associates v Association of Draughting, Supervisory and Technical Employees of Western Australia (Pepler's Case)*** (1987) 68 WAIG 11, the Commission did not have jurisdiction to deal with the matter. We were informed by Mr Bull, who appeared for the respondents, that the Commission and, in particular the Full Bench, has frequently cited ***Coles Myer Ltd v Coppin*** as an authority of this Court to the effect that a redundancy clause is implied into employment contracts. This is not so. The Court decided that it was unnecessary to resolve that issue because the proceedings before the Commission were ineffective for want of jurisdiction and must be set aside on that basis. In the penultimate paragraph of the judgment of the court (Kennedy, Rowland and Nicholson JJ) their Honours said:

> "It follows that the Commission has no jurisdiction to deal with the applications. In the circumstances it is unnecessary for this Court to resolve the issue between the parties. In fact in the absence of jurisdiction in the Commission this Court lacks jurisdiction to deal with that issue. **It should not, however, be thought that the Court accepts that a term in the terms found in each case can on the evidence before the Commission be implied in the contracts of employment between the parties**."

18 ***Coles Myer Ltd v Coppin*** does not stand as authority for the proposition that a redundancy entitlement is implied in employment contracts and I am not aware of any other case which is authority for that proposition except decisions of the Commission itself.

19 In ***Riverwood International Australia Pty Ltd v McCormick*** (2000) 177 ALR 193 the Federal Court had to consider whether the provisions of a redundancy policy contained in an employer's manual were incorporated into the employment contract between the appellant employer and the respondent employee. The employee's main case was that the redundancy policy was incorporated into the employment contract by express agreement. The employee also contended that alternatively a redundancy entitlement was implied in the contract by law. The trial Judge found that the redundancy policy set out in the manual was incorporated into the contract by express agreement and also held that the contract contained, or would have contained, an implied term, implied by law, that the employee would receive redundancy benefits if his position was made redundant. The first part of this judgment was upheld by majority (North and Mansfield JJ) on appeal, Lindgren J dissenting. Because they found that there was an express redundancy agreement, the two Judges comprising the majority did not consider it necessary to decide whether the contract would have contained an implied term for redundancy benefits. In his dissenting judgment, however, Lindgren J emphatically rejected the latter proposition. He said (par 63):

> "There is no warrant for saying that there is implied by law in all contracts of employment a provision for the making of a special payment by the employer to the employee where the employer terminates the employment because the employee's services have become redundant to the employer's needs."

20 Although Lindgren J was the dissenting Judge, no disagreement is to be found in the judgments of the other members of the court with this statement of the law as to implied redundancy clauses and it is entirely consistent with the judgments in ***Byrne & Frew v Australian Airlines Ltd*** (1995) 185 CLR 410. In that case, it was argued on behalf of two airport baggage handlers who were dismissed for pilfering, that there was an implied term in the contract of service that they would not be dismissed in a harsh, unjust or oppressive manner. The High Court held that there was no implied term in the contracts of employment to the effect that the employees would not be dismissed in a harsh, unjust or oppressive manner because the implication of such a term was not necessary for the reasonable and effective operation of the employment contracts and would not have been accepted by both contracting parties as a matter "so obvious that it would go without saying".

21 A redundancy payment clause is, in my opinion, even less necessary and even less obvious than an unfair dismissal clause. The contract of employment is entirely effective without such a clause and, as to obviousness, it cannot be postulated that contracting parties would regard a redundancy clause as so obvious as to go without saying. The employer is bound at general law as a matter of implied agreement to terminate only on giving reasonable notice (***Byrne v Australia Airlines Ltd*** (*supra*) at 429). It is therefore quite unlikely that the employer would regard it as obvious that, in the case of a redundancy but not otherwise, he should also make a payment called "reasonable redundancy". Neither does it appear reasonable, or equitable, that an employer should be obliged to both give reasonable notice and, as well, pay a redundancy sum. As a general rule, length of service is a consideration in determining the reasonableness of the period of notice: ***Quinn v Jack Chia (Australia) Ltd*** [1992] 1 VR 567 at 580. Any additional reward for length of service is a matter for express agreement, generally speaking.

The issue of genuine redundancy

22 Returning now to the history of the matter, a rather curious situation appears to have developed with respect to the head of claim for a redundancy payment. As recounted at the beginning of this judgment, Wood C found as a fact that the appellant was not genuinely made redundant but was dismissed for incompetence when it was not fair to dismiss him on that ground. This was not a finding which the appellant welcomed and this is because, in accordance with the practice in the Commission, if there is no genuine redundancy, the Commission holds that there is no requirement at law to make a redundancy payment.

23 Therefore, in order to maintain his claim for a redundancy payment, the appellant included in his grounds of appeal to the Full Bench grounds which challenge the finding of Wood C that there was no genuine redundancy. The appellant's grounds of appeal on this point are as follows:

> "Redundancy and Redundancy Payment
>
> The Commissioner:
>
> 9. Erred in not deciding that the appellant was made redundant by virtue of his job or position being made redundant.
>
> 10. Erred in deciding that the appellant was not entitled to a reasonable redundancy payment as an implied term of his contract of employment, in addition to a period of reasonable notice.
>
> …
>
> 13. Erred in not notifying the parties that he was going to consider the question of whether the redundancy was genuine and allowing the parties to make submissions on that matter.
>
> 14. Erred in holding that there was an onus on the employer to prove that the appellants redundancy was genuine."

The respondent employer, in effect, conceded these grounds of appeal.

24 The appellant's submissions in support of his contention that he was made redundant, in the sense of genuinely made redundant, are set out in the appellant's written submissions on the appeal at AB 216 *et seq* as follows:

> "69. The Commissioner found that the respondent had not discharged its onus to prove that the appellant's termination was a genuine redundancy …
>
> 70. …
>
> 71. The position or job that the appellant did was clearly different from the two positions or jobs that were created following the restructure even though there may have been some element of overlap between the duties of the appellant's former position or job and the two new positions or jobs …
>
> 72. The applicant's position or job was made redundant and no-one was employed to carry out the functions of the appellant's former position or job.
>
> 73. The appellant was not given any alternative duties or functions."

25 The respondent's response to these contentions, in effect conceding that they were correct, are set out at AB 221 as follows:

> "8. The Respondent submits that the Appellant was made redundant when he was dismissed on 14 July 2000.
>
> 9. The evidence before the Commission is … overwhelmingly in support of such a conclusion. The job that the appellant was doing prior to the dismissal was made redundant … by decision … to separate the

> functions of Business Development and Credit Analysis from the jobs then performed by the Appellant and Mr Hawkesford. This decision was taken some time early June 2000 and Mr Little offered a choice of jobs to Mr Hawkesford but not to the Appellant.
>
> 10. The [appellant's] Contract of Employment created the job of National Agency Manager. That job disappeared with the restructure referred to in paragraph 9."

26 This led all members of the Full Bench to hold that the dismissal was "procedurally" unfair but not "substantively" so. It was not "substantively" unfair because there was a genuine redundancy so that the appellant was going to lose his job in any event (AB 11 par 25 per Sharkey P, AB 17 par 875 per Scott C and Smith C). The Full Bench came to this conclusion on the basis of the appellant's own contention that there should have been a finding of genuine redundancy and the respondent's concession that there should have been such a finding.

Inconsistent claims by appellant for relief

27 Before us, Mr Howlett, who appeared for the appellant, submitted that the Full Bench erred in disposing of this issue in this way. I am not persuaded that it did. Mr Howlett argued that the appellant's contention before the Full Bench that Wood C should have held that he had been genuinely made redundant only affected the question whether there should be a redundancy payment and in pursuing that head of claim, the appellant was not really maintaining that he was, in fact, genuinely made redundant, but was seeking only to take advantage of the reasons given by the respondent for dismissing the appellant. As I understood this submission, it was to the effect that if the employer tells the employee that he is redundant and terminates the employment on that basis, he is liable to make a redundancy payment, even if there was no genuine redundancy; and if the employee can show that it was not a genuine redundancy at all, the employer is also liable to pay compensation on the basis that the dismissal was substantively unfair in that it was not a genuine redundancy. I cannot accept this submission. Quite apart from what I have said about what I would regard as the erroneous notion that an employee who becomes redundant is entitled in law as a matter of implied agreement to a "redundancy payment", I do not see any justification for permitting an employee who has been dismissed to pursue inconsistent heads of claim against the employer.

28 In my opinion, the Full Bench was perfectly correct to approach the disposition of this matter on the basis that it was common ground between the parties that the decision of Wood C that there was no genuine redundancy must be set aside. The employer averred that a redundancy occurred and the employee agreed; there was no relevant dispute on the issue and it was not for the Commission to create one.

29 The significance of this is, of course, that the area of dispute is confined to the loss or injury occasioned by the procedural unfairness in the dismissal, that is, in implementing the redundancy in an unfair manner, including inadequate notice. The respondent accepts that there was unfairness in the manner of effecting the redundancy (AB 222 par 14).

30 As the claim for compensation was confined to compensation for loss or injury caused by the manner of dismissal, the Full Bench was bound to conclude, as the majority did, that Wood C was wrong to proceed to assess compensation as if there was a substantive unfairness.

Full Bench's decision

31 How should the Full Bench have then disposed of the matter? It seems to me that there were two options. The appellant's application could have been sent back to Wood C to reassess the award of compensation on the basis that there was procedural unfairness only and no substantive unfairness. Alternatively, the Full Bench could have proceeded itself to reassess the award of compensation on that basis. The Full Bench decided that this is what should be done and they proceeded to assess the appellant's loss. The majority came to the conclusion that the appellant was entitled to only $14,926.99 and, as this was less than the amount awarded by Wood C, they held that the appeal should be dismissed. In their joint reasons, Scott C and Smith C said that in all the circumstances there should have been three months' notice or three months' pay in lieu of notice, that the payment in lieu of notice should have included an amount for the commissions that probably would have been earned in the three-month period of notice and there should have been a pro rata allowance of superannuation entitlements and, putting all of these together, they found that the appellant's monthly benefits amounted to $6,441.10 (or $19,323.30 for three months). From this, they would have deducted the sum which was paid to the appellant as a payment in lieu of notice, ie, $4,396.32, giving an ultimate figure of $14,926.99. They would not have made any deduction on account of the six weeks' severance pay which the respondent paid to the appellant. The Commissioners said that they would not have brought this to account to the credit of the respondent because it should be regarded as a payment on account of redundancy pay, extinguishing what the respondent's obligation would otherwise have been as regards redundancy pay.

32 On behalf of the appellant, Mr Howlett complained firstly that the Full Bench had no authority to engage in this exercise because there was no appeal by the respondent against the assessment made by Wood C and, in particular, against his finding that the appellant's starting loss should be taken to be 33 weeks' pay, not three months. As to this, the answer is that, having found that Wood C's assessment was based upon a wrong premise, namely, that there was no genuine redundancy, the Full Bench was entitled to embark upon a reassessment of loss for itself or, alternatively, to remit the matter to Wood C for reassessment. It chose the former course and I am not persuaded it was wrong to do so.

Compensation for wrongful dismissal - general principles

33 Mr Howlett sought to contend that the payment of one month's base salary in lieu of notice ought not to have been brought to account to the credit of the respondent in assessing the compensation which the respondent should pay to the appellant because this was a payment of a "contractual entitlement". Furthermore, he contended that in confining themselves to a calculation of the appellant's economic loss, the majority members of the Full Bench failed to have regard for the fact that an award of compensation may extend beyond claims for purely economic loss.

34 As to the first contention, an employer who has wrongfully dismissed an employee, but who has made payments to that employee in lieu of notice or for "severance" is entitled to have those payments credited in the quantification of his liability to the employee arising from the wrongful dismissal. In their essential character, the payments are compensatory, their purpose being to satisfy the employee's claim for damages for breach of the implied term not to terminate except on reasonable notice. They are not payments in consideration for work done. They are not wages earned and accrued due: ***Automatic Fire Sprinklers Ltd v Watson*** (1946) 72 CLR 435 per Dixon J at 466 - 467. That being so, the law requires that they be brought to account in any assessment of overall compensation: ***Delaney v Staples (trading as De Montfort Recruitment)*** [1992] 1 AC 687 per Lord Browne-Wilkinson at page 692; ***Ogilvy & Mather (New Zealand) Ltd v Turner*** [1996] 1 NZLR 641 at 646 - 647.

35 In ***Gothard v Mirror Group Newspapers Ltd*** [1988] ICR 729 at 733, Lord Donaldson MR said, at 692:

> "If a man is dismissed without notice, but with money in lieu, what he receives is, as a matter of law, payment which falls to be set against, and will usually be designed by the employer to extinguish, any claim for damages for breach of contract, ie wrongful dismissal. During the period to which the money in lieu relates he is not employed by his employer."

36 In ***Delaney v Staples (Trading as De Montfort Recruitment)*** (*supra*) Lord Browne-Wilkinson said that this was "the only possible legal analysis of a payment in lieu" where, without the agreement of the employee, the employer summarily dismisses him and tenders a payment in lieu of proper notice. He said:

> "The employer is in breach of contract by dismissing the employee without proper notice. However, the summary dismissal is effective to put an end to the employment relationship, whether or not it unilaterally discharges the contract of employment. Since the employment relationship has ended no further services are to be rendered by the employee under the contract. It follows that the payment in lieu is not a payment of wages in the ordinary sense since it is not a payment for work done under the contract of employment."

37 In light of some of the submissions that were made to us as to how the Commission deals with claims by dismissed employees for monetary payments, it may be helpful, although risking some repetition, here to state what I apprehend to be well-settled general principles of the common law with respect to contracts of service and their termination, and the nature of a claim for "salary" by a dismissed employee.

38 A party to a contract who repudiates it does not bring the contract to an end. The repudiation gives rise to a right of rescission in the innocent party. The innocent party can decline to accept the repudiation and remain ready himself to perform and so keep the contract on foot. On the other hand, he may elect to accept the repudiation, and if he does so, it is that election which rescinds the contract. These principles are of general application and apply to employment contracts. In the case of employment contracts, a wrongful dismissal is a repudiation by the employer, which does not of itself rescind the contract. However, what must be understood is that the dismissal, although wrongful, does put an end to the employment relationship, because a dismissed employee has no legal right to insist on being allowed to work. Employment contracts are not specifically enforceable as a general rule: ***J C Williamson Ltd v Lukey*** (1931) 45 CLR 282 especially per Starke J at 292 - 293. A dismissed employee therefore cannot claim to be paid wages, because wages are a payment for work done under the contract of service: ***Automatic Fire Sprinklers Pty Ltd v Watson*** (*supra*) per Dixon J at 466 - 467. The only consequence of the principle that a repudiation does not of itself terminate the contract of employment is that the employee can continue to proffer his services in the hope that the employer will change his mind and if the employer does take the employee back, there may be continuity of employment under the original contract, rather than a fresh engagement under a new contract: ***Barnsley v Taylor*** (1868) 37 LJQB 39. The fact that the employment contract itself may survive a wrongful dismissal does not mean that the wrongful dismissal is ineffective to end the employment relationship. The wrongful dismissal, although it is wrongful, is not a nullity. It does end the employment relationship in the sense explained; that is, in the sense that refusal by the employer to allow the employee to do the work the subject of the employment contract disentitles the employee to wages. Because specific performance is not a remedy which is available to the employee, he is left with a claim for damages for breach of contract: ***White & Carter (Councils) Ltd v McGregor*** [1962] AC 413, especially at 429; ***Delaney v Staples (Trading as De Montfort Recruitment)*** (*supra*) especially per Lord Browne-Wilkinson at 692 - 693; ***Ogilvy & Mather (New Zealand) Ltd v Turner*** (*supra*).

39 In the absence of express terms in the contract of employment providing for special payments on termination and where summary dismissal is not justified, the single obligation on the employer in terminating the contract is to give reasonable notice and if he fails to do so, there will be a wrongful dismissal entitling the employee to the single remedy of damages. The general rule with respect to the quantification of damages for wrongful dismissal is that the starting-point is the gross amount that would have been earned during the period of reasonable notice had the contract continued. From this must be deducted the gross amount actually received by the employee during that period: ***Kilburn v Enzed Precision Products (Australia) Pty Ltd*** (1988) 4 VIR 31 at 33 - 34. The amounts to be deducted include all payments made to the employee by the employer (including payments for leave which is due to the employee) as well as all remuneration earned by the employee in other employment: ***Quinn v Jack Chia (Australia) Ltd*** (*supra*) at 581. (Of course, the employee will be entitled to have the benefit of any accrued rights such as wages actually earned, but not paid.) Even if an employee who is wrongfully dismissed elects to keep the contract of employment on foot, he or she cannot claim wages in respect of any period after the wrongful dismissal because the right to receive wages is dependent on the services having been rendered: ***Byrne v Australian Airlines Ltd*** (*supra*) per Brennan CJ, Dawson and Toohey JJ at 427 - 428. Furthermore, the employee is under a duty to mitigate. He must act reasonably to minimise the loss which the wrongful dismissal has occasioned to him: ***Gunton v Richmond-upon-Thames London Borough Council*** [1981] 1 Ch 448 at 468.

40 In my opinion, the only error which the majority Commissioners made was in failing to bring to account to the respondent's credit the amount paid as severance pay. On the principles stated above, that, too, must be taken to be a payment made on account of the respondent's liability to pay damages for failure to give reasonable notice. But that was an error which favoured the appellant and is an error not sought to be corrected by the respondent in its appeal.

41 As to the contention that the majority members of the Full Bench confined themselves to a calculation of economic loss, it may be acknowledged that in settling an industrial matter involving a claim of unfair dismissal, the Commission is not necessarily confined by the common law rules governing the assessment of damages (economic loss) for wrongful dismissal: ***FDR Pty Ltd v Gilmore*** (1998) 78 WAIG 1099 But those rules provide the *prima facie* measure of the "amounts to which the claimant is entitled" within the meaning of s 23A(1)(a). There was, in this case, no evidence that the appellant had sustained any other loss. The appellant did not put forward, so far as I can tell, any case in support of non-economic loss or injury.

Was the Full Bench correct to dismiss the appeal or should it have reduced the appellant's award?

42 The next question (which arises in the respondent's appeal) is, having decided that the amount of compensation assessed by Wood C was excessive, what should the Full Bench have done? Should the award below have been set aside and the lower amount substituted, or was the Full Bench correct to simply dismiss the appeal?

43 Mr Howlett argued that, because the respondent did not appeal against the award of $26,251.10, it would not have been proper for the Full Bench to set that award aside and make a lower award, and its decision not to do so was correct. I think this submission must be accepted. It would be a very unsatisfactory state of affairs if an appellant who goes to the Full Bench complaining that an award of compensation for unfair dismissal is too low is at risk of having his or her award reduced notwithstanding that there is no contention by way of appeal on the part of the employer that the award should be reduced. It would seem to me to offend fundamental principles of natural justice that an appellant should be at risk of losing the award below, without being put on notice that there would be a contention to that effect, and without having particulars of the grounds of that contention. It seems to me in any case that the point was decided by this Court in ***Cousins v YMCA of Perth*** (2001) 82 WAIG 5 per Kennedy J at pars 47 - 50 where his Honour held, in effect, that the power of the Full Bench to vary a decision can only be exercised in favour of a successful appellant or "cross-appellant". Applying that decision to this case, there was no power to vary the award downwards in favour of the respondent who had not lodged an appeal (by way of "cross-appeal") attacking the decision. The *Industrial Relations Act* makes no provision for a cross-appeal as such so that a respondent who wishes to contend that the decision should have been more favourable to him must himself lodge an appeal. Therefore, I use the expression "cross-appeal" only for convenience, recognising that it is not strictly correct to use the expression in this context.

44 What I have just said disposes of the respondent's "cross-appeal" in which the respondent pleads that, having come to the conclusion that the proper award was only $14,926.99, the order made by Wood C should have been varied to that figure.

45 For these reasons, I would dismiss both appeals.

46 **SCOTT J**: In this matter I have had the advantage of reading in draft the reasons to be published by the presiding Judge. I agree generally with the reasons of the presiding Judge and with the orders proposed by him.

47 The appellant, Peter Dellys ("Mr Dellys"), brought an application for unfair dismissal against Elderslie Finance Corporation Ltd ("Elderslie") in the WA Industrial Relations Commission under s 29(1)(b(i) and (ii) of the *Industrial Relations Act (1979)* ("the *Industrial Relations Act*"). The application was for reinstatement of his position or, alternatively, compensation.

48 The application fell into two parts, namely:

(1) An application for compensation for unfair dismissal. The applicant contended that he had been both substantially and procedurally unfairly dismissed.

(2) An application for loss of contractual benefits arising from his signed contract of employment.

49 The matter came before Wood C who delivered his decision on the matter on 20 June 2001: ***Dellys v Elderslie Finance Corporation Ltd*** [2001] WAIRC 03074.

50 After analysis of the facts and referring to authority, Wood C said at [28]:

> "The facts in this matter lead me to doubt that even the first stage of a redundancy was achieved. Section 40 of the Minimum Conditions of Employment Act 1993 defines 'redundant' as -
>
> > 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 workforce, the employer has decided that the job will not be done by any person."

51 [29]:

> I find, in view of section 40 of the Minimum Conditions of Employment Act and the facts in this matter, that the respondent has not discharged their onus to prove that this was a genuine redundancy. This is a case where largely Mr Hawkesford and Mr Dellys did the same duties (business development and lending). This is in my view the evidence of Mr Hawkesford which I accept. These duties were then split so allowing Mr Hawkesford to concentrate on one set of duties (business development) while another position concentrated on the other set of duties (lending)."

52 It follows that the Commissioner who heard the matter concluded on the facts before him after trial that there was no genuine redundancy. That led the Commissioner to the conclusion that Mr Dellys' dismissal was both procedurally and substantively unfair. Wood C cited authority for reaching that conclusion.

53 After taking into account the various components of Mr Dellys' claim, Wood C came to the conclusion that Mr Dellys should be awarded $26,251.10.

54 Mr Dellys appealed to the full bench of the Industrial Commission, claiming that he was entitled to a greater sum because, in addition to the amount awarded for unfair dismissal, he was also entitled to a further sum for loss of contractual benefits arising out of his contract of employment.

55 In the notice of appeal in relation to the redundancy payment, ground 9 of the grounds of appeal was:

> "The Commissioner:
>
> (9) erred in not deciding that the appellant was made redundant by virtue of his job or position being made redundant."

56 The reason for challenging the finding that redundancy had not been established was to support the claim for contractual benefits.

57 In the decision of the full bench a majority (Scott and Smith CC) reached the conclusion that the amount awarded by Wood C was in excess of the amount that should have been awarded. Those Commissioners would have awarded Mr Dellys $14,926.99. Because there was no cross-appeal by Elderslie, the majority therefore concluded that the appeal should be dismissed so that the award of Wood C remained.

58 The President in dissent would have allowed the appeal and awarded Mr Dellys $39,719.

59 In the argument before the full bench it was conceded that Mr Dellys's job was made redundant within the statutory and common law definition. That concession was, of course, contrary to the decision of Wood C. The effect of that concession was that the full bench had to re-assess the award of compensation.

60 Following the decision of the full bench, both Mr Dellys and Elderslie lodged appeals to the Industrial Appeal Court (IAC 1 and IAC 2 of 2002 respectively).

61 In Mr Dellys's appeal in IAC 1 of 2002 Mr Dellys contends that not only should he be awarded the amount assessed by Wood C for unfair dismissal, but he should also be allowed a sum for loss of contractual benefits.

62 The difficulty with that contention was revealed in the course of argument before us. Mr Howlett, on behalf of Mr Dellys, contended that, for the purposes of the unfair dismissal component of the claim, there was no genuine redundancy so that the decision of Wood C should stand. For the purposes of the contractual benefits claim, however, he maintained that there was a genuine redundancy, at least from the point of view of Mr Dellys' employer, Elderslie.

63 The inconsistency of those two claims is apparent. Either there was a genuine redundancy or there was not, and that was a question of fact. It is not for the Industrial Appeal Court to determine questions of fact because the jurisdiction of the Industrial Appeal Court is confined by s 90 of the *Industrial Relations Act* which provides:

> "90(1) Subject to this section, an appeal lies to the Court in the manner prescribed from any decision of the President, the full bench, or the Commission in Court session on the ground that the decision is erroneous in law or is in excess of jurisdiction but upon no other ground."

64 It is not for the Industrial Appeal Court to determine or redetermine questions of fact. The matters of fact were determined by Wood C. This Court is required to act upon those facts.

65 It follows, in my view, that because there was no appeal by Elderslie against the decision of Wood C, Scott and Smith CC were justified in reaching the conclusion that although they would have assessed the award for Mr Dellys at less than the sum fixed by Wood C, the appeal should be dismissed.

66 The position is not altered because of the fact that there are two appeals before the Industrial Appeal Court. There was no appeal by Elderslie against the decision of Wood C and, as a consequence, Mr Dellys was never put on notice by a cross-appeal that Elderslie were contending that the award should be reduced. It is no answer to that proposition to say that Elderslie, in their submissions to the full bench, contended that the award should be reduced. Absent an appeal by Elderslie, the full bench was in no position to reduce the award: ***Cousins v YMCA of Perth*** (2001) 82 WAIG 5 at [47 - 50].

67 It follows, in my view, that no error has been demonstrated in the conclusions reached by the full bench so that both appeals should be dismissed.

68 **HASLUCK J**: I have had the advantage of reading in draft the reasons to be published by the presiding Judge. I agree that both appeals should be dismissed for the reasons given by his Honour.

2002 WAIRC 05770

WESTERN AUSTRALIAN INDUSTRIAL APPEAL COURT

PARTIES	PETER DELLYS, APPELLANT
	v.
	ELDERSLIE FINANCE CORPORATION LIMITED, RESPONDENT
CORAM	ANDERSON J (Presiding Judge)
	SCOTT J
	HASLUCK J
DATE OF ORDER	TUESDAY, 18 JUNE 2002
FILE NO/S	IAC 1 OF 2002
CITATION NO.	2002 WAIRC 05770

Result	Dismissed
Representation	
Appellant	Mr D Howlett (of Counsel)
Respondent	Mr G E Bull (of Counsel)

Order

HAVING HEARD Mr D Howlett (of Counsel) for the Appellant and Mr G E Bull (of Counsel) on behalf of the Respondent, THE COURT HEREBY ORDERS THAT:

The Appeal be dismissed.

JOHN SPURLING,
Clerk of Court.

2002 WAIRC 05771

WESTERN AUSTRALIAN INDUSTRIAL APPEAL COURT

PARTIES	ELDERSLIE FINANCE CORPORATION LIMITED, APPELLANT
	v.
	PETER DELLYS, RESPONDENT
CORAM	ANDERSON J (Presiding Judge)
	SCOTT J
	HASLUCK J
DATE OF ORDER	TUESDAY, 18 JUNE 2002
FILE NO/S	IAC 2 OF 2002
CITATION NO.	2002 WAIRC 05771

Result	Dismissed
Representation	
Appellant	Mr G E Bull (of Counsel)
Respondent	Mr D Howlett (of Counsel)

Order

HAVING HEARD Mr G E Bull (of Counsel) for the Appellant and Mr D Howlett (of Counsel) on behalf of the Respondent, THE COURT HEREBY ORDERS THAT:

The Appeal be dismissed.

JOHN SPURLING,
Clerk of Court.

FULL BENCH—Proceedings for enforcement of Act—

2002 WAIRC 05851

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	REGISTRAR OF THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION, APPLICANT
	v.
	GERARD DORNFORD, RESPONDENT
CORAM	FULL BENCH
	HIS HONOUR THE PRESIDENT P J SHARKEY
	COMMISSIONER S J KENNER
	COMMISSIONER S WOOD
DELIVERED	WEDNESDAY, 26 JUNE 2002
FILE NO/S.	FBM 1 OF 2002
CITATION NO.	2002 WAIRC 05851

Result	Application proven
Representation	
Applicant	Mr A Bastow (of Counsel), by leave
Respondent	Mr G Dornford, on his own behalf
	Mr R Grayden (of Counsel), by leave

Reasons for Decision

PRESIDENT

1 This was an application brought by the Registrar of this Commission to enforce s.44(3) of the *Industrial Relations Act* 1979 (as amended) (hereinafter referred to as "the Act") for the enforcement of s.44(3) – "failing to attend a conference on 8 November 2001", a summons having been issued to the respondent, Gerard Dornford, to so attend.

2 The particulars were therefore insufficient but no point was taken on that issue.

3 S.44(3) of the Act reads as follows:-

> "Any person so summoned shall, except for good cause, proof of which is on him, attend the conference at the time and place specified in the summons and continue his attendance thereat as directed by the Commission".

4 At the hearing of this matter on 19 June 2002, the respondent through Mr Grayden, of counsel, admitted that he had failed to attend the conference and that he had failed to attend the time and place at the time and at the place specified in the summons and further that he had contravened or failed to comply with s.44(3) of the Act .

5 I, as a member of the Full Bench, on that admission, found the breach or non-compliance alleged, proven.

6 There was no evidence of any previous contraventions or failures by the respondent to comply with the Act or s.44(3) or any summons there under; nor was there evidence of any previous relevant contraventions or non-compliances by the respondent.

7 The facts submitted in mitigation were that the respondent had not wilfully failed to attend, that there was some confusion because he was living at his mother's home and messages, letters etc, went to other addresses of his and that he did not necessarily receive them.

8 Through counsel he expressed his remorse for and admitted the contravention or non-compliance alleged against him.

9 The respondent, through counsel, unreservedly gave an undertaking to comply with all future orders or directions of the Commission and to attend all future conferences which he might be required to attend in the Commission.

10 S.84A requires the Full Bench, in dealing with an application under s.84A, which this is, to have regard to:-

(a) The seriousness of the contravention or failure to comply.

(b) Any undertakings that may be given as to future conduct.

(c) Any mitigating circumstances.

11 Since the non-compliance or contravention was admitted, and counsel for the parties were in agreement as to the penalty which should be imposed, it was my opinion as a member of the Full Bench, that to invite the parties to confer with it would be unavailing.

12 No invitation was therefore given to the parties.

13 On the hearing of an application under s.84A, the Full Bench may, if the contravention or failure to comply is proved, relevantly:-

(a) Accept any undertaking given.

(b) By order, issue a caution or impose such penalty as it considers just but not exceeding $2000 in the case of an employer, organisation or association and $500 in any other case.

14 Since the respondent was an employer the maximum penalty imposable was $2000.

15 In this case I had regard as the Full Bench was required to do, to:-

(a) The unreserved and wide undertaking given as to his future conduct.

(b) The following mitigating circumstances:-

(i) There was no evidence of any other breach or non-compliance.

(ii) That remorse for the contravention or failure to comply was expressed.

(iii) That the failure to attend the conference at the time and date fixed due to the respondent's failure to properly deal with the notifications and messages he received was not necessarily wilful.

(iv) That the respondent admitted his contravention or non-compliance and did not oppose the application, as a result.

16 Taking all of those matters into account, I concluded that a fair and proper order would be to accept the full and unconditional undertaking to which I have referred above accordingly. For all of those reasons therefore I joined with my colleagues in making such an order.

17 It should be emphasised that the question of contraventions or non-compliances with summonses, orders or directions of the Commission are serious matters. Such compliance is essential for the efficient and proper exercise of the Commission's jurisdiction as a court and tribunal charged with its jurisdiction by the parliament of this state. It therefore follows that any non-compliances or contraventions as described above, can never be taken lightly.

18 No order was sought as to costs and therefore no order for costs was made.

COMMISSIONER S J KENNER

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

COMMISSIONER S WOOD

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

PRESIDENT

21 For all of those reasons, the application was proven and the Full Bench made an order accepting the undertaking of the respondent.

Order accordingly

2002 WAIRC 05774

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	REGISTRAR OF THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION, APPLICANT
	v.
	GERARD DORNFORD, RESPONDENT
CORAM	FULL BENCH
	HIS HONOUR THE PRESIDENT P J SHARKEY
	COMMISSIONER S J KENNER
	COMMISSIONER S WOOD
DELIVERED	WEDNESDAY, 19 JUNE 2002
FILE NO/S.	FBM 1 OF 2002
CITATION NO.	2002 WAIRC 05774

Result	Application proven
Representation	
Applicant	Mr A Bastow (of Counsel), by leave
Respondent	Mr G Dornford, on his own behalf
	Mr R Grayden (of Counsel), by leave

Order

This matter having come on for hearing before the Full Bench on the 20th day of May 2002 and for hearing and determination on the 19th day of June 2002, and the Full Bench having heard Mr A Bastow (of Counsel), by leave, on behalf of the applicant and Mr G Dornford, on his own behalf on the 20th day of May 2002, and Mr R Grayden (of Counsel), by leave on behalf of the respondent on the 19th day of June 2002, and the Full Bench having found on the admission of the respondent that the allegation that the respondent had failed to attend a conference of the Commission held pursuant to s. 44 of the Act on the 8th day of November 2001 and thereby contravened s.44 (3) of the Act was proven, and the Full Bench having accepted the undertaking given by the respondent through counsel that he would comply with all future orders and directions of the Commission, and attend all conferences of the Commission which he might be required to attend, and both parties having waived the rights conferred on them by s.35 of the *Industrial Relations Act* 1979 (as amended), and the Full Bench having determined that its reasons for decision to be delivered on a date to be advised, it is this day, the 19th day of June 2002, ordered as follows:-

(1) THAT the said undertaking given by the respondent be and is hereby accepted by the Full Bench.

(2) THAT there be no order for costs.

By the Full Bench

(Sgd.) P. J. SHARKEY,

[L.S.] President.

2002 WAIRC 05605

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	REGISTRAR, APPLICANT
	v.
	GERARD DORNFORD, RESPONDENT
FULL BENCH	HIS HONOUR THE PRESIDENT P J SHARKEY
	COMMISSIONER S J KENNER
	COMMISSIONER S WOOD
DATE OF ORDER	MONDAY, 20 MAY 2002
FILE NO/S.	FBM 1 OF 2002
CITATION NO.	2002 WAIRC 05605

Decision	Adjourned
Appearances	
Applicant	Mr A Bastow (of Counsel), by leave
Respondent	Mr G Dornford on his own behalf

Order

This matter having come on for hearing before the Full Bench on the 20th day of May 2002, and having heard Mr A Bastow (of Counsel), by leave, on behalf of the applicant and Mr G Dornford, on his own behalf, and the Full Bench having adjourned the matter, and both parties having waived the rights conferred on them by s.35 of the *Industrial Relations Act* 1979 (as amended), it is this day, the 20th day of May 2002, ordered that the hearing and determination of matter No FBM 1 of 2002 be and is hereby adjourned to a date to be fixed by the Full Bench.

By the Full Bench

(Sgd.) P. J. SHARKEY,

[L.S.] President.

COMMISSION IN COURT SESSION—Matters dealt with—

2002 WAIRC 05844

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS AND OTHERS, APPLICANTS
	v.
	ADSIGNS PTY LTD AND OTHERS, RESPONDENTS
CORAM	COMMISSION IN COURT SESSION
	SENIOR COMMISSIONER A R BEECH
	COMMISSIONER J F GREGOR
	COMMISSIONER J H SMITH
DATE	TUESDAY, 25 JUNE 2002
FILE NO/S.	APPL 1683B, 1725B, 1726B, 1779B, 1829B & 1832B OF 2001
CITATION NO.	2002 WAIRC 05844

Result	Application to vary building and construction awards granted.
Representation	
Applicant	Ms E. Peak and with her Ms L. Dowden on behalf of the Construction, Forestry, Mining and Energy Union of Workers
Respondent	Mr K. Dwyer on behalf of the respondent members of the Chamber of Commerce and Industry of WA Mr K. Richardson on behalf of the Master Builders' Association of Western Australia (Union of Employers)

Reasons for Decision

1 These are applications to vary a number of building trades awards by including "fares and travel allowances" in the definition of ordinary time earnings in the superannuation clause of each award. The amendments are to include only reference to the standard daily payment as contained, For example, in the *Building Trades (Construction) Award 1987*. in subclauses 12A (2), (3), (4) and (13).

2 Clause 50(1)(e) of the *Building Trades (Construction) Award 1987* provides—

> "For the purpose of this clause—
>
> "Ordinary time earnings" (which, for the purposes of the Superannuation Guarantee (Administration) Act 1992, will operate to provide a notional earnings base) shall mean the actual ordinary rate of pay the employee receives for ordinary hours of work including tool allowance, industry allowance, trade allowances, shift loading, special rates, qualification allowances (eg. first aid, laser safety officer), multi-storey allowance, district/location allowance, piecework rates, underground allowance, award site allowances, asbestos eradication allowance, leading hand allowances, in charge of plant allowance and supervisory allowances where applicable. The term includes any regular over-award pay as well as casual rates received for ordinary hours of work. All other allowances and payments are excluded."

3 In respect of the *Building Trades (Construction) Award 1987* the applicant union sought in its application to amend the last two sentences of clause 50 by replacing those sentences as follows—

> "The term includes any regular over-award pay as well as casual rates received for ordinary hours of work, and fares and travel allowances."

4 During the hearing however Ms Peak on behalf of the union advised the Commission that the Union was only seeking to include in the definition of "ordinary time earnings" in each award, travel allowances that are daily payments that are not "reimbursement" allowances. Following the hearing the Union filed "minutes of proposed order" for each award. In respect of the *Building Trades (Construction) Award 1987* the union now seeks the following—

> "Clause 50 – Superannuation
>
> **(1)(e) Delete the existing sub-clause and replace with the following—**
>
> Ordinary time earnings" (which, for the purposes of the *Superannuation Guarantee (Administration) Act 1992*, will operate to provide a notional earnings base) shall mean the actual ordinary rate of pay the employee receives for ordinary hours of work including tool allowance, industry allowance, trade allowances, shift loading, special rates, qualification allowances (eg. first aid, laser safety officer), multi-storey allowance, district/location allowance, piecework rates, underground allowance, award site allowances, asbestos eradication allowance, leading hand allowances, in charge of plant allowance and supervisory allowances where applicable. The term includes any regular over-award pay as well as casual rates received for ordinary hours of work, and fares and travel allowances payable pursuant to clauses 12A(2), 12A(3), 12A(4) and 12A(13). All other allowances and payments are excluded."

5 Clause 12A(2), (3), (4) and (13) *Building Trades (Construction) Award 1987* provides—

> "(1) Metropolitan Radial Areas
>
> The following fares allowance shall be paid to employees employed under the terms and conditions of this award for travel patterns and costs peculiar to the industry which include mobility requirements of employees and the nature of employment on construction work.
>
> (2) Perth Metropolitan Radial Area
>
> When employed on work located within a radius of 50 kilometres from the G.P.O. Perth - $13.30 per day.
>
> (3) Other Radial Areas
>
> The allowance defined in subclause (2) of this clause shall be paid for work performed by employees employed on distant work as defined in Clause 22. - Living Away From Home - Distant Work when the work is carried out away from the place where, with the employer's approval, the employee is accommodated for the distant work, and is within a radius of 50 km from the place of accommodation.
>
> (4) Country Radial Areas
>
> An employer whose business or branch or section thereof is established in any place (other than on a construction site) outside the area mentioned in subclause (2) of this clause for the purpose of engaging in construction work there from shall in respect to employees engaged for work for that establishment, pay the allowance therein mentioned for work located within a radius of 50 kilometres from the post office nearest the establishment.
>
> Where the employer has an establishment in more than one such place the establishment nearest the employee's nominated residence shall be the establishment that shall be taken into account, and employees shall be entitled to the provisions of subclause (5) of this clause when travelling to a job outside the radial area of the establishment nearest his/her residence.
>
> (13) Apprentices
>
> An apprentice's entitlement to allowances prescribed under subclauses (2), (3) or (4) of this clause herein shall be in accordance with the following scale :-
>
> On first year rate - 75 per cent of amount prescribed
>
> On second year rate - 85 per cent of amount prescribed
>
> On third year rate - 90 per cent of amount prescribed
>
> On fourth year rate - 95 per cent of amount prescribed
>
> The foregoing amounts shall be calculated to the nearest five cents, two cents and less to be disregarded."

6 The applications are based upon advice received by the national office of the union from the Australian Taxation Office that the ATO considers that the fares and travel allowance is part of ordinary time earnings where the allowances are paid as a fixed rate on a daily basis to compensate for excess fares and travelling time to and from places of work, irrespective of actual travel costs and travelling time incurred by an individual worker. That advice is that the fares and travel allowance is not a reimbursement as it is paid to all employees whether the employees incur a travel expense or not. In most circumstances the allowance would form part of ordinary time earnings as defined by the ATO. The union submits that the current definition of ordinary time earnings in the awards, without the inclusion of reference to "fares and travel allowance" leads to a situation where employees are receiving less in superannuation contributions than they would receive if there was no definition of ordinary time earnings in the award. That situation, it is submitted, is inconsistent with the maintenance of an effective award safety net of fair and enforceable minimum wages and conditions of employment and it should be rectified.

7 The union also relies on the recent amendment to the *National Building and Construction Industry Award 2000* by the Australian Industrial Relations Commission on 30 July 2001 (Print PR907231). An appeal against that decision was recently

dismissed by a Full Bench of that Commission (Print PR918011). The union points not only to the nexus it maintains exists between the *Building Trades (Construction) Industry Award 1987* and the *National Building and Construction Industry Award 2000* but also to the fact that as the national award operates in Western Australia all employees in Western Australia whose wages and conditions are regulated by that award and are already getting the benefit of the award variation. The union submits that it is important to maintain consistency throughout the industry for ease of administration for employers and for equity amongst employees performing the same work.

8 The union addressed the State Wage Principles. It submitted that the applications fall within the Principles because the fact that the claim affects all employees covered by the awards means that it is not able to be progressed and or finalised pursuant to s.41 of the *Industrial Relations Act 1979*. Further, the claim has not been pursued under other Principles because the nature of the applications does not relate to any other Principle.

9 The union submits that it is in the public interest to ensure the maintenance of an effective award safety net of fair and enforceable minimum wages of conditions of employment. The awards must be taken to apply to the lowest paid employees in the industries covered by the awards which are those employees who are reliant on the award as a safety net, as well as having an impact on the future retirement income of those employees. Correspondingly, the union submits that the employers bound by the award have received a pecuniary benefit because the current wording in these awards means that employers have not been required to make superannuation contributions incorporating reference to the fares and travel allowance.

10 The union submits that the state of the national and Western Australian economies is such that the cost involved in granting the applications would not result in any impact on employment or inflation. It was submitted that the amendments sought are already in the building and construction industry by virtue of the operation of federal awards and that the large number of federal and state registered industrial agreements to which the unions and their federal counterparts are party include for fares and travel allowances in the definition of ordinary time earnings for the purposes of superannuation.

11 For the respondents, the MBA of WA, supported by the CCI of WA, opposed the applications. It was acknowledged in the submissions made on behalf of the respondent employers that the fact of the amendments to the *National Building and Construction Industry Award 2000*, and the long and detailed history of the examination of this issue by the Australian Industrial Relations Commission, places the respondents to these applications in somewhat of a difficult position in opposing the union's application. Nevertheless, the MBA stated that from its understanding of ATO rulings, the ATO draws a distinction between allowances paid by way of reimbursement and allowances paid as an allowance. In particular, the ATO rulings reveal that where the fares and travel allowance is paid to employees who are transporting tools or heavy equipment, or who are classed as "itinerant" employees for ATO purposes, the allowance is not part of ordinary time earnings. The MBA urges the Commission in Court Session not merely to amend these awards by following the amendment made to the *National Building and Construction Award 2000* but rather to provide for at least these exclusions.

12 The MBA submitted that the nexus between the *Building Trades (Construction) Award 1987* and the *National Building and Construction Award 2000* has tended to break down after 1995, particularly as a result of the award simplification process in the national award but also because of differences which have arisen because of the influence of enterprise bargaining. Therefore less reliance should be placed on the fact of the national award amendment.

13 The MBA also tendered a schedule showing the economic costs involved in the unions' claim. It is estimated the cost per employee will be $5.32 per week at the superannuation contribution of 8% and $5.99 per week at the superannuation contribution of 9%. The MBA called evidence from Mr Graham Harrison, a former Deputy and Assistant Commissioner of Taxation who is a tax consultant with over 30 years' experience in working with the taxation laws. Mr Harrison's evidence went particularly to the effect of granting retrospectivity to any award amendment.

Conclusions

14 The Commission in Court Session accepts that the present definition of ordinary time earnings in the superannuation clauses in the various awards before the Commission means that although an employee may receive fares and travel allowance and have it assessed as part of his or her ordinary taxable income, that income is not included in the definition of ordinary time earnings for superannuation purposes. The Commission in Court Session agrees that there should be some consistency between an employee's income for taxation purposes and the employee's income for the purposes of the Superannuation Guarantee Assessment legislation. Once the Australian Taxation Office has ruled that fares and travelling allowances are part of an employee's ordinary time earnings for the one purpose, we are unable to see good reason why there should be a difference for the other purpose. Further we are satisfied that the applications comply with the principles.

15 We also see it as desirable to maintain consistency across the industries covered by both these awards and the awards of the Australian Industrial Relations Commission. We consider it undesirable to have any significant differences between the treatment of superannuation entitlements as between employees in these industries simply on the basis of their award coverage. Therefore, we place weight upon the decisions of the Australian Commission to which we have been referred in reaching our conclusion. We have decided that the awards should be amended to provide for the standard daily payment prescribed by the fares and travel allowances clauses of the awards to be included in the definition of ordinary time earnings. We consider that the amendment made by the union which refines the fares and travel allowance to the standard daily rate significantly accommodated the employers' reservations in these proceedings.

16 The residue of the employers' reservations applies only to circumstances where the fares and travel allowance is paid to an employee who is transporting bulky tools or who travels from job to job on such a regular basis that he is seen as "itinerant" for the ATO's purposes. As the information from the ATO itself notes, there is no measure of the circumstances which attracts this latter description - each case will need to be assessed on its own facts. The Commission understands that in such circumstances the tax treatment of the fares and travel allowance is different because of the distinction between the payment of fares and travel allowance as reimbursement or as an allowance.

17 We have no evidence before us of the extent to which these two exclusions occur within the industries covered by these awards. Further, for reasons which we are unaware, these exclusions have not been raised or pursued in any of the numerous proceedings before the Australian Industrial Relations Commission. That may be because the issue, whilst apparent from the documentation presented to us, may not be of practical significance. For those reasons, we are less inclined to attempt on the information before us to insert exclusions about which we have insufficient information to understand their practical effect. Rather, we would prefer to reserve the position such that in the event that the issue is pursued by an application to vary to the *National Building and Construction Industry Award 2000*, the amendment to be made to these awards in this Commission on this occasion will not prevent an application being made to further vary these awards.

Date of operation

18 The amendment to the *National Building and Construction Industry Award 2000* which resulted from the decision of 30 July 2001 operated from the first pay period on or after 30 April 2001. At the hearing, the unions claimed that the amendments sought in these applications operate from that same date. In correspondence received after the conclusion of the hearing the

unions advised that given the provisions of s.39(3) of the *Industrial Relations Act 1979*, which prevent the Commission from ordering a date of operation earlier than the date the application was lodged in the Commission, the unions seek an operative date for the amendments for 3 December 2001.

19 The respondents object to any retrospective operation of these amendments. They submit that employers in WA have not been obstructive and that the union itself also preferred to wait for the outcome of the federal proceedings before pursuing the applications in this jurisdiction.

20 The employers also rely upon the evidence of Mr Harrison. Mr Harrison's evidence was supplemented in a letter dated 10 June 2002 provided to the Commission and to the unions. His evidence is that under the *Superannuation Guarantee (Administration) Act 1992 (Cth)* an employer must pay the required superannuation contributions to a complying fund by 28 July 2002. That Act does not provide for any extension of time to make the required contributions. Failure to do so renders the employer liable to a charge equivalent to the amount of the shortfall plus interest plus an administrative payment. The charge is not tax deductible whereas the payment of the required superannuation contributions prior to 28 July 2002 is tax deductible.

21 If a decision of this Commission after 28 July retrospectively increases the base upon which the superannuation payment is calculated then employers will not have paid the required superannuation contribution by virtue of the retrospective operation of the award amendment and thus will technically be in breach of the superannuation guarantee legislation. The Commissioner of Taxation, it is submitted, does not have a discretion to overlook a failure to pay contributions by the due date.

22 Our consideration of the date of operation is as follows. By virtue of s.39 of the *Industrial Relations Act 1979* an award variation will operate from the date the variation is made unless there are special circumstances which make it fair and right for the date of operation to be at an earlier date. In any event, the Commission is not able to make an award amendment operate earlier than the date the application was filed in the Commission unless there is consent of all parties. There is no consent on this occasion. The applications before us were filed on a range of dates including 19 and 27 September, 8 and 17 October 2001. Therefore, retrospectivity is not able to be granted from the same date as the amendment operated in the *National Building and Construction Industry Award 2000*.

23 We are influenced by the historical nexus which has operated in relation to money matters between this award and the *National Building and Construction Industry Award 2000*. The Commission has not been presented with any accurate picture of the extent to which the National award in Western Australia covers the industry. There was an estimation by Mr Richardson that some 60 to 70% of the industry is covered by the State award in this jurisdiction. However, this award has a history of following amendments to the *National Building and Construction Industry Award 2000* in order to ensure that employers are not faced with differing conditions of employment thus causing uncertainty and increasing an employer's administrative costs.

24 Further, we are aware that the matter under consideration will have an effect on the future retirement incomes of employees. In our assessment, the circumstances of this matter indicate that the variation should be given retrospective operation.

25 We are mindful of Mr Harrison's evidence. On this occasion the decision in this matter will come into effect on a date in June, well before the deadline of 28 July 2002. We have not therefore seen his evidence as critical to our consideration.

26 We consider the nexus between these awards and the corresponding federal awards, together with the history of the amendment nationally and the operation of the *National Building and Construction Industry Award 2000* in this State, constitute special circumstances and the amendments to be made will, in each case, operate from the first pay period on or after 3 December 2001.

27 For those reasons the matter is decided accordingly and Minutes of Proposed Orders now issue. The Commission proposes that any issue arising from the minutes be submitted in writing to the Commission by close of business of Monday, 24 June 2002 and the Commission will decide the issues on the written submissions.

2002 WAIRC 05835

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS, APPLICANT
	v.
	ADSIGNS PTY LTD AND OTHERS, RESPONDENTS
CORAM	COMMISSION IN COURT SESSION
	SENIOR COMMISSIONER A R BEECH
	COMMISSIONER J F GREGOR
	COMMISSIONER J H SMITH
DATE	TUESDAY, 25 JUNE 2002
FILE NO.	APPLICATION 1683B OF 2001
CITATION NO.	2002 WAIRC 05835

Result	Application to vary building and construction awards granted.
Representation	
Applicant	Ms E. Peak and with her Ms L. Dowden on behalf of the Construction, Forestry, Mining and Energy Union of Workers
Respondent	Mr K. Dwyer on behalf of the respondent members of the Chamber of Commerce and Industry of WA Mr K. Richardson on behalf of the Master Builders' Association of Western Australia (Union of Employers)

Order

HAVING HEARD Ms E. Peak and with her Ms L. Dowden on behalf of the Construction, Forestry, Mining and Energy Union of Workers, Mr K. Dwyer on behalf of the respondent members of the Chamber of Commerce and Industry of WA and Mr K.

Richardson on behalf of the Master Builders' Association of Western Australia (Union of Employers), the Commission in Court Session, pursuant to the powers conferred on it under the *Industrial Relations Act 197*9 hereby orders—

THAT *Building Trades (Construction) Award 1987, No. R 14 of 1978* be varied in accordance with the following schedule and that such variation shall have effect from the first pay period commencing on or after 3 December 2001.

COMMISSION IN COURT SESSION

SCHEDULE

Clause 50. – Superannuation: Delete paragraph (e) of subclause (1) of this clause and insert in lieu thereof the following—

(e) "Ordinary time earnings" (which, for the purposes of the *Superannuation Guarantee (Administration) Act 1992*, will operate to provide a notional earnings base) shall mean the actual ordinary rate of pay the employee receives for ordinary hours of work including tool allowance, industry allowance, trade allowances, shift loading, special rates, qualification allowances (eg. first aid, laser safety officer), multi-storey allowance, district/location allowance, piecework rates, underground allowance, award site allowances, asbestos eradication allowance, leading hand allowances, in charge of plant allowance and supervisory allowances where applicable. The term includes any regular over-award pay as well as casual rates received for ordinary hours of work, and fares and travel allowances payable pursuant to Clauses 12A(2), 12A(3), 12A(4), 12A(13) and 12B(1). All other allowances and payments are excluded.

2002 WAIRC 05836

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS, APPLICANT
	v.
	CRYSTAL SOFTDRINKS AND OTHERS, RESPONDENTS
CORAM	COMMISSION IN COURT SESSION
	SENIOR COMMISSIONER A R BEECH
	COMMISSIONER J F GREGOR
	COMMISSIONER J H SMITH
DATE	TUESDAY, 25 JUNE 2002
FILE NO.	APPLICATION 1725B OF 2001
CITATION NO.	2002 WAIRC 05836

Result	Application to vary building and construction awards granted.
Representation	
Applicant	Ms E. Peak and with her Ms L. Dowden on behalf of the Construction, Forestry, Mining and Energy Union of Workers
Respondent	Mr K. Dwyer on behalf of the respondent members of the Chamber of Commerce and Industry of WA Mr K. Richardson on behalf of the Master Builders' Association of Western Australia (Union of Employers)

Order

HAVING HEARD Ms E. Peak and with her Ms L. Dowden on behalf of the Construction, Forestry, Mining and Energy Union of Workers, Mr K. Dwyer on behalf of the respondent members of the Chamber of Commerce and Industry of WA and Mr K. Richardson on behalf of the Master Builders' Association of Western Australia (Union of Employers), the Commission in Court Session, pursuant to the powers conferred on it under the *Industrial Relations Act 197*9 hereby orders—

THAT *Building Trades Award 1968* be varied in accordance with the following schedule and that such variation shall have effect from the first pay period commencing on or after 3 December 2001.

COMMISSION IN COURT SESSION

SCHEDULE

Clause 38. – Superannuation: Delete paragraph (d) of subclause (2) of this clause and insert in lieu thereof the following—

(d) "Ordinary time earnings" (which for the purposes of the *Superannuation Guarantee (Administration) Act 1992* will operate to provide a notional earnings base) shall mean the ordinary rate of pay the employee receives for ordinary hours of work including tool allowance, construction allowance, shift loading, special rates, location allowance and leading hand allowances where applicable. The term includes any regular over-award pay as well as casual rates received, and additional rates and allowances paid for work undertaken during ordinary hours of work including fares and travelling allowances payable pursuant to Clause 14(1)(d). Other reimbursement allowances are excluded.

2002 WAIRC 05837

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS, APPLICANT
	v.
	MASTER BUILDERS ASSOCIATION OF WA AND OTHERS, RESPONDENTS
CORAM	COMMISSION IN COURT SESSION
	SENIOR COMMISSIONER A R BEECH
	COMMISSIONER J F GREGOR
	COMMISSIONER J H SMITH
DATE	TUESDAY, 25 JUNE 2002
FILE NO.	APPLICATION 1726B OF 2001
CITATION NO.	2002 WAIRC 05837

Result	Application to vary building and construction awards granted.
Representation	
Applicant	Ms E. Peak and with her Ms L. Dowden on behalf of the Construction, Forestry, Mining and Energy Union of Workers
Respondent	Mr K. Richardson on behalf of the Master Builders' Association of Western Australia (Union of Employers)

Order

HAVING HEARD Ms E. Peak and with her Ms L. Dowden on behalf of the Construction, Forestry, Mining and Energy Union of Workers and Mr K. Richardson on behalf of the Master Builders' Association of Western Australia (Union of Employers), the Commission in Court Session, pursuant to the powers conferred on it under the *Industrial Relations Act 197*9 hereby orders—

THAT *Engine Drivers' (Building and Steel Construction) Award No. 20 of 1973* be varied in accordance with the following schedule and that such variation shall have effect from the first pay period commencing on or after 3 December 2001.

COMMISSION IN COURT SESSION

SCHEDULE

Clause 35. – Superannuation: Delete paragraph (c) of subclause (1) of this clause and insert in lieu thereof the following—

(c) "Ordinary time earnings" (which for the purposes of the *Superannuation Guarantee (Administration) Act 1992* will operate to provide a notional earnings base) shall mean the actual ordinary rate of pay the employee receives for ordinary hours of work including industry allowance, shift loading, special rates, site allowances and location allowances where applicable. The term includes any regular over-award pay as well as casual rates received, and additional rates and allowances paid for work undertaken during ordinary hours of work including fares and travel in Clauses 22(1)(a) and 22(1)(d). Other reimbursement allowances are excluded.

2002 WAIRC 05838

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS, APPLICANT
	v.
	ABRASIVE BLASTING SERVICES PTY LTD AND OTHERS, RESPONDENTS
CORAM	COMMISSION IN COURT SESSION
	SENIOR COMMISSIONER A R BEECH
	COMMISSIONER J F GREGOR
	COMMISSIONER J H SMITH
DATE	TUESDAY, 25 JUNE 2002
FILE NO.	APPLICATION 1779B OF 2001
CITATION NO.	2002 WAIRC 05838

Result	Application to vary building and construction awards granted.
Representation	
Applicant	Ms E. Peak and with her Ms L. Dowden on behalf of the Construction, Forestry, Mining and Energy Union of Workers
Respondent	Mr K. Richardson on behalf of the Master Builders' Association of Western Australia (Union of Employers)

Order

HAVING HEARD Ms E. Peak and with her Ms L. Dowden on behalf of the Construction, Forestry, Mining and Energy Union of Workers and Mr K. Richardson on behalf of the Master Builders' Association of Western Australia (Union of Employers), the Commission in Court Session, pursuant to the powers conferred on it under the *Industrial Relations Act 197*9 hereby orders—

THAT *Industrial Spraypainting and Sandblasting Award 1991* be varied in accordance with the following schedule and that such variation shall have effect from the first pay period commencing on or after 3 December 2001.

COMMISSION IN COURT SESSION

SCHEDULE

Schedule B – Superannuation: Delete paragraph (e) of subclause (1) of this clause and insert in lieu thereof the following—

(e) "Ordinary time earnings" (which for the purposes of the *Superannuation Guarantee (Administration) Act 1992* will operate to provide a notional earnings base) shall mean the actual ordinary rate of pay the employee receives for ordinary hours of work including shift loading, special rates, location allowance and leading hand allowance where applicable. The term includes any regular over-award pay as well as casual rates received, and additional rates and allowances paid for work undertaken during ordinary hours of work including fares and travel allowances payable pursuant to Clauses 47(2), 47(3) and 47(4). Other reimbursement allowances are excluded.

2002 WAIRC 05839

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS, APPLICANT
	v.
	GOLDFIELDS CONTRACTORS PTY LTD AND OTHERS, RESPONDENTS
CORAM	COMMISSION IN COURT SESSION
	SENIOR COMMISSIONER A R BEECH
	COMMISSIONER J F GREGOR
	COMMISSIONER J H SMITH
DATE	TUESDAY, 25 JUNE 2002
FILE NO.	APPLICATION 1829B OF 2001
CITATION NO.	2002 WAIRC 05839

Result	Application to vary building and construction awards granted.
Representation	
Applicant	Ms E. Peak and with her Ms L. Dowden on behalf of the Construction, Forestry, Mining and Energy Union of Workers
Respondent	Mr K. Richardson on behalf of the Master Builders' Association of Western Australia (Union of Employers)

Order

HAVING HEARD Ms E. Peak and with her Ms L. Dowden on behalf of the Construction, Forestry, Mining and Energy Union of Workers and Mr K. Richardson on behalf of the Master Builders' Association of Western Australia (Union of Employers), the Commission in Court Session, pursuant to the powers conferred on it under the *Industrial Relations Act 197*9 hereby orders—

THAT *Earth Moving and Construction Award* be varied in accordance with the following schedule and that such variation shall have effect from the first pay period commencing on or after 3 December 2001.

COMMISSION IN COURT SESSION

SCHEDULE

Clause 32. – Superannuation: Delete paragraph (c) of subclause (1) of this clause and insert in lieu thereof the following—

(c) "Ordinary time earnings" (which for the purposes of the *Superannuation Guarantee (Administration) Act 1992* will operate to provide a notional earnings base) shall mean the actual ordinary rate of pay the employee receives for ordinary hours of work including industry allowance, shift loading, special rates, site allowances, location allowance and in charge of plant allowance where applicable. The term includes any regular over-award pay as well as casual rates received, and additional rates and allowances paid for work undertaken during ordinary hours of work including fares and travel allowances payable pursuant to Clauses 23(1)(a), 23(1)(b) and 23(2). Other reimbursement allowances are excluded.

2002 WAIRC 05840

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS, APPLICANT
	v.
	MASTER BUILDERS OF WESTERN AUSTRALIA AND OTHERS, RESPONDENTS
CORAM	COMMISSION IN COURT SESSION
	SENIOR COMMISSIONER A R BEECH
	COMMISSIONER J F GREGOR
	COMMISSIONER J H SMITH
DATE	TUESDAY, 25 JUNE 2002
FILE NO.	APPLICATION 1832B OF 2001
CITATION NO.	2002 WAIRC 05840

Result	Application to vary building and construction awards granted.
Representation	
Applicant	Ms E. Peak and with her Ms L. Dowden on behalf of the Construction, Forestry, Mining and Energy Union of Workers
Respondent	Mr K. Richardson on behalf of the Master Builders' Association of Western Australia (Union of Employers)

Order

HAVING HEARD Ms E. Peak and with her Ms L. Dowden on behalf of the Construction, Forestry, Mining and Energy Union of Workers and Mr K. Richardson on behalf of the Master Builders' Association of Western Australia (Union of Employers), the Commission in Court Session, pursuant to the powers conferred on it under the *Industrial Relations Act 197*9 hereby orders—

THAT *Foreman (Building Trades) Award 1991* be varied in accordance with the following schedule and that such variation shall have effect from the first pay period commencing on or after 3 December 2001.

COMMISSION IN COURT SESSION

SCHEDULE

Clause 19. – Superannuation: Delete subclause (3) of this clause and insert in lieu thereof the following—

(3) "Ordinary Time Earnings" (which for the purposes of the *Superannuation Guarantee (Administration) Act 1992* will operate a notional earnings base) shall mean the actual ordinary rate of pay the employee receives for ordinary hours of work. The term includes any regular over-award pay as well as casual rates received and any additional rates and allowances paid for on a regular basis for work undertaken during ordinary hours of work, including fares and travel allowances payable pursuant to Clause 18(1)(a), 18(1)(b) and 18(1)(c)(i). Other reimbursement allowances are excluded.

PRESIDENT—Matters dealt with—

2002 WAIRC 05799

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CIMLIE JEAN BOWDEN, APPLICANT
	v.
	THE SECRETARY OF THE AUSTRALIAN NURSING FEDERATION, INDUSTRIAL UNION OF WORKERS PERTH, RESPONDENT
CORAM	HIS HONOUR THE PRESIDENT P J SHARKEY
DELIVERED	FRIDAY, 21 JUNE 2002
FILE NO/S.	PRES 25 OF 2002
CITATION NO.	2002 WAIRC 05799

Decision	Application adjourned
Representation	
Applicant	Mr C Young
Respondent	Mr R W Richardson (of Counsel), by leave

Orders and Directions

This matter having come on for a directions hearing before me on the 21st day of June 2002, and having heard Mr C Young on behalf of the applicant and Mr R W Richardson (of Counsel), by leave, on behalf of the respondent, and the parties herein having consented to waive the rights conferred on them by s.35 of the *Industrial Relations Act 1979* (as amended), and I having directed that application No PRES 25 of 2002 be heard and determined on 9 July 2002, it is this day, the 21st day of June 2002, ordered that the application herein be and is hereby adjourned for hearing and determination to 10.00 am on Tuesday, the 9th of July 2002.

(Sgd.) P. J. SHARKEY,

[L.S.] President.

2002 WAIRC 05933

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CIMLIE JEAN BOWDEN, APPLICANT
	v.
	THE SECRETARY, THE AUSTRALIAN NURSING FEDERATION, INDUSTRIAL UNION OF WORKERS, PERTH, RESPONDENT
CORAM	HIS HONOUR THE PRESIDENT P J SHARKEY
DELIVERED	TUESDAY, 9 JULY 2002
FILE NO/S.	PRES 25 OF 2002
CITATION NO.	2002 WAIRC 05933

Decision	Application dismissed
Representation	
Applicant	Mr C Young, as agent
Respondent	Mr M Olson, as Secretary of the respondent union

Order

This matter having come for hearing and determination before me on the 9th day of July 2002, and having heard Mr C Young, as agent, on behalf of the applicant and Mr M Olson, as Secretary of the respondent union, and reasons for decision having been given at the same time, it is this day, the 9th day of July 2002, ordered that application No PRES 25 of 2002 be and is hereby dismissed.

(Sgd.) P. J. SHARKEY,

[L.S.] President.

2002 WAIRC 05869

Editor's Note: Order re adjournment in Matter No. PRES 18 of 2002 [MNC 2002 WAIRC 05670] was published in June WAIG, Vol. 82, Part 1, Sub-part 6 at page 970.

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	DAVID GRANT GREEN, APPLICANT
	v.
	COMMUNICATIONS, ELECTRICAL, ELECTRONIC, ENERGY, INFORMATION, POSTAL, PLUMBING AND ALLIED WORKERS' UNION OF AUSTRALIA, ENGINEERING AND ELECTRICAL DIVISION, WA BRANCH, RESPONDENT
CORAM	HIS HONOUR THE PRESIDENT P J SHARKEY
DELIVERED	THURSDAY, 27 JUNE 2002
FILE NO/S.	PRES 18 OF 2002
CITATION NO.	2002 WAIRC 05869

Decision	Application dismissed
Representation	
Applicant	Mr C Young, as agent
Respondent	Mr W Game

Reasons for Decision

INTRODUCTION

1 This is an application by Mr David Grant Green, the above named applicant, which application has been brought naming the Communications Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Workers' Union of Australia, Engineering and Electrical Division, WA Branch (hereinafter referred to as "the CEPU") as the respondent.

2 The CEPU is an organisation registered under the *Industrial Relations Act* 1979 (as amended) (hereinafter referred to as "the Act") and as defined in s.7 of the Act.

3 This application purports to be brought under s.66 of the Act.

4 At the hearing of this application the respondent was represented by its secretary, Mr William Game, and the applicant by his agent, Mr Young.

5 The Federated Brick, Tile and Pottery Industrial Union of Australia (Union of Workers) Western Australian Branch (hereinafter referred to as "the FBTPIU"), an organisation registered under the Act, was most important in these proceedings, but was not named as a party, nor did it seek to intervene.

6 The file relating to the registration of that organisation was in court by my direction, as were other related files pertaining to matters before the Commission constituted by a single Commissioner. I advised the parties that I proposed to examine those files and invited them to inspect the files for the purposes of making any necessary submissions.

7 The respondent did not oppose the application, and, indeed, consented to the orders sought. It is necessary to say, however, that I did not regard myself as bound by that consent for reasons which will be apparent from what I say hereinafter.

8 Summarised, the orders sought in the application were:-

a. David Green was admitted as a financial member of the CEPU.

b. David Green is still a financial member of the CEPU.

c. The CEPU can represent the industrial interests of David Green.

9 What are sought are declarations rather than orders, and, in fact, and substantially, declarations that the CEPU can represent the industrial interests of David Green, and that it is entitled to enrol him as a member. That, of course, means that declarations are sought that the CEPU is able to do so because of the constitutional coverage conferred upon it by its rules registered in the Commission. It is trite to observe that constitution rules or the "eligibility rule" as such rules are more often called, is mandatory, and the CEPU rule was correctly conceded by Mr Young to be mandatory in this case.

10 The evidence was that Mr Green was demoted from the position of supervisor to the position of operator by his employer, the Midland Brick Company Pty Ltd. This action was the subject of an application brought by the CEPU to this Commission pursuant to s.44 of the Act and filed in the Commission on 17 May 2001 numbered as matter C 120 of 2001.

11 By order dated 12 March 2002, in matter CR120 of 2001, the application was discontinued by leave of the Commissioner at first instance upon the application of the CEPU, arbitration proceedings, according to the recital in the order, having been adjourned to enable the applicant CEPU to seek legal advice "on the issue of constitutional coverage".

12 The particulars of this application, therefore, wrongly allege that application C120 of 2001, which became matter CR 120 of 2001, was dismissed, when, in fact, it was discontinued by leave of the Commissioner upon the application of the respondent to these proceedings, the CEPU.

13 Upon the hearing of this application, Mr Green was the only witness called on behalf of the applicant and no evidence was adduced on behalf of the respondent. Mr Green's evidence was that, when the matter of his demotion arose, he made attempts to locate the FBTPIU, but could not find their telephone number in the white pages telephone directory or the yellow pages telephone directory. He was unable to locate or make contact with the FBTPIU. As a result, having spoken to a friend of his, he made a written application for membership of the CEPU on 7 May 2001 and paid an annual contribution to the CEPU in accordance with rule 4.4.5 of the rules. I am satisfied and find that this is what occurred.

14 By virtue of rule 4.2.3 of the CEPU rules Mr Green would be deemed a member of that organisation, subject to his financiality, upon the receipt by the Secretary of the application, but subject to the endorsement of the Executive Committee. There was no evidence of such endorsement. Accordingly without such evidence I could not be satisfied or find that he had even become a member validly and in accordance with the CEPU rules and their requirements in any event.

15 The case for the applicant represents an attempt to achieve what was, in effect, impliedly conceded not to be the case as a matter of law at first instance, that is that the CEPU had constitutional coverage of Mr Green by virtue of his calling or vocation and/or the industry in which he was employed.

16 The evidence was, and I accept it, that Mr Green was first a supervisor and then an operator employed by a brick manufacturer. I am satisfied and so find. It is not clear what being an operator or a supervisor involved in terms of the actual work done or duties performed. It is not clear, on his evidence, whether he was or was not eligible to be a member of the FBTPIU, although, at first blush, it would seem on a reading of the constitution rule of that organisation that he would be eligible.

ISSUES AND CONCLUSIONS

17 "Eligibility" or "constitution" rules were properly conceded by Mr Young to be mandatory as I have said above.

18 Constitutional coverage of each organisation of employees (unions), must be found by ascertaining the criteria for membership of each organisation of employees as expressed by the registered rules of each such organisation. (This is a matter of construction and a question of law), and then by finding whether the disputed classifications (or vocations) satisfy the criteria (a matter of interpretation and a question of fact) (see *Transport Workers' Union of Australia, WA Branch v Hamersley Iron Pty Ltd & Others* (1973) 53 WAIG 1103 (IAC) per Burt, Wickham and Wallace JJ).

19 In addition, in order to ascertain whether a worker is eligible for membership, it is first necessary to locate in the constitution or eligibility rule, the industry in which he/she is employed, and then to examine the exceptions and exclusions to see whether, notwithstanding his/her being employed in an industry described in the rule, who he/she is excluded from eligibility for membership (see per O'Dea P, *Transport Workers' Union of Australia & Other v Argyle Diamond Mines Pty Ltd & Other* (1985) 65 WAIG 775 (FB)).

20 The question is when upon the construction of the word used, the eligibility rule identifies the industry with respect to which the union is registered, whether a particular person, as a matter of fact, is employed within it (see *Hospital Employees' Industrial Union v WA Cleaners, Caretakers, Lift Attendants, Window Cleaners, Attendants and Watchmen's Industrial Union* (1981) 61 WAIG 609 (IAC) at 610 per Burt CJ)

21 In the interpretation of the rules of these organisations I shall apply the principle laid down by Brinsden J (with whom Smith J agreed) in *Hospital Salaried Officers' Association of WA v Minister for Health* (1981) 61 WAIG 616 at 618 (IAC) as follows:-

> "Generally speaking, the correct approach to the interpretation of a union rule is to interpret it in the same manner as any other document. It must be remembered however that union rules are not necessarily drafted by skilled draftsmen. It is therefore necessary I think in construing a union rule not to place too literal adherence to the strict technical meaning of words but to view the matter broadly in an endeavour to give it a meaning consistent with the intention of the draftsmen of the rule".

(see also *R v Aird ex parte The Australian Workers' Union* (1973) 129 CLR 654 at 659 per Barwick CJ).

22 These authorities have been applied by me in a number of cases in this Commission including *Lovell & Others v AEEFEU (Western Australian Branch)* (1995) 75 WAIG 2514 at 2515. It is trite to observe that the applicant bears the onus of establishing on the balance of probabilities those facts upon which it relies to establish his case. If he does not do so then he can not succeed.

23 It was the case for the applicant (which, as I have said, was not opposed by the respondent) that the words which indicated that Mr Green was eligible for membership of the CEPU were as I now express them. First it was submitted that Mr Green was engaged in the calling or vocation of "electrical workers generally". Those words appear in rule 2.1.1, the Constitution rule of the CEPU, which, of course, describes the eligibility of employees for membership of the CEPU. It is not at all clear on the evidence that he did any "electrical work" at all or that he was an "electrical worker" and I am not able to so find.

24 The applicant also relied on another part of rule 2.1.1 which reads as follows:-

> "… and all other machine operators and examiners of work prepared by the foregoing classifications and vocations employed in the engineering, locomotive, ship building, rolling stock, aircraft, agricultural implement making and kindred trades, munition and iron trades, or in any other industry whatsoever engaged on the manufacturing of engineering products or in the maintenance of plants but not including tool and material storepersons employed otherwise than in the Education Department and in the gate fence and frame manufacturing industry."

25 These words, also, qualify the earlier words in that clause "Persons who are employed or usually employed … engaged in the following callings or vocations".

26 In my opinion, there is nothing in any of the words which I have quoted from Rule 2.1.1, on the evidence, which at all refer to Mr Green's occupation as either an operator or a supervisor employed by a brick manufacturer or in a brickyard. Indeed it might be quite correctly found that he was employed in the calling on his evidence of "supervisor" or "operator" in a brickyard or in the brick manufacturing industry. There is no evidence that he was employed as an "electrical worker" or that he was employed in any calling, vocation or industry referred to in rule 2.1.1 as I have quoted above the relevant parts on which the applicant relied above.

27 It is trite to observe that the mere acceptance of Mr Green as a member by the CEPU does not and did not validly render him a member of or eligible to be a member of the CEPU. If he is not validly a member (and he was not, as I have said, validly accepted according to the rules of the organisation as a member by the endorsement of the Executive Committee as required by the rules, or at least there was no evidence that such action was taken), and therefore at law has no right to be a member, he has no standing to bring an application under s.66 of the Act against an organisation of which he is not validly a member. Ipso facto, he has no right to seek orders in relation to the rules of an organisation which cannot validly enrol him as a member or represent him.

28 In my opinion, one cannot read s.66 as prescribing that a member who is not validly a member of an organisation has any right to make an application under s.66. First, of course, the person is simply not a member in fact or at law.

29 Further, not to interpret the section accordingly would confer on persons who have no right as a matter of fact or law the right to make applications under s.66. Further, it would not promote the objects of the Act contained in s.6(f), and apply s.18 of the *Interpretation Act 1984* (as amended) correctly to interpret the section in any other way.

30 I am not satisfied, upon the evidence, and the proper construction of the rules, and, in particular, rule 2.1.1, that the CEPU has any constitutional coverage of Mr Green by virtue of rule 2. In particular, it has not been established, for the reasons which I have observed above, that his vocation or calling or the industry in which he is or was employed at the material time, is or was one which is or was at all within the "constitution" rule of the respondent organisation.

31 That finding is fortified by a reading of rule 3 of the rules of FBTPIU which confers coverage on that organisation in express terms of "Brickyard, Pottery, Porcelain, Roof Tile fixer employee as hereafter in these Rules". Rule 3 also provides in its penultimate paragraph:-

> "The words "Brickyard, Pottery, Porcelain, Roof Tile Fixers employee", when used in connection with these Rules, shall denote any worker directly employed in or about a Brickyard, Pottery Porcelain works, Tilery, Cement Tile Factory, or in Roof Tile fixing, in the State of Western Australia, who is not eligible to join another industrial union and includes persons whether engaged in the industry or not, who have been appointed paid officers of the Union and admitted to membership."

32 It is quite clear, on his own evidence, that Mr Green is an employee (worker) directly employed in or about a brickyard, by a brick manufacturer. Further, it is not at all clear established on the evidence, that he is an employee who is eligible to join any other organisation of employees, or that if he is, that that organisation is the respondent CEPU.

33 S.66(2) of the Act reads as follows:-

> "(2) On an application made pursuant to this section, the President may make such order or give such directions relating to the rules of the organization, their observance or non-observance or the manner of their observance, either generally or in the particular case, as he considers to be appropriate and without limiting the generality of the foregoing may …"

34 It was submitted by Mr Young that this was an application relating to the non-observance of the rules. I do not understand that submission. An application which relates to the non-observance of the rules, in its plain terms, is an application which alleges that an organisation has not complied with its rules, and the applicant complains that it is not observing those rules and requires orders which deal with that situation.

35 This application does not relate to the observance or non-observance of the rules of the CEPU because the CEPU under its rules cannot represent him and would be acting in breach of its rules and the Act (see s.61) if it did; or if that is not the case, it has not been otherwise established.

36 It is trite to observe that a party or the parties cannot confer jurisdiction on this Commission as a court or tribunal which it does not have (see *SGS Australia Pty Ltd v Trevor Taylor* (1993) 73 WAIG 1760 (FB)). The applicant, for those reasons, cannot seek the orders which it seeks because they are not within the jurisdiction or the power of the President.

37 It was also submitted by Mr Young that this was not a s.72(A) demarcation application in disguise because it was a "one off" application only directed to Mr Green's case. The application is one which de facto seeks an order under s.72(A) that the respondent has the right to represent employees in Mr Greens vocation or calling (or in the industry identified by the eligibility rule) even though the CEPU rules do not permit it or have not been established to permit it, to the de facto exclusion of the FBPTIU.

38 I say that on its face, the application is one which seeks to establish coverage of employees in an industry which coverage prima facie exists in this case in the FBTPIU, and if the order is made it is one which would create a precedent for the coverage by the CEPU of some or all persons employed in brickyards.

39 I am not satisfied that this is not a s.72A application in disguise. If it were, it would be solely within the exclusive jurisdiction of the Full Bench. It is therefore not established that it is an application within the jurisdiction of the Commission under s.66 of the Act.

40 In any event, I would not make such an order as those sought where the FBTPIU is not a party to the application, since an adverse finding might be made against its interests which it has not the opportunity to put a case in relation to.

41 It was submitted by Mr Game that I should direct the Registrar investigate the FBPTIU, which it was submitted was moribund. That, of course, may be the case, but, there is no evidence on which I might make such a finding, other than that bald statement. However, I am not disposed to do that in a case where that organisation was not named as a respondent or joined as a respondent or sought to intervene. Where such naming or joining occurred it might well be open to renew the application made by Mr Game to direct such an investigation, depending on what the evidence before me was.

42 It has not been established that I have the jurisdiction or power to hear and determine the application on the orders sought for the reasons which I have expressed above.

43 For all of those reasons, I will dismiss the application.

2002 WAIRC 05868

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	DAVID GRANT GREEN, APPLICANT *v.* COMMUNICATIONS, ELECTRICAL, ELECTRONIC, ENERGY, INFORMATION, POSTAL, PLUMBING AND ALLIED SERVICES UNION OF AUSTRALIA, ENGINEERING AND ELECTRICAL DIVISION, WA BRANCH, RESPONDENT
CORAM	HIS HONOUR THE PRESIDENT P J SHARKEY
DELIVERED	THURSDAY, 27 JUNE 2002
FILE NO/S.	PRES 18 OF 2002
CITATION NO.	2002 WAIRC 05868

Decision	Application dismissed
Representation	
Applicant	Mr C Young, as agent
Respondent	Mr W Game

Order

This matter having come for a directions hearing before me on the 31st day of May 2002 and for hearing and determination on the 20th day of June 2002, and having heard Mr C Young, as agent, on behalf of the applicant and Mr W Game, on behalf of the respondent, and having this day the 27th day of June 2002 delivered my reasons for decision, it is this day, the 27th day of June 2002, ordered that application No PRES 18 of 2002 be and is hereby dismissed.

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

2002 WAIRC 05961

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	DAVID GRANT GREEN, APPLICANT *v.* THE FEDERATED BRICK, TILE AND POTTERY INDUSTRIAL UNION OF AUSTRALIA (UNION OF WORKERS) WESTERN AUSTRALIAN BRANCH, RESPONDENT
CORAM	HIS HONOUR THE PRESIDENT P J SHARKEY
DELIVERED	MONDAY, 8 JULY 2002
FILE NO/S.	PRES 19 OF 2002
CITATION NO.	2002 WAIRC 05961

Decision	Application adjourned
Representation	
Applicant	No appearance by or on behalf of the applicant
Respondent	No appearance by or on behalf of the respondent

Order

This matter having come on for a directions hearing before me on the 8th day of July 2002, and there being no appearance by or on behalf of the applicant and no appearance by or on behalf of the respondent, it is this day, the 8th day of July 2002, ordered that the application herein be and is hereby adjourned to a date to be fixed by the Commission.

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

2002 WAIRC 05944

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	KWIK & SWIFT PTY LTD TRADING AS KWIK & SWIFT COURIERS, APPLICANT
	v.
	KARAN CHOPRA, RESPONDENT
CORAM	HIS HONOUR THE PRESIDENT P J SHARKEY
DELIVERED	TUESDAY, 9 JULY 2002
FILE NO/S.	PRES 26 OF 2002
CITATION NO.	2002 WAIRC 05944

Decision	Application dismissed
Representation	
Applicant	Mr C Hughes, as general manager
Respondent	Mr B Stokes, as agent

Reasons for Decision

INTRODUCTION

1 This is an application by the above named applicant employer. The matter is an application by Kwik & Swift Pty Ltd trading as Kwik & Swift Couriers and the respondent is Karan Chopra.

2 This is an application brought by the above named applicant company pursuant to s.49(11) of the *Industrial Relations Act* 1979 (as amended) (hereinafter referred to as "the Act"), wherein the applicant seeks an order for the stay of the operation of an order made by a single Commissioner in application No 1813 of 2000, such order having been made on 5 February 2002, and deposited in the Registry on 6 February 2002.

3 The application for a stay of operation of the decision at first instance was filed in the Commission on 18 June 2002 and the notice of appeal was filed on 27 February 2002. The appeal has not been listed for hearing; nor was there any indication to me that that would occur in the near future or at all.

4 The substance of the order appealed against is that the respondent (the above named applicant) was required to pay to the applicant (the above named respondent), Mr Chopra, within 10 days of the date of this order, the sum of $13,650.00 as compensation. The order has not been complied with.

5 The Industrial Magistrate's Court has already made an order to enforce the order of the Commissioner made at first instance. That order was made on 18 June 2002 in the Industrial Magistrate's Court at Perth.

6 The grounds of the application are that the sum of compensation ordered is substantial and should the applicant pay it, and if its appeal be then successful, the applicant believes it would have difficulty in recovering the money from the respondent.

GROUNDS OF APPEAL

7 The grounds of appeal are, summarised, that the Commissioner at first instance failed to properly exercise her discretion or alternatively her discretion miscarried in that she:-

(a) erred in fact:-

(i) in finding that the applicant had been unfairly dismissed;

(ii) in not finding that the applicant had received two written warnings for unsatisfactory work performance;

(iii) in not finding that the applicant's employment had been terminated as a result of there being a shortage work; and

(iv) in finding that the applicant was unable to find alternative employment until 13 August 2001.

(b) erred in law:-

(i) in determining the issue without hearing evidence from material witnesses namely Allan Shawyer and Ian Shawyer;

(b) in failing to allow the appellant an opportunity to address the Commissioner as to the issue of prejudice caused by its failure to lead material evidence from material witnesses, namely Allan Shawyer and Ian Shawyer; and

(c) in failing to properly inform the respondent that its failure to call material witnesses, namely Allan Shawyer and Ian Shawyer caused or would result in the learned Commissioner drawing an adverse inference that that person's evidence would not have assisted the respondent's case.

PRINCIPLES

8 The principles which apply to applications for a stay were most recently expressed by the Commission, constituted by the President, in *Bamboo Holdings PtyLtd v Halligan* 82 WAIG 966 at 967-968, and are as follows:-

> "The principles which apply to applications for a stay were most recently expressed by the Commission, constituted by the President, in *Stanley and Others t/a Communique Communications v Bryant* 82 WAIG 785 at 787 and are as follows:-
>
> > "The principles by which applications pursuant to s.49(11) of the Act are determined are well settled in this Commission (see *Commissioner of Police v CSA* 81 WAIG 2553 at 2554):-
> >
> > > "The principles by which applications pursuant to s.49(11) of the Act are determined are well settled in this Commission. Amongst others, the reasons for decision in *AWU v BHP Iron Ore Ltd* 81 WAIG 406 properly expresses them at pages 407-408:-
> > >
> > > > "I reproduce hereunder the relevant extract from *CSA v Director General, Department of Transport* 80 WAIG 2855 at 2856:-
> > > >
> > > > > "These principles have been laid down in a number of cases, including *Gawooleng Dawang Inc v Lupton and Others* 72 WAIG 1310, *Director General of the Ministry for Culture and the Arts v CSA and Others* 79 WAIG 670 and *City of Geraldton v Cooling* 80 WAIG 1751.
> > > >
> > > > > It is for the applicant to establish that the stay should be granted. It is, of course, an underlying principle that the successful party is entitled to the fruits of her/his/its order, award or declaration.
> > > >
> > > > > For the applicant to succeed, it must be established that there is a serious issue to be tried, that the balance of convenience favours the applicant and that other factors consistent with the application of s.26(1)(a), s.26(1)(b) and/or s.26(1)(c) of the Act, if they exist, require that the application be granted.
> > > >
> > > > > If these ingredients exist, then exceptional circumstances exist which warrant the granting of the application as a matter of equity, good conscience and the substantial merits of the case. (I say that to further explain the principles.)"
> > > >
> > > > The need to prevent there being any more uncertainty than is necessary, in industrial matters, is important, too (see *Re Moore; Ex parte Pillar* [1991] 65 ALJR 683 at 685 (HC))."""
>
> I would add the following further observations.
>
> Before weighing other factors the court needs to be satisfied that there is an arguable case on appeal, (in this jurisdiction a serious issue to be tried also described as a strong case), to ensure that the appeal has not been lodged simply to delay execution (see *Croney v Nand* [1999] 2 Qd R 342 at 348-9 (CA)).
>
> If an appeal may be nugatory a stay will be granted. An appeal will be nugatory when because of the respondent's financial state there is no reasonable prospect of recovering monies paid to him pursuant to the judgment.
>
> An appeal will be nugatory too, if the appellant can show that without a stay of execution he/she will be ruined (see *Lino Type Hell Finance Ltd v Baker* (Practice Note) [1992] 4 All ER 887 at 888).
>
> Inconvenience and the possibility of risk to the appellant's property do not constitute special circumstances (see *Cox v Simeon* (SC (WA) Full Court Lib No 5063 7 September 1983, unreported)).
>
> The onus is on the applicant, of course, to demonstrate a proper basis for a stay, as I have observed above, which will be fair to all the parties and the court will weigh the balance of convenience and the rights of the parties as I have observed above (see *Alexander v Cambridge Credit Corp Ltd* (1985) 2 NSWLR 685 at 694).
>
> The mere preservation of the status quo, nor by themselves, the merits of the appeal are not sufficient. Further, it is not sufficient to constitute special circumstances that the appeal is arguable, is being pursued in good faith and with expedition and that the stay will not prejudice anybody (see *Hamersley Iron Pty Ltd v Lovell* (No 2) (1998) 20 WAR 79 and 80, 88 (FC)).
>
> Appropriate circumstances may exist within the context of the balance of convenience if serious injury will result to the applicant unless a stay is granted (see *McBride v Sandland* (No 2) (1918) 25 CLR 369 and 375) and, as I have observed, an appeal will be nugatory when, because of the respondent's financial state, there is no reasonable prospect of recovering monies paid to him/her pursuant to the judgment, but appropriate circumstances are not limited to that situation and will exist whenever there is a real risk that it would not be possible for a successful appellant to be restored substantially to his/her former position (see *Federal Commission of Taxation of Commonwealth of Australia v The Myer Emporium Ltd* (No 1) [1986] 160 CLR 221 at 223)."

COMPETENCE OF APPLICATION

9 I was satisfied that the application was brought by a party who had sufficient interest within the meaning of s.49(11) of the Act, given that the applicant was a respondent to the proceedings at first instance in which the order sought to be stayed by this application was made.

10 I was also satisfied that an appeal had been instituted within the meaning of that term in s.49(11) of the Act, the notice of appeal having been filed and served.

SERIOUS ISSUE TO BE TRIED

11 It was submitted that there was a serious issue to be tried because two witnesses, the Messrs Shawyer, said to be material witnesses were not called.

12 Further, it was alleged that the Commissioner at first instance erred in law in determining the matter without hearing their evidence.

13 Further, the allegation in the grounds of appeal and the submission was that the Commissioner erred in failing to allow the appellant an opportunity to address the Commissioner about the issue of prejudice caused by its failure to lead "material evidence" from the Messrs Shawyer who were said to be material witnesses.

14 Further, it is alleged in the grounds of appeal that the failure to call such material witnesses would result in the Commissioner drawing an adverse inference that the evidence would not have assisted the respondent's case and that advice was not given to the appellant.

15 I should observe at first that it is not at all clear from the submissions that have been made that had these witnesses been called they would have assisted the applicant's case. From what I will say hereinafter one witness might well have.

16 Second, however, it is also clear that the Commissioner gave every opportunity to the appellant's managing director, Mr Hughes, who appeared at first instance and who appeared before me upon this application, to call those witnesses and he did not do so. Indeed, the Commissioner at first instance "strongly recommended" that Mr Hughes call one of the Messrs Shawyer "because I think he's an important witness, because you've heard one version of events from the applicant and there are lots of things that only Mr Shawyer can answer" (see page 191 of the appeal book (hereinafter referred to as "AB")). This was said on 23 November 2001.

17 Mr Hughes then advised the Commissioner on 26 November 2001 that Mr Shawyer did not feel that it was worth his while to attend because he had a job and that therefore he, Mr Hughes, was happy to proceed and conclude the case that day (without calling Mr Shawyer) (see page 193 (AB)). It was not suggested that any summons to witness had been issued to or served upon Mr Shawyer. There is nothing to suggest that the Commissioner erred in law in dealing with this issue.

18 As to the allegations that the Commissioner at first instance had erred in making certain findings of fact as alleged in the grounds of appeal, there was no substantial submission that that issue constituted a serious issue to be tried and certainly no arguments were advanced that would persuade me that that was the case.

19 It is trite to observe that it is for the applicant in an application for a stay of operation of the decision at first instance, to establish its case.

BALANCE OF CONVENIENCE

20 It was submitted by Mr Craig Hughes, an officer of the applicant, in effect, that the balance of convenience favoured the respondent because, if the amount of the order was paid out to him, and the appeal was successful, it might not be recovered. For the respondent, his agent, Mr Stokes, denied that this was or would be the case.

21 There was no sworn evidence to that effect, both parties relying on competing assertions from the bar table. I was not therefore disposed to attach weight to evidence from either side.

22 There was some evidence of Mr Chopra's financial and employment situation adduced at the hearing at first instance, but that was four months ago and of little assistance.

23 In any event, put at best for the applicant, the evidence, if I accepted it, was that Mr Chopra was in employment, at least in recent times, did change jobs frequently, and did change addresses with some frequency. Even if I accepted that evidence, it is evidence that there might be some difficulty in recovering the money, not evidence that it cannot be recovered. It is not evidence that he was or is unable to repay it. It is evidence that he is and was in employment and earning money. There is no direct or cogent evidence of his inability to repay the monies. I am therefore unable to find that if the monies were paid they could not be recovered.

24 More cogently, however, there are other reasons which lead me to find that the balance of convenience does not favour the appellant, and, indeed, favours the respondent.

25 First, the notice of appeal was filed herein on 27 February 2002. Next, the order appealed against was made on 5 February 2002 and perfected by depositing it in the office of the Registrar on 6 February 2002.

26 The order required, inter alia, that the respondent (the applicant herein) pay to the applicant (the respondent herein) the sum of $13,650.00 as compensation within 10 days of the date of the order ((ie) on or before 16 February 2002). Those monies had not been paid as at the date of the hearing of this matter on 28 June 2002.

27 I should add that the application herein for a stay of operation of the order was filed on 18 June 2002 and heard on 28 June 2002.

28 More than four months after the order was made and deposited it had not been complied with, and no application for a stay had been filed.

29 The appeal has not been listed for hearing four months after the notice of appeal was filed.

30 There was no request on file to list this application urgently. Nonetheless, it was heard 10 days after it was filed.

31 In the meantime, however, upon the application of the respondent hereto, judgment has been obtained against the applicant for the amount of $13,650.00, the amount ordered to be paid in the order sought now to be stayed. Judgment for the amount of the order was given in favour of Mr Chopra, the respondent herein, on 19 June 2002, together with interest and costs in the Industrial Magistrate's Court at Perth. That is, of course, some days before the application for a stay was heard and determined and the day after the application was filed. There was no declaration of service of this application for a stay filed until 21 June 2002.

32 I therefore observe as follows. I will not make an order staying the operation of the order of the Commissioner at first instance. To do so would be to do something which could have no effect because the order has been "enforced" by judgment by default against the applicant in the Industrial Magistrate's Court, and to stay its operation even if such an order were valid would be to no avail.

33 Next, the respondent, Mr Chopra, has been deprived for over four months of the fruits of the order which he obtained by virtue of the applicant's lengthy delay in doing anything. The applicant has not paid the amount ordered to be paid within 10 days of the date of the order at all. The applicant did not even seek a stay of the order with which it failed to comply until over four months after the date of the order and its depositing in the office of the Registrar.

34 Next, the appeal has not been sought to be listed, even some four months after the notice of appeal was filed.

35 No explanation has been offered for the failure to pay and for any of this serious delay. The inference which I draw is that the delay was intended to deprive the respondent for as long as possible of the fruits of his order. He should, I find, but for the fact that he has taken steps to enforce the order, not be deprived by any order staying the operation of the decision at first instance of the fruits of his order any longer. The balance of convenience clearly lies with the respondent.

FINALLY

36 There are no exceptional circumstances requiring me to make an order for a stay. The interests of Mr Chopra under s.26(1)(c) of the Act should certainly supervene over those of the applicant.

37 For those reasons, the equity, good conscience and the substantial merits of the case clearly lay with the respondent, Mr Chopra. I therefore dismissed the application.

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2002 WAIRC 05877

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	KWIK & SWIFT PTY LTD TRADING AS KWIK & SWIFT COURIERS, APPLICANT
	v.
	KARAN CHOPRA, RESPONDENT
CORAM	HIS HONOUR THE PRESIDENT P J SHARKEY
DELIVERED	FRIDAY, 28 JUNE 2002
FILE NO/S.	PRES 26 OF 2002
CITATION NO.	2002 WAIRC 05877

Decision	Application dismissed
Representation	
Applicant	Mr C Hughes, as general manager
Respondent	Mr B Stokes, as agent

Order

This matter having come for hearing before me on the 28th day of June 2002, and I having heard Mr C Hughes, as general manager, on behalf of the applicant company and Mr B Stokes, as agent, on behalf of the respondent, and I having determined that my reasons for decision will issue at a future date, it is this day, the 28th day of June 2002, ordered that application No PRES 26 of 2002 be and is hereby dismissed.

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

[L.S.]

2002 WAIRC 05463

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	KIM LUBY, APPLICANT
	v.
	THE AUSTRALIAN NURSING FEDERATION, INDUSTRIAL UNION OF WORKERS PERTH AND OTHERS, RESPONDENTS
CORAM	HIS HONOUR THE PRESIDENT P J SHARKEY
DELIVERED	TUESDAY, 30 APRIL 2002
FILE NO/S.	PRES 12-17 OF 2002
CITATION NO.	2002 WAIRC 05463

Decision	Orders and directions given.
Appearances	
Applicant	Mr C Young, as agent
Respondents	Mr R Castiglione (of Counsel), by leave

Orders and Directions

These matters having come on for a directions hearing before me on the 30th day of April 2002, and having heard Mr C Young, as agent, on behalf of the applicant and Mr R Castiglione (of Counsel), by leave, on behalf of the respondents, and I having determined that it was just and expedient to make the orders and directions hereinafter contained, it is this day, this 30th day of April 2002, ordered and directed as follows:-

(1) THAT all of the above applications be listed for hearing and determination seriatim for five days at 10.00 am on the 10th, 11th, 12th, 13th and 14th days of June 2002.

(2) THAT the respondents have leave to file and serve any request for further and better particulars of the applications herein on or before the 3rd day of May 2002.

(3) THAT particulars of the said applications so requested be filed and served no later than the 20th day of May 2002.

(4) THAT any answers or counterproposals be filed and served within 14 days of the filing and service of such applications.

(5) THAT the Secretary of The Australian Nursing Federation, Industrial Union of Workers, Perth make available for inspection to the applicant and the taking of copies, where appropriate, within seven days of the date of this order, of all minutes and agendas of The Australian Nursing Federation, Industrial Union of Workers, Perth of the Executive, Council and Council packs with all audio recordings of any such meetings from the 1st day of November 2001 to the date of the order, and including any minutes which include reference to a computer contract awarded to Mr Farrell.

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

[L.S.]

2002 WAIRC 05924

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	KIM MAREE LUBY, APPLICANT
	v.
	THE SECRETARY, THE AUSTRALIAN NURSING FEDERATION, INDUSTRIAL UNION OF WORKERS, PERTH AND OTHERS, RESPONDENTS
CORAM	HIS HONOUR THE PRESIDENT P J SHARKEY
DELIVERED	MONDAY, 8 JULY 2002
FILE NO/S.	PRES 13 OF 2002
CITATION NO.	2002 WAIRC 05924

Decision	Declaration
Representation	
Applicant	Mr C Young, as agent
Respondents	Mr R W Richardson (of Counsel), by leave
	Ms Toni-Michelle Young on her own behalf

PARTIES	KIM MAREE LUBY, APPLICANT
	v.
	THE AUSTRALIAN NURSING FEDERATION, INDUSTRIAL UNION OF WORKERS PERTH, RESPONDENT
CORAM	HIS HONOUR THE PRESIDENT P J SHARKEY
DELIVERED	MONDAY, 8 JULY 2002
FILE NO/S.	PRES 22 OF 2002
CITATION NO.	2002 WAIRC 05924

Decision	Declaration
Representation	
Applicant	Mr C Young, as agent
Respondent	Mr R W Richardson (of Counsel), by leave

Reasons for Decision

1 These were two applications heard together, by consent. Both were brought under s.66 of the *Industrial Relations Act* 1979 (as amended) (hereinafter referred to as "the Act"), by the above named applicant who at all material times was a member of the respondent organisation, and, indeed, of its Council and Executive.

2 At all material times the respondent organisation, The Australian Nursing Federation, Industrial Union of Workers Perth (hereinafter referred to as "the ANF") was an "organisation" of employees within the meaning of the term "organisation" as it is defined in s.7 of the Act.

3 There was, therefore, jurisdiction in the Commission as presently constituted to hear and determine the applications.

4 Application PRES 13 of 2002 names as respondents all of the members of the Council. All of those persons were represented by Mr Richardson (of Counsel), with the exception of Ms Toni-Michelle Young who represented herself, in that capacity, and elected not to take part in these proceedings.

5 In application PRES 22 of 2002 the ANF was named as respondent.

6 It is difficult to understand why these matters were not the subject, in the beginning, of one application.

7 Condensed, the applications, after amendment of application PRES 22 of 2002 during the course of proceedings, alleged, in one allegation, that the practice of granting leave of absence to members of the Council or Executive was contrary to or not within the powers conferred by the rules.

8 During the course of the proceedings it was conceded on behalf of the ANF, and conceded correctly, that there was power in the Council and the Executive to grant leave of absence to members of either.

9 Thus, the remaining question confronting the Commission was whether the quorum for all meetings of Council, Executive and any Committees of the Council was a simple majority of all of the members, or whether it was a simple majority of those members present, not taking into account members who were on leave of absence.

10 Rule 26 prescribes what is a quorum for the relevant meetings and reads, in that respect, as follows:-

> "The quorum for a meeting of the Council, Executive and any committees of the Council as may exist from time to time shall be a simple majority of all its members."

BACKGROUND

11 At all material times, the applicant, Kim Maree Luby, a registered nurse, was a member of the Executive and of the Council of the ANF.

12 The Council is charged with managing the affairs of the ANF (see rule 10). The Council's decisions are final and binding on all members unless subsequently amended or rescinded by the Council or by a vote in plebiscite by a majority of the members of the ANF (rule 29).

13 Council is subject to direction by the Annual General Meeting, General Meetings or Urgent General Meetings of the union (see rule 27(2) and (13)).

14 The Council is subject, therefore, to the control of the members of the ANF. It has the powers prescribed in rule 11 and elsewhere in the rules (see rule 11). There are presently 25 Council positions of which 24 are filled.

15 The Executive, which consists of the President, Vice-President, Secretary and four Executive Members (see rule 12) has all of the powers of the Council except in relation to certain prescribed exceptions (see rule 13(1)). That it has those powers is subject to also the decision or the direction of the Council.

16 Further, the Executive is required, subject to the rules, to carry out the duties delegated or imposed on it by Council.

17 At all material times, Mr Mark Anthony Olson has been the Secretary of the ANF and Ms Patricia Fowler its President.

18 By virtue of rule 25(2), if any member of Council is absent from three consecutive meetings of the Council without first obtaining leave of the Council, the Council may declare his/her office vacant and he/she shall cease to be a member of the Council from that time. Implicit in that is a power to grant leave of absence. That leave is not required, except in relation to the Committee meeting from which a member of Council is absent.

19 An apology clearly applies only to any one meeting, or no more than two consecutive meetings from which the member is absent because, if he/she does not obtain leave of absence in relation to three consecutive meetings from which he/she will be absent, then the person is automatically removed.

20 In the end, after amendment, orders were sought in both applications that:-

> "Quorum requirements for meetings of all Council, Executive or any Committees of the Council shall be a simply majority of all of its members with no allowance made for people on leave of absence."

21 It was alleged that the ANF has adopted the practice of deducting the number of people on "leave of absence" from the "simple majority" as required by rule 26, in order to calculate what constitutes a quorum. There is evidence, which I accept, that there has been a practice of giving leave of absence, and, indeed, that was conceded to be within power under the rules as I have observed.

22 There was no evidence that the question of what constituted a quorum for Executive or Council meetings, or Committee meetings of Council was an issue which arose at any such meetings since 30 November 2001 when the applicant took up office after election, on both Executive and Council. In other words, the question of whether there was a quorum at any such meetings and what constituted a quorum did not arise at any such meetings, as a matter of controversy or in order to require to be decided by any such meetings.

23 It was clear, and I find, that the expressed and presumably approved policy of the ANF for quorums at Council meetings, Executive meetings and Committee meetings is as expressed in Exhibit 2.1, an ANF document headed "Information for Councillors" and on the uncontradicted evidence of Mrs Luby given to her when she became a Councillor on 30 November 2001. That says:-

> "For a quorum of any meeting of Council shall consist a majority of the members elected unless an elected member gives prior notice that they will be absent at the Council meeting preceding the next meeting of the Council."

Further it says:-

> "A quorum for each meeting is therefore more than half ((i.e.) 13 plus 1 to make a majority = 14 out of 25)."

24 That policy, which was at no time denied to be the policy, then provides quite clearly that "If Councillors seek leave of absence at a preceding meeting then that number is taken from the total (i.e.) if 4 Councillors sought leave of absence the quorum for the next meeting would be 12, or a majority of those who were in attendance".

25 That is the applicant's complaint, namely that a quorum is calculated on the numbers present at the meeting and not taking into account absentees given leave of absence (or presumably any absentee) and certainly not on the basis of the total number of those who are presently members of Council.

26 It is quite clear on the evidence, and I so find, that Mrs Luby has not sought to have the Council consider or determine the question, or request it to obtain legal advice.

27 It is also clear that Mrs Luby and some other nurses are critical of some aspects of the administration and processes of the ANF (see the flyer exhibit 2 dated 2 June 2002).

28 She denied in evidence that these applications were a political weapon used against the administration. She explained that she had not written direct to the President of the ANF, Ms Patricia Fowler, because she was not permitted to do so, at least without an inordinate delay which she estimated at two months because of a resolution of the Council of 22 April 2002 requiring that letters to the President by Council members be forwarded to the Secretary so that they could then be placed before Council. It was, of course, clear that the resolution, which is somewhat odd, could not have prevented Mrs Luby writing to the President before 22 April 2002 or otherwise raising the matter in Council before or after 22 April 2002.

29 The Council, it should be observed, has power, subject to the provisions of the Act, to "Provide a final and binding interpretation of the rules" (see rule 11(21)).

30 However, I infer from the evidence that she actually mistrusts some or many of her colleagues on Council and that that is the reason why she has made these applications.

31 From the evidence, it would seem that Ms Rosemary Lorrimar and Ms Toni-Michelle Young (who are members of the Council, too) are at issue with Mr Olson and with other members of the Council in relation to a number of matters of policy and otherwise within the Council.

ISSUES AND CONCLUSIONS

32 The applications were made seeking a declaration in terms of s.66(2)(d) of the Act. S.66(2)(d) reads as follows:-

> "On an application made pursuant to this section, the President may make such order or give such directions relating to the rules of the organization, their observance or non-observance or the manner of their observance, either generally or in the particular case, as he considers to be appropriate and without limiting the generality of the foregoing may declare the true interpretation of any rule."

33 It was submitted that, because of the failure to raise the matter in Council or in Executive, there was no real dispute and there had to be a real dispute before I could declare the true interpretation of the relevant rule pursuant to s.66(2)(d). I do not agree. S.66(2)(d) confers on the Commission constituted by the President the express power to declare the interpretation of a rule.

34 In any event, there is sufficient dispute, in this case, in that the applicant disagrees with the interpretation of the rule expressed in the official information given to her, in exhibit 2.1.

35 I turn now to s.110(1) of the Act which reads as follows:-

> "Every dispute between an organization and any of its members, or between an association and any organization represented therein, shall, subject to section 66, be decided in the manner directed by the rules of the organization, or, as the case may be, by the rules of the association."

36 That section is expressly prescribed in its terms to be subject to s.66 of the Act. It requires a dispute between an organisation and its members to be decided in the manner directed by the rules of the organisation.

37 It was open to the applicant, and she should have, it might be argued, asked the Council to interpret the rule pursuant to its powers, as contained in rule 11(21).

38 As Mr Richardson submitted, and it was open to do so, the time to bring the matter to the Commission was if she disagreed with the Council interpretation of rule 26, after that interpretation was given by the Council in accordance with the rules.

39 I wish to make it clear that s.110 of the Act or any failure to comply with it does not prevent a member, a past member or a person who has been denied membership applying to the Commission under s.66 of the Act, nor does it or can it prevent the exercise of jurisdiction and power by the Commission pursuant to s.66, to hear and determine the matter.

40 However, it is, as was correctly submitted, relevant to whether I exercise my discretion to make the order or declarations sought, whether an applicant has sought to resolve a matter in dispute according to the rules of the organisation.

41 It is relevant here, too, of course, that there has been no actual incident, at or arising out of a meeting, giving rise to the dispute on the evidence. It is also relevant, to the exercise of my discretion, that the matter was not raised by Mrs Luby at a meeting of Council or Executive, so that she could properly and formally, in the case of the Council, obtain the view of the Council (or even the Executive).

42 However, having regard to the interests of the members, the ANF and its government, I propose to declare the true interpretation of rule 26. Most cogently as a refutation of the significance of the failure to raise this matter in the Council or otherwise with the ANF by Mrs Luby, the fact is that this matter has not been resolved even after these applications had been filed. There is a live dispute, however, between the applicant and the ANF and it is before me.

43 Rule 26 clearly and unequivocally prescribes what is a quorum, taking into account the plain meaning of its words. The words are plain, simple and unambiguous. They prescribe that a quorum only for a meeting of the Executive or the Council or for a Committee of the Council, is a simple majority of all of its members. "All of its members" means precisely that, "all of its members", whether present or not.

44 Rule 26 does not say "all of its members present at any meeting" which one would expect the rule to say if that was what was meant, I would add. I have reached that interpretation by applying the principal laid down in *Hospital Salaried Officers of WA v Vic Minister for Health* [1981] 61 WAIG 616 at 618 (IAC), and also *R v Aird, Ex parte AWU* [1973] 129 CLR 654 at 659 per Barwick J.

45 Accordingly on its true interpretation the rule prescribes that a quorum for any meeting of the Council, Executive or any Committee of the Council shall be a simple majority of all of the members of each, whether present or not at any meeting. It follows that the quorum is not and cannot be validly calculated in accordance with the rules by reference to the number of members present, only, unless all of the members are present. It follows further that the quorum cannot be validly calculated in accordance with the rule 26 as a majority of those members present, whilst some are absent on leave of absence, or, indeed, are absent for any reason at all.

46 The quorum must and can only be calculated by reference to the number of members, that is all of the members of the Council, Executive or Committee of the Council, as the case may be.

47 Accordingly, members of the Council who are absent cannot, if the rule is to be complied with, be counted for the purpose of calculating whether there is a quorum at any of the abovementioned meetings because a quorum consists of a simple majority "of all of its members". That is each and every member whether present or absent.

48 I would also add that s.110 of the Act is not an obstacle to the exercise of my discretion on the facts of this matter, because the meaning of the rule and its effect is so manifestly clear that it is difficult to understand why the applications could have been opposed on the merits. That it was, militates entirely against the argument that I should exercise my discretion not to make the declaration sought because the applicant did not raise the question to be determined with the Council, first.

49 That these applications were unnecessarily opposed on the merits and not resolved before the matter was heard and determined puts that argument to flight also.

50 Because of the plain meaning contained in the words of rule 26, read in the context of the rules as a whole, the common law as to what a quorum is affords no assistance.

51 I will, therefore, issue a declaration to reflect what is the true and proper interpretation of rule 26 in this context, and as expressed in the above reasons.

Declare accordingly

2002 WAIRC 05954

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	KIM MAREE LUBY, APPLICANT
	v.
	THE SECRETARY, THE AUSTRALIAN NURSING FEDERATION, INDUSTRIAL UNION OF WORKERS, PERTH AND OTHERS, RESPONDENTS
CORAM	HIS HONOUR THE PRESIDENT P J SHARKEY
DELIVERED	MONDAY, 8 JULY 2002
FILE NO/S.	PRES 13 OF 2002
CITATION NO.	2002 WAIRC 05954

Decision	Declaration
Representation	
Applicant	Mr C Young, as agent
Respondents	Mr R W Richardson (of Counsel), by leave
	Ms Toni-Michelle Young on her own behalf

PARTIES	KIM MAREE LUBY, APPLICANT
	v.
	THE AUSTRALIAN NURSING FEDERATION, INDUSTRIAL UNION OF WORKERS PERTH, RESPONDENT
CORAM	HIS HONOUR THE PRESIDENT P J SHARKEY
DELIVERED	MONDAY, 8 JULY 2002
FILE NO/S.	PRES 22 OF 2002
CITATION NO.	2002 WAIRC 05954

Decision	Declaration
Representation	
Applicant	Mr C Young, as agent
Respondent	Mr R W Richardson (of Counsel), by leave

Declaration

These matters having come on for hearing and determination before me on the 12th and 13th days of June 2002, and having heard Mr C Young, as agent, on behalf of the applicant and Mr R W Richardson (of Counsel), by leave, on behalf of the respondents, save and except for the respondent, Ms Toni-Michelle Young, who appeared on her own behalf, and having delivered my reasons for decision on the 8th day of July 2002, it is this day, the 8th day of July 2002, declared as follows:-

THAT the true and correct interpretation of rule 26 is as follows:-

> The quorum for a meeting of the Council, Executive or for a Committee of the Council of the above named respondent shall be a simple majority of all of the members of the said Council, Executive or of a Committee of the Council respectively, whether present or not.

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

[L.S.]

2002 WAIRC 05752

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	KIM MAREE LUBY, APPLICANT
	v.
	THE AUSTRALIAN NURSING FEDERATION, INDUSTRIAL UNION OF WORKERS PERTH AND OTHERS, RESPONDENTS
CORAM	HIS HONOUR THE PRESIDENT P J SHARKEY
DELIVERED	MONDAY, 17 JUNE 2002
FILE NO/S.	PRES 17 OF 2002
CITATION NO.	2002 WAIRC 05752
PARTIES	KIM MAREE LUBY, APPLICANT
	v.
	THE AUSTRALIAN NURSING FEDERATION, INDUSTRIAL UNION OF WORKERS PERTH AND OTHERS, RESPONDENTS
CORAM	HIS HONOUR THE PRESIDENT P J SHARKEY
DELIVERED	MONDAY, 17 JUNE 2002
FILE NO/S.	PRES 23 OF 2002
CITATION NO.	2002 WAIRC 05752

Result	Applications dismissed
Appearances	
Applicant	Mr C Young, as agent
Respondents	Mr R W Richardson (of Counsel), by leave
	Ms Toni-Michelle Young on her own behalf

Orders

Applications PRES 17 and PRES 23 of 2002 having come on before me for hearing and determination on the 10th to 13th days of June 2002 inclusive, and having heard Mr C Young, as agent, on behalf of the applicant and Mr R W Richardson (of Counsel), by

leave, on behalf of the respondents, save and except for the respondent, Ms Toni-Michelle Young, who appeared on her own behalf, and upon the undertaking of the individual respondents in the following terms namely that:-

1. they will individually and collectively from this day not give or exercise any proxies for the purpose of voting at a meeting of the Council or any sub-committee thereof or the Executive of the ANF, subject only to the rules being duly amended to authorise the use of proxies.
2. they will at the next meeting of the Council individually and collectively cause a motion to be put in terms of undertaking 1 and to vote in favour of the said motions.

and, by consent, the parties having waived the rights conferred on them by s.35 of the *Industrial Relations Act* 1979 (as amended), it is this day, the 17th day of June 2002, ordered that applications PRES 17 and PRES 23 of 2002 be and are hereby dismissed with no order as to costs.

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

2002 WAIRC 05680

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	KIM MAREE LUBY, APPLICANT
	v.
	THE AUSTRALIAN NURSING FEDERATION, INDUSTRIAL UNION OF WORKERS PERTH, RESPONDENT
CORAM	HIS HONOUR THE PRESIDENT P J SHARKEY
DELIVERED	WEDNESDAY, 5 JUNE 2002
FILE NO/S.	PRES 21-24 OF 2002
CITATION NO.	2002 WAIRC 05680

Decision	Orders and directions given
Appearances	
Applicant	Mr C Young, as agent
Respondents	Mr R Castiglione (of Counsel), by leave

Orders and Directions

These matters having come on for a directions hearing before me on the 5th day of June 2002, and I having heard Mr C Young, as agent, on behalf of the applicants and Mr R Castiglione (of Counsel), by leave, on behalf of the respondents, and having made such orders and given such directions as are necessary or expedient for the expeditious and just hearing and determination of these matters, and having given reasons, and the parties having waived the rights conferred on them by s.35 of the *Industrial Relations Act,* 1979 (as amended), it is this day, the 5th day of June 2002, ordered as follows:-

(1) THAT these matters be heard and determined with PRES 12 to PRES 17, inclusive, of 2002.

(2) THAT leave to the respondent be and is hereby granted to file and serve any answer to these applications by 9.00 a.m. Monday the 10th day of June 2002.

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

AWARDS/AGREEMENTS—Variation of—

2002 WAIRC 05834

CLERKS' (RACING INDUSTRY—BETTING) AWARD 1978
No. R 22 of 1977

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	AUSTRALIAN MUNICIPAL, ADMINISTRATIVE, CLERICAL AND SERVICES UNION OF EMPLOYEES, W.A. CLERICAL AND ADMINISTRATIVE BRANCH, APPLICANT
	v.
	B.P.D.BROOKES AND OTHERS, RESPONDENTS
CORAM	COMMISSIONER J L HARRISON
DATE OF ORDER	TUESDAY, 25 JUNE 2002
FILE NO.	APPLICATION 773 OF 2002
CITATION NO.	2002 WAIRC 05834

Result	Award varied

Order

HAVING heard Mr P Hartley on behalf of the applicant and Mr R Heaperman on behalf of the respondents and by consent, the Commission, pursuant to the powers conferred under the Industrial Relations Act, 1979, hereby orders—

THAT the Clerks (Racing Industry – Betting) Award 1978 (No. R22 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 24th day of June 2002.

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

SCHEDULE

1. Schedule C – Enterprise Agreement – Totalisator Agency Board of Western Australia: Delete this schedule and insert the following in lieu thereof—

(1) Application—

(a) The provisions of this Schedule shall apply only to the Totalisator Agency Board and its employees.

(b) The provisions of this Schedule shall be read in conjunction with the provisions of this award. Where these provisions are inconsistent with, or different from the provisions of the award, the provisions of this Schedule shall prevail.

(2) Rates of Pay—

(a) The minimum hourly base rates of pay payable to the employees classified hereunder shall be—

	Award as at 28 May 2000	**20% Admin payment rate 6 July 2001. Effective increase to TAB Base Rate -5.32%**	**22% Admin payment 1 July 2001. Effective increase to TAB Base Rate 1.62%**	**3% increase to the Base Rate – 1 January 2002**	**1.5% increase to the Base Rate – 1 January 2003**	**3.0% increase to the Base Rate – 1 January 2003**
Customer Service Representative Call Centre equivalent Flat Rate.	*** $16.35**	*** $17.22**	*** $17.50**	*** $18.03**	*** $18.30**	*** $18.85**
***The above rates contain a loading of 38.1% in lieu of annual leave, annual leave loading, sick leave, Public Holidays, evenings, Saturdays and Sunday Race Days**						

(b) Rates of Pay – The following rates of pay apply to casual employees within the operational areas of the TAB—

(i) Customer Service Centre / Control Centre / Managed Agencies –receive a Flat Base Rate of Pay as outlined in Attachment B.

This Flat Base Rate of Pay includes a loading of 38.1% in lieu of annual leave, annual leave loading, sick leave, Public Holidays, evenings, Saturdays and Sunday Race Days.

(ii) Call Centre – receive a Base Rate of pay PLUS a penalty for hours worked on a Sunday or Public Holiday as outlined in Attachment B.

The change from a Flat Base Rate of Pay to the Base Rate PLUS penalties for Sunday and Public Holidays will take effect from the first pay period on or after the registration date of this EBA.

(c) An additional payment of either 10% or 20% above the equivalent Call Centre Flat Rate as outlined in (2) (a) of this Agreement will be applied to employees employed as Customer Service Representatives in the Customer Service Centre; Casual employees employed in the Control Centre or Casual employees employed within TAB Managed Agencies depending on their specific skill level and competencies as assessed from time to time. These rates recognise the additional responsibilities associated with these three operational areas and are set out in Attachment A to this Agreement.

(d) Trainee Rate - A Trainee Rate being 90% of the Call Centre Customer Service Representatives' Rate, shall apply to all new employees in the Call Centre for a period of 6 months subject to the provisions of Clause 7 (b).

(e) Given the different wage structure between operational areas, as defined in Clause (2) (b) (i) and (ii), the following payment conditions apply to cover the movement of employees from the Call Centre to either the Customer Service Centre or the Control Centre—

(i) Permanent Transfer – where a Call Centre employee is permanently transferred to the Customer Service Centre or the Control Centre, that employee will be paid on the same basis as other employees in that operational area depending on the employee's individual skills and competencies as outlined in Attachment A to this Agreement.

(ii) Temporary Transfer - where a Call Centre employee undertakes a shift or number of shifts in the Customer Service Centre or Control Centre on a temporary or relief basis, the rate of pay applied will be in line with the existing Wages framework within the Call Centre i.e. Base Rate plus Sunday and Public Holiday penalties for the respective area.

This temporary rate will also be dependant on the employee's individual skills and competencies as outlined in Attachment A to this Agreement

(f) (i) The loading and penalties referred to in (2) (b) (i) in relation to work performed on Sundays is based on the requirement that employees can be required to be rostered to work 50 Sundays in any one year.

(ii) The number of Sundays which incorporate Race Days will be reviewed prior to the commencement of each Racing Calendar Year. Should the number of such Sunday Race Days increase, the Flat Base Rate loading shall be increased accordingly.

(3) Call Centre – Staffing Arrangements—

Shift Rosters will be prepared taking into account business needs, skill levels required to handle the business offering and where possible employee preferences in line with established processes.

Whilst the Contract of Employment requires Customer Service Representatives to make themselves available to work rostered hours as requested by the TAB, including Sunday Race Days, it is recognised that employees will require some flexibility within the rostering system to cater for personal needs.

The following rules will be incorporated into the rostering and shift swapping process for the **TAB Call Centre**. Any changes to Call Centre staffing arrangements, as outlined in this Agreement, will only be introduced after consultation with employees and union delegates.

Shift Swapping

(a) Whilst each employee is responsible for working shifts as rostered, employees are able to swap the following number of shifts per month without prior approval of their Team Leader—

All Timers – 5 shifts

Other Call Centre Employees –3 shifts.

Once a shift swap is agreed between the parties, the Team Leader must be advised to arrange rostering amendments.

(b) Employees seeking additional shift swaps are to consult with their immediate Team Leader for prior approval. Each request for additional shift swaps are to be assessed on an individual needs basis.

(c) It is the responsibility of all employees to check the roster for approved shift swaps.

(d) Each employee who accepts a shift swap is ultimately responsible to ensure that the rostered shift is performed.

(e) Where possible, an employee should attempt to swap within their designated availability or Team.

(f) The shift swap must be agreed by both employees involved in the swap.

(g) Shift Swaps are to be arranged via the process developed and implemented by the organisation from time to time to assist both employees and Team Leaders in managing the process.

(h) Where practicable double Shifts (as approved) must have a minimum 30 minutes break between shifts where the overall shift time exceeds 8 hours.

Employee Rostering

(a) Where possible, employee rosters are to be published 4 weeks in advance.

(b) It is expected that all employees will be available to work as per their nominated availability. Where employees anticipate having another appointment during the forthcoming roster period they are required to advise their Team Leader of their unavailability prior to the roster being finalised.

(c) There is a requirement for all employees to advise management of their available times for rostering purposes as required. Any subsequent changes are to be in writing.

Extra Shifts

(a) Where additional shifts become available during a rostering period where possible the additional available hours will be allocated to employees who have had their hours "reduced" during that rostering period due to unforeseen circumstances (e.g. racing schedules affected by bad weather).

(b) Any available extra shifts (other than Sunday or Public Holidays) required by the WA TAB, after the establishment of the roster for that period, will be filled on a cyclical basis from a nominated availability list. Employees will periodically be invited to nominate for the list.

Sunday Shifts

(a) Sunday work continues to be an extra shift.

(b) The Sunday rosters are to be filled on a cyclical rostering arrangement.

(c) Where a rostered Sunday shift is not required by the employee, the shift may be "swapped" for another shift or given away to another employee.

Public Holidays

(a) Public Holiday rosters are to be filled on a cyclical rostering arrangement.

(b) Where a Public Holiday shift is not required by the employee, the shift may be "swapped" for another shift or given away to another employee.

(4) Control Centre/Customer Service Centre – Staffing Arrangements—

(a) Employees shall be available to be rostered to work on Sundays as required in addition to their Monday to Saturday rostered shifts.

(b) Sunday shifts in the Customer Service Centre will be rostered on a cyclical basis in line with the employee's competencies. In the case of the Customer Service Centre, Sundays will be considered to be an extra shift.

(c) Employees are able to swap shifts with other employees. Once a shift swap is agreed between the parties, the Supervisor or Team Leader must be advised to arrange rostering amendments.

(d) Where an employee is unable to perform a rostered shift, the employee may seek to arrange a suitable swap with another employee or give the shift away.

(5) Minimum Engagement—

An employee who is engaged for a work period and who commences such work shall be paid for a minimum of 2 hours work.

(6) Breaks Changes—

SATURDAY

Shift Duration	Meal Break	Rest Break	Total Break Time
Up to 4 hours	15 minutes	2 x 5	25 mins
4 to 6 hours	20 minutes	3 x 5	35 mins
Over 6 hours	20 minutes	4 x 5	40 mins
Over 8 hours	30 minutes	4 x 5	50 mins

MONDAY TO FRIDAY & SUNDAY

Shift Duration	Meal Break	Other Breaks
Up to 4 hours	15 minutes	Non-scheduled breaks to be provided on a required basis subject to business demands. Such breaks to be not less than those applying to the schedule of Saturday breaks.
Over 4 hours	20 minutes	

(a) Shift scheduled breaks for employees will be posted before the commencement of Saturday and Public Holiday shifts.

(b) Employees will monitor the progress of races on television screens and computer terminals to use common sense in taking breaks and communicate with the shift Team Leader/ Supervisor at the time.

(c) Employees will not take a break if a race is about to jump or there are calls waiting to be answered. However, it is recognised than on occasion due to an unanticipated demand it may not be practical to wait until there are no calls waiting to be answered before taking a rostered or additional rest break.

(7) Training—

(a) It is the aim of the TAB to maintain and where appropriate further develop their workforce to meet both business requirements and the needs of customers.

(b) New Trainees will remain on the Trainee rate for a period of 6 months or until they are assessed as being fully competent.

(c) Where employees are identified as not meeting the required operational standards the emphasis will continue to be on coaching and re-training to assist employees in improving their skill level to meet the needs of the customer and the organisation.

(d) Retraining of existing employees is to be undertaken by the Training Officer and/or Team Leaders and can, by agreement, involve some of the more experienced employees.

(e) The TAB will include the continued provision of comprehensive level of training in line with the current training and retraining processes and programs including specific training for new products and marketing initiatives.

(f) Where the training is required to meet specific marketing campaigns, employees will either be called on a voluntary basis to meet the demand. Where a specific skill level is required to undertake the role, employees will be advised of this aspect when nominations are called for.

(8) Ongoing Consultation Processes between TAB Management and Employees—

The parties recognise the need for effective communication to improve the business/operational performance and working environment in the agencies/departments. The parties acknowledge that decisions will continue to be made by the employer, who is responsible and accountable to Government for the effective and efficient operation of the agency/department.

The parties agree that:

(a) Where the employer proposes to make changes likely to affect existing practices, working conditions or employment prospects of the employees, the employees affected shall be notified by the employer as early as possible.

(b) For the purposes of such discussion, the employer shall provide to the employees concerned relevant information about the changes, including the nature of the changes on the employees, provided that the employer shall not be required to disclose any confidential information.

(9) Duration of Schedule—

(a) This Schedule shall operate from the date of registration and shall remain in force for a period of thirty months.

(b) The parties are committed to commencing negotiations for a replacement agreement six months prior to the expiry of this agreement.

(c) The parties agree to no further claims during the period of this EBA.

(10) Signatures to Agreement

(a) Signed for and on behalf of the Australian Services Union, West Australian Clerical & Services Branch

signed 3 May 2002

_____ _____

(P Burlinson) (Date)

Branch Secretary

(b) Signed for and on behalf of the Totalisator Agency Board of Western Australia.

signed 3.5.2002

_____ _____

(R B Bennett) (Date)

Chief Executive Officer

ATTACHMENT A

Rates of Pay for employees employed in Control Centre / Customer Service Centre / TAB Managed Agencies based on rates of pay as at 6 July 2001.

Position	*Rate per Hour*
CONTROL CENTRE	
Casual - Fully Competent – able to work any shift in the Control Centre including Loading & Checking & Events Monitoring with minimal supervision and direction.	$20.66 - [+20%] *
Casual – Events Monitoring Fully competent and able to work any shifts with minimal supervision.	$18.94 - [+10%]*
Casual - Entry Rate Utilised whilst the employee is learning the Events Monitoring function and reaches a standard where they are able to be rostered on any shift.(approx 6 weeks)	$18.08 [Difference between Call Centre Flat Rate of $17.22 and 110% rate of $18.94]
CUSTOMER SERVICE CENTRE	
Casual – Fully Competent – able to undertake all functions in the Customer Service Centre with minimal supervision and direction.	$20.66 - [+20%]*
Casual – Undertaking and learning a range of Customer Service Centre functions but not assessed at Fully Competent.	$18.94 - [+10%] *
Casual - Entry Rate Utilised whilst the employee is learning a basic range of CSC functions	$18.08 [Difference between Call Centre Flat Rate of $17.22 and 110% rate of $18.94]
MANAGED AGENCIES	
Managed Agency Casual – Managing the Agency or working alone.	$20.66 - [+20%] *
Agency Casual	$17.22

[* - % above Call Centre Customer Service Representative EBA equivalent Flat Rate]

ATTACHMENT B

EBA Pay Rates - Existing Flat Rate / Base Rate with Sunday/Public Holiday Penalty

(Reflects agreed rates for each of the work areas as per Ballot 1)

		ADMIN PAYMENT (1.62%) 1/07/01*	**3% INCREASE 1/01/02***		**1.5% + 3% INCREASE 1/01/03***	
		FLAT RATE ONLY	**FLAT RATE ONLY**	**BASE RATE + 10% SUN 15% P/HOL PENALTY**	**FLAT RATE ONLY**	**BASE RATE + 20% SUN 25% P/HOL PENALTY**
CALL CENTRE						
	MON - SAT	17.50 ON E RATE		17.80		18.36
	SUN			19.25		21.64
CUSTOMER SERVICE REP	**P/HOL**			20.13		22.54

	ADMIN PAYMENT (1.62%) 1/07/01*	**NEW CASUAL PAY RATES STRUCTURE 14/12/01***		
CUSTOMER SVCE CENTRE				
FULLY COMPETENT (+20%)		21.00	21.64	22.64
CASUAL (+10%)	19.25	19.25	19.83	20.74
ENTRY RATE (+5%)		18.38	18.93	19.79
CONTROL CENTRE				
FULLY COMPETENT (+20%)		21.00	21.64	22.64
CASUAL (+10%)	19.25	19.25	19.83	20.74
ENTRY RATE (+5%)		18.38	18.93	19.79
AGENCY				
WORKING ALONE (+20%)	18.23	21.00	21.64	22.64
AGENCY CASUAL	17.50	17.50	18.03	18.85

***** Payable from the first completed pay period commencing on or after the date shown.

ATTACHMENT C

Example of Full EBA Pay Rates - Existing Flat Rate v's Base Rate with Sun/ Public Holiday Penalties

NOTE: These rates for Customer Service Centre, Control Centre & Managed Agencies provided to cover relief periods as the FLAT RATE ONLY APPLIES IN THESE AREAS.

		ADMIN PAYMENT (1.62%) 1/07/01 *	NEW CASUAL PAY RATES STRUCTURE 14/12/01*		3% INCREASE 1/01/02*		1.5% + 3% INCREASE 1/01/03*	
		FLAT RATE ONLY	FLAT RATE ONLY	BASE RATE	FLAT RATE ONLY	BASE RATE PLUS 10% SUN 15% P/HOL PENALTY	FLAT RATE ONLY	BASE RATE PLUS 20% SUN 25% P/HOL PENALTY
CALL CENTRE								
CUSTOMER SERVICE REP	MON-SAT	17.50	N/A		18.03	17.80	18.85	18.36
	SUN		N/A		18.03	19.25	18.85	21.64
	PUB HOL		N/A		18.03	20.13	18.85	22.54
CUSTOMER SERVICE CENTRE								
FULLY COMPETENT (+20%)	MON-SAT	19.25 ONE RATE	21.00		21.64	21.36	22.64	22.03
	SUN		21.00		21.64	23.10	22.64	25.97
	PUB HOL		21.00		21.64	24.16	22.64	27.05
CASUAL (+10%)	MON-SAT		19.25		19.83	19.58	20.74	20.20
	SUN		19.25		19.83	21.18	20.74	23.80
	PUB HOL		19.25		19.83	22.14	20.74	24.79
ENTRY RATE (+5%)	MON-SAT		18.38		18.93	18.69	19.79	19.28
	SUN		18.38		18.93	20.22	19.79	22.72
	PUB HOL		18.38		18.93	21.14	19.79	23.67
CONTROL CENTRE								
FULLY COMPETENT (+20%)	MON-SAT	19.25 ONE RATE	21.00		21.64	21.36	22.64	22.03
	SUN		21.00		21.64	23.10	22.64	25.97
	PUB HOL		21.00		21.64	24.16	22.64	27.05
CASUAL (+10%)	MON-SAT		19.25		19.83	19.58	20.74	20.20
	SUN		19.25		19.83	21.18	20.74	23.80
	PUB HOL		19.25		19.83	22.14	20.74	24.79
ENTRY RATE (+5%)	MON-SAT		18.38		18.93	18.69	19.79	19.28
	SUN		18.38		18.93	20.22	19.79	22.72
	PUB HOL		18.38		18.93	21.14	19.79	23.67
AGENCY								
WORKING ALONE (+20%)	MON-SAT	19.25	21.00		21.64	21.36	22.64	22.03
	SUN		21.00		21.64	23.10	22.64	25.97
	PUB HOL		21.00		21.64	24.16	22.64	27.05
AGENCY CASUAL (+10%)	MON-SAT	17.50	N/A		18.03	17.80	18.85	18.36
	SUN		N/A		18.03	19.25	18.85	21.64
	PUB HOL		N/A		18.03	20.13	18.85	22.54

* Payable from the first completed pay period commencing on or after the date shown.

2002 WAIRC 05734

RAILWAY EMPLOYEES' AWARD NO. 18 OF 1969

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	COMMUNICATIONS, ELECTRICAL, ELECTRONIC, ENERGY, INFORMATION, POSTAL, PLUMBING, AND ALLIED WORKERS UNION OF AUSTRALIA, ENGIN & ELECT DIV, WA BRANCH, APPLICANT *v.* WESTERN AUSTRALIAN GOVERNMENT RAILWAYS COMMISSION, THE AUSTRALIAN RAIL, TRAM AND BUS, INDUSTRY UNION OF EMPLOYEES, WEST AUSTRALIAN BRANCH, THE AUTOMOTIVE, FOOD, METALS, ENGINEERING, PRINTING AND KINDRED INDUSTRIES UNION OF WORKERS - WESTERN AUSTRALIAN BRANCH, RESPONDENTS
CORAM	COMMISSIONER J H SMITH
DATE OF ORDER	THURSDAY, 13 JUNE 2002
FILE NO.	APPLICATION 467 OF 2002
CITATION NO.	2002 WAIRC 05734

Result	Award amended to properly reflect arbitrated safety net adjustments.
Representation	
Applicant	Mr J Murie
Respondents	Ms J Hayman on behalf of WAGRC Mr R Wells on behalf of ARTBIUE Mr J Murie on behalf of AFMEPKIU

Order

HAVING heard Mr J Murie on behalf of the Applicant and Ms J Hayman, Mr R Wells and Mr J Murie on behalf of the Respondents, the Commission, by consent, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders—

THAT the Railway Employees Award No 18 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 13 June 2002.

(Sgd.) J. H. SMITH,
[L.S.] Commissioner.

SCHEDULE

1. Clause 44. – Classification Structure and Rates of Pay: Delete sub-clauses (2) to (6) inclusive of this Clause and insert in lieu thereof the following—

(2) Rates of Pay

(a) The following rates of pay shall apply to the classifications contained in paragraph (1)(a) of this clause —

LEVELS	BASE RATE $	SAFETY NET ADJUSTMENT $	TOTAL RATE $
Level 10	588.60	88.00	676.60
Level 9	566.80	88.00	654.80
Level 8	545.00	88.00	633.00
Level 7	501.40	88.00	589.40
Level 6	479.60	88.00	567.60
Level 5	457.80	90.00	547.80
Level 4	436.00	90.00	526.00
Level 3A	422.50	90.00	512.50
Level 3	408.10	88.00	496.10
Level 2	388.10	88.00	476.10
Level 1	367.10	88.00	455.10

(b) Experience Allowance

Employees classified at levels 4 to 7 inclusive shall be paid the following experience allowance —

After 12 months' service with the employer	$3.70
After 24 months' service with the employer	$7.30

(3) General

The following rates of pay shall apply to employees employed in the following classifications —

Item No.	DESIGNATION	BASE RATE $	SAFETY NET ADJUST-MENT $	TOTAL RATE $
11.	Driver: Motor Truck			
	(a) Non-articulated: In excess of 9 tonnes capacity	460.10	90.00	**550.10**
	(b) Articulated—			
	(i) Over 9 tonnes capacity but under 21 tonnes	468.30	88.00	556.30
	(ii) 21 tonnes capacity and over but under 25 tonnes	474.60	88.00	562.60
	(iii) 25 tonnes capacity and over	479.50	88.00	567.50
12.	Driver: Commissioner's Car	465.90	88.00	553.90
13.	Attendant - Central Registry	383.40	88.00	471.40
14.	Office Cleaner (rate includes allowance in lieu of long service leave)	10.31197	2.53	12.841970
	Leading Hand Office Cleaners shall be paid the following allowances —			
	(i) Perth $12.10 per week			
	(ii) Midland $8.40 per week			

(4) Junior Employees and Junior Station Assistants shall be paid at the rate of the following percentage of the appropriate rate prescribed for Level 1 in paragraph (2)(a) of this clause —

	%	BASE RATE $	SAFETY NET ADJUST-MENT $	TOTAL RATE $
Up to 16 years	41	150.51	36.08	186.59
At 16 years	51	187.22	44.88	232.10
17 years	58	212.92	51.04	263.96
18 years	69	253.30	60.72	314.02
19 years	79	290.01	69.52	359.53
20 years	90	330.39	79.20	409.59

Provided that juniors aged 18 years and over who are employed in adult positions shall be paid at the Award rate for the position occupied.

(5) Apprentices—

The weekly wage rate shall be a percentage of the tradesperson's rate as under —

	%	BASE RATE $	SAFETY NET ADJUST-MENT $	TOTAL RATE $
(a) **Five year term**				
First Year	40	174.40	36.00	210.40
Second Year	48	209.28	43.20	252.48
Third Year	55	239.80	49.50	289.30
Fourth Year	75	327.00	67.50	394.50
Fifth Year	88	383.68	79.20	462.88
Four year term:				
First Year	42	183.12	37.80	220.92
Second Year	55	239.80	49.50	289.30
Third Year	75	327.00	67.50	394.50
Fourth Year	88	383.68	79.20	462.88

	%	BASE RATE $	SAFETY NET ADJUST-MENT $	TOTAL RATE $
Three and a half year term:				
First six months	42	183.12	37.80	220.92
Next Year	55	239.80	49.50	289.30
Next following year	75	327.00	67.50	394.50
Final Year	88	383.68	79.20	462.88
Three year term:				
First Year	55	239.80	49.50	289.30
Second Year	75	327.00	67.50	394.50
Third Year	88	383.68	79.20	462.88

(b) For the purpose of this part "tradesperson's rate" means the rate of pay payable to an adult male fitter under the Engineering Trades (Government) Award numbered 29, 30 and 31 of 1961 and 3 of 1962 as amended. The rates above are based on the L4 tradesman rate previous in this clause.

2. Clause 44. – Classification Structure and Rates of Pay: Renumber sub-clauses (7) to (10) as (6) to (9).

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

2002 WAIRC 05803

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE FEDERATED MISCELLANEOUS WORKERS' UNION OF AUSTRALIA, W.A. BRANCH, APPLICANT
	v.
	HON MINISTER FOR EDUCATION, RESPONDENT
CORAM	SENIOR COMMISSIONER A R BEECH
DATE	FRIDAY, 21 JUNE 2002
FILE NO.	APPLICATION 1525 OF 1990
CITATION NO.	2002 WAIRC 05803

Result	Application for variation discontinued.
Representation	
Applicant	No appearance
Respondent	No appearance

Order

WHEREAS an application was lodged in the Commission pursuant to section 40 of the *Industrial Relations Act 1979* to vary the Child Care Workers (Education Department) Award No. A20 of 1984;

AND WHEREAS the applicant subsequently advised the Commission that it wished to discontinue this application;

NOW THEREFORE, I the undersigned, pursuant to the powers conferred on me under the *Industrial Relations Act 1979*, hereby order—

THAT the application be discontinued.

(Sgd.) A.R. BEECH,
[L.S.] Senior Commissioner.

NOTICES—Award/Agreement matters—

IN THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

Application No. AG 91 of 2002

APPLICATION FOR REGISTRATION OF AN INDUSTRIAL AGREEMENT TITLED "PORT HEDLAND VISITORS CENTRE (INC.) ENTERPRISE AGREEMENT 2002"

NOTICE is given that an application has been made to the Commission by the Australian Municipal, Administrative, Clerical and Services Union of Employees, W.A. Clerical and Administrative Branch under the Industrial Relations Act 1979 for registration of the above Agreement.

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

4.0 WHO THE AGREEMENT COVERS

This Agreement shall apply to and be binding upon:

- The Port Hedland Visitors Centre (Inc) … ;
- Australian Municipal, Administrative, Clerical & Services Union of Employees, Western Australian Clerical and Administrative Branch (ASU); and
- Employees of the Port Hedland Visitors Centre (Inc). Persons employed after 28th November 2001 shall be employed under this Agreement or alternatively on salaries and conditions that are equivalent to or better than the terms of this Agreement in every respect.

There are approximately 6 employees covered by this Agreement.

A copy of the Agreement may be inspected at my office at 111 St George's Terrace, Perth.

J. A. SPUR LING,
Registrar.

24 June 2002

PUBLIC SERVICE ARBITRATOR—Matters Dealt With—

2002 WAIRC 05766

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
PARTIES	THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED, APPLICANT
	v.
	EXECUTIVE DIRECTOR, DEPARTMENT OF FISHERIES, RESPONDENT
CORAM	SENIOR COMMISSIONER A R BEECH
DATE	TUESDAY, 18 JUNE 2002
FILE NO.	PSAC 21 OF 2002
CITATION NO.	2002 WAIRC 05766

Result	Application for an interim Order dismissed.
Representation	
Applicant	Mr J. Ross
Respondent	Mr D. Matthews (of counsel)

Reasons for Decision

1 On 17 June 2002 the Commission reconvened the conference in this matter. Both parties informed the Commission that the suggestions made by the Commission which might have enabled the parties to resolve the matter by conciliation had not met with success. The Commission therefore formed the view that the parties were unlikely to reach any agreement. The union then pressed for interim Orders to issue and what follows are the Commission's reasons for refusing the interim Orders.

2 On 22 May 2002 the Regional Manager - Gascoyne of the Department of Fisheries wrote to Ms Anderson. The letter stated, in particular, that he had been informed of a "further incident" which allegedly occurred at the Gascoyne Regional Office on 16 May 2002. The allegations were then set out. The Regional Manager stated that "given the nature of the allegations may constitute an act of misconduct under Section 80 of the *Public Sector Management Act 1994*, you are required to provide me with a written response to these matters by close of business, Wednesday, 5 June 2002 so that I may consider them further". The union states, correctly, that the letter does not mention s.81 of the *Public Sector Management Act 1994*. The union states for that reason that the Department has not validly initiated the exercise of power pursuant to s.81 of that Act and the letter, and any subsequent suspension of Ms Anderson which has occurred, are therefore invalid.

3 In my view, for the powers under s.81 of the *Public Sector Management Act 1994* to be validly invoked, it is not necessary to mention the number of the section. Rather, once s.81 is read in its entirety, its intent can be seen. Its intent is to provide to an employee who is suspected of having committed a breach of discipline a reasonable opportunity to submit an explanation to her or his employer. In my view, the letter of 27 May 2002 validly provides Ms Anderson with a reasonable opportunity to submit an explanation to her employer of the matters which the employer suspects constitute a breach of discipline. On that basis, the fact that the number of the section of the *Public Sector Management Act 1994* upon which the employer was acting does not need to be mentioned for the intent of the section to be achieved.

4 It follows therefore that I do not uphold the submission made by Mr Ross that the Department of Fisheries therefore had no valid power to suspend Ms Anderson. I find that it did.

5 In considering the suspension of Ms Anderson I suspect that the Department of Fisheries did not follow the provision in Clause 8.11 Suspension of "A Practical Guide to Discipline" which was produced to the Commission and is apparently from the Ministry of Premier and Cabinet. Both the Department and the union accept that the Department was obliged to follow this provision. I accept that the Department is obliged to follow this provision without deciding when in fact, or in law, it is indeed obliged to do so.

6 That part of Clause 8.11 not followed is the requirement that the employer's intention to suspend an employee must be put to the employee so that the employee has an opportunity to be heard in relation to that intention. I accept Mr Ross' statement to me that whilst he was spoken to (and I find that satisfies the requirement to speak to the employee given that the union was acting on her behalf), Mr Ross was informed after the decision to suspend had been made.

7 However, given the fact that the union, on Ms Anderson's behalf, promptly applied to have her suspension without pay made into a suspension with pay, an application that was granted by the Department of Fisheries, I consider that event has overtaken the failure to follow the internal disciplinary guideline. I was assisted in reaching this conclusion by the distinction n between a suspension with pay, as opposed to a suspension without pay, drawn by Rowland J. in *Re Piper*; *ex parte Meloney* (1996) 63 IR 473 at 477.

8 I am not persuaded that there is sufficient before me to issue an Order on an interim basis to overturn the actions that have been taken by the Department of Fisheries and to return Ms Anderson to her workplace. This decision is not any judgment on my part as to fault on either side. I conclude merely that I have insufficient before me to warrant the Commission making an Order to intervene at this stage in the steps which have been taken by the respondent to manage the Department and its Carnarvon office as it is obliged to do.

9 Therefore to the extent that it is necessary to do so, I formally dismiss the application for an interim Order.

2002 WAIRC 05801

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED, APPLICANT
	v.
	COMMISSIONER OF MAIN ROADS, RESPONDENT
CORAM	SENIOR COMMISSIONER A R BEECH
DATE	FRIDAY, 21 JUNE 2002
FILE NO.	P 6 OF 1999
CITATION NO.	2002 WAIRC 05801

Result	Application for order discontinued.
Representation	
Applicant	Mr J. Dasey
Respondent	Ms M. Bastian

Order

WHEREAS an application was lodged in the Commission pursuant to section 80E of the *Industrial Relations Act 1979*;

AND WHEREAS the applicant subsequently advised the Commission that it wished to discontinue this application;

NOW THEREFORE, I the undersigned, pursuant to the powers conferred on me under the *Industrial Relations Act 1979*, hereby order—

THAT the application be discontinued.

(Sgd.) A. R. BEECH,
[L.S.] Senior Commissioner.

2002 WAIRC 05831

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED, APPLICANT
	v.
	DIRECTOR GENERAL, MINISTRY OF JUSTICE, RESPONDENT
CORAM	SENIOR COMMISSIONER A R BEECH
DATE	TUESDAY, 25 JUNE 2002
FILE NO.	P 11 OF 2001
CITATION NO.	2002 WAIRC 05831

Result	Application for order discontinued.
Representation	
Applicant	Mr J. Ross
Respondent	Mr N. Cinquina

Order

WHEREAS an application was lodged in the Commission pursuant to section 80E of the *Industrial Relations Act 1979*;

AND WHEREAS the applicant subsequently filed a Notice of Discontinuance in the Commission;

NOW THEREFORE, I the undersigned, pursuant to the powers conferred on me under the *Industrial Relations Act 1979*, hereby order—

THAT the application be discontinued.

(Sgd.) A. R. BEECH,
[L.S.] Senior Commissioner.

2002 WAIRC 05747

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED, APPLICANT *v.* DIRECTOR GENERAL, MINISTRY OF JUSTICE (NOW KNOW AS DEPARTMENT OF JUSTICE), RESPONDENT
CORAM	COMMISSIONER P E SCOTT PUBLIC SERVICE ARBITRATOR
DATE OF ORDER	FRIDAY, 14 JUNE 2002
FILE NO.	P 55 OF 2001
CITATION NO.	2002 WAIRC 05747

Result	Application pursuant to Section 80E withdrawn by leave

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Order

WHEREAS this is an application pursuant to Section 80E of the Industrial Relations Act 1979; and

WHEREAS by an email dated the 13th day of June 2002 the Applicant advised that the file could be closed;

NOW THEREFORE, the Public Service Arbitrator, pursuant to the powers conferred under the Industrial Relations Act 1979, hereby orders—

THAT this application be, and is hereby withdrawn by leave.

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

2002 WAIRC 05744

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED, APPLICANT *v.* CHIEF EXECUTIVE OFFICER, WATER AND RIVERS COMMISSION, RESPONDENT
CORAM	COMMISSIONER P E SCOTT PUBLIC SERVICE ARBITRATOR
DATE OF ORDER	FRIDAY, 14 JUNE 2002
FILE NO.	P 2 OF 2002
CITATION NO.	2002 WAIRC 05744

Result	Application dismissed in the public interest
Representation	
Applicant	Mr M Amati
Respondent	Mr R Bathurst (of Counsel)

Order

WHEREAS this is an application pursuant to Section 80E the Industrial Relations Act 1979, to the Public Service Arbitrator regarding the applicant's member, Mr Dewan; and

WHEREAS the Applicant sought interim and final orders in the matter; and

WHEREAS having considered the arguments of the parties the Public Service Arbitrator dismissed the application for interim orders; and

WHEREAS the Applicant appealed to the Full Bench in FBA 16 of 2002, against the Arbitrator's refusal to issue interim orders, the Full Bench dismissed the appeal and issued Reasons for Decision on the 16th day of May 2002; and

WHEREAS the Respondent sought the dismissal of the substantive application and the parties provided written submissions on that application; and

WHEREAS the Respondent has now advised the Arbitrator, and the Applicant has confirmed, that the investigation regarding Mr Dewan has been concluded and Mr Dewan has been dismissed; and

WHEREAS the Applicant has advised the Arbitrator that it is the intention of Mr Dewan to appeal the dismissal to the Public Service Appeal Board; and

WHEREAS on the 4th day of June 2002 the Applicant advised the Arbitrator's Associate that the application ought not be dismissed as matters which preceded the disciplinary action against Mr Dewan require consideration by the Arbitrator; and

WHEREAS by letter dated the 6th day of June 2002, at the direction of the Arbitrator, the Arbitrator's Associate wrote to the Applicant seeking the Applicant's advice as to—

1. the specific nature of the matter/s which were said to precede the disciplinary action against Mr Dewan which the Applicant sought that the Arbitrator hear and determine; and
2. how, in light of the stated intention to appeal against the decision to dismiss Mr Dewan to the Public Service Appeal Board, the hearing and determination of the matter/s identified by the Applicant, referred to in paragraph 1, is in the public interest.

WHEREAS by letter dated the 10th day of June 2002, the Applicant advised the Arbitrator of the issues it sought to be heard and determined; and

WHEREAS the Respondent provided a written submission on that matter by letter dated the 13th day of June 2002; and

WHEREAS the Applicant in its letter of the 10th day of June 2002 raised matters which are able to be and are appropriate to be considered by the Public Service Appeal Board. The Full Bench in the Reasons for Decision in FBA 16 of 2002, in particular at paragraphs 28 to 30 inclusive, noted the appropriateness of the Public Service Appeal Board dealing with matters of the nature raised by the Applicant; and

WHEREAS the application sought the following final orders—

1. The purported investigation of Mr Ken Trainer and any other investigation – whether covert or overt – for and on behalf of the respondent, in relation to the allegations of misconduct against Mr Suman Dewan are unlawful and are hereby void ab initio.
2. Within 7 days of the date of this order, the respondent shall remove all documentation from Mr Dewan's personal file, connected with and/or flowing from the said unlawful investigation undertaken by Mr Trainer and any other agent of the respondent.
3. Within 14 days of the date of this order, the respondent shall provide verification by affidavit, to both the CSA and Mr Dewan, that it has fully and completely undertaken all of the requirements in all of the aforementioned orders.
4. The respondent is prohibited from re-instigating any action, disciplinary or otherwise against Mr Dewan in relation to the allegations made against him by the respondent.

WHEREAS the investigation the subject of the orders sought is now complete, and Mr Dewan has been dismissed. Mr Dewan has recourse to an appeal from the decision to terminate according to section 80I of the Industrial Relations Act 1979, and accordingly it is not in the public interest for the application to proceed, and it should be dismissed;

NOW THEREFORE, the Public Service Arbitrator, pursuant to the powers conferred under the Industrial Relations Act 1979, hereby orders—

THAT the application be, and is hereby dismissed.

[L.S.]

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

2002 WAIRC 05716

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	WESTERN AUSTRALIAN POLICE UNION OF WORKERS, APPLICANT
	v.
	COMMISSIONER OF POLICE, RESPONDENT
CORAM	COMMISSIONER P E SCOTT
	PUBLIC SERVICE ARBITRATOR
DATE OF ORDER	WEDNESDAY, 12 JUNE 2002
FILE NO.	P 10 OF 2002
CITATION NO.	2002 WAIRC 05716

Result Application pursuant to s.46 withdrawn by leave

Order

WHEREAS this is an application pursuant to Section 46 of the Industrial Relations Act 1979; and

WHEREAS on the 7th day of June 2002 the Applicant advised that the matter was resolved; and

WHEREAS on the 11th day of June 2002 the Applicant sought to withdraw the application;

NOW THEREFORE, the Public Service Arbitrator, pursuant to the powers conferred under the Industrial Relations Act 1979, hereby orders—

THAT this application be, and is hereby withdrawn by leave.

[L.S.]

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

INDUSTRIAL MAGISTRATE—Complaints before—

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

Claim No. M 269 of 2001

Date Heard: 15 May 2002

Date Decision Delivered: 21 June 2002

BEFORE: WG. Tarr I.M.

BETWEEN:

Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union ofWorkers – Western Australian Branch

Claimant

and

Bell-A-Bike Rottnest Pty Ltd

Respondent

Appearances:

Mr T Kucera, of Counsel, appeared on behalf of the Claimant.

Mr J Brits of *The Chamber of Commerce and Industry of Western Australia* appeared as Counsel for the Respondent.

Reasons for Decision.

The Claimant union in these proceedings has brought an action on behalf of Lenard Christie who, between the relevant dates, was an employee of the Respondent company.

It is alleged by the Claimant that during the employment period, the Respondent failed to pay its employee Christie the correct rates of pay for ordinary hours worked, work performed on Sundays and public holidays and overtime, contrary to the provisions of the Metal Trades (General) Award No 13 of 1965 (the Award) and claims the difference between amounts due and the amounts paid.

The Respondent company was party to a Management Agreement with the Rottnest Island Authority to manage the Authority's bike hire business on Rottnest Island. The agreement was tendered on behalf of the Respondent and therein "Business" is defined as meaning "the business of hiring bikes for use on the Island and ancillary retail sale and repair activities".

It is clear from the evidence that although the Respondent's business sold water and soft drinks and other limited retail items as well as spare parts and accessories for privately owned bicycles, the primary and substantial business activity was the hire of bikes, including pedal cars, wheel chairs and tricycles. The evidence before me is that the Respondent managed the hire of almost 2000 bicycles.

The copy of the Respondent's Profit and Loss account tendered as exhibit S indicated a trading profit of $25,627.00 for the year ending 30 June 2000, income from labour of $7,092.00 and income from bicycle hire of $1,667,603.00.

In the course of managing the bike hire business the Respondent ran a repair shop where it repaired bikes of "its own fleet" according to the evidence of its witness and director, Sandra Parker. In her evidence she said they were "constantly repairing our bikes". Her husband and fellow director, Glen Parker, gave evidence that there was "always plenty of repairs" and "repairing bicycles was a crucial part of the business".

Both witnesses admitted that the business repaired bikes belonging to the public and that providing a repair service for the public and bikes hired by Boat Torque was a requirement of the Rottnest Island Authority. The evidence before me supports their claim that this activity was a minor part of the business.

Mr Parker admitted in his evidence that the Respondent usually employed 3 to 4 bicycle mechanics who at busy times would help out on the floor assisting with customer needs. He gave evidence that the workshop was important and was an essential part of the business.

Mr Christie gave evidence that he commenced working with the Respondent during the week ending 5 November 1999 and worked, on average, in excess of 42 hours per week until his employment was terminated on 14 January 2002. While there has been some attempt by the Respondent to classify Mr Christie in some other role, I accept the evidence of Mr Christie, which is supported by the Claimant's other witnesses and documentary evidence, that his primary duties were those of a bicycle mechanic.

The next question to be determined is whether the Award applies to the employment relationship between Mr Christie and the Respondent.

Clause 3 of the Award, under the heading of Area and Scope, provides:

> This award relates to each industry mentioned in the Second Schedule to this award and applies to all employees employed in each such industry in any calling mentioned in Clause 31. - Wages and Supplementary Payments (including the appendix thereto) of Part I - General or Clause 10. - Wages of Part II - Construction Work of this award but does not apply within the area occupied and controlled by the United States Navy at and in the vicinity of North-West Cape in relation to Increment 1 of the construction of the Communications Centre.

In clause 5. - Definitions and Classification Structure, subclause (3) provides for employee classifications and definitions which have superseded the old tasks and craft based definitions contained in Appendix I and II of the Award. In Appendix II "Cycle Mechanic" is defined to mean "an employee engaged in assembling (except for the first time in Australia), building, brazing, repairing, altering or testing the metal parts of a pedal cycle. A "Cycle Assembler" is defined as "an employee engaged in assembling, putting together and adjusting the parts of a pedal cycle as received from the maker".

Having accepted the evidence that Mr Christie's primary duties were those of a bicycle repairer, there can be no doubt that he would have been classified in the calling of a cycle mechanic based on the old definition in Appendix II.

The calling of cycle mechanic now lines up with the wage group C12 as set out in Appendix I and classified as Engineering/Production Employee Level III in subclause 5(3).

While the approach to determine whether or not an award applies should probably start with the employers industry and not the employees calling, both require consideration.

Section 37(1) of the ***Industrial Relations Act 1979*** provides:

> **37. Effect, area and scope of awards**
>
> (1) An award has effect according to its terms, but unless and to the extent that those terms expressly provide otherwise it shall, subject to this section —
>
> (a) extend to and bind —
>
> (i) all employees employed in any calling mentioned therein in the industry or industries to which the award applies; and
>
> (ii) all employers employing those employees;
>
> and
>
> (b) operate throughout the State, other than in the areas to which section 3(1) applies.

The Second Schedule to the Award lists those industries to which the Award relates. The Claimant submits that the Respondent comes within the Cycle Manufacturers and Repairers industry which has as it's only named respondent, the Malvern Star Bicycle Co.

There can be no doubt that the Respondent company repaired bicycles. As has been mentioned, its own witnesses testified that they were constantly repairing their bicycles, there were plenty of repairs and repairing bikes was a crucial part of their business. That is what one would expect where the Respondent had a hire fleet of approximately 2000 bikes, which were generally hired to holiday makers on an island like Rottnest.

It is argued by the Respondent that it is not in the cycle repair industry but in the bike hire industry.

In my view, the evidence suggests that the Respondent was involved in both industries. As was found on appeal to the Full Bench of the Western Australian Industrial Relations Commission in ***Eltin Open Pit Operations Pty Ltd v MEWU*** 73 WAIG 1466, that although the appellant was engaged in the gold mining industry, the earth moving work done in the process of delivering ore to the crusher placed it in the industry of earthmoving contractors. At page 1467, His Honour the President said:

> If an employee is a worker in a calling mentioned in an industry to which the award relates, whatever the undertaking of the employer may be, and whatever the character of his business might be, then it is so bound.

A question that might test whether the Respondent's business involved two industries is whether there could be a separation of the two. In my view there could. Although it may not be as practical and might have some financial implications, a bike hire business could contract out its bicycle repair needs or use the services of a nearby bicycle repair business.

In ***The King v Drake-Brockman & Others Ex Parte National Oil Pty Ltd*** 68 CLR 51, Latham CJ explained:

> A single employer may carry on two or more industries. The same man may be a farmer and a miller and a baker, but there is a distinction between the industry which produces wheat, the industry which produces flour, and the industry which produces bread. The applicant company in this case conducts two industries. One is an industry the product of which is shale, and the other is an industry the products of which are oil and petroleum coke.
>
> The fact that two industries are carried on at the same place does not abolish the distinction between them. If a single company mined coal and then used the coal to manufacture gas in works alongside the mine, it would nevertheless still be the case that two industries were carried on by that company, one the mining of coal and the other the manufacture of gas. The manufacture of gas would not become "coal mining" because one company was engaged in both enterprises. Nor would the industry of gas manufacturing for that reason become a part of the industry of coal mining.

It follows, in my opinion, that the employees, including Mr Christie, who were engaged in the repair of bicycles, were employed in the bicycle repair industry, notwithstanding the evidence that they may have assisted in other areas during busy times, and the Award applies to the Respondent.

The Respondent raised the defence of "officially induced error of law" claiming that it received advice from the Department of Consumer and Employment Protection as evidenced by the department's letter dated 20 November 2001 (exhibit V). That letter advised:

> The investigation concluded that the Metal Trades (General) Award does not apply to any employees of Rottnest AA Bike Hire.
>
> This conclusion was reached by way of application of the principles established by the Donovan Case (57 WAIG 1317).

It has been long held that mistake (or ignorance) of the law is no defence in criminal matters or where a law is being enforced, as it is in this case. I have been referred to an article by ***Mithalingam K*** entitled ***Mistake of Law – Criminal Offence or Reasonable Defence*** (1994) 18 Criminal Law Journal 271. In that article, the author discusses some exceptions to the maxim where an offence requires knowledge of unlawfulness as an element or where there is an honest claim of right. He discusses reliance on legal/official advice or upon "the law" as a defence as follows:

> It has been generally held that ignorance of law based on advice will not be a defence. However, some statutory exceptions are being recognised, especially in America. In an English case, ***Dodsworth***, Lord Denman held that a person should not be convicted if he or she had acted bona fide and had been guided in his or her conduct in a matter of law by persons who are conversant with the law. There is a move in America to providing a defence of mistake of law where the legality of the accused's act has been upheld by a decision of the highest court of the jurisdiction and not overruled until after the accused had committed the act.

In ***Randy Jorgenson and 913719 Ontario Ltd v The Queen*** (1995) 4 RCS 55, the question of knowledge of the law arose and the question of officially induced error of law was summarised as follows at page 81:

> In summary, officially induced error of law functions as an excuse rather than a full defence. It can only be raised after the Crown has proven all elements of the offence. In order for an accused to rely on this excuse, she must show, after establishing she made an error of law, that she considered her legal position, consulted an appropriate official, obtained reasonable advice and relied on that advice in her actions. Accordingly, none of the four justifications for the rule that ignorance of the law does not excuse which Stuart outlined is undermined by this defence. There is no evidentiary problem. The accused, who is the only one capable of bringing this evidence, is solely responsible for it. Ignorance of the law is not encouraged because informing oneself about the law is a necessary element of the excuse. Each person is not a law unto himself because this excuse does not affect culpability. Ignorance of the law remains blameworthy in and of itself. In these specific instances, however, the blame is, in a sense, shared with the state official who gave the erroneous advice.

The court, however, had already stated that "to benefit from this excuse, the accused must demonstrate reliance on the official advice":

> This can be shown, for example, by proving that the advice was obtained before the actions in question were commenced and by showing that the questions posed to the official were specifically tailored to the accused's situation.

It was not until the 20 November 2001 letter did the Respondent receive the advice it claims to have relied upon, well after the "event". On the evidence before me I cannot conclude that the information provided to the Department of Consumer and Employment Protection and its legal advisers was objective and sufficiently detailed to allow a proper conclusion to be reached and relied upon.

In finding as I have that the Respondent is bound by the Award and having no difficulty in concluding that the employee Christie's primary duties were those of a bicycle repairer, I can only conclude that the information provided for the Department to conclude "that the Metal Trades (General) Award does not apply to any employees of Rottnest AA Bike Hire" was subjective and incomplete.

For those reasons it is my view that the Respondent cannot succeed with its defence of "officially induced error of law".

Whether or not the employee Christie was employed as a casual is another issue to be decided.

"Casual Employee" is defined in subclause 5(1) of the Award as meaning "an employee engaged and paid as such".

Casual employees are referred to in subclause 6(6) under the heading of **Notification on Engagement** as follows:

> On the first day of engagement an employee shall be notified by his employer or by the employer's representative, whether the duration of his employment is expected to exceed one month and, if hired as a casual employee shall be advised accordingly.

Subclause 6(7) provides, in relation to **Casual Employees**:

(a) (i) The period of notice of termination in the case of a casual employee shall be one hour.

(ii) If the required notice of termination is not given one hour's wages shall be paid by the employer or forfeited by the employee.

(b) An employee shall for the purpose of this award be deemed to be a casual employee -

(i) if the expected duration of the employment is less than one month, or

(ii) if the notification referred to in subclause (6) of this clause is not given and the employee is dismissed through no fault of the employee within one month of commencing employment.

Subclause 31(5) provides for the rate of pay for a casual employee and subclause 33(1) provides that a casual employee who has:

(aa) had a start with the employer on 30 days in a period not greater than one year, provided that such period does not commence earlier than a date preceding one year from the operation of this clause; and

(bb) achieved an average, in the case of a junior employee, of at least 12 hours per week and, in the case of adult employees, employment of at least six hours per week with the employer during the month immediately preceding any day the employer would, but for this definition, be required to make superannuation contributions prescribed in subclause (2) of this clause.

becomes an eligible employee for the purposes of employer superannuation contributions.

The evidence before me is that the employee Christie commenced employment with the Respondent on 2 November 1999 and he worked continuously until 13 September 2000. A total period of about 10 ½ months. During that time he worked 5 days each week and averaged in excess of 42 hours per week. The days he worked depended upon a roster prepared by management as did the days he took off each week. The time and wages records indicate the employee had 2 consecutive days off each week and those days were usually week days.

Although Mr Christie had been told he was employed as a casual and remained a casual during his time with the Respondent, he was not happy as he did the same hours and work as a full time employee who had the benefit of sick leave, annual leave and paid public holidays. As a result he contacted the union and made inquiries. It was his evidence that although he was told he was a casual, he worked full time from day one.

The Award is not very helpful when "Casual Employee" is defined as meaning an employee engaged and paid as such.

I cannot conclude that the provisions of subclause 6(6) were complied with, but both that subclause and subclause 6(7) envisage a casual employee to be employed for a period of less than one month.

For the purpose of superannuation, the minimum requirement for a casual employee is to have a start with the employer on 30 days in a period not greater than one year and achieve an average employment of at least 6 hours per week with the employer during the month immediately preceding any day the employer would be required to make superannuation contributions.

I do not see that the Award envisaged a casual employee working for an employer in excess of an average of 42 hours each week for the duration of his employment over a

10 ½ month period.

In fact, the Award provides, in clause 13, that the ordinary hours of work shall be an average of 38 per week for a full time employee.

In ***Serco (Australia) Pty Limited v Moreno*** **76 WAIG 937** the Full Bench referred to ***Squirrell v Bibra Lakes Adventure World Pty Ltd t/a Adventure World*** **64 WAIG 1834** where it was said at page 939:

> The concept of casual employment within the common law of employment, untrammelled by award prescription, is generally taken to connote an employee who works under a series of separate and distinct contracts of employment entered into for a fixed period to meet the exigencies of particular work requirements of an employer, rather than under a single and ongoing contract of indefinite duration.

The Full Bench went on to cite the common law:

> The parties, of course, cannot by use of a label render the nature of a contractual relationship something different to what it is.

and then followed with:

> Certain indicia may be indicative of the nature of the contract, but they are not determinative, taken alone. These may include the classifying name given to a worker and initially accepted by the parties, the provisions of the relevant award, the reasonable expectation that work would be available to him, the number of hours worked per week, whether his employment was regular, whether the employee worked in accordance with a roster published in advance, whether there

was reasonable mutual expectation of continuity of employment, whether the notice is required by an employer prior to the employee being absent on leave, whether the employer reasonably expected that work would be available, whether the employee had a consistent starting time and set finishing time, and there may be other indicia.

Although the definition in the award in ***Serco v Moreno*** (supra) defined Casual Workers in more detail than the Award, both envisage the casual worker being engaged for periods of up to one month at a time.

Mr Christie's employment was regular and there was a reasonable expectation that work would be available to him. He worked in accordance with a roster published in advance and there was a reasonable expectation of continuity of work, provided the Respondent continued to manage the business and the Claimant performed to the employer's satisfaction. He had a consistent starting time and a set finishing time.

Although the Respondent considered Mr Christie to be a casual employee, I conclude, on the evidence, him to be a full time employee under the Award and common law.

Lastly, I have to consider whether or not, when travelling to and from Rottnest Island by ferry, Mr Christie was working. As I have found, Mr Christie was employed as a cycle mechanic who sometimes helped out in other areas if required. There is no suggestion in the evidence that Mr Christie did any more, when on the ferry, than on a few occasions answer any questions about bicycle hire. There is no evidence to support his claim that the time spent on the ferry should be classified as "time worked". Because of the uniqueness of employment on Rottnest Island, it appears it is normal for an employer to pay employees who live on the mainland the fares incurred in travelling on the ferry and payment for the time taken.

Any entitlement due for the time spent on the ferry should be by way of travelling time as provided in clause 20 of the award. That is, ordinary rates.

I find that the employer Respondent is liable to the extent of my reasons and invite the parties to make submissions as to quantum.

(Sgd.) W. G. TARR,
Industrial Magistrate.

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

Claim No. M 154 of 2001

Date Heard: 22 May 2002

Date Delivered: 29 May 2002

BEFORE: G. Cicchini I.M.

BETWEEN:

Lynn Diane Davis

Claimant

and

Blaxland Pty Ltd

Respondent

Appearances:

Mr RW Clohessy of *Union Industrial Advisory Services* appeared as agent for the Claimant.

Ms J Auerbach of *The Chamber of Commerce and Industry of Western Australia* appeared as Counsel for the Respondent.

Reasons for Decision.

Claim

By her claim filed 30 May 2001, the Claimant alleges that the Respondent has failed to comply with the provisions of the *Minimum Conditions of Employment Act 1993* (the Act) in that it did not pay to her annual leave entitlements for the period

21 September 1993 to 4 March 2001. In that regard the Claimant originally sought to recover the sum of $31,514.95 allegedly not paid. That amount was calculated as follows:

7 years x 4 weeks = 28 weeks @ $1125.53 = $31,514.95 (sic).

The Claimant also claims interest and costs.

The Claimant initially amended her claim by virtue of the statement of claim filed in this matter on 1 August 2001. The claim was amended so that it only related to the period 1 December 1993 to 3 April 2001. Further during the course of the hearing on 22 May 2002 the Claimant again amended her claim. The period of claim is now expressed to be for the period 27 May 1995 to 3 April 2001. The amount alleged to be owing in that regard is $94,500.00, which is calculated as follows:

6 years x 4 weeks = 24 weeks @ $3,937.50 = $94,500.00.

Response

By its defence filed 27 August 2001, the Respondent has denied the claim. It argues that the Claimant is not an employee for the purposes of section 3(1) of the Act and Schedule 1 of the Regulations thereto in that the Claimant was remunerated wholly by commission or percentage reward.

Issue

The pivotal issue, which requires determination in this matter, is whether or not the Claimant was wholly remunerated on a commission or percentage reward basis. If she was then she does not fall within the definition of "employee" for the purposes of the Act and is consequently not entitled to annual leave payments. However if her remuneration was not based *wholly* (my emphasis added) on commission or percentage reward then she would fall within the definition of "employee" for the purposes of the Act and would therefore be entitled to payment for annual leave.

Legislation

The matter comes before this Court pursuant to section 7 of the Act, which reads as follows:

> ***Enforcement of minimum conditions***
>
> *7. A minimum condition of employment may be enforced —*
>
> *(a) where the condition is implied in a workplace agreement, under Division 1 of Part 5 of the Workplace Agreements Act 1993;*
>
> *(b) where the condition is implied in an award, under Part III of the Industrial Relations Act 1979; or*
>
> *(c) where the condition is implied in a contract of employment, under section 83 of the Industrial Relations Act 1979 as if it were a provision of an award, industrial agreement or order other than an order made under section 32 or 66 of that Act.*

Accordingly this Court has jurisdiction to hear and determine the matter by virtue of section 7(c) of the Act.

As previously stated the pivotal issue to be considered and determined is whether or not the Claimant is an employee within the meaning of the Act. The definition of "employee" is found in section 3(1) of the Act, which provides:

> ***"employee"*** *means —*
>
> *(a) a person who is an employee within the meaning of the Industrial Relations Act 1979, but for the purposes of this Act section 7B of that Act is to be disregarded;*
>
> *(b) a person to whom section 43 (1) of the Workplace Agreements Act 1993 applies;*
>
> *but does not include a person who belongs to a class of persons prescribed by the regulations as persons not to be treated as employees for the purposes of this Act;*

Relevantly, regulation 3 of the *Minimum Conditions of Employment Regulations 1993* (the Regulations) provides:

> ***3. Persons who are not employees for purposes of Act***
>
> *The classes of persons set out in Schedule 1 are prescribed as persons who are not to be treated as employees for the purposes of the Act.*

The relevant part of Schedule 1 is as follows:

> ***Schedule 1***
>
> ***PERSONS WHO ARE NOT EMPLOYEES FOR THE PURPOSES OF THE ACT***
>
> ***1. Persons paid wholly by commission***
>
> *Persons whose services are remunerated wholly by commission or percentage reward.*

The Terms of the Contract of Employment as Found by Commissioner Gregor

On 8 March 2002 Commissioner JF Gregor of the Western Australian Industrial Relations Commission delivered a decision with respect to a dispute between these parties. In essence, the Claimant, who was the applicant in those proceedings, alleged that the respondent had failed to pay her outstanding benefits. The application for orders pursuant to section 29(1)(b)(ii) of the *Industrial Relations Act 1979* was dismissed. By virtue of those proceedings, Commissioner Gregor had to necessarily determine the terms of the contract of employment between the parties. Commissioner Gregor found the contract of employment between the parties varied from time to time. With respect to remuneration he found that the initial agreement was that the Claimant was to be paid commission on sales at the rate of 47%. Additionally, the Respondent paid 3% superannuation. The Claimant was allowed a 10% advertising allowance and a bonus at the end of each quarter. In addition, the Claimant received rent and referral fees on a pro rata basis when applicable. He found that from the gross sales commission of 50%, superannuation was deducted to achieve the actual sales commission payable.

Commissioner Gregor found that in 1996 the terms of the agreement between the parties was varied in that the superannuation contribution increased to 6% and the commission paid to the Claimant reduced to 44%. That he found to be consistent with the contention of the Respondent that as the superannuation guarantee increased there was a corresponding reduction of commission agreed to be paid.

Commissioner Gregor found that the contract of employment was further varied on

1 July 2000. The 8% superannuation payment then applicable was applied to the 50% staff commission thereby reducing the actual commission paid to the Claimant.

Commissioner Gregor found that the Claimant had a clear understanding of the contractual structure. He found that the Claimant's own evidence established that there was a form of contract which provided that, of the 50% commission, a varying amount was deducted for superannuation with the balance being paid to the Claimant.

Commissioner Gregor also made a finding concerning the issue of professional indemnity. He found that prior to January 2000 the Respondent paid the entire professional indemnity premium. On 11 January 2000, however, the Respondent circulated a letter received by it from insurance brokers which indicated that an insurance sharing arrangement between the principal and individual employees be adopted to ensure full coverage of employees. In accordance with that proposal individual employees of the Respondent firm, including the Claimant, were required to pay $272.16. The Commissioner found that the Claimant was reluctant to accede to the proposal but, nevertheless, did so. Such constituted a variation of the contract of employment.

I have referred to Commissioner Gregor's determinations because they give rise to issue estoppel. Issue estoppel arises when a competent tribunal delivers a final decision in a matter. It applies to findings of fact and law, which the prior judgment relied on as the foundation for, or justification of its conclusion. The Full Court of the Supreme Court of Western Australia in ***Bartucciotto v Euro Printing Pty Ltd*** Library No 990097 considered issue estoppel. His Honour Anderson J. said at pages 7 and 8 of the unreported decision:

> *Estoppel can arise out of the decision of any tribunal which has jurisdiction to decide the issue between the parties notwithstanding that the jurisdiction of the tribunal is statutory. **The Administration of the Territory of Papua & New Guinea v Guba** (1973) 130 CLR 353. That is the case here. The Industrial Relations Court is a court of limited jurisdiction.*
>
> *An issue is settled once and for all so as to give rise to estoppel if it is actually raised in the proceedings and decided and if the judgment of the tribunal required that it be decided one way or the other. **Brown v Robinson** (1960) 60 SR (NSW) 297; **Scruby v Hoggan** (1955) 55 SR (NSW) 2. The principle extends to any point which was fundamental to the decision, whether expressly or impliedly. **Hoysted v Federal Commissioner of Taxation** (1925) 37 CLR 290. Issue estoppel does not arise merely from a process of reasoning or in respect to evidentiary facts. It arises only from the determination of ultimate issues of law or fact. **Falk v Haugh** (1935) 53 CLR 163.*

The correctness or incorrectness of the finding which amounts to an estoppel is irrelevant. It is immaterial that the finding may be thought by the second court to be wrong or based on insufficient evidence. It is enough that the issue was decided in the earlier judgment. Once that is done, no allegation legally inconsistent with the finding may be made by one party against the other in subsequent proceedings. ***Mraz v The Queen [No 2]*** *(1956) 96 CLR 62.*

The fact that the forms of action are not the same does not matter. ***Mungatah v Public Trustee*** *(1925) 25 SR (NSW) 546. As Stephen CJ said in* ***Norton v Hosking*** *(1867) 6 SCR (NSW) 37 (at 68):*

> *"... the sentence of a court may be conclusive, notwithstanding the difference in point of objects between the two suits. The question decided, however, must have been not merely between the same parties, or persons in privity. It must have been directly put in issue, on the same subject matter."*

The findings made by Commissioner Gregor apply to this matter and are bound by the same.

Evidence

There were only two witnesses called in this matter, they being the Claimant on the one hand, and Mr Raymond Fitzgerald, a director of the Respondent, on the other.

The Claimant testified that her remuneration consisted of the following:

- Commission on sales,
- Payments for property management referrals, and
- Payments for settlement agency referrals.

I will now address the evidence given with respect to each aspect of remuneration.

Commission

The Claimant's evidence concerning the payment of commission and the relevant rates over the period in issue was consistent with the findings made by Commissioner Gregor. I do not, therefore, intend to repeat her evidence in that regard save for two issues. Firstly, that it is apparent that the quantum of commission payable was entirely dependant upon the rate of the compulsory superannuation contribution payable by the Respondent at any given time. Secondly, that if sales exceeded a particular set basic level in any quarterly period, commissions earned in excess thereof would attract a bonus commission calculated on a set percentage basis.

Mr Fitzgerald did not take issue with any of the evidence given by the Claimant concerning commission.

Property Management Referrals

The evidence of the Claimant in regard to payments made to her for property management referrals was quite straightforward. She testified that the arrangement was that the fee paid to her was calculated based on the term of the rental agreement. The two critical rental terms that gave rise to entitlements were six-month term and twelve months respectively. A six-month rental term triggered a payment of the equivalent of one week's rent. A twelve-month term or more triggered the payment of the equivalent of two week's rent. There is no dispute about that evidence. Indeed Mr Fitzgerald agreed with it. What is in issue, however, is whether such payment constitutes a percentage or pro-rata payment. I will return later to address this issue.

Settlement Agency Referrals

The Claimant explained in her testimony that she received a payment for referring customers to "Wembley Settlements". Mr Fitzgerald testified that at the material time the directors of the Respondent partially owned Wembley Settlements. The two businesses were associated. Accordingly, employees of the Respondent were rewarded for referring customers to the settlement agency.

The Claimant testified that she was never made aware of how the payments she received in that regard were calculated. She was of the understanding that such payments were flat payments not based on commission or percentage reward basis. However it is apparent that she was not correct in that view. The evidence of Mr Fitzgerald, together with documentary evidence (exhibit 9) dictates that the referral payments were not flat payments at all. The referral payments were calculated at being 10% of the settlement fee achieved by reason of the introduction. The documents in exhibit 9 were discovered by the Respondent to the Claimant. Regrettably, the Claimant's agent did not refer those documents to the Claimant. Had she been shown those documents, she may well have reconsidered her view about the payments. I find that the evidence overwhelmingly dictates that the settlement agency referral payments were percentage reward payments.

Other Evidence Relating to Remuneration

The Claimant's pay was paid on a fortnightly basis and was constituted by income received from commission on sales, property management referrals and settlement agency referrals. If the Claimant did not achieve sales or make any referrals she would not be paid. If she did achieve sales and referrals there would be deducted from such gross commissions and percentage payments an amount that represented so much of her advertising expenses, which exceeded the 10% allowance. Accordingly, advertising expenditure incurred (if any) in excess of the 10% advertising budget for the relevant period would have the effect of reducing her actual entitlement. Such amount having been deducted, the balance constituted her gross pay from which tax was deducted.

Insurance Premium

Both the Claimant and Mr Fitzgerald also gave evidence concerning the issue of professional indemnity insurance. Their evidence is not inconsistent with what Commissioner Gregor found. In view of such findings I propose to say no more about it in this context.

Assessment of Witnesses

Both the Claimant and Mr Fitzgerald were credible witnesses and their evidence was generally not in dispute. The only real contentious issue was that relating to the payment made for settlement agency referrals. In that regard, it is apparent that the Claimant simply did not know how the payments were calculated. She honestly thought that they were flat payments. However it is obvious that she was wrong in that belief.

Findings

It follows from what I have said, and in the light of Commissioner Gregor's findings, that the Claimant's main form of income was that derived from commission payments at various rates from time to time. On occasions she received bonus commission. That too was calculated on a percentage basis. Her other income was sourced from referrals. I have already commented upon the settlement agency referrals. It is quite readily apparent from both the documentary evidence and the viva voce evidence that such payment was made on the basis of percentage reward payment. As to the property management referral payments, the evidence dictates that they too were percentage reward payments. Such is readily apparent from the evidence of the Claimant herself and indeed from the documentary evidence (see for example exhibit 3). The factual circumstance in that regard is no different to the situation found to

have been the case in ***Hignett v Joburne Pty Ltd*** 81 WAIG 30. It was decided by the Full Bench of the Western Australian Industrial Relations Commission in that matter that such payments were correctly held to be pro rata.

It is apparent from what I have said that all payments received by the Claimant from the Respondent during the course of her employment were by way of commission or percentage reward. The Claimant was wholly remunerated in that way.

Mr Clohessy, for the Claimant, argues, inter alia, that the deduction of advertising expenditure from the commission and percentage reward payments changes the character of such payments. With respect to him I cannot see how that can be so. Irrespective of the deduction (if any) it is apparent that the payments made were wholly derived from commission or percentage reward payment. Mr Clohessy also argues that the superannuation payments made by the Respondent form part of remuneration. I do not agree. Indeed the situation in this matter is no different to ***Hignett*** in which the Full Bench held that the superannuation payment made under a statutory obligation ought not to be considered as part of income. It is apparent from the documentary evidence that in this instance the Respondent made payments of superannuation under a statutory obligation. Accordingly the same cannot be considered to be income. It appears in that regard that I am being asked to revisit the decision of the Full Bench in ***Hignett*** and find to the contrary. I am bound by that decision and it is quite inappropriate to be asked to find against what the Full Bench has held.

Finally, I comment about the issue of the professional indemnity insurance payment in the sum of $272.16 made by the Claimant to the Respondent. As I understand it, Mr Clohessy suggests that by virtue of the variation of the contractual arrangement between the parties as constituted by the said payment that that somehow changes the nature of the remuneration received by the Claimant, bringing her within the provisions of the Act. Quite frankly, I found it impossible to follow his argument in that regard. I cannot see how that could be so. The payment was one from the Claimant to the Respondent. It was not a payment by the Respondent to the Claimant. In those circumstances I fail to understand how it could impact upon my determination in respect to this matter.

Conclusion

The evidence dictates that the Claimant was not an employee within the meaning of the Act. Consequently, the Respondent was not required to make payments to the Claimant for annual leave. It follows that I find that the claim lacks merit and therefore ought to be dismissed.

In view of my determination on the pivotal issue, the other issues raised by the evidence and by the parties during the course of submissions need not be addressed.

(Sgd.) G. CICCHINI,
Industrial Magistrate.

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

Claim No. M 154 of 2001

Date Heard: 29 May 2002

Date Delivered: 29 May 2002

BEFORE: G. Cicchini I.M.

BETWEEN:

Lynn Diane Davis

Claimant

and

Blaxland Pty Ltd

Respondent

Appearances:

Mr RW Clohessy of *Union Industrial Advisory Services* appeared as agent for the Claimant.

Ms J Auerbach of *The Chamber of Commerce and Industry of Western Australia* appeared as Counsel for the Respondent.

Supplementary Reasons for Decision.

(Given extemporaneously at the conclusion of the hearing, extracted from the transcript of proceedings and edited by His Worship)

The application before me, made by the Respondent in this action, is for costs as a result of my finding that the claim was without merit. In that regard I have taken some time to consider the decision of the Full Bench of the Western Australian Industrial Relations Commission in ***Australian Liquor, Hospitality and Miscellaneous Workers Union, Western Australian Branch v Falcon Investigations and Security Pty Ltd*** **81 WAIG 2425**.

The Respondent argues that the Claimant has either frivolously or vexatiously instituted these proceedings before me. It is argued in this instance that the claim brought could never have succeeded and that looking at the matter objectively I should find that the claim was fundamentally flawed from the outset.

However it is clear on the authorities that just because the claim was found to be without merit, that of itself, does not give rise to a finding that the proceedings were instituted either frivolously or vexatiously. In my view, for the Respondent to succeed with respect to this application, I would have to necessarily find that the claim instituted was so manifestly faulty that there was no possibility of a good cause of action.

On my view, the evidence before me dictates that the Claimant, at the time that she instituted these proceedings, believed, albeit erroneously as it turned out, that she was the recipient of remuneration in the form of flat payments which brought her within the definition of "employee" for the purposes of the *Minimum Conditions of Employment Act 1993*. It became apparent however, during the course of these proceedings that she did not receive flat payments. Her belief in that regard resulted from her receipt of payment without explanation. I have made comment about her honesty during the course of my written reasons for decision and I have no doubt that she was an honest witness in that regard.

I accept that at the time that she instituted the proceedings, she was of the view that she had received flat payments. That view was held both honestly and reasonably. She instituted these proceedings in those circumstances. It was only when the discovered

documentation on the issue was put to her and explained to her during the process of cross-examination that it became apparent to her that the settlement agency referral payments were not flat. She consequently necessarily conceded that they were not flat. However that only resulted from the explanations that accompanied the cross-examination of her by counsel for the Respondent. Mr Fitzgerald in his testimony later affirmed counsel's explanation.

It is apparent from the relevant documents that they were not ostensibly demonstrative of the fact that payments were not flat. They needed to be explained and clarified and it was only when that occurred that the Claimant then conceded the issue. Had her agent, Mr Clohessy, shown her the documents, as he should have done, it may have led to the Claimant recognising that such payments were flat and may have led to the Claimant reconsidering her position. However on the other hand it may not have. It is indeterminable at this stage as to what would have occurred.

The Respondent, in my view, could have by its pleadings or by way of letter for that matter, asked for further and better particulars of the claim so that it could have precisely determined the basis of the Claimant's claim. That did not occur. Through that process it may have discovered that the claim was partly related to the alleged flat rate payments for settlement agency referrals that gave rise to the issue of whether or not the Claimant was an "employee" for the purposes of the *Minimum Conditions of Employment Act 1993*.

In my view, had that happened it might have enabled the Respondent to discover that the Claimant's claim was based inter alia upon flat payments made with respect to settlement agency referrals. In those circumstances the Respondent could well have brought to the attention of the Claimant particular aspects of those documents and drawn to the Claimant's attention the fact that the claim was without merit. Had that been done, in the light of the documentation then the Respondent would have been in absolutely no difficulty in respect of this application for costs because in those circumstances, if the Claimant had chosen to proceed, clearly such action would have been frivolous or vexatious. However that did not happen.

In the circumstances, what has happened here is that the Claimant has honestly, but erroneously, viewed a payment. The matter was not determined until she was cross-examined and only further after explanations were made in relation to aspects of the documents that were put to her. In those circumstances, in my view, with the evidence as it is before me, and given the nature of the Claimant's evidence in relation to this matter, I am not prepared to make a finding that the proceedings were frivolously or vexatiously instituted.

The determination that the claim is without merit of itself does not necessarily give rise to a finding that the proceedings were either frivolously or vexatiously instituted. I cannot find that they were in this case. Accordingly, the orders that I propose to make in relation to this matter are that the claim be dismissed and there be no order as to costs.

(Sgd.) G. CICCHINI,
Industrial Magistrate.

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

Claim No. M 366 of 2001

Date Heard: 5 and 6 June 2002

Date Decision Delivered: 6 June 2002

BEFORE: WG. Tarr I.M.

BETWEEN:

Albert Laurence Graham Phillips

Claimant

and

Divine Mercy College Inc

Respondent

Appearances:

Mr D Clarke of *Senate Pty Ltd* appeared on behalf of the Claimant.

Mr R Gifford appeared on behalf of the Respondent.

Reasons for Decision.

(Given extemporaneously at the conclusion of the hearing, extracted from the transcript of proceedings and edited by His Worship)

The claim before me is a claim by Albert Laurence Graham Phillips against the Respondent, Divine Mercy College Inc, claiming that the Respondent is in breach of the **Independent School Teachers Award 1976 No R27 of 1976** (the Award), in that it has not paid the Claimant his entitlement to holiday pay and leave loading for the periods claimed. The evidence before me is that the Claimant commenced as a teacher with the Respondent school in February of 1997, and continued during that year until 7 November 1997, when there was a dismissal. The evidence before me is that the Claimant was employed pursuant to a contract which was not tendered but which has been found by another Court to have been in breach of the provisions of section 114 of the *Industrial Relations Act 1979*, which provides:

> "… a person shall not be freed or discharged from any liability or penalty or from the obligation of any award, industrial agreement or order of the Commission by reason of any contract made or entered into by him …"

is no doubt that Mr Zydek gave some direction to Mr Phillips to attend that service .

I am unable to conclude whether that direction was given for the purpose of having Mr Phillips attend the service in particular or to put an end to the confrontation which was taking place in relation to Mr Phillips's request. My suspicion is that it was the latter. Mr Zydek was keen to get Mr Phillips out of the way, and that was one way of doing it. It was the evidence of Mr Zydek that the morning was a difficult one for him. He was expecting a visit on that day from the Inspector of private schools, if that was who it was, but certainly someone who had, as he said, the authority to close the school down if he found the school was not performing in a manner that was required.

He gave evidence that he was himself under tremendous pressure because of this visit and the need for him to ensure that all that was required was being complied with. After the prayer service, and no doubt during the prayer service, what had happened was on the mind of Mr Zydek, and he said to Mr Phillips that he was withdrawing the dismissal, and, as I understand the evidence, was going to discuss the matter later with him. In evidence, one of the reasons given for that withdrawal was on compassionate grounds, and I suppose in a school of the type that has been described, compassion is one of those qualities which would have been encouraged.

It seems as though Mr Phillips did not accept at the time that the dismissal had been withdrawn, and, in fact, left the school at lunch time, without advising Mr Zydek that he was leaving. I understand that it was the normal practice to advise someone if leaving the school, and a practice, I would have thought, appropriate in all the circumstances. He left the school to seek legal advice in relation to his situation, and, as it happened, he was late back after that luncheon break. Later on that day the Principal, Mr Zydek, sought counsel from members of the board, a number by phone and at least one in person The contract is contrary to the provisions of the Award.

It is not in dispute, and it has been found in other proceedings, that the Award does apply to the Claimant and Respondent. Subclause 9(1) of the Award provides that:

> "… a teacher shall be allowed the holidays granted by the school in which he/she is employed, including term and Christmas vacations, without deduction of pay."

The claim is defended by the Respondent on the basis of the provision of subclause 9(5) of the Award, that:

> "A teacher who is justifiably dismissed for misconduct shall not be entitled to the benefits of the provisions of this clause."

Clause 7.- Contract of Service of the Award sets out the contract of service between the parties to the Award and there has been a finding, and acceptance, that the Respondent was a full time teacher. Subclause 7(3) says:

> "Except as elsewhere provided herein a period of six weeks notice given in writing and falling wholly within the period of any school term shall be necessary to terminate the engagement of a teacher."

Subclause 7(6) reads:

> "Nothing within this clause detracts from the employer's right to dismiss summarily any teacher for serious misconduct in which case salary shall be paid up to the time of dismissal only."

So the contract of service clause under the Award puts in place a provision for general dismissal by giving six week's notice, and I would be surprised if that did not provide for a situation where six week's pay in lieu of notice can be given. In fact, in this case the question of performance of the teacher had been dealt with by the school, and the Claimant was advised his services would be no longer required beyond 5 December 1997, the end of the school year. I am told that notice was given to him some six weeks before the end of the school year. I assume that was in mid-October.

I do not think the actual date was given, but it was on the clear understanding of both the Claimant and the Respondent that the notice had been given and at the end of that time the teacher would leave the school as provided, as I said, in one of his conditions of service.

Subclause 9(4), provides that a teacher who is justifiably dismissed for misconduct shall not be entitled to the benefits of the provisions of that clause, and a teacher can only be justifiably dismissed for misconduct under the provisions of subclause 7(6). That subclause provides that the employer, notwithstanding anything else in the contract of service clause, may, as is his right, dismiss any teacher for serious misconduct. Accordingly, when considering the reasons for dismissal and whether or not they are justified, one needs to consider whether the behaviour of the teacher would fall within the classification of serious misconduct.

The evidence before me is, in relation to the conduct complained of, that on the morning of 7 November 1997, the Claimant approached the Respondent's Principal, a Mr Zydek, and, for reasons that did not come out until I asked, demanded from him, as I understand the evidence, four items of information. One was the Constitution, one was a list of members of the Association, and there were two other items but I cannot recall what they were. Generally there was some information sought from Mr Zydek. Mr Zydek has given evidence that at that time he was not in a position, and was not prepared to give the items to Mr Phillips, but said to him that he would give them to him later on, which, as I understand the evidence, was done. Mr Phillips did not accept the response of Mr Zydek, and, as I understand, demanded on two or three occasions that the items be produced there and then, and even to the extent that he demanded to know the password into the computer so that he could, I assume, get the information himself. This took place just before 8.30 am. I have heard evidence that at 8.30 am the majority of the teachers and students attended at the chapel for a morning prayer service, and there, and it would seem that after a discussion with them there was a decision made, notwithstanding what else had happened, that Mr Phillips was to be dismissed. A letter dated 7 November 1997 was prepared, and in the manner described there was an attempt to hand that letter to Mr Phillips. There is evidence given that at the meeting in Mr Zydek's office, Mr Phillips was told about the contents of the letter. He refused to accept the envelope containing the original letter and went immediately off to seek counsel of the school chaplain, who was about to leave the school at that time.

After the initial dismissal in the morning, the evidence before me is that Mr Zydek had changed his mind, and had asked Mr Phillips to honour the commitment he had in relation to the taking of children to swimming lessons, as I understand the evidence, and there was an expectation, I would have thought, that after that Mr Phillips would have continued, as I understand he did, until the end of the school day with his class, grades 6 and 7, until the time he was asked to attend the office of Mr Zydek.

The matter before me today is the third of three actions that have been before this Court. There was a matter which was dealt with by Wheeler IM in 1998. That was a complaint alleging an underpayment of wages, and that complaint was proven. There was a further complaint filed in 1998 which was dealt with by

Cicchini IM, and as I understand, that related to unfair dismissal. Both parties have referred to the transcripts that have been tendered, and it is my view that I can take note of any findings that may well have come out of those matters, albeit that they may well be obiter. It is clear from the finding of Mr Cicchini where he says at page 48 of the transcript:

> "In my view of all those circumstances, an exasperated Zydek actually dismissed Mr Phillips, and there can be no doubt that there was a summary dismissal at that particular point in time. (*He is referring then to the morning dismissal*) That is when the dismissal occurred, irrespective of what happened later in the afternoon, and that is when the dismissal became effective, in my view, so far as the defendant is concerned. Notwithstanding that, the complainant then went on and he remained at the school during the course of the day."

He went on, on page 50, to say that:

> "Mr Phillips was clearly forceful, would not take "No" for an answer. It is also clear to me that the instruction that Mr Phillips attend the prayer session was not an instruction that could be lawfully made on the contract of employment as it then existed, (*as I have said, I am not privy to the terms of that contract of employment generally*) because the position was, as I have said earlier, that Mr Phillips was going to these prayer sessions on a voluntary basis as part of his commitment to the school."

He went on to say:

> "…there can be no doubt that his approach and manner was aggressive and also inappropriate. So far as it was aggressive and inappropriate - that is, Mr Phillips' manner was aggressive and inappropriate - that of itself did not justify a summary dismissal on its own. It is a question of degree, but the position was that it did not necessarily vitiate the contractual relationship between the parties to the extent that a dismissal was warranted …"

The reasons for the dismissal on 7 November 1997, contained in the letter dated the same day, was that Mr Phillips had refused to follow a legal instruction and, according to the evidence before me, that legal instruction was to attend the chapel, and that he left school during the school day without permission. I have no doubt that the behaviour of Mr Phillips was inappropriate. It seems that he was certainly not accepting the position of the Principal. But it was an incident which arose in the circumstances that have been described. There was a heated discussion about his demand, and Mr Kydek's inability to satisfy that demand at that time. There was some evidence that Mr Phillips blocked Mr Kydek's way by a movement. But the evidence before me is that Mr Kydek was able to just move around him and proceed to the chapel.

The provision of the Award, and the law generally, allows for dismissal for serious misconduct, and while this is not an unfair dismissal case, because of the provisions of the Award, and particularly clause 9, which deals with the situation where a teacher is justifiably dismissed for misconduct, and therefore not entitled to the benefits that are being claimed under the provisions of clause 9, then I need to make a decision on whether or not the conduct was serious misconduct and justified the summary dismissal. Normally examples of serious misconduct are stealing, perhaps an assault, a deliberate act of failing to do the duties that may well be required under a contract of service, or some unprofessional conduct, for example, in this case, in relation to the children. The onus in these matters to prove that the dismissal was justifiable under the provisions of the Award is on the Respondent. I have some doubts that the conduct of the teacher on this day alone, and that is what I am dealing with, was sufficient for the Principal to dismiss him on the spot, and I think there is some evidence supporting the view that the Respondent itself had some doubts about that.

As to the dismissal in the morning, there was an attempt to withdraw that. The Claimant was paid to 5 December 1997, and if the Respondent had thought it was on strong grounds, it had no obligation to pay after the dismissal on 7 November 1997. Certainly the fact that there was an attempt to withdraw the dismissal and request the Claimant to continue on with his next obligation, which was in relation to the swimming lessons, and then to finish the rest of the day, in my mind does not support the probability that the conduct was serious misconduct. The conduct was certainly inexcusable. What happened after the dismissal in the morning is not something that I can take into account in particular. The Claimant left the school to seek advice in relation to his employment. He had been dismissed in the morning and I would have thought that he had a right to seek advice. Perhaps, in hindsight, it would have been prudent for him to seek permission, but under all the circumstances it is arguable that he may have felt that he had no obligation to do that because he had been dismissed, although he did stay at the school on that day and complete the duties that were required of him.

In view of the evidence generally, I cannot conclude to the required standard that the conduct of Mr Phillips falls within the provision of the Award described as “serious misconduct” which would justify a summary dismissal, and, as I have said, the Respondent, for whatever reason, has contributed to that finding by his actions after withdrawing the dismissal, allowing the Claimant to continue for the rest of the day, and paying him up until 5 December 1997. That being the case, my finding is that he was not justifiably dismissed summarily at that time so as to invoke subclause 9(5) in relation to holidays and vacations. Under the Award, the Respondent is liable to pay the Claimant the amount he is entitled to under clause 9 in relation to holidays and vacations.

In relation to the other part of the claim, for leave loading, subclause 9(6)(a) provides that:

> "A leave loading equivalent of 17.5 per cent of four weeks’ salary shall be paid to a teacher, including a part-time and temporary teacher, who has completed twelve months’ continuous service with the employer or who has been employed for all four terms of the calendar year."

On the evidence before me, the Claimant was dismissed on 7 November 1997, and he was paid four weeks' pay as part of the six week period, in lieu of notice, and it would seem, that being the case, he has not completed twelve months’ continuous service, nor has he been employed for all four terms in a calendar year. That being the case, under subclause 9(6)(a) he is not entitled to be paid that leave loading, and that part of the claim will be dismissed.

I have some doubts about the imposition of a penalty in all the circumstances. This is a matter that should have been dealt with, I believe, long before it has come before this Court today. Each party has a right to defend or prosecute these matters, and, as it has turned out, I do not believe Mr Phillips is a person with clean hands. There is evidence before me that he misled the school when he was given the position in relation to his prior teaching experience, not that that is necessarily a reason for me not to punish the school for not applying the Award. I think, in all the circumstances, that the finding that I make in relation to the payment of holiday pay and the costs will be sufficient without the imposition of a penalty in view of all the circumstances.

There will be an order that the application as far as it relates to leave loading will be dismissed. In relation to the holiday pay, the Respondent is to pay the Claimant the sum of $5048 .28. Costs will be fixed at $40.00. I will make an order that the amounts be paid within 30 days of today.

Finally, in relation to the claim for the payment of pre-judgment interest, as I have already said, the Claimant had an opportunity to deal with this matter a long time ago and did not take that opportunity. That being the case, I am not going to make an order in relation to interest.

(Sgd.) W.G. TARR,
Industrial Magistrate.

UNFAIR DISMISSAL/CONTRACTUAL ENTITLEMENTS—

2002 WAIRC 05712

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
PARTIES	ANTHONY ALBERT BISHOP, APPLICANT
	v.
	PIXEN PTY LTD T/AS MEGABUS, RESPONDENT
CORAM	COMMISSIONER P E SCOTT
DATE	TUESDAY, 11 JUNE 2002
FILE NO.	APPLICATION 1959 OF 2001
CITATION NO.	2002 WAIRC 05712

Result	Finding re Scope of claim
Representation	
Applicant	Mr K Trainer
Respondent	Mr B Walker

Reasons for Decision

1 This is an application made by an employee referred to in s.29(1)(b) of the Industrial Relations Act 1979.

2 By s.29(1)(b), an employee may refer to the Commission a claim that—

"(i) He has been harshly, oppressively or unfairly dismissed from his employment; or

(ii) He has been not been allowed by his employer a benefit, not being a benefit under an award or order, to which he is entitled under his contract of service."

3 The parties are in dispute as to whether the application before the Commission in this matter includes a claim of harsh, oppressive or unfair dismissal pursuant to s.29(1)(b)(i) or is a claim only in respect of denied contractual benefits pursuant to s.29(1)(b)(ii).

4 The application in this matter was filed on 5 November 2001 in the prescribed form, being Form 1 – Notice of Application, and attached is the Particulars of Claim in the proforma used by the Commission. The lack of information contained in question 5 of the Particulars of Claim dealing with the name and address of the applicant's authorised representative, indicates that at the time of completing the Form 1 and Particulars of Claim the applicant was unrepresented. However, the applicant was represented in making submissions to the Commission on this matter.

5 The Form 1 filed by the applicant is the standard form completed in respect of claims pursuant to s.29(1)(b) and it provides the following—

"The grounds on which the application is made are:

(a) harsh, oppressive or unfair dismissal, and/or

(b) outstanding benefits (non-award entitlements)."

6 The Form 1 filed by the applicant contains no markings to indicate whether the claim relates to (a) and/or (b).

7 The Particulars of Claim proforma contains a number of sections, the first of which sets out the details of the applicant, the employer, the occupation of the applicant and particulars of the employment such as start and finish dates, rates of pay and the nature of the instrument of employment. The second part of the Particulars of Claim is clearly related to claims pursuant to s.29(1)(b)(i), in that it contains questions relating to claims of harsh, oppressive or unfair dismissal which commence at the top of page 3 at question 20, and continue up to and including question 23. Immediately before question 20, at the top of page 3, there is a note in bold which says—

"**NOTE: Claims of unfair dismissal cannot be accepted if more than 28 days have elapsed since the termination of employment.**"

8 In the margin, typed perpendicular to the remainder of the page and in bold, is the following—

"**Claim of harsh, oppressive or unfair dismissal**

(if no claim go to question 24)"

9 In this case, the Particulars of Claim form is blank in respect of all of the questions 20 – 23.

10 Page 4 of the Particulars of Claim form includes at the top half of the page an explanatory note followed by a question. It states—

"Contractual benefits are benefits that were arranged between you and your former employer under a contract of employment, providing that benefits were not provided by an industrial award, agreement, workplace agreement or due under the Minimum Conditions of Employment Act.

What sum/s of money are you claiming you are due under the contract of employment and what is each for?"

11 This question is answered in detail in this application in the following manner—

$	FOR
292.38	ANNUAL LEAVE LOADING PAID FOR TWO WEEKS LEAVE PRIOR TO FINISHING THEN DEDUCTED FROM TERMINATION PAYOUT
865.38	EXTRA WEEKS NOTICE ENTITLEMENT FOR OVER 45 WITH 2 YEARS CONTINUOUS SERVICE
1,730.76	TWO WEEKS NOTICE FOR DENIAL OF THE ABILITY TO WORK OUT MY TERMINATION NOTICE TWO DAYS PRIOR TO TAKING TWO WEEK (sic) ANNUAL LEAVE

12 Perpendicular to the page, in the margin and in that section of the page dealing with question 24 is typed, in bold, the following—

"**Claim that due contractual benefits have been denied**

(if no claim go to next section)"

13 The question to be answered at this point is whether the application before the Commission includes a claim of harsh, oppressive or unfair dismissal pursuant to s.29(1)(b)(i). The parties have made written submissions on that question, and those submissions are noted. It is true that the applicant in completing the Form 1 has not identified the nature of the claim by any particular marking of the Form, in that he has not circled nor struck out nor in any other way indicated the nature of the claim he wishes to pursue. The Form 1, therefore, does not demonstrate whether the grounds on which the application was made relate to either or both of a claim of harsh, oppressive or unfair dismissal, and denied contractual benefits. As the Form 1 specifies "and/or", one might assume that the applicant would indicate the nature of the grounds by striking through one or the other or circling one or the other of the options provided. In this case, the lack of such indication leaves the nature of the claim unclear.

14 However, clarity can be sought by reference to the Particulars of Claim. The Particulars of Claim must have some standing where the applicant failed to clarify in the Form 1 the nature of his claim. Whilst it is appreciated that the applicant may have been unrepresented at the time of completing the Form 1 and the Particulars of Claim, the form itself and the Particulars of Claim are not so complex or uncertain in their structure to cause such confusion that one could not ascertain on their face which sections of them would be expected to be completed if one were claiming harsh, oppressive or unfair dismissal and which were to be completed if the claim related to denied contractual benefits.

15 In this case, I am satisfied that the Commission ought have recourse to the Particulars of Claim to give some clarity to the Form 1. The Particulars of Claim give no indication that the applicant alleges that his dismissal was harsh, oppressive or unfair. That section of the Particulars of Claim has been left blank. Bearing in mind the notation at the top of page 3, and the direction in the margin "if no claim go to question 24", it is clear that the applicant did not by this application allege harsh, oppressive or unfair dismissal. By not answering any questions in this section, he has demonstrated that there was no claim in respect of harsh, oppressive or unfair dismissal.

16 On the other hand he has completed in clear, neat handwriting, a claim of denied contractual benefits, identifying the sum of money said to be denied, and the basis of each amount claimed.

17 On the basis of the application completed and filed and now before the Commission, and having taken account of the parties' submissions, I find that the nature of the claim is for denied contractual benefits pursuant to s.29(1)(b)(ii) and does not raise a claim of harsh, oppressive or unfair dismissal pursuant to s.29(1)(b)(i).

18 Two other issues have been raised which warrant comment. They are the terms contained on the Notice of Hearing and the conduct of the parties. Neither of these can be used in determining the nature of the claim filed by the applicant. The Notice of Hearing is of no assistance as it was prepared by the Commission without this particular issue having been formally raised for consideration. The Commission in preparing its notices has made an assumption based upon its perusal of the application and this of itself does not constitute any concluded view of the application. As to the question of the conduct of the parties, the Notice of Answer and Counter Proposal is of no assistance as it is a document prepared by the respondent to answer the application. It is the application itself which is to be the source for determining what the applicant claims before the Commission.

19 I conclude from the manner in which the applicant has completed the Form 1 and the Particulars of his claim that his claim is in accordance with s.29(1)(b)(ii) only.

2002 WAIRC 05755

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ANTHONY ALBERT BISHOP, APPLICANT
	v.
	PIXEN PTY LTD T/AS MEGABUS, RESPONDENT
CORAM	COMMISSIONER P E SCOTT
DATE	MONDAY, 17 JUNE 2002
FILE NO.	APPLICATION 1959 OF 2001
CITATION NO.	2002 WAIRC 05755

Result	Application for contractual benefits partially allowed
Representation	
Applicant	Mr K Trainer
Respondent	Mr E Rea

Extempore

Reasons for Decision

1 This is an application pursuant to section 29(1)(b)(ii) of the Industrial Relations Act 1979, in which the applicant claims denied contractual benefits. The terms of the application as to what is sought have been amended today in respect of the notice period. The applicant seeks a reasonable notice period of 2 months, and he also seeks the reinstatement of annual leave loading for the period of annual leave he took immediately prior to the cessation of his employment, which was deducted on termination.

2 I have heard the evidence of the applicant and of Mr Allan John Holst. Having observed the witnesses I accept the applicant's evidence and Mr Holst's evidence. They each gave evidence in a frank and forthright manner and I have no reason to doubt their evidence insofar as they were able to give it.

3 The applicant's employment with the respondent commenced in excess of 11 years ago and he was engaged in a position which has been variously described, but one which was clearly associated with technical responsibilities, mainly involving computer hardware. He has described himself as a senior technician and as a senior engineer with no formal qualifications but with substantial experience and training in respect of the work that he has undertaken.

4 The evidence is that there was no written contract between the parties at the time the employment commenced nor was there a written contract at any time subsequently. The evidence is that with the exception of a matter with which I shall deal later in these reasons, there was no verbal general contract between the parties, either at engagement or at any other time.

5 As to the notice period, although I have noted that there was no verbal contract between the parties, or no terms verbally agreed generally between the parties, the applicant has given evidence that approximately 8 months prior to the termination of his employment, following a heated exchange between himself and Mr Holst, it was agreed between them that there would be a period of 4 weeks' notice on either side.

6 The applicant has given evidence, and it is not contested, that on 26 September 2001, being a Wednesday, two days prior to the applicant proceeding on a period of 2 weeks' annual leave from 28 September 2001, that period of annual leave having previously been authorised and arrangements made for the applicant to go on leave, Mr Holst informed the applicant that he was to be dismissed and was given 4 weeks' notice.

7 The applicant proceeded on leave at the end of 28 September 2001, and returned to the workplace on 16 October 2001, the day he was due to return. Immediately upon attending for work he was told that he was to be dismissed then and he was paid 2 weeks' pay in lieu of notice at that point.

8 The applicant claims that he is entitled to reasonable notice on the basis that there was no agreed term of notice. However, I conclude that there was agreement some 8 months prior to the termination of employment that 4 weeks' notice on either side was applicable.

9 The applicant was given in total 4 weeks' and 2 days' notice. Two days prior to going on leave he received notice of 4 weeks and then at the termination of his employment after being on leave for 2 weeks he received 2 weeks' pay in lieu of notice.

10 However, annual leave and notice periods are separate entitlements and are not able to be run concurrently. The applicant is entitled to both the 4 weeks' notice and the annual leave which he took. Therefore, the difference between the period of notice given and the 4 weeks due to the applicant as notice is applicable. He received 2 weeks' pay in lieu of notice and had 2 days' notice during which he worked. Therefore, I find that the applicant is due 1 week and 3 days' notice at the rate of pay of $865.38 per week.

11 In these circumstances, of there having been a term of the contract for notice, there is no need to deal with the question of implying a term of reasonable notice into the contract.

12 As to the question of the annual leave loading claimed, there is no evidence of a contractual term which would entitle the applicant to annual leave loading. However, there is evidence both from the applicant and Mr Holst that there was a practice of paying annual leave loading when the applicant proceeded on approved annual leave.

13 The claim for annual leave loading is for the amount paid to the applicant immediately prior to him proceeding on annual leave, which was prior to the date of termination, but while he was under notice. The amount was $292.38. This was subsequently deducted from his termination pay.

14 This is not an annual leave loading associated with annual leave paid out on termination but is annual leave loading which was attributable to the period of annual leave taken and in fact was paid prior to the annual leave being taken.

15 I acknowledge the evidence of Mr Holst that annual leave loading is not payable on termination, and that the reason that it was paid to the applicant was that the person who organises the pays had not been instructed by him not to pay it prior to the applicant proceeding on annual leave. However, it is clear that the annual leave was approved and was taken during the course of employment. This was not annual leave loading relating to annual leave paid out on termination. The parties anticipated that the applicant would proceed on annual leave and he did so during the course of his employment and immediately prior to the end of that employment.

16 Under the normal practice that was applicable to the applicant's employment, the applicant was entitled to the annual leave loading, although Mr Holst says that allowing the applicant to take annual leave already booked was a concession after having given the applicant notice. The fact is that this was approved leave taken prior to termination and the practice was that there would be annual leave loading paid for leave taken.

17 Accordingly, I find that the applicant is entitled to the annual leave loading previously paid but subsequently deducted. In any event, there is no power on the part of the employer to deduct without authority the amount already paid.

18 In all of these circumstances, then, I conclude that the applicant is entitled to be paid the annual leave loading deducted from his final pay, being $292.38, and an amount of 1 week and 3 days' pay in lieu of notice calculated at the rate of $865.38.

19 Minutes of proposed order will issue.

2002 WAIRC 05773

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ANTHONY ALBERT BISHOP, APPLICANT
	v.
	PIXEN PTY LTD T/AS MEGABUS, RESPONDENT
CORAM	COMMISSIONER P E SCOTT
DATE OF ORDER	WEDNESDAY, 19 JUNE 2002
FILE NO.	APPLICATION 1959 OF 2001
CITATION NO.	2002 WAIRC 05773

Result Application for contractual benefits partially allowed

Order

HAVING heard Mr K Trainer on behalf of the applicant and Mr E Rea on behalf of the respondent, the Commission, pursuant to the powers conferred under the Industrial Relations Act 1979, hereby orders that—

1. THE respondent pay to the applicant—
   (a) the amount of $292.38 being for annual leave loading; and

(b) the amount of $1,384.60 being for pay in lieu of notice of 1 week and 3 days, calculated at the rate of $865.38 per week.

2. THE amounts set out in Order 1. shall be paid within 7 days of the date of this Order.

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

2002 WAIRC 05592

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	STACEY SHARON BOOTH, APPLICANT
	v.
	NGARINGGA NGURRA ABORIGINAL CORPORATION, RESPONDENT
CORAM	COMMISSIONER J H SMITH
DELIVERED	FRIDAY, 17 MAY 2002
FILE NO.	APPLICATION 1570 OF 2001
CITATION NO.	2002 WAIRC 05592

Result	Applicant unfairly, harshly and oppressively dismissed. Orders made the Applicant be paid $9,000.00 as compensation for injury and $4,127.50 as contractual benefits.
Representation	
Applicant	Mr D E Booth (as Agent)
Respondent	Mr P G Robertson (as Agent)

Reasons for Decision

1 Stacey Sharon Booth ("the Applicant") made an application under s.29(1)(b)(i) of the *Industrial Relations Act 1979* ("the Act") on 30 August 2001 claiming that she was harshly, oppressively and unfairly dismissed by Ngaringga Ngurra Aboriginal Corporation ("the Respondent") on 29 August 2001.

2 The Applicant also makes a claim under s.29(1)(b)(ii) of the Act, that she has been denied benefits to which she was entitled under her contract of employment (not being a benefit under an award or order), in that she was entitled to be paid the following sums of money—

(a) Wages from 28 May 2001 until 29 August 2001 at $600.00 per fortnight grossed up to $1,165.02 per fortnight, for 13.2 weeks pay plus two weeks' pay in lieu of notice at $582.51 per week, being a total of $8, 854.15.

(b) Claim for disbursements at $15.00 per fortnight from 1 April 2000 to 29 August 2001, being 73 weeks or 36.5 fortnights at $15.00 = $547.50, less $220.00 paid to the Applicant, being a total of $327.50.

(c) $2,141.97 being pay in lieu of accrued annual leave.

(d) $1,883.61 as superannuation, pursuant to the provisions of the *Superannuation Guarantee Charge Act 1992* and the *Superannuation Guarantee (Administration) Act 1992* ("the Superannuation Acts").

3 In respect of her claim for unfair dismissal the Applicant claims that she should be awarded the maximum amount of six months' salary as compensation, assessed at $582.51 per week, being a total of $15,145.26.

4 The Applicant is a qualified Chartered Accountant. She says she was employed by the Respondent, a non-profit organisation as a bookkeeper/accountant. She says she was harshly, oppressively and unfairly dismissed by the Respondent following false complaints to the police including a complaint that she had stolen funds from the Respondent in relation to a cheque cashed by her for repairs to her laptop computer. The cheque was made out as payable to Computer Corp. The police executed a search warrant on the Applicant's premises on 1 June 2001. A few days later the police advised the Applicant that no charges would be laid and the police investigation was closed. When the police executed a search warrant the Applicant was suspended. Following the police investigation the Applicant continued to be suspended whilst the Department of Family and Children's Services conducted an audit of the Respondent's books. Shortly prior to the audit being completed the Applicant says that the Respondent terminated her employment as the Chairperson of the Respondent, Mrs Sandra Butters, advised her that "it was best she did not work for them any longer as one of the managers did not like her."

Issues in Dispute

5 The Respondent says that the Commission has no jurisdiction to deal with the Applicant's claims as it did not employ the Applicant, that at all material times the Applicant was engaged as a contractor.

6 The Respondent says that even if the Applicant was engaged as an employee that the Applicant's employment was not terminated by the Respondent. The Respondent contends that the Applicant was suspended in June 2001 pending the completion and preparation of an audit report. The Respondent says that the audit report was not completed until a date in early September 2001. The Respondent says the Applicant "jumped the gun" and repudiated her contract of employment by filing an application for unfair dismissal in the Commission on 30 August 2001 in which she stated that she is not seeking reinstatement as there is no viable working relationship between herself and one of the Respondent's managers, and the Area Manager of the Respondent's funding body (the Department of Family and Children's Services).

7 Alternatively, the Respondent says that if the Commission finds that the Applicant's employment was terminated by the Respondent, the Respondent has not exercised its legal right to dismiss the Applicant in such a way that was harsh or oppressive so as to amount to an abuse of its right to dismiss, in that the Applicant's conduct in respect of the Computer Corp payment, justified her termination. The Respondent concedes, however, that if the Commission makes a finding that the Applicant was unfairly dismissed the Commission should find that the Applicant should have been paid two weeks' pay in lieu of notice.

The Applicant's Evidence

8 The Applicant testified that she is currently employed by her father, who owns Thomas Supamart supermarket ("the Supamart") in Halls Creek. The name of the business is "Westcoast Sports". She said that her family has run the Supamart for 45 years. When she first left school she attended Curtin University and completed a double major in accounting and business law and also completed a management degree. She returned to Halls Creek after she left university and that while she was there she was employed by the Ngoonjuwah Aboriginal Corporation as their Assistant Accountant. She also did some work for Waringarri Corporation as an Assistant Accountant. She carried out the work as a contractor under the name "Northwest Accounting Services".

9 In October 1994 the Applicant was engaged to carry out the Respondent's bookkeeping. She said that she was then working in Kununurra so she agreed to do the bookkeeping for them as a contractor. She did their bookkeeping work for them until 1996 when she returned to Perth. She then worked as an accountant for an accounting firm in Perth.

10 In September 1999 the Applicant returned to Halls Creek to help her father with the implementation of GST at the Supamart. She said she only intended to stay in Halls Creek for a 12 month period as her father was intending to sell the Supamart. At that time she had not married. Her name was then Stacey Thomas. The Applicant said that after she returned to Halls Creek, the then Chairperson of the Respondent, Ms Pearl Gordon, approached her and told her that the Respondent's Co-ordinator, Ms Karen Wright, wanted to speak to her about doing the bookkeeping. She said she had never met Ms Wright before. She spoke to Ms Wright and Ms Wright asked her to prepare a quote for the bookkeeping. It is common ground that at that time the Respondent's bookkeeping was being carried out by Lawson's Commercial Services which was located in Perth. Because they were not located in Halls Creek there were a number of difficulties in providing services to the Respondent and the Respondent found the cost of the service provided by Lawson's Commercial Services to be very expensive.

11 The Applicant said that she prepared a draft quote on her computer. She says the draft was prepared in January 2000. In the draft she stated "I would be happy to undertake the position commencing 01-03-2000 on the following terms". The draft then set out a number of terms including proposed weekly hours as follows:

> "Ngaringga Ngurra Administration 4-5 hours
>
> Halls Creek Safe House 4-5 hours
>
> I will be given a key to the Administration and Safe House office so that I can easily access information when it is required.
>
> If the Committee is satisfied with the above I will perform the services for a fee of—
>
> Ngaringga Ngurra Administration $150/week
>
> Halls Creek Safe House $150/week"

12 The Applicant said she did not provide the draft quote to Ms Wright because she did not wish to work for the Respondent as a contractor. She said she spoke to Ms Wright and said that she would be prepared to do the bookkeeping for $600.00 per fortnight on a salary sacrifice arrangement. A salary sacrifice arrangement is where an employee agrees to receive part or, in the case of the Applicant, almost all of her remuneration as benefits. She said that Ms Wright wanted to bring down the costs of the bookkeeping services and that the Applicant wanted to receive what she felt was a fair amount of remuneration. She said they discussed the fact that she wanted to be paid $300 per week which equated to $15,600.00 per year for the bookkeeping work, which was significantly less than the amount of $27,000.00 which had been paid to Lawson's Commercial Services by the Respondent in the previous year.

13 The Applicant produced in evidence a copy of the draft quote. She said the copy produced was obtained as a result of a request under the *Freedom of Information Act 1992* to the Department of Community Development. The document was tendered as Exhibit 1 and is dated 17 September 2001. The Applicant says that this document is dated 17 September 2001 as it was printed from her computer records that were seized by the police in June 2001. The Applicant says that the form of the quote was a proforma she used for contract work.

14 The Applicant said that after she spoke to Ms Wright, Ms Wright informed her that the Committee had changed their mind and they did not wish to engage the Applicant to do the bookkeeping. She said that occurred in mid-February 2000. She said that several weeks later she had some further discussions with Ms Wright and came back and forth saying "we do want you", "we don't want you".

15 The Applicant testified that late in March 2000, Ms Wright came into the Supamart in a panic. The Applicant said Ms Wright had informed her that funding had been cut off by the Department of Family and Children's Services and that Lawson's were not going to provide the books until they had been paid. The Applicant said that Ms Wright asked her to contact Family and Children's Services to arrange to get the books back from Lawson's. The Applicant said she did this and that Ms Wright made it very plain to her that the Respondent wanted her to commence the bookkeeping work.

16 The Applicant said no written agreement was entered into but that she made it very plain to Ms Wright that she would not work for the Respondent unless she could be remunerated by taking advantage of a salary sacrifice arrangement.

17 The Applicant said that the books came up from Perth and there was extensive work to be done. She said the MYOB file and the payroll did not balance, group certificates were due and audit preparation work was required. She also said she also had to assist in the preparation of grant submissions. One was for a Lotteries or ATSIC grant for computing equipment. Another was for domestic violence. She said she worked all weekend preparing the necessary documents for the grants. The Applicant said she wanted to work at the Respondent's office but that she would be unable to do so during working hours as she was working at the Supamart between 9.00 and 5.00 each day. She said that Ms Wright had said she would organise a key for her but that did not eventuate. She said Ms Wright later informed her that they did not want her working in the office. The Applicant said she agreed to carry out the work from her premises because Ms Wright informed her that the office was too small and they did not have any facilities. I understand what she meant by "facilities" is that there was no computer that the Applicant could use at the Respondent's office.

18 The Applicant said that the terms of her engagement were such that she would always be paid $600.00 per fortnight except if there was some abnormal overtime to be carried out, which was in relation to audit matters or one-off matters. She said that she negotiated with Ms Wright to work 8 – 10 hours a week and that was the basis on which she agreed to work for $300.00 per week. She said that she prepared all of the wages each week and they were prepared on a wages cheque requisition form. She said as with all other employees of the Respondent, her wages were prepared by generating a wages cheque requisition form each fortnight. The Applicant said that different requisition forms were used for payments of invoices (accounts). She said she did not fill out a time sheet because the agreement was that she would be paid $600.00 each fortnight except when she worked abnormal overtime. She said that if she ever prepared any correspondence for the Respondent whilst she was engaged by them, she used their letterhead and this was different to when she had worked as a contractor for the

Respondent in 1994 to 1996. She said when she worked as a contractor, if she sent any correspondence on behalf of the Respondent she sent it on her own letterhead namely, "Northwest Accounting Services".

19 The Applicant said that when she was working at the Supamart during the day she had to cover the till so she could not leave the Supamart. Consequently if any of the Respondent's employees had any issues that they needed to be dealt with by her they came across to the shop. She said it got to the point where her customers were complaining and her store manager was complaining that the store was suffering. She raised the issue with Ms Wright and on 5 January 2001 Ms Wright wrote a memo to the Respondent's staff members saying—

> "Stacey has brought to my notice that Staff are going direct to her. If staff have any issues they are to raise these with the Manager who in turn will notify myself and I will raise the issue with the Bookkeeper during the time allocated for the services of Ngaringga Ngurra. The Bookkeeper is not employed full time with Ngaringga Ngurra. It would be appreciated that Staff of Ngaringga Ngurra do not approach the Bookkeeper direct."

20 The Applicant said that she took direction from Ms Wright but she also took some limited direction from the Safe House Manager, Ms Jennifer Heritage. She said she also took some direction from Ms Sandra Butters who became the Chairperson of the Respondent in early 2001.

21 The Applicant testified that she took leave on a number of occasions over the first twelve months of her employment. In July and August 2000, she went to the Greek Islands. She said she spoke to Ms Wright prior to making the decision to go and arranged to take unpaid leave, as she had not yet worked twelve months for the Respondent. She said she requested permission from Ms Wright to go and that she (Ms Wright) gave her permission. She conceded that she did not fill out any written application for leave.

22 One of the principal issues in dispute in this matter is the basis of the salary sacrifice arrangement participated in by the Applicant and other persons engaged by the corporation. It is maintained by the Respondent that Ms Wright and Ms Butters (as the Chairperson) did not understand how salary sacrificing worked. The Applicant testified that she salary sacrificed her entire salary. She said she discussed this with members of the Australian Taxation Office (ATO) at a meeting with Mr Sam Soliman and Mr Don Maclean at the Respondent's office on 31 May 2000. The Applicant said that Ms Wright was present at this meeting and that they spoke about the allowability of a 100% salary sacrifice arrangement. She said she specifically asked Mr Soliman whether it was allowable to salary sacrifice to 100%. She said that Mr Soliman informed her—

> "In the tax legislation there is nothing that specifically states the percentage of your salary that can be salary sacrificed, however, the notes to the Tax Act and the Commissioner's discussion papers state that an amount of 30% would be considered an appropriate amount or a usual amount."

She said she then said to Mr Soliman "is that the amount you can go to?" and he said "No, well, technically not. The limits for a benevolent institution is $17,000 per year grossed up", which became roughly $30,000 per annum. He then told her that there was nothing in the Tax Act that says you cannot salary sacrifice 100% providing you stay under the $17,000 limit per year. The Applicant produced in evidence a copy of a letter from Mr Soliman dated 19 February 2002. In that letter Mr Soliman states that he confirmed that he attended a meeting at the Respondent's office on 31 May 2000. He said that also present at that meeting was the Applicant, Mr Don Maclean and Ms Wright. That letter stated—

> "As part of any indigenous advisory visit at that time we were discussing proposed changes to Fringe Benefits Tax legislation and the effects it may have on Public Benevolent Institutions who used salary sacrifice for its staff."

23 The Applicant testified that Ms Wright, after that meeting, became interested in salary sacrifice arrangements and Ms Wright, herself, entered into a salary sacrifice arrangement some time in late August, early September 2000. The Applicant said that she believed that superannuation was not payable on salary sacrifice amounts. She said, however, she later received conflicting advice from the auditor and the ATO in relation to that issue, but at the time in which she entered into a salary sacrifice arrangement, she believed there would be a saving to the Respondent in superannuation payments.

24 The Applicant said that shortly after Ms Heritage was appointed as Safe House Manager, Ms Wright advised her (the Applicant) she was owed a pay rise. Ms Heritage was engaged to be paid $38,000 per annum and Ms Wright was at that time being paid $37,500 per annum. The Applicant said that she sat down with Ms Wright and they worked out she was owed back pay to bring her up to an amount of $40,000 per annum.

25 The Applicant said that when she prepared the wage requisitions, she would make a note on the wage requisitions to indicate the salary sacrifice amounts, whether it was for her or other people employed by the Respondent. She produced a number of wage requisitions. One requisition was for 21 February 2001. On it was noted the amount of $600.00 as paid to Janine Fullerton with a notation "S/S, SB" meaning "salary sacrifice, Stacey Booth". On that form, as with all other wages requisitions, there are signatures of two Committee members indicating by whom the payment has been authorised. Further, the person who prepared the cheque requisitions also signed the forms. During the currency of the Applicant's employment usually the Applicant or Ms Wright signed the forms as the person who prepared the cheques.

26 During the Applicant's engagement a number of issues arose in relation to salary sacrificing. The Applicant said that her relationship with Ms Wright broke down following a dispute that she (the Applicant) had with Ms Wright's son. The Applicant said that in July 2000 Ms Wright's son came to Halls Creek. He was a computer technician and he came to install computers at the Respondent's business. She said that Ms Wright asked her to employ her son. The Applicant said she did so and that just before Christmas 2000 she went to Broome for a week, to be married. Whilst she was away there were problems with Ms Wright's son, which led to his termination of employment from the Supamart. The Applicant said after he was terminated there was an altercation in the Supamart, during which he threatened to ruin the Applicant personally and professionally. Subsequent to this Ms Wright contacted her and shouted at her about the incident. She said that Ms Wright came to the shop, closed her account and informed the Applicant "I am never coming back in here again".

27 Prior to that time, Ms Wright and her son had requested that the Applicant loan her son $500.00 so that he could buy his child some clothes. Ms Wright, along with most other employees of the Respondent who salary sacrificed, had accounts at the Applicant's store which were paid through the salary sacrifice system. In early January 2001 the Applicant said that she told Ms Wright's son that she needed to get the $500.00 back and that he said to her "Oh, I have spoken to Mum about it. Take it out of Mum's wages so she gets the salary sacrifice benefit. I am doing some work on the photocopier up at the post office and at the pub and I am getting more than $500.00 for that. I will reimburse Mum for the cash when she gets back to town." The Applicant then made the deduction from Ms Wright's pay. Ms Wright at that time was in Katherine in the Northern Territory. Shortly thereafter Ms Wright telephoned the Applicant from Katherine to query why her pay was so short and the Applicant informed her that she had taken out $500.00 for her son's loan and Ms Wright said to her "What did you do that for?" and the Applicant replied "Well, I thought Daniel had arranged it with you. He's going to give you the cash when he gets back to town." She said that Ms Wright informed her that she needed the money to buy an air ticket so the Applicant said that this was not a problem, that she would deposit the money into her bank account by electronic transfer in the morning. The Applicant said she arranged for that to be done by 9.30am the next morning. She said that around that time an issue arose in

relation to purchase order books that Ms Jennifer Heritage, the manager of the Safe House, wanted to have her own purchase order book. The Applicant wrote a memorandum to the Committee on 12 January 2001 advising the Chairperson, Ms Butters, that there was to be a new bank account established solely for the Safe House and that Ms Heritage was to have her own Safe House purchase order book and Safe House cheque book. Further, that there would be a separate purchase order book and cheque book for the Family Centre, which was run by Ms Wright. In that memorandum the Applicant stated that she confirmed that she was answerable directly to the Committee and so too was Ms Heritage and Ms Wright. The Applicant then left Halls Creek for a short period in January 2001. In that memo the Applicant also confirmed that it was an instruction of the Committee, at the new committee meeting in January 2001, that she was to provide the Committee, for Committee discussion and approval, full wage details of the Respondent's staff upon her return.

28 On her return the Applicant prepared a memorandum for the Committee on 7 February 2001. In that memorandum she set out the salaries for Ms Wright, Ms Heritage, Ms Rose Stretch, the rate paid to Safe House workers and the rate paid to her (the Accountant). As to Ms Wright, the Applicant noted that Ms Wright had received a pay rise, effective from 4 October 2000. As to the Accountant's wage, she noted the amount paid was $300.00 per week, with an hourly rate of $35.00. Also in the note of 12 February 2001 the Applicant advised the Committee that she had made a number of requests to Ms Wright that she provide cheque books, purchase books and invoices for past periods, so she could prepare those documents for the Respondent's auditor and she asked for the Committee to advise Ms Wright that the documents were needed as the auditors were arriving in Halls Creek on 21 February 2001. It is common ground that at that particular point in time that the Applicant and Ms Wright were not directly communicating with each other.

29 The Applicant said that she attended a Committee meeting in February 2001 to explain to the Committee that she was very concerned as it was her view that there were not enough funds available for it to run the Safe House and Family Centre until 30 June 2001. She said that Ms Heritage had raised an issue in relation to Ms Wright's son, in particular she was concerned that he had been paid for five hours work at $70.00 per hour when he had only done $2^1/_2$ hours work and that she (the Applicant) had not seen the invoices. The Applicant said Ms Heritage asked the Applicant to raise this at the Committee meeting. The Applicant said she did so and the Committee members indicated to her that they would investigate this issue. She said she then spent some $1^1/_2$ hours explaining the accounts. In particular, she went through printouts of the accounts, explaining items and accounting for her wages and explained the salary sacrifice arrangements. She said Ms Wright was not at the meeting at the same time as she was there, however, she may have attended the meeting when the Applicant was not present. She said she thought that meeting took place on 13 February 2001. Minutes of the Committee meeting for 13 February 2001 were produced. Those minutes do not indicate that the Applicant attended that meeting or spoke about the issues raised by her in her evidence. However, Ms Butters testified that the Applicant did attend a Committee meeting in February 2001. She said that this was the only meeting that the Applicant had ever attended whilst she (Ms Butters) was Chairperson.

30 The Applicant said that about two weeks after the February Committee meeting she received a phone call from Mr Damien Miles, Area Manager of the Department of Family and Children's Services at Halls Creek. She said that he advised her that Ms Wright had requested a mediation session and that she (the Applicant) was to attend. She said she was told she had to attend at lunch time and that although she had other obligations at that time she complied. She said the mediation meeting lasted over three hours, in two sittings. She said a number of issues were discussed, including Ms Wright's time sheets and the fact that supervisors needed to sign off time sheets. She said that at the last mediation meeting Ms Wright informed her that she (Ms Wright) had written a letter to the Institute of Chartered Accountants complaining about the negligent way she (the Applicant) was doing the bookkeeping. The Applicant produced a copy of a letter from Ms Wright to the Institute of Chartered Accountants, dated 23 February 2001, in which Ms Wright made a complaint about "… the professional practice of Stacey Thomas who is engaged by the Ngaringga Ngurra Aboriginal Corporation as our Bookkeeper. This is a personal complaint by me, as that organisation's Coordinator, and relates to the way in which my own pay is handled." In that letter Ms Wright made a complaint that the Applicant had used her pay to pay off a private bill which belonged to her son and made an unexplained deposit of $500.00 in her (Ms Wright's) account which equalled the missing pay.

31 The Applicant said that at that meeting Ms Wright offered to retract the letter if she (the Applicant) provided her (Ms Wright) with a letter of apology. The Applicant said that she refused to provide Ms Wright with a letter of apology because she thought it would be used in the town to make it appear that she had done something wrong. She said that she had not done anything wrong, although she conceded she had made an error of judgment. She maintained, however, that as soon as she was advised of the error in her judgment she had immediately rectified it.

32 Following the mediation, both the Applicant and Ms Wright received a letter from Ms Butters. Both of those letters were identical. The letter to the Applicant stated as follows—

> "It has come to the attention of Ngarringa Ngurra Management Committee that there may be conflictual issues regarding your work, and other staff member's. These issues are a concern to Ngarringa Ngurra Management Committee, therefore we wish that you could resolve your differences by meeting as individuals to discuss these issues. The Ngarringa Ngurra Management Committee wishes to see that you work professionally, and communicate with all relevant staff directly whilst you are employed by Ngarringa Ngurra Aboriginal Corporation.
>
> Ngarringa Ngurra Management Committee hope that this matter can be resolved in a professional, and supportive manner. If you have any further issues please do not hesitate to contact me, or any other members of the committee."

33 The Applicant testified that she spoke to Ms Butters about the letter and the conflict with Ms Wright and that Ms Butters said that she could not help her (the Applicant) because she worked for the TAFE College, which is run by Ms Wright's husband. She said that Ms Butters informed her that she could not be seen to be doing anything against Ms Wright. The Applicant said she later received a further letter from the Respondent, addressed to her personally, in which she was informed "The Management Committee is currently revising contracts for employment. Could you please provide a copy of your duty statement to the Committee." The Applicant said she did not have a copy of her letter because it was seized by the police and that document has not been returned to her.

34 The Respondent's Committee meeting minutes dated 15 March 2001 record that "Damien Miles (FCS) spoke about mediation between Karen Wright and Stacey Thomas. Committee decision was to write letters to all staff of Ngarringa Ngurra regarding their positions and roles and responsibilities within the organisation which will be salaries, hours, job description, etc."

35 The Applicant was required to formally respond to the Institute of Chartered Accountants in respect of the complaint. On 9 April 2001 Ms Heritage as Manager of the Safe House wrote a memorandum that was provided to the Institute. In the memorandum Ms Heritage stated that there were 10 staff employed at the Safe House whose wages were prepared by the Applicant. She also stated that to her (Ms Heritage's) knowledge all are more than satisfied with the Applicant as accountant and the majority of staff untilize salary sacrifice through the Applicant. On 16 May 2001 the Applicant was advised that in relation to the complaint made by Ms Wright, the Institute's decision was that there were no grounds for any disciplinary action and the file had been closed.

36 The Applicant testified that after the mediation Ms Wright refused to communicate with her or answer her request for copies of documents for the audit. She said she was having difficulty being able to reconcile MYOB because she was not getting bank statements. She said Ms Wright was the only person with a key to the Respondent's post office box and she would not provide her (the Applicant) with any information. In a memo to the Committee, addressed to Ms Butters on 20 March 2001 the Applicant outlined a number of issues which were of concern to her, in particular, she stated—

> "Sandra,
>
> The following things are of great concern to me—
>
> 1. I am unable to submit the BAS for February which is due tomorrow until I receive from Karen the Bank Statement for the period 1/2/01 – 1/3/01.
>
> The bank has advised me that it was posted to her 2/2/01.
>
> 2. I had detailed discussions with Leon Steilow yesterday.
>
> Leon faxed Karen the draft financial statements that she advise(sic) him she would forward onto me immediately to examine. She didn't do this, instead she forwarded them directly to Damien at DFCS without my knowledge that they had been received.
>
> Leon also stated that he had given Karen questions to forward to me re the Audit, yet I have not received anything from her.
>
> In light of these events I have now arrange(sic) with Leon that he is to contact me directly. I had not done this in the past as I believed that Karen would pass on any information to me. Leon stated that in fact Karen had actually told him that as she was the "Administrator" of Ngaringga Ngurra all correspondence had to go through her.
>
> Sandra, I just don't understand Karen realised how bad it looked for Ngaringga Ngurra when Damien rang me to discuss the Financial Statements and I hadn't seen them. We are trying to give DFCS the impression that things are running smoothly and efficiently, and when events like that happen it shows that in fact they are not. It also looked extremely bad to the Auditor who had relied on Karen.
>
> 3. I have not received any mail correspondence from Karen for the past 3 weeks. I am unable to process invoices and unable to process payments, because of this I am unable to provide Jennifer with the monthly budget.
>
> Karen had advised in the mediation with DFCS that she would put her personal feelings aside and perform her job as Family Centre Manager in an efficient and cooperative manner. She is not doing this and is acting in a manner that is seriously jeopardising the future of the Family Centre.
>
> I have no hesitation in stating that it is my opinion that DFCS are very close to taking the Family Centre funding off Ngaringga Ngurra and that if Karen does not start acting responsibly DFCS will not renew our funding next financial year.
>
> I am unable to do or say anything that will make Karen act differently and therefore I write this memo to you. It is extremely important that something is done immediately."

37 The Applicant testified that despite the memo she sent to the Committee on 20 March 2001 Ms Wright kept saying that she could not get the information, that it was not there. The Applicant said that the Family and Children's Services Department informed her that the Respondent owed some $60,000 in surplus funds and in order to resolve this issue the Applicant needed the information to prepare the 1998 – 1999 Audits.

38 The Applicant wrote a further memo to the Committee on 17 May 2001 headed "Points to discuss at GM" In that memo she raised a number of issues, including the following—

> "1. Last year's audit. Note: importance of Member's fund deficit.
>
> 2. Documentation still not received from KW to allow preparation of 1998 and 1999 re audits. Direction received from DFCS 2/3/01. Stress urgency of committee to get KW to provide these documents. If not provided corporation required to pay DFCS approx. $60,000 which will cause the corporation to go bankrupt.
>
> 3. Current year's financials. Crisis still to receive 1 QTR. Cash award prorated. Family and Poverty have NO funds left. Advise that they should cease operation until 30/06/01. Still need to bring to account employee AL accrual expense. Have removed all accounting costs and put to Crisis. Will have to put all audit costs to Crisis. Advise committee of importance to advise KW that absolutely NO expenditure to 30/6/01.
>
> …
>
> 7. KW is giving me statements without attached invoices (ie till receipts for Corner store, Supavalu, Buckaroo clothing) to pay. Should not pay without receipts. Advise committee of importance to advise KW to ensure that all receipts AND Blue POs are attached to statements given to me."

39 The Applicant also produced a memorandum she sent by facsimile to Ms Wright requesting records for the financial year 1998/1999. At that time, Ms Wright had requested the paid invoices file from the Applicant. On 14 May 2001 Ms Wright wrote to the Applicant requesting that she (the Applicant) provide Rose with the paid invoice file. In a memo dated 15 May 2001 the Applicant indicated she would provide that file to Ms Wright on the following Thursday as the committee meeting had been moved back one day. On the same day the Applicant received a phone call from Damien Miles advising her that Ms Wright's pay increase, paid from October 2000 was unauthorised and that Ms Wright's salary should be reduced to the authorised salary limit. The Applicant then wrote a further memorandum to the Committee dated 15 May 2001 outlining her conversation with Mr Miles and attaching a reconciliation of wage adjustments, which indicated that Ms Wright had been overpaid an amount of $5,733.22.

40 The Applicant said that on 28 May 2001 Ms Heritage rang and said she needed the paid invoices file. She then came and picked up the file from the Applicant.

41 In March 2001 the Applicant sent her laptop computer to a company in Perth, Computer Corp, to repair the screen. The Applicant said that when she attended the mediation session with Mr Miles and Ms Wright she had taken the computer and files with her and that at the mediation they went through financial statements. She said that while she was at the mediation her computer screen received a crack in the right hand side which slowly got larger. On 23 March 2001 Computer Corp received her computer and provided her with an internal job card which indicated that the cost of the repairs would be about $2,500.00 including GST. The Applicant said that she spoke to Ms Butters about the Respondent paying for repairs to the computer. This conversation occurred when Ms Butters came into the Supamart. The Applicant said she told Ms Butters "My

computer's been damaged, Sandra. I've cracked the screen. I'm going to need a new screen. It's expensive." And Ms Butters said to her "How much was it?" and the Applicant said she told Ms Butters she did not know at that stage and asked, "Would it be okay to have it paid for?" and she (Ms Butters) said "Yes, it shouldn't be a problem."

42 The Applicant said she prepared a cheque requisition for payment to Computer Corp for the amount of $2,558.40 on 26 April 2001 and attached a cheque for that amount made out to Computer Corp and a copy of the internal job card, on which she had written the amounts of the original quote and an amount of $2,558.40. She said she put this invoice with a number of other invoices which were due and payable at that time. She said the invoices and cheques were sent to the Committee members for signing. The cheque requisition for Computer Corp indicates that a Ms Butters and Ms Rivers signed the cheque and the cheque requisition. The Applicant said that the cheque was sent to the Committee members about 1 May 2001. She rang and spoke to Computer Corp about picking up the computer. She said they were concerned that there would be a delay in getting the cheque to Perth, banked and cleared, so the Applicant decided that she would pay for the computer through her Visa. The cheque was not sent to Computer Corp.

43 In a memorandum from Mr Hadwin from Computer Corp it is recorded that the computer was expected to be completed by 3 May 2001 but on that date further delays caused the completion date to be revised to 14 May 2001. Delays then occurred again and eventually the parts were received on 22 May 2001. As the service was not completed until that day in compensation for a lengthy delay, the Applicant was granted a discount of $1,000 off the quoted price. Mr Hadwin said in the memorandum—

> "In accordance with the payment terms the account was required to be settled in full by cash prior to the release of the computer. After discussion with our Accounts Department it was determined that the preferred method of payment was visa, and Mrs Booth supplied her personal visa card details over the phone to cover the full cost of the computer repairs and courier fees to allow the computer to be released. In accordance with her instructions the computer was couriered on 22/5/01 to Mr Damien Miles in Midland."

44 Mr Hadwin also noted in his memo that the invoice for the cost of the computer repair was placed inside the side pocket of her computer carry case. That invoice records that the total cost of the job was $1,386.45. As the Applicant had already paid for the repairs with her Visa she deposited the cheque in her account.

45 The Applicant said that on Friday 1 June, 2001 she was upstairs at the Supamart and her store manager buzzed her on the intercom at 2.00pm and said "Stacey, the police are here." She was informed that they wanted to see her. She went downstairs and saw two police officers together with Mr Damien Miles.

46 The Applicant said that Mr Miles informed her that they had a search warrant to seize the Respondent's books as they had been informed by the Respondent that she had been stealing. She asked why they did not telephone her? Why did they get a search warrant? Why not ask her for the books? Mr Miles replied "We have reason to believe that you have been failing to hand the books across to Ngaringga Ngurra" to which the Applicant replied it was not true, that Ms Heritage had picked up the invoice files two or three days ago. She asked if the police could stay downstairs while Mr Miles went upstairs to her office. She said there were about five customers in the shop at the time and everyone was staring at her. She said she then went upstairs with Mr Miles and the police. They asked her about the Computer Corp cheque. She said she told them it was for a repair to her laptop computer. She was asked whether the cheque had been banked and she told them it had been banked into her bank account because she had paid for the repairs to the computer on her Visa card. She was asked who authorised the cheque and she told them Ms Butters.

47 The Applicant was formally cautioned by the police. She was also asked about a cheque for superannuation. The police then asked her for her details for her superannuation account and fund and she told them it was Allied Buck. She was then asked to give the Police copies of her personal bank records and Visa statements which she produced. The police then downloaded all of her financial records from the computer, including the files for the Respondent. She said Mr Miles told her she was on suspension, pending a full audit and that she was under criminal investigation.

48 The police left her premises. The Applicant said she was very concerned about the investigation. She had just put a deposit on a property and she was negotiating a loan with her bank. She said she was terrified because the police had told her her bank account was going to be audited and she thought this might affect her capacity to obtain a loan. She went to the Police Station. She told the Police she was four months pregnant. She asked questions about who was investigating her. She said she told the police about the incidents with Ms Wright's son and Ms Wright's complaints about her. The Applicant then wrote out a cheque payable to the Respondent for the difference between the amount of the Computer Corp cheque and the amount charged to her Visa.

49 On 14 June 2001 the police closed their investigation, having determined there was insufficient evidence. On 12 June 2001, the Applicant later obtained information through a Freedom of Information request about the police investigation. In the police running sheet for the Halls Creek Police Station it is recorded that a complaint was received in relation to the Applicant on 1 June 2001. The running sheet states that several allegations and discrepancies were raised, in particular, there was a complaint that the Applicant had ignored several requests to hand over documents. In the Offence Information System – Offence Report – under the heading "Narrative" the police have recorded the Applicant as the "POI"(person of interest) and stated—

> "POI is the bookkeeper for the complainant. During that last six months there have been reported discrepancies in the bookkeeping, accounts and superannuation management. POI has been paying herself different rates of pay and utilising complainant cheques to pay off bills directly avoiding tax."

In relation to the alleged offence, in an application for a search warrant it is recorded: "… there are reasonable grounds to believe the mentioned property located at Lot 93 Thomas Street, Halls Creek will afford evidence of the offence Stealing as a Servant and Fraud."

50 After the police completed their investigation all the records seized by them were handed to the Department of Family and Children's Services to conduct an audit. The Applicant says that she was informed initially by the police that the internal police were going to audit the books and then she was told that they would be audited by Family and Children's Services auditors. Then she was later told that there was to be an independent auditor appointed.

51 The Applicant said she went to see Ms Butters and she was told by her to "go away", that she (Ms Butters) could not talk to her. She said that no one who worked for the Respondent would speak to her or answer her telephone calls. The Applicant said she went to Darwin for a week and when she returned from Darwin she was very distressed. Her waters broke and she was flown to King Edward Memorial Hospital by Royal Flying Doctor and was on a drip for three and a half weeks. Her child was born stillborn. She said that whilst she was in hospital she kept calling a number of people at the Family and Children's Services Department as she was trying to find out when the audit was being conducted. She was informed that the audit had not started. She said she thought it was cruel to leave her sitting in hospital thinking she was under investigation and the audit had not commenced. She said that after she left hospital and after the funeral for her baby, she was able to find out the name

of the auditors who had been appointed. She went to their office on two occasions. On the second occasion she was able to speak to the auditor, Mr Toms. She said he explained to her that he had not received the files until late July 2001 and he would correspond with her. She testified that she advised him she was happy to assist in any way she could.

52 The Applicant said she returned to Halls Creek on 19 or 20 August 2001. She said she was very reclusive because of the rumours flying around the town about her. She then found out that the Respondent had appointed a new Bookkeeper, Mr Ken Olney.

53 The Applicant said she went to see Ms Butters at her office at the TAFE Centre about four times. She said she was told by Ms Butters that they would have a Committee meeting to talk about settling the issue with the Applicant. She went and saw Ms Butters and she informed her (the Applicant) "It's best you don't work for us any longer because one of the managers does not get on with you." The Applicant said she thought this conversation occurred on 29 August 2001. She said that this was the first time anyone had said anything to her about not doing anymore work for the Respondent. She said she then filed the application for unfair dismissal. She said that the auditor, Mr Toms, came and saw her in Halls Creek on 4 and 5 September 2001. She further said that she had not obtained a copy of Mr Tom's report despite making requests for it until shortly before the hearing of this matter.

54 In an internal audit review conducted by Mr Toms and Ms S Whittle dated 10 September 2001, Mr Toms recited the factual circumstances of the drawing of the cheques for Computer Corp. In the report he made a recommendation that all expenditure should be supported by an invoice or a receipt of payment. He however did not make any adverse comments in that report that the payment of the Applicant's computer repairs by the Respondent was unauthorised.

55 In cross-examination many questions were put to the Applicant in an attempt to establish that she was a contractor rather than an employee. Firstly, a number of payroll activity summary sheets from the Respondent's MYOB system were produced which listed all of the employees of the Respondent. The Applicant was not mentioned on the lists. She conceded she was responsible for imputing the information in the payroll summary sheet but said that because she was engaging in 100% salary sacrifice, she did not require a group certificate and it was from that list that the group certificates were generated. It was also put to her and conceded by her that the general ledger showed that payments to her were accounted for under a heading accounting or bookkeeping and not under the wages column. In response the Applicant said it was good accounting practice to keep the entirety of accounting costs as a one line expense. Accordingly, she coded her salary sacrifice payments under that heading. The Applicant conceded that she did not fill out any time sheets or leave applications. She did not work from the Respondent's premises yet she said she worked for other Aboriginal organisations and did so from their premises. She also conceded that she did the Respondent's work whenever she could fit it in with her full time work at the Supamart and her other part time bookkeeping positions.

56 As to annual leave the Applicant conceded that in July/August 2000 she was in Greece for four weeks. Further that she went to Alice Springs for a week in October 2000. In December 2000 she was married and had a week and a half off which included public holidays. In January 2001 she went to Sydney for a week and she used to regularly visit Darwin for a couple of days at a time to visit her husband. Her husband is a pilot who flies out of Darwin. The Applicant said that in relation to each absence she sought permission to go away and organise for someone to cover her work or for her work to be carried out by her before or after she went on leave.

57 Ms Nola Carter gave evidence that she worked with the Applicant for a period of two years between 1994 and 1997 when she, Ms Carter, was employed as the Respondent's coordinator and the Applicant was contracted as a bookkeeper. Ms Carter said her role as coordinator was to support the Management Committee. She said that at that time they were in the process of establishing a Safe House to complement their other services, which were the Halls Creek Art Centre, an occasional child care centre and a family support service. She said the Respondent's Management Committee are all volunteers so she was employed to facilitate their plans for the services and to manage the services. She said that at the time she was employed salary sacrifice arrangements were offered to all employees as an inducement to take up positions with the Respondent. She testified that information was given to the Committee about the limits of salary sacrificing and the types of things that could be paid for. She said that at the time she was employed Ms Butters was a member of the Management Committee and that after she left Ms Butters became the Safe House Manager. She said that she was present at Ms Butters' interview when she applied for that position and said that at that time Ms Butters she was well known in the community. She said Ms Butters had a very good reputation as a reliable and responsible employee. Ms Carter also said that salary sacrificing arrangements were offered to Ms Butters when she was engaged as Safe House Manager.

58 Ms Carter testified that when she commenced work for the Respondent they had not had anyone managing financial affairs for about five months. She arranged for the Applicant to do the book work for the Respondent. In terms of the preparation of cheques for payment to creditors of the Respondent Ms Carter testified that she would write out cheque requisitions and cheques for signing by the Committee. She said she created financial procedures because prior to her commencement with the Respondent the Registrar of Aboriginal Corporations had demanded that appropriate processes be put in place for making payments. Accordingly, cheque requisition forms were created on which all the relevant information in respect of payments was to be detailed. She said it was part of her role as Coordinator to speak to members of the Committee when the cheques were signed. She said it was her practice to make notes on the cheque requisitions so the members would understand the service funding from which the monies were being paid and what the cheques were for.

59 Ms Carter said that the Applicant's work as Bookkeeper during that period they worked together ensured that by the time she (Ms Carter) left the organisation, the whole process was running very smoothly. She said that at that time the Applicant was paid by the tendering of invoices. There was a maximum ceiling of hours for the work she could be paid for and she was also paid an allowance for certain expenses, such as travelling time. If there were any extra duties she would be paid for those as a type of overtime because it was extra to her contractual arrangements.

The Respondent's Evidence

60 Ms Karen Wright gave evidence that she is employed by the Respondent for 50% of her time as an Administrator and Coordinator. The other 50% of her time she works as a financial counsellor for the Respondent. As to her administrative role she stated that at all material time she has the authority to run the Respondent's business from day to day.

61 Ms Wright testified that she commenced employment with the Respondent in March 1999. She said that the Respondent was having difficulty with Lawson's Commercial Services and they decided to terminate the contract. On 8 November 1999 Mary Jarzabek, a Community Development and Funding Officer with the Department of Family and Children's Services, wrote to the then Chairperson of the Respondent, Ms Pearl Gordon and suggested to the Respondent's Committee that they obtain a quote from a service in Kununurra to carry out the bookkeeping work. On notes attached to that letter it is noted that the Respondent Committee had decided to terminate the contract with Lawson's Commercial Services as soon as the 1999 Audited Financial Statements were completed by giving of one month's notice in accordance with the contract.

62 Ms Wright said that the Applicant came into the Respondent's office and someone told her that the Applicant was an accountant. Ms Wright said shortly after that she met the Applicant socially and the Applicant confirmed that she was an accountant. She (Ms Wright) told the Applicant about the difficulties the Respondent was experiencing with their accounting services and the Applicant informed her (Ms Wright) that she would "love to do" the bookkeeping for the Respondent. Ms Wright said she asked the Applicant to put in a quote. She said the Applicant submitted a quote on the basis of contract work for $35 per hour. Ms Wright identified Exhibit 1, the document produced by the Applicant, as a copy of the quote that she had received. She said she received a signed copy of that document around January 2000. The Respondent, however, did not produce a signed or unsigned copy of that letter dated January 2000. Ms Wright said that the Committee advised her that the Applicant's quote was accepted and she informed the Applicant that the quote was successful. She testified she informed the Applicant that she had to give Lawson's Commercial Services one month's notice. Ms Wright produced a copy of an unsigned letter from her dated 1 March 2000, to Lawson's Commercial Services, stating:

> "In accordance with the agreement between Lawsons and Ngaringga Ngurra, please be advised that the Committee are giving one months notice to withdraw from the contract. As of 1/4/2000 the services of Lawsons will no longer be required.
>
> All Financial books and records relating to the Financial Management of Ngaringga Ngurra are to return promptly to the Family and Children's Services, marked for ATTENTION, Mr Sherif Andrawes
>
> Corporate Finance and Consulting Manager
>
> BDO Nelson Parkhill
>
> PO Box 7426
>
> Cloisters Square
>
> PERTH 6850"

Ms Wright said she informed the Applicant she could commence on 1 April 2000.

63 It was put to Ms Wright in cross-examination that she had not sent the letter to Lawson's Commercial Services on 1 March 2000 terminating their services from 1 April 2000. Ms Wright maintained this was the case but could not explain why Lawson's had not been paid until the beginning of April 2000. Ms Wright agreed that this should have been the case. It was also put to her in cross-examination that the last account that was paid by the Respondent to Lawson's Commercial Services was in November 1999. Ms Wright was unable to give any explanation for this. She said she did not prepare the payment of accounts at that time. Further, she could give no explanation as to why Lawson's Commercial Services did not render the Respondent with an account for the period from November 1999 until April 2000.

64 Ms Wright said that she recalled attending a meeting with the Applicant and officers from the ATO on 31 May 2000. She said the prime purpose of the meeting was for the ATO officers to discuss the impact of the GST. She said that she recalled that the Applicant asked them about salary sacrifice and that they advised her that was not something that they could give advice on because it was not their area and that they were in Halls Creek to discuss GST. Ms Wright's evidence was that at that time she knew nothing about salary sacrifice.

65 Ms Wright testified that during the engagement of the Applicant, the Applicant would regularly advise her (Ms Wright) that she would be going away for a period of time. She said the Applicant did not seek her permission and she did not fill out any leave applications. She said employees of the Respondent were required to fill out leave applications. In particular, she testified that when she went on leave she would fill out a leave application and have it signed by a Committee member. However, when a leave application for her to take leave was put to Ms Wright in cross-examination, that was filled out and authorised by her, she conceded that on that occasion she had only sought the verbal approval of the Committee.

66 Ms Wright testified that not long after the Applicant returned from Greece, in mid 2000, the Applicant raised the issue of salary sacrifice with her and the Applicant advised her (Ms Wright) that you could salary sacrifice food bills, credit card accounts. She (Ms Wright) then opened up an account at Supamart and entered into a salary sacrifice arrangement which enabled her account at the supermarket to be paid as a benefit under her contract of employment. Ms Wright said she was not happy with the arrangement because more than minimum payments were paid on her credit card and she never knew from fortnight to fortnight how much cash she was going to get in her hand. She said she told the Applicant in December 2000 that she did not wish to salary sacrifice anymore.

67 Ms Wright said she did not direct the Applicant in her field of bookkeeping and accounting as her knowledge of accounting was not to the standard of the Applicant. She said that she did not give her any directions. She said, however, that when the Applicant was away she would normally write out the cheques and cheque requisitions. She said that there was one occasion that she did the payroll but she did it by hand and then the Applicant entered it into the MYOB system after she returned.

68 Ms Wright was asked in evidence to look at a cheque butt and a salary requisition form dated 14 December 2000 which was filled out by her (Ms Wright). The cheque butt and the attached cheque requisition states that a payment of $820.00 was made payable to Thomas Store for bookkeeping fees on the cheque butt and on the requisition it is stated "S/S Stacey". Ms Wright said she did not make the notation "S/S" in December 2000 because she did not know what that meant at that time. She said that sometime in January or February 2001, she wrote that notation on the cheque butt and on the requisition. It is apparent from her evidence that she did not query why the Applicant was paid on a wages requisition form rather than on an invoice requisition.

69 Ms Wright testified that on 5 January 2001 she wrote to all the staff of the Respondent advising them that they should not go and speak to the Applicant about issues involving the Respondent's business. In the note to staff, set out in paragraph 19 of these reasons for decision, Ms Wright referred to the Applicant as not being employed full time. In relation to the words "the Bookkeeper is not employed full time with Ngaringga Ngurra" Ms Wright testified that what she meant by those words was that the Applicant was employed on a contract basis and she "loosely" used the word "employed".

70 Ms Wright said in January 2001 there was an issue in relation to her pay. She said she was in Katherine in the Northern Territory and she wanted to purchase some goods in the Woolworths shop and she thought her wages had not gone into her account, so she rang the Applicant and asked when her wages would go through. She said the Applicant said "I know you are a very understanding person, but Daniel owed me some money and I took it out of your pay." Ms Wright said she informed the Applicant that it was illegal to deduct money from anybody's wages without their written authority and that she (the Applicant) replied that she did not know that. Ms Wright said the conversation became quite heated and that she told the Applicant that she would make a complaint to the police if the money was not in her account by the next morning. She said the money was deposited into her account the next morning. However, in her complaint to the Institute of Chartered Accountants, dated 23 February 2001, Ms Wright stated—

> "… On return from my holidays, I noticed from reading my own bank statement, a deposit of $500 in to my account from TRF Westcoast Sports. I have no idea who Westcoast Sports are but the amount of $500 is the same amount of money owed to me because of the earlier disaster with my pay.

> I would be pleased if you could look into this matter for me and I authorise you to correspond with Stacey on this matter for me. My concerns are: (1) The failure to process my pay and to use my pay, to pay off a private bill that belongs to my son, and (2) the unexplained deposit of $500 which equals the missing pay from 11 January. I have never authorised any such deduction from my pay."

Ms Wright said she also had another occasion on which she was not paid and she reported it to the Chairperson, who contacted the Applicant and the money was then put into her account. She said the reason that she was not paid was because she had not put in a time sheet. She said the Applicant made a rule that if no time sheet was submitted no pay would be paid but another employee at that time had not submitted a time sheet and they were paid.

71 Ms Wright said that in relation to the deduction of $500 she made a complaint to the Committee that the deduction had been unauthorised and she asked the Committee members whether she could make a complaint to the Institute of Chartered Accountants. She said they informed her that if she wanted to do that she had every right do so, but she should do it on her own behalf. Shortly thereafter both Ms Wright and the Applicant were asked to go to mediation. Ms Wright said she participated in three mediation sessions with the Applicant and Mr Miles to see whether they could settle the dispute. She said that when she informed Mr Miles that she had submitted a complaint to the Institute of Chartered Accountants he said, "Well, we may as well finish the mediation if that is the case." Ms Wright asked for a letter of apology which the Applicant would not give, so she pursued the complaint. Ms Wright, however, conceded that there were other issues raised at the mediation other than her pay.

72 Ms Wright said that after the mediation she did not have a lot of communication with the Applicant and that she communicated requests of the Applicant through Rose or Sandra. She said she was seeking the paid invoices file. She said she wrote a memo on 14 May 2001 to the Applicant making a request for the file. On 15 May 2001 she received a response advising that she would receive the paid invoices file on Thursday yet she did not receive this file until it was returned to Ms Heritage. When Ms Wright received the paid invoices file, she said she and Ms Heritage examined the file and found a cheque which she regarded as suspicious, which was made out to a "J Fullerton". She said she did not know what the cheque was for. She then found a cheque made out to Computer Corporation which had been generated by a cheque requisition form. She said there was no document attached to that cheque requisition. She said Ms Heritage rang the bank, had the cheque traced and ascertained that the cheque had been deposited into the Applicant's account. She then contacted Computer Corp and ascertained that the Applicant had a computer fixed by them. Ms Wright then had a meeting with the Chairperson, Ms Butters, and others from the Department of Family and Children's Services. At that meeting a decision was made to report the matter to the police.

73 Ms Wright maintained in her evidence that she did not say very much at the meeting, that Ms Heritage conveyed most of the information. Further she maintained that she (Ms Wright) did not go to the police station and make a complaint. When cross-examined Ms Wright vehemently denied that she had been the source of the information which led to the complaint being made to the police, or that she had, herself, reported any matters to the police. Ms Wright also maintained in her evidence that once the matter was reported to the police that the police did not report back to the Respondent about their investigation at all. In particular, they heard nothing about the police closing their investigation.

74 Ms Wright maintained in her evidence that she had no real comprehension of how salary sacrificing worked. She also said that on the odd occasions when she wrote out cheques and cheque requisitions and she would take those to Committee members for signing, she would simply present the cheque requisitions to them but did not give them any explanation prior to a Committee member signing the cheques and requisition forms. She said if they asked a question she would explain but she would not give an explanation unless it was asked for. She said she did not usually take the cheques, cheque requisition forms and invoice requisition forms to the members for signing, it was usually done by one of the Safe House workers as the Applicant would hand over the requisitions and cheque payments to a Safe House worker.

75 In June 2001 Ms Wright prepared a report to the Committee in which she stated that on—

> "… Thursday 28th June 2001 I will be meeting with Naomi from Kimberley Legal Service to construct an appropriate dismissal letter for Stacey Booth."

She said she did not mean the words "dismissal" to mean a dismissal, she simply meant that it was intended that a letter be prepared advising that the Applicant was suspended until the internal audit investigation was completed. On 11 July 2001 the Committee meeting minutes record that Ms Wright was to organise a letter to the Applicant as soon as possible regarding suspension due to the investigation. It is common ground that no such letter was written to the Applicant. When asked why, Ms Wright said that the advice she was given by Kimberley Legal Service was that the Applicant was engaged as contractor rather than as an employee and as there was no contract stating a period to suspend or dismiss anybody, there was no need to write a letter to the Applicant.

76 As to Ms Wright's pay rise she received in October 2000, Ms Wright testified that in late August, early September 2000, the Applicant informed her that she (Ms Wright) was entitled to a pay rise. She said that the Applicant informed her that she was aware that Committee minutes noted that money could be used from the Safe House for a consultancy and that this money could be used to pay Ms Wright a pay increase. Ms Wright said that she requested the Applicant not to arrange a pay rise. Further, she said that at that time the Safe House Manager's position was not filled and she was doing work at the Safe House which included her being called out at night and doing weekend work, for which she was reimbursed. She said that once Ms Heritage was appointed as Safe House Manager she did not carry out the extra work. She said she not realise that her pay had been increased because of the salary sacrificing arrangements and she did not receive payslips. She conceded, however, that she had been overpaid by an amount of about $5,700 as a result of the implementation of the pay increase. Further, it is apparent from her evidence that when the issue of the pay rise was discussed with the Applicant she did not raise the matter with the Committee.

77 Ms Wright maintained in her evidence, that at all material times the Applicant was engaged as a contract bookkeeper. Yet she conceded that the Applicant was paid wages but said that she thought that the Applicant was "slack" in not supplying an invoice. It is apparent from her evidence, however, that she never raised this with the Applicant or the committee.

78 In the police report there is a reference to a complaint being made in respect of superannuation paid on behalf of the Applicant. A cheque requisition and a cheque was raised on 7 March 2001 in the amount of $1,090.69. Under the budget line it is noted "Super Payable" and it is also noted that the payment was for "SB" meaning the payment was to be made on behalf of the Applicant. Ms Wright said that this requisition and cheque was queried at the same time as the Computer Corp cheque. In a minute of the Respondent's Committee meeting held on 14 September 2001 it is recorded that Ms Wright advised the Committee that the superannuation cheque should be traced and perhaps the Fraud Squad needs to be involved if the Respondent suspects that something is not right. When asked about this issue she conceded that the Respondent became aware a week after the trace had been put on the cheque in June 2001 that the cheque had bounced. Ms Wright said that she understood that at the time the cheque was presented in May 2001 the Respondent was in a debit balance so the cheque was dishonoured. When asked about the Committee minutes of September 2001, as to why that cheque was raised by her, Ms Wright's response was that she did not write the minutes. She then said that the minutes were incorrect.

79 Sandra Butters testified that in 2000 she became the Chairperson of the Respondent. Prior to taking up that position she was employed as the Safe House Manager. Ms Butters said that since 17 February 2000 she has been employed as an Aboriginal Development Officer at TAFE. The position requires her to be engaged in the running of TAFE courses and also establishing TAFE courses in aboriginal communities. She has also been employed by other aboriginal corporations to carry out work such as simple bookkeeping.

80 Ms Butters testified that she was present at a meeting of the Respondent's Committee when she was a staff member, on 19 January 2000. In minutes written by Ms Butters it is stated—

> "Bookkeeper and Accountant
>
> Committee also suggested that Ngaringga Ngurra find another bookkeeping service to commence doing the accounts. As Lawsons is costing too much, and they are based too far away. This needs to be done urgently. Stacey Thomas is interested, Committee needs to ring or write to her maybe requesting that she sends in a quote."

81 Ms Butters, however, testified that she did not see a copy of any quote submitted by the Applicant but she understood that she was engaged as a contractor. Ms Butters said that the Applicant was engaged by the Committee prior to her becoming the Committee Chairperson. She conceded, however, that the Applicant was paid a wage of $600.00 per fortnight. She said that all staff were paid by wages requisition forms. She said that she did not fully understand salary sacrifice arrangements and she did not know what "S/S SB" meant. However, she was able to identify cheque requisition payments which were made out as salary sacrifice payments to third parties, as wages paid to the Applicant. Ms Butters' signature, along with another Committee member's is to be found on most of the cheque requisitions produced in evidence in these proceedings. Ms Butters said that she never read any of the cheque requisitions that were presented to her. She simply signed them because "we trusted Stacey". Although Ms Butters did not address the issue directly, in evidence it is apparent that prior to the Applicant commencing her engagement with the Respondent, Ms Butters had prepared wages and cheque requisitions for both wages and invoices for the Respondent for Committee members to sign, on a number of occasions. (Exhibits 37 and 39)

82 Ms Butters said that the conflict between the Applicant and Ms Wright got to the point where neither would talk to the other. She said the Applicant would contact her or Ms Heritage to deliver materials to Ms Wright. She also said that on a couple of occasions Ms Wright had not completed her time sheet so the Applicant did not pay her. Ms Butters said that as a result of the conflict the Committee determined that both Ms Wright and the Applicant should engage in mediation and arranged for Mr Miles from the Department of Family and Children's Services to carry out the mediation. She said that after the mediation meetings were completed both the Applicant and Ms Wright were sent an identical letter requiring that—

> "… The Ngarringa Ngurra Management Committee wishes to see that you work professionally, and communicate with all relevant staff directly whilst you are employed by Ngarringa Ngurra Aboriginal Corporation."

When asked what the words "employed by" meant in relation to the Applicant, Ms Butters said "employed on a contract basis at Ngaringga Ngurra". She said that the mediation did not resolve the conflict.

83 When asked about a memorandum written by the Applicant to the Committee dated 12 January 2001, that contained a note that the Applicant was to provide the Committee with full wage details of all the Ngaringga Ngurra staff, Ms Butters said she specifically asked the Applicant for a breakdown of the wages of the staff but that did not include the Applicant, as she was on contract. She said she could only recall the Applicant attending one Committee meeting. She thought that this may have been the 13 February 2001 meeting but she could not recall whether or not the Applicant provided financial information to the Committee at that meeting.

84 Ms Butters was also asked about a Committee decision made on 15 March 2001 (Exhibit 47), to write letters to all staff regarding their positions, roles and responsibilities with the organisation, including salaries, hours and job description. Ms Butters said that the Department of Family and Children's Services required that they have a job description for the workers. When asked why, in May 2001, an agenda for a Committee meeting (Exhibit V) showed under the heading "Staff Duty Statements/Contracts" a list of persons, including Ms Wright and the Applicant, Ms Butters said, "We wanted a job description from three of our staff, Karen, Rosie and Jennifer and the contract is Stacey's".

85 In relation to the computer Ms Butters said that she could recall in early 2001 that she had a conversation in the Supamart during which the Applicant mentioned to her that her computer had a cracked screen. Ms Butters, however, said there was nothing said about the Respondent paying for the cost of fixing the computer although she did recall there was a conversation in which the Applicant indicated to her that she was going to get the computer fixed. She said she recalled signing the cheque and seeing the cheque requisition for Computer Corp but there were no documents attached to the requisition. She said she recalled the cheque because it was for a large amount and she thought it was the cost for repairing one of the Respondent's computers.

86 Ms Butters said that after the Applicant's employment was suspended she spoke to the Applicant on a number of occasions and she recalled the Applicant came to see her at TAFE around about 29 August 2001. She agreed it was an emotional meeting and the Applicant pleaded with her to try and clear her name. She said she told the Applicant that they (the Respondent) had to wait until the investigation was over. She denied saying to the Applicant that "it's best you do not work here anymore".

87 Ms Butters conceded that the Toms and Whittle audit report did not make any findings that she (the Applicant) was guilty of misappropriating any funds. Further she conceded the Respondent took no steps to inform the Applicant of the content or outcome of the report. When asked whether she (Ms Butters) thought that the Applicant had done anything wrong, Ms Butters after some hesitation said that "she did not come to the committee to make a decision to pay Computer Corp … for her computer."

Legal Principles

88 It is not for the Respondent to show that the Applicant was not an employee but for the Applicant to show, on the balance of probabilities, that she was an employee (*The Western Australian Builders' Labourers, Painters and Plasterers Union of Workers v R B Exclusive Pools Pty Ltd t/as Florida Exclusive Pools* (1996) 77 WAIG 4 at 8 per Fielding SC).

89 I observed in *Howe v Intercorp Services Pty Ltd trading as WestVision Painting Company* [2001] WAIRC 2643 at [24] and [25]; (2001) 81 WAIG 1212 at 1214 that—

> "The relationship of employer and employee is a contract of service where an employee contracts to provide his or her work and skill (typically to enable an employer to achieve a result). An independent contractor works in his or her own business on his or her own account. Whilst the authorities do not establish a conclusive test for determining whether a person is an employer, regard must be had to the whole of the relationship. In *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16 Mason J at 24 and Wilson and Dawson JJ at 36 held that a prominent factor is the degree of control which the person (who engages the other) can exercise over the person engaged to perform work. The High Court also held that the existence of control is not the sole criteria, other relevant matters include, but are not limited to, the mode

of remuneration, the provision and maintenance of equipment, the obligation to provide exclusive services, provision for holidays, deduction of income tax, delegation of work, the right to suspend or dismiss, the right to dictate the place of work and hours of work. Further, Mason J in *Stevens v Brodribb Sawmilling Co Pty Ltd* at 26 to 27 also observed that in some cases the organization test can be a further factor to be weighed (along with control), in deciding whether the relationship is one of employment or of independent contractor. The organization test is whether the party in question is carrying on the business, in the sense of carrying it on for himself or on his own behalf and not for a superior (*Montreal v Montreal Locomotive Works* [1947] 1 DLR 161 per Lord Wright at 169).

Whilst regard can be had to whether the parties regarded their contractual relationship one of employee/employer or independent contractor, if the evidence shows otherwise the parties cannot alter the truth of that relationship by putting another label on it (*Massey v Crown Life Insurance Co* (1978) 1 WLR 676 and *Narich Pty Ltd v Commissioner of Pay-Roll Tax* (1983) 2 NSWLR 601)."

90 The distinction between an employee and an independent contractor is "rooted fundamentally in the difference between a person who serves his employer in his, the employer's, business, and a person who carries on a trade or business of his own" (*Marshall v Whittaker's Building Supply Co* (1963) 109 CLR 210 per Windeyer J at 217; see also *Northern Sandblasting Pty Ltd v Harris* (1997) 188 CLR 313 per McHugh J at 366; approved by Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ in *Hollis v Vabu Pty Ltd* [2001] HCA 44 at [40]; (2001) 181 ALR 263 at 275).

91 The notion of "control" and its adjustment to the circumstances of contemporary life was recently re-considered by the majority of High Court in *Hollis v Vabu Pty Ltd* [2001] HCA 44 at [43-44]; (2001) 181 ALR 263 at 276; where Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ observed—

"… In *Humberstone* [62], Dixon J observed that the regulation of industrial conditions and other statutes had made more difficult of application the classic test, whether the contract placed the supposed employee subject to the command of the employer. Moreover, as has been pointed out [63]—

'The control test was the product of a predominantly agricultural society. It was first devised in an age untroubled by the complexities of a modern industrial society placing its accent on the division of functions and extreme specialisation. At the time when the courts first formulated the distinction between employees and independent contractors by reference to the test of control, an employer could be expected to know as much about the job as his employee. Moreover, the employer would usually work with the employee and the test of control and supervision was then a real one to distinguish between the employee and the independent contractor. With the invention and growth of the limited liability company and the great advances of science and technology, the conditions which gave rise to the control test largely disappeared. Moreover, with the advent into industry of professional men and other occupations performing services which by their nature could not be subject to supervision, the distinction between employees and independent contractors often seemed a vague one.'

It was against that background that in *Brodribb* [64] Mason J said that, whilst these criticisms might readily be acknowledged—

'the common law has been sufficiently flexible to adapt to changing social conditions by shifting the emphasis in the control test from the actual exercise of control to the right to exercise it, 'so far as there is scope for it', even if it be 'only in incidental or collateral matters': *Zuijs v Wirth Brothers Pty Ltd* [65]. Furthermore, control is not now regarded as the only relevant factor. Rather it is the totality of the relationship between the parties which must be considered.' "

Relevant Matters

Control

92 Whilst the Respondent did not exercise control over how the Applicant carried out bookkeeping and accounting functions, the Respondent did retain the right of control. For example Ms Butters gave instructions to the Applicant that she was required to attend mediation.

Obligation to work and Mode of Remuneration

93 The Applicant could determine when she carried out her work, however, she was required to work 4 to 5 hours per week for $300 per week. The Applicant was free to carry out bookkeeping or accounting work for other aboriginal organisations. She did not fill out any timesheets. The Applicant was paid the same amount each week. When she worked overtime she was paid extra. She did not pay income tax except on amounts paid as overtime. The $300 per week was paid as a benefit under a salary sacrifice arrangement. The ATO, in paragraph 28 of its draft ruling TR 2001/D5 states that an effective salary sacrifice arrangement is one where—

"Benefits provided to or on behalf of employees under effective SSAs may be derived as ordinary or statutory income by the employees. Any such benefits that are convertible to money are derived by the employees as ordinary or statutory income. However, these benefits are not assessable income of the employees … "

94 Further, under paragraph 18 the ATO states—

"Under the *A New Tax System (Fringe Benefits) Act 2000,* from the 2000-01 FBT year, the concessional treatment given to benefits provided to an employee of a public hospital, a non-profit hospital or a non-government public hospital is limited to $17,000 of the total grossed up value per employee. Any benefit provided above this limit will be subject to normal FBT treatment. Under that same Act, from the 2001-02 FBT year, the concessional treatment given to benefits provided to an employee of a public benevolent institutions (other than a hospital) or an FBT rebatable organisation will be limited to $30,000 of total grossed-up value per employee."

95 It is common ground that the salary sacrifice arrangement can only be entered into by employees. The Applicant was paid each week by the creation by her or by Ms Wright of a wages requisition. The bookkeeping and accounting work was required to be carried out personally. If the Applicant was away from Halls Creek for any periods of time, she arranged for the weekly wages to be prepared by her before she went on leave or for Ms Wright to do them.

Provision and Maintenance of Equipment

96 The Applicant worked from her home office, used her own laptop computer, telephone and other incidental items. She used the Respondent's letterhead if she sent any correspondence on behalf of the Respondent. It is not in dispute that Ms Wright, on behalf of the Respondent, agreed to pay her disbursements. However, the amount is in dispute.

Intention of the Parties

97 For the reasons set out below, I do not accept Ms Wright's and Ms Butters' evidence that the Respondent engaged the Applicant as a contractor. Both Ms Wright and Ms Butters in correspondence to the Applicant referred to her as an employee. All staff were sent a letter about their positions, roles and responsibilities following a Committee meeting in March 2001. The Applicant gave uncontradicted evidence she received a letter from the Respondent about the preparation of a job description for her position.

The Organisation Test

98 The Applicant provided her own equipment and place of work yet she did not carry on an accounting business of her own. Although when she carried out short term bookkeeping/accounting work for other organisations she did so as a contractor and rendered an invoice for payment in the name of S Booth. Exhibit 26 shows that between 14 February 2001 and 4 March 2001 she carried out 23.08 hours of administrative support for the Ngoonjuwah Aboriginal Corporation. She provided them with an invoice for the work at the rate of $35.00 per hour (Exhibit 26).

Conclusion – Nature of Engagement

99 Whilst some of the facts could be said to point to a contractual relationship, such as the fact that the Applicant was not required to complete a leave application or fill in a time sheet, when all the incidents of engagement are considered, I am satisfied that at all material times the Applicant was a part time employee, working under a contract of service. The reason I have reached this view is that the Respondent not only retained the right of control, it exercised that right. Whilst the Applicant did take on other work as a contractor, the Applicant was only engaged to work for the Respondent for 4 to 5 hours per week. Further, I am satisfied that she worked as an integral part of the Respondent's business. She had no ability to delegate her work other than to other employees of the Respondent and it is clear that whilst working for the Respondent she was not carrying on that work for herself but for the Respondent.

Credit

100 Having heard all of the evidence, in general I prefer the evidence given by the Applicant to the evidence given by Ms Wright and Ms Butters. The Applicant gave consistent evidence and was not shaken in cross-examination. I did not find Ms Wright to be a credible witness. If I were to accept her evidence I would conclude that she is not competent to run the Respondent's business. Her explanation as to her use of imprecise language in documents that indicated the Applicant was an employee did not make sense. Further, I do not accept her evidence that she knew "nothing about salary sacrifice" in May 2000 and that she did not know what "S/S S/B" meant until February 2001. Ms Wright conceded that in late 1999 the Respondent had received a report from Lawson's Commercial Services that addressed fringe benefits tax and salary sacrifice arrangements. She said she did not understand the report and she gave the report to the Executive Committee. The preparation of the report cost the Respondent $3,200. She also said that she contacted Lawson's Commercial Services and advised them that she did not understand the report, yet she contends she sought no explanation from the author of the report. In addition, she prepared the wages, in particular the Applicant's salary sacrifice payments on a number of occasions prior to February 2001. As to payment of wages and debts, Ms Wright said that the only time she presented cheques and requisitions to Committee members was when she prepared the cheques herself, and that she did so without explanation. It seems clear that she only did so when the Applicant was absent. She said it was only her duty to explain the cheques when a query was raised by a Committee member. Curiously, when the Applicant prepared the cheques and cheque requisitions Ms Wright said she did not take them to the Committee members as she was "too busy".

101 Ms Butters was hesitant and gave some of her evidence reluctantly. I also found Ms Butters' evidence about her use of words in documents indicating the Applicant was an employee to be contrived.

Conclusion – Was the Applicant Unfairly Dismissed?

102 For the reasons set out above where the evidence departs I prefer the Applicant's evidence to the evidence given by Ms Wright and Ms Butters. Consequently, I accept the evidence given by the Applicant that on 29 August 2001 Ms Butters informed her that it was best that the Applicant not work for the Respondent anymore because one of the managers does not get on with you. The Respondent concedes that if this evidence is accepted then it is open for the Commission to find that the Applicant was dismissed by the Respondent on 29 August 2001. Accordingly, I make that finding. It is apparent from the evidence that the "manager" is Ms Wright and that prior to the Computer Corp incident the Respondent's Committee had been unsatisfied with the conduct of both Ms Wright and the Applicant.

103 It is also conceded on behalf of the Respondent that the Respondent did not accord the Applicant procedural fairness prior to Ms Butters informing the Applicant that she was dismissed. It is clear that the Applicant was summarily dismissed.

104 Where an employee is dismissed summarily the onus is on the Applicant to demonstrate the dismissal was not fair on the balance of probabilities. However, there is an evidential onus upon the employer to prove that the summary dismissal is justified (*Newmont Australia Ltd v The Australian Workers' Union, West Australian Branch, Industrial Union of Workers* (1988) 68 WAIG 677 at 679).

105 The requirements of procedural fairness in respect of an investigation into alleged misconduct were considered by the Full Bench of the South Australian Industrial Relations Commission in *Bi-Lo Pty Ltd v Hooper* (1992) 53 IR 224. In the *Bi-Lo* case the Full Bench of the South Australian Commission observed at 229—

> "Where the dismissal is based upon the alleged misconduct of the employee, the employer will satisfy the evidentiary onus which is cast upon it if it demonstrates that insofar as 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; it gave the employee every reasonable opportunity and sufficient time to answer all allegations and respond thereto; and that 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; and that, taking into account any mitigating circumstances either associated with the misconduct or the employee's work record, such misconduct justified dismissal. A failure to satisfactorily establish any of those matters will probably render the dismissal harsh, unjust or unreasonable." (see also *Western Mining Corporation Limited v The Australian Workers' Union, West Australian Branch, Industrial Union of Workers* (1997) 77 WAIG 1079 at 1084 per Sharkey P and Coleman C.C.)

106 Despite the requirement to accord procedural fairness, not every denial of procedural fairness will entitle an employee to a remedy. No injustice will result if after a review of all the circumstances of the termination it can be said that the employee could be justifiably dismissed (*Shire of Esperance v Mouritz* (1990) 71 WAIG 891; *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410 at 430 per Brennan CJ, Dawson and Toohey JJ, and at 466 per McHugh and Gummow JJ).

107 The Respondent says that the Applicant's conduct in relation to the Computer Corp payment was unacceptable in that the way in which the Applicant went about seeking payment for and paying for the repairs to her computer constituted a valid reason for termination. Firstly it is contended that she completed a cheque requisition on the basis of a quote rather than a debt. Secondly, she did not attach a copy of the quote or any other document to the cheque requisition. Thirdly, the Respondent says the Applicant's explanation as to why she deposited the cheque made out to Computer Corp into her account is unsatisfactory. As to the failure to attach a copy of the quote to the cheque requisition the Respondent contends that the failure to do so led Ms Butters to think that the cheque was for repairs and maintenance to the Respondent's computers. The Respondent says that if it had sought an explanation from the Applicant concerning the Computer Corp payment and received the explanation that the Applicant presented in her evidence the result would have been the same, in that the Respondent

would have dismissed the Applicant. Mr Robertson, on behalf of the Respondent, says that two weeks' compensation would be sufficient to remedy the failure to accord the Applicant procedural fairness. I understand that submission to be a submission that two weeks would have been a sufficient period of time to enable the Applicant to put her case and for the Respondent to consider her explanation and make its decision.

108 Whilst I accept the Applicant's evidence in respect of her version of the conversation she had with Ms Butters in the Supamart about her laptop computer, and that she did attach a copy of the Computer Corp internal job card containing the quote to the cheque requisition, I am of the view that such a casual conversation was not sufficient to authorize payment of the Computer Corp account. There was no discussion about the estimate of costs of repairs. Clearly, the cost was not insubstantial. I would have expected that a prudent bookkeeper, who is a Chartered Accountant and who works for a non-profit charitable organisation, would have taken steps to formalize the agreement. Further, that the Applicant should have written a memorandum to the Committee setting out the basis of the claim, the terms of the quote and confirming that Ms Butters had indicated that payment "shouldn't be a problem". Although I accept that the job card was attached to the cheque requisition form, other than a reference to "Stacey Booth" as the client contact, there is nothing on the job card which states the name of the client. There was, however, a description of the computer and fault description stating that the "display screen was cracked".

109 Whether the job card became detached from the cheque after the Applicant prepared the cheque requisition is not known. The cheque requisition, a copy of the cheque and the job card were tendered into evidence by the Respondent's agent without explanation as to when the job card came to be in the possession of the Respondent. Mr Toms and Ms Whittle in their audit report, at page 9, say they investigated a number of payments that were unsupported by invoices or receipts. One was the payment to Computer Corp. The auditors then state—

> "Upon further investigation Audit sighted an Internal Job Card and Customer Technical Report from Computer Corporation that indicated that work was undertaken to repair a damaged computer screen for the former Accountant, with the job being entered on the 23 March 2001 and completed on 21 May 2001. An invoice from Computer Corporation to the former Accountant dated 22 May 2001 for $1,386.45 was sighted as well as a receipt for payment by credit card on 22 May 2001. A cheque for the balance from the original amount ($2,558.40) to what was actually invoiced ($1,386.45) for $1,175.95 was sighted as being paid to the organisation by the former Accountant on 5 June 2001.
>
> *Recommendation*
>
> All expenditure should be supported by an invoice or a receipt of payment."

At pages 10 and 11 of their report they refer to three payments being made where it was uncertain whether funds had been used appropriately. None of the three payments referred to the payment made to Computer Corp.

110 I do not accept that the Respondent acted fairly in making a complaint to the police. It is apparent from the Offence Report and Running Sheet that one of the matters was clearly a false allegation that the Applicant had ignored several requests to hand over documents and that she had paid bills to avoid tax. The Applicant handed over the paid invoices file, which led to Ms Wright reviewing the Computer Corp files. Further, I am not satisfied there is anything illegal about the Applicant salary sacrificing her salary. Plainly the way in which information was conveyed to the police was mischievous and led to the execution of a search warrant on her family business and home at a time when her family business was open to the public.

111 Although the delay in arranging an internal audit was in the circumstances unacceptable there is no evidence that the delay was caused by the Respondent.

112 Given that the auditors, Mr Toms and Ms Whittle, did not make a finding that payment to Computer Corp was an inappropriate payment, it is my view that the Respondent in exercising its legal right to dismiss in all the circumstances was harsh, unfair and oppressive so as to amount to an abuse of that right. In my view the failure of the Applicant to seek formal approval by the Committee did not warrant summary dismissal, although the circumstances may have justified other disciplinary action, such as a reprimand with a warning that dismissal would follow for any repeated breach of accountable procedures.

Remedy – Unfair Dismissal

113 I am satisfied that re-instatement is impractical as the relationship between the parties has broke down.

114 The duty to mitigate loss in claims of unfair dismissal lies on the claimant employee. This duty requires the Applicant to diligently seek alternative employment (see *Growers Market Butchers v Backman* (1999) 79 WAIG 1313 at 1316 and cases cited therein). It is contended on her behalf that the Applicant was unable to mitigate her loss because of the rumours caused by her dismissal. However, no evidence was given by the Applicant as to whether she had made any attempts to seek alternative employment.

115 Accordingly, I have reached the view that the Applicant has failed to mitigate her loss. I am, however, satisfied that the Applicant has made out a case that she has suffered an injury within the meaning of s.23A(1)(ba) of the Act. The Respondent's course of conduct in relation to the execution of the search warrant and the subsequent lengthy suspension without pay was extremely callous, oppressive and humiliating, culminating in a dismissal. Given that the Applicant works and resides in a small town, I accept the contention made on her behalf that she suffered significant trauma as a result of the Respondent's conduct. In the absence of medical evidence I am not satisfied that the stress suffered by the Applicant caused her to miscarry her child. I will make an award of compensation of $9,000 for injury.

Contractual Benefits

116 In an application pursuant to s.29(1)(b)(ii) of the Act, the onus is on the Applicant to establish that the subject of the claim is a benefit to which the Applicant was entitled under her contract of her employment. In that regard, it is for the Commission to determine the terms of the contract of employment and to ascertain in a juridical manner, whether the claim constitutes a benefit which has been denied under the contract of employment, having regard to the obligations on the Commission to act accordingly to equity, good conscience and the substantial merits of the case, pursuant to s.26 of the Act (*Belo Fisheries v Froggett* (1983) 63 WAIG 2394; *Waroona Contracting v Usher* (1984) 64 WAIG 1500; *Perth Finishing College v Watts* (1989) 69 WAIG 2307).

117 Unless authorised by contract, award or statute the employers may not suspend an employee without pay. The learned authors of Macken, McCarry and Sappideen in their 4th edition of *The Law of Employment* at page 154 state—

"An employer has no common law right to suspend an employee without pay for misconduct even if that misconduct would justify immediate dismissal. Such a right may, however, be granted by contract, statute or award".

However, suspension of an employee with pay is lawful pending the outcome of a disciplinary investigation (see *Cooke v The Royal Melbourne Hospital* unreported IRCA No. VI 2189 of 1995).

118 I am satisfied that the Applicant has made out a claim that she is owed wages from 28 May 2001 to 29 August 2001. I am not of the view that the agreed rate of $300.00 per week should be grossed up. Leaving aside the claim for disbursements the Applicant's contract entitled her to payment of $300.00 per week and no more. Whilst in the Federal Court awards for damages for loss of taxable income awards are grossed up to compensate for tax, grossing up is applied where tax was required to be paid in any event. At no time was the Respondent required to pay the Applicant more than $300.00 per week. Accordingly, I will make an order that the Respondent pay the Applicant 13 weeks and three days pay at $300.00 per week being an amount of $4,080.00.

119 As to the Applicant's claim for disbursements, as she did not carry out any work for the Respondent after 1 June 2001 I am not satisfied that disbursements were payable beyond that date. For the reasons set out above I accept the Applicant's evidence that it was a condition of her contract of employment that she be paid $15.00 per fortnight for disbursements. I will allow her claim from 1 April 2001 until 1 June 2001. Accordingly she is owed nine weeks' disbursements at the rate of $15.00 per fortnight, being $67.50.

120 In relation to the Applicant's claims for accrued annual leave there is no evidence that there was a contractual agreement between the parties that the Applicant was to be allowed annual leave or monies in lieu thereof. Accordingly, this claim will not be allowed.

121 As to the claim for superannuation sought as payable under the Superannuation Acts, this claim will not be allowed as the obligation to pay is a statutory one and may not be recovered as a contractual benefit (see *Dellys v Elderslie Finance Corporation Limited* [2001] WAIRC 04455 [57] – [67]; (2002) 82 WAIG 23 at 29 and the cases cited therein).

Applicant's Application for Costs

122 The Applicant makes an application for reimbursement of its expenses. The test to be applied in awarding of costs under s.27(1)(c) of the Act is set out in *Brailey v Mendex Pty Ltd t/a Mair & Co Maylands* (1992) 73 WAIG 26 in which the Full Bench held at 27—

> "The application, too, must be determined under s.26 of the Act. However, part of that equity and good conscience includes what is settled law in industrial matters that costs ought not be awarded, except in extreme cases, (eg) where proceedings have been instituted without reasonable cause (see *Hospital and Benevolent Homes Award* (1983) AILR 409 where costs were awarded in a matter where the applicant terminated the proceedings after putting the respondent to the expense of defending without obtaining an order)."

123 This case does not fall within this category. Accordingly I will not make an order for costs.

2002 WAIRC 05889

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
PARTIES	STACEY SHARON BOOTH, APPLICANT
	v.
	NGARINGGA NGURRA ABORIGINAL CORPORATION, RESPONDENT
CORAM	COMMISSIONER J H SMITH
DELIVERED	MONDAY, 1 JULY 2002
FILE NO.	APPLICATION 1570 OF 2001
CITATION NO.	2002 WAIRC 05889

Result	Issues raised in a Speaking to the Minutes.
Representation	
Applicant	Mr D E Booth (as agent)
Respondent	Mr P G Robertson (as agent)

Supplementary Reasons for Decision

1 Reasons for Decision and Minutes of Proposed Order issued by the Commission in respect to this matter on 17 May 2002. The Respondent requested a speaking to the Minutes. As the Applicant's representative resides in Darwin and the Applicant lives in Halls Creek the Commission requested and the parties agreed to the speaking to the Minutes to be by way of written submissions.

2 The issues for speaking to the Minutes raised by the Respondent are as follows—

(a) The statutory cap on compensation is six months remuneration. In the Respondent's view the remuneration of the Applicant was $300.00 per week plus $15.00 per fortnight for disbursements. Accordingly the statutory cap of six months remuneration equates to (26 x $300.00) plus (13 x $15.00) equals $7,995.00. In submissions dated 21 June 2002 the Respondent says that overtime worked by the Applicant was sporadic and should not be taken into account by the Commission in assessing the Applicant's remuneration.

(b) The Minutes of the Proposed Order requires payment to the Applicant from the Respondent within ten days of the date of the Order. The Respondent is a non-profit public benevolent (charitable) institution and contends that it has little, if any, monies readily available for purposes other than those specifically funded. The Respondent provided further written submissions in respect of time to pay on 30 May 2002, 21 June 2002 and 25 June 2002. In the submissions dated 30 May 2002 the Respondent states that it receives its funding from the Department of Community Development ("DCD"), quarterly and in advance. Further it was said that in order for the Respondent to comply with the Order of the Commission to pay, it needs time to fund raise and apply for one-off grants outside of the normal grant applications. In submissions dated 21 and 26 June 2002 the Respondent says that it has made verbal applications to the Kununurra ATSIC Regional Council and DCD for funding to enable it to comply with an order of the Commission and those applications have been refused.

The Respondent submits that its budget is committed for this financial year and its current bookkeeper and auditor advises that monies ordered to be paid to the Applicant could be paid in four equal instalments at the beginning of each of the four quarters, starting from the first quarter at the beginning of the next financial year (July 2002). Alternatively it is submitted that the Respondent could pay to the Applicant $4,000.00 gross when the first quarters' funding comes in for the new financial year; with the remainder paid off in three equal instalments at the beginning of the second, third and fourth quarters. In support of its submissions the Respondent provided a copy of the Respondent's Balance Sheet as at April 2002. The Balance Sheet shows that its assets exceed its liabilities by an amount of $2,373.29.

(c) During the suspension from 2:00pm, 1 June to 29 August 2001 the Applicant was unavailable and/or unable to work for a significant period; being mid June to 19 or 20 August. The Respondent questions whether it is required to compensate the Applicant for this period.

3 The Commission received the Applicant's Written Submissions in response to the Respondent's submissions on 7 June 2002. In response the Applicant raises the following matters—

(a) In the Applicant's view the statutory cap on compensation of 6 months remuneration must take into the consistent overtime wage that the Applicant was entitled to. It was undisputed in evidence before the Commission that the Applicant's employment contract consisted of a base salary plus overtime plus disbursements.

- Exhibit B page 2, shows that in the 2000 financial year the Applicant was remunerated $4,853.05 for 13 working weeks which includes overtime of $953.05.
- Exhibit K page 3, shows that in the 2001 financial year the Applicant performed 93.5 hours of overtime (91 hours as detailed plus 2.5 hours on the 27/07/00 that is also additional hours) for the period 01/07/00 – 27/05/01. (27/05/01 being the final day to which the applicant was paid). The Applicant was remunerated $3,272.50 as overtime over 42.28 working weeks (excludes 5 weeks unpaid leave) that equates to an average overtime wage of $77.40/week.

The Applicant submits that the maximum compensation of six months remuneration is therefore 13 x ($600 + $15 + $77.40) = $9,001.20.

(b) As to time to pay the Applicant makes a very detailed submission. In essence the Applicant says the balance sheet provided by the Respondent is fundamentally flawed by inaccuracies and that the Respondent's stated current financial position is not consistent with the 2001 audited financial statements prepared by the auditors (Exhibit E). The Applicant also makes the following points—

(i) It is the Applicant's knowledge that the Respondent receives block funding from DCD, to be spent at the discretion of Respondent for the sole purpose of ensuring the effective running of the Respondent's operations. This includes employment of staff and staff related issues. It is the Applicant's view that it is incorrect to state that the funds cannot be used for employment related matters including all matters arising in the Commission.

(ii)It is the Applicant's view that the balance sheet provided by the Respondent shows that the Respondent has ample funds available to comply with the Proposed Order.

(iii)The Applicant considers it inappropriate that the Respondent has submitted balances that are 5 weeks old, and failed to provide the appropriate Statement of Profit and Loss and Notes to Accounts to allow proper assessment of the Respondent's financial position.

(c) As to suspension on pay the Applicant says that as the Respondent engaged a new bookkeeper on 8 June 2001, when the Applicant was available and fit for work, and did not terminate the period of engagement of the new bookkeeper when the Applicant returned to Halls Creek on the 20 August 2001 when she was available and fit to work. Further, the Respondent clearly considered the Applicant to be on suspension for the entirety of the period and did not wish her return to work. The Respondent made no attempt to contact the Applicant during the period of suspension, and has no knowledge as to the Applicant's fitness for work. As both the preceding and succeeding bookkeepers of the Respondent are not located in Halls Creek, it is clear that it is not a requirement to be physically in Halls Creek to do the bookkeeping.

(d) The Applicant asks the Commission to consider the Annual Leave Liability of the Respondent set out in the balance sheet as evidence that all employees of the Respondent are entitled to 5 weeks Annual Leave per annum. The Applicant says she is entitled to the leave that she was promised by the Respondent at the onset of her employment. The Applicant worked for the Respondent for over 60 weeks (excluding suspension) and remains the only employee of the Respondent not to have been paid a single day's annual leave during her employment. The Applicant asks the Commission to reconsider it's finding that there is a lack of evidence to support the Applicant's Annual Leave entitlement.

Conclusion

4 The purpose of the speaking to the Minutes is to ensure that the proposed Orders to be made by the Commission properly reflect the conclusions reached in Reasons for Decision. It is not open for the parties to re-litigate issues. I do accept however that it is open to the parties to request the Commission to consider any typographical errors or other mistakes made in the Reasons for Decision in a speaking to the Minutes. Notwithstanding this well known principle I will deal with each of the matters raised by the Respondent and the Applicant.

(a) Quantum of Remuneration

5 Section 23A(1)(ba) provides—

"Under a claim of harsh, oppressive or unfair dismissal, the Commission may –

(ba) subject to subsections (1a) and (4), order the employer to pay compensation to the claimant for loss or injury caused by the dismissal;"

Section 23A (4) provides—

"(4) The amount ordered to be paid under subsection (1)(ba) or (3) is not to exceed 6 months' remuneration of the claimant, and for the purposes of this subsection the Commission may calculate the amount on the basis of an average rate received during any relevant period of employment."

6 The meaning of the word remuneration in s.23A(1)(ba) and (4) has been construed widely by this Commission. In *James A Capewell and Cadbury Schweppes Australia Ltd* (1997) 78 WAIG 299 Sharkey P observed at 301—

> "I would adopt, since there is no significant distinction in statutory terms, what Wilcox J said in *May v Lilyvale Hotel Pty Ltd* (1995) 68 IR 112 (IRC of Aust) where His Honour said at pages 116 – 117:-
>
> > "It seems to me that the approach taken in these workers' compensation cases is consonant with the contemporary Australian understanding of the word "remuneration". The Macquarie Dictionary defines the noun "remuneration" as—
> >
> > "1. the act of remunerating, 2. that which remunerates; rewards; pay." The verb 'remunerate' is defined, more helpfully, as: "1. to pay, recompense, to reward for work, trouble etc; 2. to yield a recompense for (work, services, etc)." There is nothing in either definition that suggests that remuneration is confined to cash payments. Contrary to Mr Roger's submission, Leighton does not assist his argument; indeed it points against it.
> >
> > That Parliament intended "remuneration" in s.170EE(3) to cover more than salary and wages is suggested by *the Act* itself. … Plainly, the word "remuneration" was chosen, for s.170EE(3), in order to denote a concept wider than wages. Non-monetary benefits are not wages: see *Ardinal v Count Financial Group Pty Ltd* (1994) 1 IRCR 221 at 228 – 229; 57 IR 89 at 94 -95. But they fall within the concept of remuneration."
> >
> > (See also *Ince v Hartfield Country Club Inc* 72 WAIG 1510 (FB) and the cases cited therein)
> >
> > The word "remuneration", as it is used in s.23A(4), is not therefore restricted to mere "salary" or "wage". "Remuneration" can include commission, superannuation contributions, the cost of providing a car, and also non-monetary benefits. This is not an exhaustive listing of what might constitute items or remuneration."

7 In my view the Commission is entitled to take into account the payments of overtime received by the Applicant in assessing her average remuneration in a six month period. I do not accept the Respondent's contention that in assessing remuneration for the purposes of s.23A that only regular payments of overtime can be considered. Prior to her suspension of employment on 1 June 2000 the Applicant was employed for a total of 60 weeks. She commenced employment in the first week of April 2000. Exhibit B shows that the Applicant was paid a total amount including overtime of $4,853.05 for thirteen working weeks. Exhibit K shows that the Applicant was paid an amount of $18,723.74 from the beginning of July 2000 until 28 May 2001. When those amounts are added together it is clear that the Applicant was paid $23,576.79 for that period of time. Even if the amount of $15.00 per fortnight for 51 weeks or $382.50 is deducted as being a disbursement for expenses incurred as a result of her employment, the Applicant earnt an average of $386.57 during the currency of her employment (60 weeks) until suspension. Accordingly the maximum amount of remuneration in a six month period is $10,050.82.

8 In light of matters set out above the Commission will issue an Order that requires the Respondent to pay the Applicant $9,000.00 as compensation for injury.

(b) Payment for the Period of Time Whilst Suspended

9 As set out in paragraph [117] of the Commission's Reasons for Decision on 17 May 2002 there is no power to suspend an employee without pay for misconduct. Accordingly the Respondent's submissions in respect of this issue are rejected.

(c) Applicant's Claim for Annual Leave

10 The Commission is unable to receive any fresh evidence on a speaking to the Minutes in relation to an issue raised at first instance. In any event as stated in paragraph [120] of the Reasons for Decision the Applicant gave no evidence that it was part of her contract of employment that she was to be allowed five weeks annual leave or monies in lieu thereof. Accordingly the Applicant's submissions in relation to this issue is rejected.

(d) Time to Pay

I am not satisfied that the Applicant's contentions can be made out. I am satisfied that the Respondent will be required to take steps to raise funds to satisfy the terms of the Commission's Order. Accordingly I will make an Order that the Respondent pay the Applicant the sum of $4,000.00 as compensation within seven days of the first quarter's funding for the financial year 2002/2003 becoming available to the Respondent; $5,000 as compensation within seven days of the second quarter's funding for the financial year 2002/2003 becoming available to the Respondent; and $4,127.50 as contractual benefits within seven days of the third quarter's funding for the financial year 2002/2003 becoming available to the Respondent.

2002 WAIRC 05888

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
PARTIES	STACEY SHARON BOOTH, APPLICANT
	v.
	NGARINGGA NGURRA ABORIGINAL CORPORATION, RESPONDENT
CORAM	COMMISSIONER J H SMITH
DATE OF ORDER	MONDAY, 1 JULY 2002
FILE NO.	APPLICATION 1570 OF 2001
CITATION NO.	2002 WAIRC 05888

Result	Orders made the Applicant be paid $9,000 as compensation for injury and $4,127.50 as contractual benefits.
Representation	
Applicant	Mr D E Booth (Agent)
Respondent	Mr P G Robertson (Agent)

Order

WHEREAS this is an application pursuant to Section 29(1)(b)(i) and (ii) of the *Industrial Relations Act 1979*; and

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

1. DECLARES that Stacey Sharon Booth ("the Applicant") was engaged by Ngaringga Ngurra Aboriginal Corporation ("the Respondent") as an employee;
2. DECLARES that the Applicant was unfairly, harshly and oppressively dismissed from her employment on 29 August 2001;
3. DECLARES that it is impractical to re-instate the Applicant to her former position;
4. ORDERS that the Respondent pay to the Applicant as compensation for injury caused by the dismissal within seven (7) days of the date the Respondent receives its:
   (a) first quarter funding for the 2002/2003 financial year from the Department of Community Development the sum of $4,000;
   (b) second quarter funding for the 2002/2003 financial year from the Department of Community Development the sum of $5,000;
5. DECLARES that the Respondent owes the Applicant the sum of $4,127.50 as contractual benefits;
6. ORDERS that the Respondent pay to the Applicant the sum of $4,127.50 within seven (7) days from the date the Respondent receives its third quarter funding for the 2002/2003 financial year from the Department of Community Development;
7. The application be and is otherwise dismissed.

(Sgd.) J. H. SMITH,
[L.S.] Commissioner.

2002 WAIRC 04664

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	JOHN CALHOUN, APPLICANT
	v.
	SANITAIRE PTY LTD, RESPONDENT
CORAM	COMMISSIONER J H SMITH
DELIVERED	18 JANUARY 2002
FILE NO/S.	APPLICATION 154 OF 2001
CITATION NO.	2002 WAIRC 04664

Result	Claim for contractual benefits in part made out. Order made that the Respondent pay the Applicant $11,142.31.
Representation	
Applicant	Mr G McCorry as agent
Respondent	Mr R Castiglione of counsel

Reasons for Decision

1 This is an application made under s.29(1)(b)(ii) of the *Industrial Relations Act 1979* ("the Act"). John Arthur Harold Calhoun ("the Applicant") claims that he is owed benefits to which he is entitled under a contract of employment, not being a benefit under an award or order.

Background

2 The Applicant was first employed by the Respondent in March 1986 as a sales manager. The Respondent provides a sanitary waste collection and disposal service and sanitation services to the toilets of commercial and public premises. Sanitaire was the trading name of the Respondent's business which traded through the company Industrial Hygiene Services Pty Ltd and then Gembush Pty Ltd. Gembush Pty Ltd was later re-named Sanitaire Pty Ltd. At the time the Applicant resigned he and his wife were being paid a total of $95,148.46 per annum, being payment of $50,262.06 in superannuation paid to a scheme in favour of the Applicant, a wage of $23,816.00 paid to the Applicant and $21,070.40 to Margaret Calhoun.

3 Prior to June 1995 the Respondent's business was owned by Mr Vernon Nowland. In the early 1990s, Mr Nowland began to develop symptoms of Motor Neurone Disease which ultimately led to his death in 1995. When the Applicant was first employed by the Respondent, Mr Vernon Nowland's son also worked in the business. However, after a dispute Mr Michael Nowland left the business in early 1988 and Mr Vernon Nowland took over control of the business. In 1989 Mr Nowland appointed the Applicant as General Manager and Mr Nowland left all the operational decision making to the Applicant. From that time onwards until the Applicant resigned on 16 November 2000, the Applicant controlled the business and was given almost a complete discretion as to how the business was run. After Mr Vernon Nowland's death his wife, Mrs Nola Nowland, became the sole director of the Respondent's company. It is common ground that the Respondent was dependant upon the Applicant to run the business. Mr and Mrs Nowland had a baby daughter and Mrs Nowland was for many years in no position to be involved in the running of the company.

4 The amended claims by the Applicant are as follows—

   (a) $83,360.00 being the value to the Applicant of the vehicle driven by him at the time of his cessation of employment with Sanitaire Pty Ltd as trustee for the Nowland Family Trust.
   (b) Payment in lieu of five weeks' notice of termination in the amount of $9,148.85.

(c) Payment of an amount equal to the superannuation component of the Applicant's salary package, calculated on a pro rata basis (16/30 of one month's contribution of $4,188.51) up to the date of cessation of employment in the amount of $2,233.87.

5 The Respondent filed a Substituted Answer and Counter Proposal on 12 November 2001. Paragraphs 2, 3, 9, 10, 12 and 13 of the Substituted Answer contends as follows—

2. Any agreement between the Applicant and the Respondent in relation to the vehicle—

(a) is too uncertain as to its terms to amount to a contract at law; and

(b) was not intended by the parties to impose legally enforceable obligations on the Respondent.

3. Alternatively, the Applicant cannot discharge the onus of proof of establishing the terms of the agreement with sufficient precision.

Particulars

1. The Applicant has failed to provide any particulars of the agreement including the date the agreement was formed.

2. The agreement was allegedly made some eight or nine years ago, was entirely oral and made with Verne Nowland, a person who is now deceased.

3. There is no written record of the agreement or its terms despite the Applicant having, subsequent to the agreement, entered into a management contract which comprehensively set out the terms on which the Applicant was to undertake work for the Respondent.

4. The Applicant is intending to rely upon his own recollection of the agreement which is at odds with the recollection of Mrs Nola Nowland and other witnesses.

9. Alternatively, any agreement in relation to the vehicle—

(a) was intended as an incentive to ensure that and made in consideration of the Applicant continuing in employment with the Respondent until retirement;

Particulars

1. It was made after Mr Verne Nowland discovered that he was terminally ill.

2. Mr Nowland wished to secure the services of the Applicant to ensure the success of the company so as to provide for the long term security of his wife and daughter;

and

(b) was contingent on the Applicant—

(i) continuing his employment until a mutually agreed retirement;

(ii) ensuring that a suitable successor as manager had been trained and put in place prior to the Applicant's departure; and

(iii) not being guilty of any serious wrongdoing.

10. None of the agreed preconditions was satisfied by the Respondent (Applicant) (sic) at the time of his resignation.

12. The Applicant is not entitled to any payment in lieu of notice because he resigned his position and was obliged to provide the Respondent with notice. The Respondent waived any requirement for notice.

13. The Applicant is not entitled to any superannuation payments because there was never any agreement between the Applicant and the Respondent to pay the Applicant any superannuation benefits over and above his statutory entitlements. Any such payments made prior to the Applicant's resignation were not authorised by the Respondent.

6 At the outset of the proceedings the Applicant made an application to amend the name of the Respondent from Gembush Pty Ltd to Sanitaire Pty Ltd. An application was also made on behalf of the Applicant to amend the application to include a claim in the amount of $29,650.00 for payment in lieu of accrued and untaken annual leave entitlements.

7 After hearing submissions, the Commission refused to grant leave to amend the application to include a claim for annual leave payments. The reasons why the application was refused are as follows: The application was filed in the Commission on 30 January 2001. The application did not contain a claim for accrued and untaken annual leave. The Respondent did not have notice of the claim for annual leave entitlements until a facsimile was sent to the Respondent's counsel, Mr Castiglione, on 15 November 2001, from the Applicant's agent, Mr McCorry. The hearing commenced on 19 November 2001. At the outset of the hearing Mr Castiglione advised the Commission that application was opposed as the Respondent had not had sufficient time to investigate the Applicant's claim and was not in a position to proceed to hearing in relation to the new claim. Mr Castiglione advised the Commission that there may be a factual dispute as to the accuracy of the Applicant's records as to annual leave and there was a legal issue as to whether the Applicant was entitled to make any claim for payment of annual leave in respect of a period of time in which he was engaged as a consultant through a company owned by the Applicant. Further, there was an issue about an unauthorised payment made to the Applicant prior to his termination of employment as part of a purported claim for payment in lieu for accrued annual leave.

8 Mr McCorry, on behalf of the Applicant, advised the Commission the claim was for 7.923 weeks' accrued annual leave arising out of the terms of his contract of employment. It was also argued that in the District Court proceedings between the parties, that paragraph 8 of the Respondent's Statement of Claim filed in the District Court established a basis for the claim. Paragraph 8 of the Statement of Claim provides, at termination on 16 November 2001, the first defendant (the Applicant) was entitled to payment in the sum of $13,219 in respect of accrued and untaken annual leave.

9 After hearing the submissions the Commission determined that it was not prepared to allow the amendment to the Applicant's claim at the late stage of the proceedings as the Respondent had not had an adequate opportunity to properly prepare an answer and investigate the Applicant's claim.

Facts relating to claim for the value of the motor vehicle

10 In about 1990, the Applicant discussed with Mr Nowland if he could obtain a 4-wheel drive vehicle. At that time the Applicant was driving a company Fairlane and he proposed to Mr Nowland that he put some money in to upgrade the vehicle to a 4-wheel drive. Mr Nowland agreed and the Applicant paid the company a sum of $5,000.

11 Between late 1992 and early 1993, the Applicant entered into a management services agreement with the Respondent to pay the Applicant through a management services company. Through the arrangement he was able to split his remuneration with his wife, Mrs Margaret Calhoun. Part of the agreement was that the Applicant and his wife were to cease a business commenced by the Applicant and his wife, known as Aime Hygiene, and transfer the books of Aime to the Respondent's business. Two drafts of a management services contract were tendered into evidence. Both drafts appear to be undated and unsigned although one clause indicates the drafts were created in 1993. The agreement was made between Industrial Hygiene Services (1990) Pty Ltd, the Applicant and his wife, Margaret Calhoun. The Recitals in the drafts stated that the Applicant's wife had transferred the business of Aime Hygiene to Industrial Hygiene Services (1990) Pty Ltd. One of the drafts provided for an annual service fee to be paid to the Applicant's company, in the sum of $42,445.00 payable in monthly instalments, and to provide for the use of the Applicant's company officers and employees, a current model Deluxe Nissan 4-wheel drive, whereby the Respondent was to pay the costs of all petrol, insurance, repairs and other running costs. The Respondent was to provide a new vehicle of comparative standard every three years during the term of the company's retainer. There was also a provision for the annual service fee to be reviewed every six months from the date of entering into the agreement and to increase the service fee by a percentage equal to any increase in the Consumer Price Index. The same draft also provided that the personal use of the vehicle was to be reasonable. Further, the draft expressed the rights of the parties under the document as cumulative and in addition to any other rights of that party.

12 It is apparent from both drafts of the management services agreement that neither document represented the final form of the agreement as it was common ground between the parties that the Applicant was to have unrestricted personal use of the vehicle. Further, it is apparent from a facsimile message from Mr Nowland dated 21 January 1993, to his then accountant, Mr Kevin Healy, that there was a provision in a draft which provided for annual leave. However, in neither of the drafts produced to the Commission was there any reference to annual leave.

13 The Applicant testified that there was no change in the way in which he carried out his work after he entered into the service agreement. He still worked full-time as General Manager of Sanitaire. He said he took instruction from Mr and Mrs Nowland and Mr Healey. The only thing that changed was the way he was paid. The Applicant testified that about six to eight months after the management services contract arrangement commenced Sanitaire won a large Education Department tender in December 1993 or January 1994. The Education Department contract accounted for up to 50% of the Respondent's gross revenue. They had previously won the tender in 1991, which was due to expire in April 1994.

14 On 2 March 1994, Mr Nowland sent the Applicant a facsimile message in which he stated—

> "This fax confirms our decision yesterday to Calhoun Management Services a bonus of $2,000 upon the successful retention of the Education Dept. contract. Congratulations, this was a tough one. (Nola and I now sleep easier!)"

15 The Applicant testified that Mr Nowland was so pleased with winning the contract that he said if he (the Applicant) would agree to stay on with Sanitaire and providing the company was running profitably, he could keep the vehicle he was using at the time of his leaving. The Applicant said that Mr Nowland was aware at this time that he was dying and he was concerned about the future for his wife and daughter. The Applicant said that he told Mr Nowland that he would support his wife to the best of his abilities as long as he could. The Applicant said there were no witnesses to this conversation, that the conversation took place in the office at work and they went for coffee. When asked what words were used by Mr Nowland he said that Mr Nowland had said, as long as everything was okay or words to that effect, the vehicle is yours when you leave. When asked what he understood his obligations to be, the Applicant answered, "To make the company plenty of money and then when I leave, which was no specific time, but, you know, I wasn't going to leave in the next couple of years, … I imagine any time after 55, sort of on." When asked whether it was conditional upon him continuing employment to a mutually agreed retirement, he said, "No, there was nothing like that agreed." However, when cross-examined he was asked how long Mr Nowland meant the Applicant to work, the Applicant said, "Well, I suppose until the end of my working time." When it was put to him that this meant until his retirement, he did not disagree. When asked whether it was conditional on ensuring that there was a suitable successor as manager being trained and put in place prior to his leaving, he said, "I would have wanted to do that myself, regardless. That was not discussed with me." When asked if it was conditional on him not being guilty of any serious wrongdoing, he said, "That was never an issue because I never did any wrongdoing."

16 When it was put to the Applicant that the purpose of the agreement was to retain his services because Mr Nowland valued his services and that after his death he knew that Mrs Nowland could not run the company on her own, he agreed and said that it would have been difficult for Mrs Nowland because she had a young child. The Applicant conceded that the agreement in respect to the vehicle may have occurred after the management services agreement was entered into which could have been sometime late in 1993. In particular, he said it could have been six or eight months or even a year after successfully tendering to the Education Department.

17 Ms Nola Wilson, the former office manager of the Respondent, testified that she had a number of conversations with Mr Nowland about the agreement between himself and the Applicant, in respect of a motor vehicle. Ms Wilson testified that Mr Nowland informed her that the Applicant would be entitled to keep the vehicle he was driving at the time he left the company, provided the company was running well at the time and the Applicant was not leaving because he had done anything wrong.

18 Mr Kevin Healy, a certified practising accountant and the principal of Healy and Co, a firm of accountants, testified that he provided accountancy services to Industrial Hygiene Services Pty Ltd from about 1987/1988 until 1995.

19 Mr Healey testified that he had a very clear recollection of discussions with both Mr Nowland and the Applicant concerning the vehicle. He said these discussions took place in or about 1992 or early 1993. He said that he recalled that these discussions took place after Mr Nowland had been diagnosed with a terminal illness in 1992 but that it must have been fairly early as Mr Nowland was still talking at that stage. He said the first meeting was with Mr and Mrs Nowland at their home. He said that the Applicant valued his vehicle tremendously, that he was always talking about it and that it was very important to put some incentive in place for the Applicant to do the right thing and stay with the company and not compete against the company. He said he did not trust the Applicant and that it was important that given that Mr Nowland was very ill it was necessary to secure the future of the company. He testified he put forth an idea that "if everything was going well and if Calhoun agreed to work through to retirement and trained up another sales manager and that person was actually employed and in place at the time of retirement and obviously if he did the right thing, then we would look favourably at giving him the car at its book value at the time of retirement, as long as it did not incur Fringe Benefits Tax." Further, he said it was put to Mr and Mrs Nowland that the arrangement would be entirely at the Respondent's discretion. He said a second meeting took place in relation to the car at the Nowlands' house. On that occasion the Applicant was present. Mr Healey says that the Applicant was informed about the arrangement and the terms that he had discussed with Mr and Mrs Nowland. Mr Healey said this discussion took place prior to the Applicant executing the management services agreement. He said the vehicle arrangement was not referred to in that agreement, as the vehicle arrangement was not meant to be a legally binding arrangement.

20 Mr Healey ceased to be the Respondent's accountant in 1995 after a dispute involving the Applicant and Nola Wilson. The dispute arose over what internal accounting controls should be implemented by the Applicant and Ms Wilson. Mr Healey was

critical of the Applicant and brought his concerns to Mrs Nowland in October 1995 in written correspondence. As a result of the dispute the Applicant decided he was going to resign but shortly after withdrew his resignation after Mrs Nowland persuaded him to stay on and replace Mr Healey with another accountancy firm. When cross-examined about the motive for putting in place the agreement about the vehicle, Mr Healey said that he did not trust the Applicant and would have removed him as General Manager, but that was not Mr Nowland's view. Mr Healey said in respect of the vehicle, the offer was made because he wanted the Respondent to have some hold over the Applicant. He said Mr Nowland had half forgiven the Applicant for the Aime episode but they were very concerned that he (the Applicant) did the right thing by the company. Mr Healey said that the Applicant's past behaviour was of huge concern to him and he had difficulty personally trusting the Applicant. He said Mr Nowland's attitude was that he (the Applicant) may have done wrong, that he probably does not work that hard but at the end of the day results were being achieved in terms of major contracts, and the business was going okay. Further, that when Mr Nowland became aware of the seriousness of his illness Mr Nowland's attitude was "I think he's the devil we know".

21 As to the value of the vehicle, Mr Healey said they would look to a depreciation rate of 22.5% diminishing so that after three years the vehicle would be worth about $5,000 or "something like that". As I understand his evidence, his assessment related to the value of a 4-wheel drive the Applicant was driving at the time the arrangement was entered into, not the value of the vehicle the Applicant was driving in the year 2000. Mr Healey said it was not unusual for a redundant senior executive to be given an offer to purchase the car they are driving at the time of termination at the written down value of the car but it was very rare for an executive to be just given a vehicle that they were driving. When it was put to him (Mr Healey) that his entire evidence was coloured by his distrust or dislike of the Applicant, Mr Healey denied that this was the case. He said he was not in the "like" or "dislike" business, and that his duty was to advise the Nowlands. He said that Mr Nowland made a decision to run with the Applicant withstanding the AIME episode and he respected Mr Nowland's decision. He said that the Nowlands were very small clients of his business.

22 Mrs Nola Nowland testified that she may have been present at meetings between her husband, Mr Healey and the Applicant in or about 1993 concerning discussions in respect to the vehicle but she was not at all times involved in the discussions and she had no recollection of what was discussed. She said that at the time she had a small child to look after as well as having to arrange treatment for her husband. Consequently business matters were not foremost in her mind for most of that period. She said that her understanding in respect to the arrangements for the vehicle came from a combination of her recollection of what her husband told her and what the Applicant told her subsequent to her husband's death. She said that her husband was very worried about the future of the company after his death. He was concerned about securing her future and that of their daughter. She said the Applicant was a very good salesman with very good contacts in the industry and she had no experience in running the company and would be entirely reliant on the Applicant to ensure that the company was run properly. Consequently her husband wanted some incentive for the Applicant to stay with the company until retirement. She said that her husband told her that Mr Healey had suggested to him (Mr Nowland) that he offer the Applicant the vehicle he was driving, upon retirement, so he would stay and do a good job. However, she said she could not recollect the exact basis on which the vehicle was to be offered to the Applicant by her husband. She said, however, that she was told by her husband that the Applicant would only get the car if the company was in good shape when he left and there was a properly trained successor to carry on as General Manager, in place. Further, she also recalled her husband saying that the Applicant would only get the vehicle if he had not done anything wrong, in that he must not have "raped the typist or robbed the till".

23 After her husband died Mrs Nowland had several conversations with the Applicant concerning the vehicle arrangement. She said that the Applicant told her categorically that he was entitled to have the vehicle for nothing upon his retirement. She said that she accepted that this was a true account of the understanding that he had had with her husband, as the Applicant frequently assured her that he would always do the right thing by her daughter and that the Applicant had given her husband that assurance. She said that on each occasion they spoke about the arrangement, she advised the Applicant that she would honour any arrangement made with the Applicant by her husband on behalf of the Respondent.

24 Between 1996 and 1999, Mrs Nowland met on several occasions with the Applicant and the Respondent's accountant, Mr Geoffrey Hewitt. Arrangements were discussed for putting a successor in place as a new General Manager at those meetings. At several of those meetings the issue of the understanding concerning the Applicant's arrangements with her husband in respect to the vehicle, were raised. She said that she advised Mr Hewitt on a number of occasions, in the presence of the Applicant, that it was her understanding that the Applicant could have the vehicle, conditional upon the Applicant leaving the business in good shape and having a properly trained successor in place before he (the Applicant) left. Further, that she had to be satisfied that this was the case. She said that the Applicant never at any time, stated at those meetings that he disagreed or said that he did not consider the conditions to be a true reflection of the conditions of the agreement with her husband.

25 Mr Hewitt testified that he is a member of the National Institute of Accountants and commenced as accountant for the Respondent in about January or February 1996. He testified that he recollected several meetings between 1996 and 1999 at which he was present with the Applicant and Mrs Nowland, where the vehicle arrangement was discussed. He said that he recollected that Mrs Nowland outlined her understanding of the arrangement in which he (the Applicant) was to have the vehicle and in particular, that it was conditional on the Applicant having a properly trained successor in place prior to retiring. He also said that Mrs Nowland specifically said that any arrangement concerning the new manager had to be to her satisfaction and that these matters were never challenged by the Applicant. Mr Hewitt said that he could not recall the exact words which Mrs Nowland used when outlining her understanding of the arrangement but said that it was his understanding, coming away from the meetings, that for the Applicant to be given the vehicle, the company had to be left in good shape and a successor as General Manager to be in place, to the satisfaction of Mrs Nowland.

26 When cross-examined the Applicant did not disagree that Mrs Nowland had discussed with him that his entitlement to the vehicle was dependant upon him having a properly trained Manager as a successor before he left the company. However, he said that this was not his understanding of the arrangement, he said he did not deny when the issue was raised that that was a condition because it was his "thoughts". He said specifically that it was his thought to have a manager running the place as he did not want to let the business go downhill.

Events that occurred prior to the Applicant resigning, relating to his entitlement to the vehicle.

27 Mr Hewitt gave uncontradicted evidence that in about 1997 or 1998 he and Mrs Nowland became aware that the Applicant was thinking about retirement and they discussed with the Applicant how much longer he was going to keep on working. Mr Hewitt said the Applicant informed them that he would possibly work another five years. The issue of finding a new General Manager to replace the Applicant then became pressing. In early 1998 the Applicant informed Mr Hewitt that he had retained the services of a new salesman, Neil Underwood, with a view to training him to take on management functions. Mr Hewitt testified that not long after Neil's appointment, however, the Applicant informed him (Mr Hewitt) that Neil was not going to make the grade. Mr Hewitt said that the Applicant showed some resistance to getting in someone who could take over his role when he left, that he told Mr Hewitt that he thought it would be too expensive, but despite this he (Mr Hewitt) continually raised the issue with him.

28 Mr Hewitt said the next major effort to find someone took place in June 2000. At a meeting between Mr Hewitt, the Applicant and Mrs Nowland it was resolved to engage a person, who was already working for the company, Kay Davies, for a three month trial. Mr Hewitt said that during that period she proved unsatisfactory, that she did not have the capacity to undertake the book-keeping aspect of the job, as she could not provide the financial information that he needed, such as cash flows.

29 Both Mr Hewitt and the Applicant gave evidence that in about May 2000 the relationship between the Applicant and Mrs Nowland became very strained following an argument. Mr Hewitt said a dispute occurred in February 2000 between the Applicant and Mrs Nowland concerning the Applicant's purchase of a new vehicle without her authority. The Applicant purchased a brand new 4-wheel drive at that time. The Applicant said that the 4-wheel drive that he was driving at the time was about four years' old and he made a decision to trade it in for a new vehicle. He said that shortly after taking delivery of the vehicle, he had a discussion with Mrs Nowland during which he mentioned that he had just purchased a new vehicle. He said she became quite indignant saying words to the effect that he should not have done it without her permission. He said that he explained to her that in his capacity as General Manager he purchased all the company vehicles, including the vehicle she drove without telling her at the time what he was doing. From that point in time their relationship became increasingly tense. For several months Mr Hewitt acted as a mediator between the Applicant and Mrs Nowland. Mr Hewitt said that after the February dispute, he decided that it was essential that there should be monthly and properly minuted meetings, so Mrs Nowland could be properly informed about and approve all major decisions being taken by the Applicant. The Applicant says that in the early part of 2000/2001 financial year, he instructed all staff that excess accumulated annual leave had to be taken or paid out. He said that the paymaster informed him he had 22 weeks' accumulated annual leave so he asked for 16 weeks of this accumulated leave to be paid out in the form of a payment to his superannuation fund. He said some of it was paid in July and August 2000 but there were some problems with the paymaster's calculations.

30 On 17 October 2000 the Applicant attended a monthly meeting with Mr Hewitt and Mrs Nowland. At the conclusion of the meeting the Applicant handed Mr Hewitt a document entitled "John Calhoun Package Payments". The document states as follows:

"

Date of Meeting 17/10/00

JOHN CALHOUN PACKAGE PAYMENTS

MONTHLY SUPERANNUATION	$4110.00 x 12		$49320.00
WEEKLY WAGE JC	$458.00 x 52		$23816.00
WEEKLY WAGE MC	$405.20 x 52		$21070.40
TOTAL PACKAGE UP TO 30/9/00			$94206.40
PLUS INCREASE IN SUPERANNUATION 1/7/00 OF 1%			$942.06
NEW TOTAL PACKAGE			$95148.46
WHICH EQUATES TO PER WEEK	$1829.78		
LEAVE LOADING SHOULD BE CALCULATED ON THIS FIGURE 17.5%			
WHICH FOR A 40 HOUR WEEK IS $320.21/WEEK.			
THEREFORE FOR THE 640 HOURS OF LEAVE PAID THE LEAVE LOADING WOULD BE $320.21 X 16 WEEKS			$5123.36
MYOB CALCULATES LEAVE LOADING ON WEEKLY WAGES FOR JC & MC			
WHICH FOR THE 640 HOURS PAID IN JULY 2000 SHOULD BE			
JC 17.5% of $458.00/WEEK IS $80.15/40 HOURS X 16 WEEKS		=	$1282.40
MC 17.5% of $405.20/WEEK IS $70.91/40 HOURS X 16 WEEKS		=	$1134.56
			$2416.96
BALANCE OF LEAVE LOADING TO BE PAID TO JC			$2706.40
LEAVE ONLY PAID ON MYOB WAGES OF $863.20 PER WEEK			
SHOULD BE PAID ON TOTAL PACKAGE OF $1829.78 PER WEEK			
DIFFERENCE OF $966.58 PER WEEK FOR 16 WEEKS		=	$15465.28
ALSO DIFFERENCE OF 1% IN SUPER NO(sic) PAID FOR JUL/AUG/SEPT			
$78.51/MONTH X 3		=	$235.53
TOTAL OWED TO JC			$18407.21 "

31 Mr Hewitt said that the Applicant gave him the document and asked him to confirm that the calculations were correct, as he thought he had been underpaid. Mr Hewitt later showed Mrs Nowland a copy of the document. Mrs Nowland testified that she was shocked when she saw the document and that she had never authorised the package of entitlements in the document. She said that she asked Mr Hewitt to inform the Applicant that he was not entitled to the amounts set out in the document. The Applicant said that Mr Hewitt rang him to say that he and Mrs Nowland were coming to see him to discuss his salary and conditions. The Applicant said that he did not wish to continue working for Sanitaire and that he would be handing in his resignation to finish on 22 December 2000.

32 On 16 November 2000 the Applicant met with Mr Hewitt and Mrs Nowland. He handed to her a letter of resignation. The Applicant's letter of resignation stated as follows—

> "In writing what follows I have used deliberation to the maximum. It has not been an easy decision, and certainly not the one I had planned.
>
> When first joining IHS in March 1986 I believed I was joining a well run established business, how wrong this was, but you know that story.
>
> Then for ten years I was left on my own; with only my family as support. In later years I faced criticism because I employed people I knew and relatives, all which benefited IHS, as did my decisions on vans and buildings. In regards to employing friends and relatives, it is well known that you must know their character well, and I did, this is now a proven known fact, as is the profit returned year after year because of these decisions.

> As of the year 2000 Sanitaire is the market leader in its field, and is a large and successful company employing approximately 80 people both full-time and part-time, with fourteen service vans.
>
> We are still returning a healthy profit even though times are tougher and there is more competition, but we have still managed to stay a jump ahead of them.
>
> However in regards to my own position, I feel like I am in a bad marriage, where neither party trusts the other. Whilst I can stand against anything the opposition tries to say or do to damage myself or Sanitaire, when the same thing occurs from inside the organization it causes irreparable damage which has finally got to me, even though it took 6 years.
>
> The job I set out to do I have more than achieved, and now its time for me to go – to move on.
>
> I have therefore decided to resign from Sanitaire as of Friday December 22nd 2000."

33 Mrs Nowland testified that the Applicant said he was not worried about an audit but he would not agree to stay out of the industry for two years, that he would only agree to a period of six months. Mrs Nowland then told him that she did not accept that. She said that she told the Applicant that he was not to take the vehicle, that it was company property and if he did not return it he could be charged with theft. When the Applicant was cleaning out his desk Mrs Nowland testified that the Applicant told Mr Hewitt and her that they did not understand the enormity of what they had done in relation to certain contracts and that once the industry found out that a key person had left the organisation, (particularly the Education Department,) that they would be likely to rescind their contracts.

34 When the Applicant handed the resignation to Mrs Nowland she informed the Applicant that she wanted him to leave immediately. She informed him that she did not wish him to serve out his period of notice, that she would pay him four weeks' pay in lieu and wanted him off the premises immediately. A verbal confrontation then occurred between the Applicant and Mrs Nowland.

35 During the course of the meeting, and prior to the verbal altercation, the Applicant and Mrs Nowland spoke about the vehicle. The Applicant testified that he did not have the vehicle at work that day because it was in for some minor repair work and Mrs Nowland informed him that she was not going to let him take the car. She said the vehicle was company property and that he was not to take it. The Applicant said the purported condition requiring him to train and have in place a suitable replacement General Manager was discussed. The Applicant testified that he informed Mr Hewitt that he was not there when he made the agreement with Mr Nowland that the condition was never specified and in any case, Mr Underwood, who had been training for management, was quite capable of performing the duties. He said they had some further argument regarding the conditions under which he could take the car, but he could not recall the details.

36 Mrs Nowland testified that she was prepared to look at him having the vehicle, even though she believed he had not fulfilled the terms of the agreement. She said she told him he could have the vehicle on two conditions. These were—

(1) that a full investigative audit be carried out (after he left) to show there were no irregularities;

(2) that he undertook not to be involved in any way in the hygiene industry for two years after his resignation.

37 Mrs Nowland prepared in minute form a note of what was said at the meeting when the Applicant tendered his resignation. Mr Hewitt testified that he had reviewed those notes and that they accorded with his recollection of the meeting. Both Mr Hewitt and Mrs Nowland testified that no one could assert that the Applicant had trained and had in place a manager to take his position at the time of his (the Applicant's) resignation.

38 After the Applicant's employment was terminated, Ms Glenys Maton was appointed as General Manager, in January 2001. When cross-examined Mr Hewitt testified that after the Applicant had threatened to resign, he and Mrs Nowland met with Ms Maton on 7 November 2000. At that time Ms Maton was manager of "Ladysan" which conducts a similar business. Mr Hewitt was asked if any offer was made to Ms Maton at that meeting. He said no formal offer was made but said, however, that Mrs Nowland and Mr Hewitt asked Ms Maton whether she would consider the position if it became available. He said that Ms Maton informed them that she would only consider the position in the event that the Applicant was not employed by Sanitaire.

Rate of pay

39 Mr Stephen Bowen, a Certified Practising Accountant, testified that he has been engaged by the Applicant as his accountant since 1995. He said that after Mr Healey was terminated as the Respondent's accountant in 1995, Mr Bowen met with the Applicant and Mrs Nowland at the offices of Sanitaire in August or September 1995. Prior to this meeting Mr Bowen had discussions with Mrs Nowland about taking over the accounting work for Sanitaire. Mr Bowen said that when he examined the records of the company and noticed what the Applicant was being paid, he advised Mrs Nowland and Ms Wilson that the General Manager's pay, was not adequate for the position and a substantial increase in remuneration was warranted to ensure that the company retained a General Manager of the quality of the person it appeared to have.

40 In 1995, the Applicant's terms and conditions of engagement were still governed by the management services agreement. Mr Bowen formed the view that at all material times the Applicant was an employee of Sanitaire and an arrangement which purported to have him provide consultancy services to Sanitaire on a fee for services basis did not represent the true nature of the relationship. Mr Bowen said that at the meeting in August or September 1995 with the Applicant and Mrs Nowland a new salary packaging arrangement was discussed. He said it was agreed there would be established a direct employment relationship between Sanitaire Limited, the Applicant and the Applicant's wife, Margaret Calhoun. He said he advised Mrs Nowland that Margaret Calhoun's share of the total remuneration should reflect the agreed value of the work she performed for Sanitaire in supporting her husband's role as General Manager. Mr Bowen said at that time the Applicant's total employment package was $47,672.00 gross per annum and at that meeting Mrs Nowland advised that she intended to increase the Applicant's remuneration by $25,000 per annum so that his total package would be $72,672.00 per annum. He also says that it was agreed that the pay increase would be backdated to 1 July 1995. Although the discussion at the meeting was not documented, Mr Bowen prepared a note of the salary package arrangements that were to be paid to the Applicant and Margaret Calhoun. He forwarded this document to Ms Wilson, who also made some notations on the document as to the payments to be made to the Applicant and Margaret Calhoun. The document records that a total of $20,000 per annum was to be paid into superannuation and of the remaining $52,672 per annum, the Applicant was to be paid 60% of that amount and Margaret Calhoun was to be paid 40%.

41 In cross-examination it was put to Mr Bowen that Mrs Nowland never agreed to or proposed the amount of $25,000. In response he said he had no input to the amount and he was surprised at the amount she put on the table. Mrs Nowland, in her evidence, denied that she knew that Mrs Margaret Calhoun was an employee of the company prior to October 2000. Further, when she gave her evidence she said that when she read Mr Bowen's witness statement of his evidence in chief about the $25,000 increase, she said it came as a complete surprise to her on a number of levels. However, she said that she was not suggesting that Mr Bowen was not telling the truth. Mrs Nowland, however, was not asked to explain why Mr Bowen's evidence came as a complete surprise to her.

42 Mr Calhoun gave similar evidence to the evidence given by Mr Bowen in respect of this issue. Mrs Nola Wilson, who was employed as the office manager of the Respondent company until about August 1998, testified that the Applicant received a $25,000 increase backdated to July 1995. She said she was not present at the meeting with Mr Bowen and Mrs Nowland at which the pay increase was discussed. Mrs Wilson identified her handwriting on the document created by Mr Bowen, which recorded the pay increases effected in 1996. Mrs Wilson also testified that in mid 1996 there was a change in distribution of the Applicant's remuneration, in which he re-calculated his after tax entitlement. She said after this time he regularly received wage increases or bonuses.

43 The Applicant testified that he had a number of wage increases and bonus payments from 1996. He said although he could not recall exactly when the wage increases occurred, he received $10,000 increase in mid 1996, a further $3,000 in the 1997/1998 financial year, $10,000 in the 1998/1999 financial year and a $4,000 increase in the 1999/2000 financial year. He also said that he was paid a bonus of $5,000 when he won the Education Department contract for the third time in 1997 or 1998. Further, in 1998/1999 Sanitaire had a major victory over the State Revenue Department in respect to tax. The Applicant argued on behalf of Sanitaire that Sanitaire's service contracts were not taxable. Mrs Nowland advised him that if they were successful with their argument that she would give him half of the tax that was recovered. Ultimately, the claim was successful and the Applicant was paid a bonus of $30,000, which he arranged to have paid into his superannuation fund.

44 The Applicant testified that at the time of his termination of employment he and his wife's total package was $95,148.46 as set out in the document entitled "John Calhoun's Package Payments" in paragraph 30 of these reasons for decision.

45 Mrs Nowland testified that when this document was brought to her attention in October 2000 she was very surprised, as this was the first she became aware that Margaret Calhoun was employed as an employee of the company. She said that Margaret Calhoun had never been an employee of the company that she had never done work for the company and she (Mrs Nowland) had never approved such a package. Further, she had never approved the total payment of $49,320.00 per annum in superannuation. She says in about early 1997 she authorised an increase of about $3,000 followed by another amount of $10,000 in mid 1998. She said they were the only increases she authorised following her husband's death. Her understanding was that the cash component of the Applicant's salary should have been about $75,000 at the time of his resignation and he was only authorised to receive statutory superannuation.

46 Mrs Nowland did, however, say that she agreed to pay the Applicant a bonus of $30,000 being half of the money paid in tax that was refunded from the State Revenue Department in July 1999. When cross-examined Mrs Nowland said that in 1997 the Applicant approached her and said he should be on around $75,000 per annum and asked her for a $15,000 pay increase. She said she was not prepared to give him that increase and agreed to a $3,000 increase which would have taken him to about $60,000 or $65,000 per annum. When a document, written by her, was shown to her that recorded that in November 1994 the Applicant had recently received a $10,000 per annum pay increase, she said she could not recall that increase but that she did not dispute the accuracy of the statements contained in the document.

Margaret Calhoun's employment status

47 Mrs Nowland testified that until she received the document "John Calhoun Package Payment" she had no idea that Margaret Calhoun was employed by her company. She said subsequent to the Applicant's departure she became aware that company records had been generated, including tax documents, purporting to show that Margaret Calhoun was an employee of the company. Further, that a letter was sent out under her name, signed by the Applicant, purporting to be a job offer to Margaret Calhoun. She says that all of these actions were taken on the instruction of the Applicant, without her knowledge or authority. Mrs Nowland's evidence, however, was contradicted by the evidence given by Mr Bowen, who testified that at the meeting in late 1995 it was discussed and agreed between the Applicant and Mrs Nowland that as part of the salary packaging arrangement, there would be established a direct employment relationship between Sanitaire Limited, the Applicant and Margaret Calhoun. Mr Bowen said that as a result of that arrangement Margaret Calhoun did become an employee of the Respondent, as he prepared her tax returns for her after that arrangement came into place. Further, he testified that in no sense could it be said that her income for the work that she did for the company, was the Applicant's income.

48 The Applicant testified that Margaret Calhoun did a lot of the work that Mrs Nowland was not aware of because "she (Mrs Nowland) was not there a lot of the time". He said that Margaret Calhoun would go on runs to Dwellingup and other areas. Further, the Sanitaire designs and all the van ideas were Margaret's. In particular, the bags in the units were all Margaret's ideas. He said he would frequently send Margaret into every toilet from here to "England" checking on whose sanitary units are whose.

Conclusions

(a) Claim for the vehicle.

49 The Applicant claims the Respondent should be ordered to pay to him the sum of $83,360, being calculated as follows—

> "The sale price of the vehicle was $57,185 and tax on termination payments is 31.4%. The gross amount to give a net payment of $57,185 after deduction of 31.4% tax is $83,360."

However, evidence given by Mr William Paterson, the principal of Newtown Toyota, established that the vehicle was sold by the Respondent to Newtown Toyota for $48,500 and onsold for $53,990.

50 Although the Respondent argues that it was not intended by the parties to impose a legally enforceable obligation on the Respondent in respect of the vehicle the Applicant was driving at the time of his resignation, I am not persuaded that this argument can be made out at law. In commercial arrangements, it will be presumed that the parties intend to create legal relations and thus make a contract (*Cheshire and Fifoot's Law of Contract* 7th Australian edition (1997) at para. 5.11). Mr Healey is the only witness that put forth any evidence in support of this argument, however, his evidence shows it was apparent that the offer made of the vehicle was made on the basis of creating legal relations, that is to ensure that the Applicant did not resign and to ensure that he provided faithful and consistent service to the Respondent.

51 The Respondent also argues that any agreement between the Applicant and Respondent in relation to the vehicle was too uncertain as to its terms to amount to a contract at law. In *Upper Hunter County District Council v Australian Chilling & Freezing Co* (1968) 118 CLR 429 Barwick CJ said "… a contract of which there can be more than one possible meaning or which when construed can produce in its application more than one result is not therefore void for uncertainty. As long as it is capable of a meaning … the court … will decide its application … No narrow or pedantic approach is warranted …". The readiness of courts to uphold bargains is stronger if the parties have acted on the agreement (see *Sinclair v Schildt* (1914) 16 WALR 100 at 106 per Burnside ACJ and at 110 per Rooth J). Courts have in some cases refused to uphold agreements that are vague, ambiguous or imprecise. I am of the view that this case is not one of those. The evidence given in these proceedings establishes, in my view, that an agreement was reached, however, the difficulty raised by the evidence in this case is determining what were the terms of the agreement as the witnesses all recall a different version of the conditions. Clearly in this case the parties have acted on an agreement. The real issue is what exactly were the conditions attached to the provision of the vehicle to the Applicant on his resignation.

52 Having considered all of the evidence I am not satisfied that Mr Healey's evidence sets out all of the terms and conditions of the agreement, in particular I am not satisfied that it was a condition that the agreement would be discretionary and the vehicle could be obtained by payment by the Applicant of an amount representing the book value of the vehicle at the time of retirement as long as it did not incur Fringe Benefits Tax (FBT). Whilst it may be the case that these were part of the terms suggested to Mr and Mrs Nowland in early 1993, the evidence given by Mr Healey in respect of a payment by the Applicant is not corroborated by the evidence given by any other witness. Mr Healey, however, did say that the other terms were that the Applicant could have the vehicle if he agreed to work through to retirement and trained up another salesperson and that salesperson was employed and actually in place at the time of retirement, and if he did the right thing. These terms are supported by the evidence given by Mrs Nowland, the Applicant and to some extent by Ms Wilson.

53 I have had regard to the evidence given by Mrs Nowland about her being informed by her husband of the agreement and by the Applicant. In relation to the evidence that she gave about what her husband told her about the agreement, although that evidence is hearsay, I have had regard to it on the basis of the rule in *Subramaniam v Public Prosecutor* [1956] 1 WLR 965 where a statement is not hearsay and admissible when evidence is received of a statement made to a witness by a person who is not, himself, called as a witness if the evidence is not received as to the truth that the statement was made. Mrs Nowland's evidence of course is not entirely dependant upon what her husband told her about the agreement but also what the Applicant told her about the agreement.

54 I am satisfied after having regard to the evidence given by the Applicant and Mrs Nowland that it was a condition of the provision of the vehicle to the Applicant, that he work until his retirement. However, I am not satisfied, after having regard to the evidence of Mrs Nowland that it was a term that the date of the retirement had to be mutually agreed. There is nothing in her evidence which suggests that this was a term that was conveyed to her by the Applicant or by her husband. However, it is quite apparent from the Applicant's evidence and from Mrs Nowland's evidence that the agreement was put in place as an incentive to keep the Applicant with the company until retirement.

55 As to the Respondent's contention that it was also a condition that the agreement was contingent on the Applicant ensuring that a suitable successor as Manager had been trained and put in place prior to the Applicant's departure, the evidence given by the Applicant and Mrs Calhoun establishes that this was a condition precedent. Mrs Nowland said in her evidence that the Applicant frequently assured her that he would always do the right thing by her daughter and by her and he had given this assurance to Mr Nowland. Further, the information conveyed to her by her husband that it was conditional upon the Applicant leaving the business in good shape and having a properly trained successor in place, before the Applicant left, was not contradicted by the Applicant when it was raised with him in a number of meetings at which Mr Hewitt was present. The Applicant in his evidence conceded that he never challenged that contention. Further, when it was put to him that the agreement was conditional on ensuring a suitable successor being trained and put in place as Manager prior to his leaving, the Applicant's response to that is that he would have wanted to do that himself regardless. Further, the Applicant in his evidence says that the words used by Mr Nowland were that he said "as long as everything was okay" or words to that effect, "then the vehicle is yours when you leave." Whilst it is not in dispute that the business was financially in good shape at the point when the Applicant tendered his resignation, I am not satisfied that the argument made on behalf of the Applicant "as long as everything was okay" should be construed only in terms of the business being profitable at the time of the Applicant's retirement. The reason I have reached this view is that it is apparent from the evidence that it was important in relation to at least one major contract, (the Education Department contract) that the obtaining of that contract could be due in part to the fact that the Applicant was well known to those who determined who would win the tender for that work. Mrs Nowland gave uncontradicted evidence that on the day in which the Applicant tendered his resignation, he made it plain to her that there was a real risk that the Education Department could cancel its contract once it was known that he was leaving the company. Consequently, I have come to the view that the words "as long as everything was okay" should be construed as being that at the time of the termination of the Applicant's employment not only should the company be financially viable but that it should be left in competent and trained hands so as to ensure the financial viability of the business. Part and parcel of that obligation is "to ensure that a suitable successor as a Manager had been trained and put in place prior to the Applicant's departure." Although the Applicant testified that when he handed Mrs Nowland his letter of resignation he said to her that Neil Underwood was quite capable of performing the duties of General Manager, the Applicant did not maintain this view at the hearing. He said there were doubts about Mr Underwood.

56 In relation to the third condition contended on behalf of the Respondent, that the Applicant not be guilty of any serious wrongdoing, it was not contended at the hearing in these proceedings that the Applicant had been guilty of any serious wrongdoing at the time of his termination of employment. All such allegations in these proceedings were withdrawn.

57 Having regard to my findings, it is my view that the Applicant's claim for payment of a sum in lieu of possession or transfer of the title to the vehicle should be dismissed.

(b) Claim for superannuation

58 I do not accept Mrs Nowland's evidence that she was not aware that she had approved a $25,000 pay increase for the Applicant in late 1995. I prefer the evidence given by Mr Bowen to the evidence given by Mrs Nowland in relation to the rate of pay and pay arrangements reached in 1995. It is apparent from Mrs Nowland's evidence that she has very little recollection of the pay increases that she approved for the Applicant. For example, when a document was put to her that showed a $10,000 increase had been approved by her sometime in 1994, she was surprised in that she had no recollection of approving such an increase. Mr Bowen's evidence is supported by contemporaneous notes made by himself and Ms Wilson in relation the late 1995 salary packaging arrangements. In addition it is common ground that the Respondent gave the Applicant complete discretion as to how the business was to be managed.

59 The Applicant conceded in his evidence that he did not have a very good recollection of the history of his pay increases. However, the rate of pay for the payment in lieu of five weeks' notice is sought on the basis that this was the amount that was being paid to the Applicant by the Respondent at the time he resigned. It is apparent from the evidence that the amount as sought is in accordance with the record prepared by the Respondent's pay officer. Further, it is apparent from the evidence given by Mr Hewitt that the accounts of the business were regularly audited by him. Accordingly, I am of the view that the Applicant and his wife were entitled to be paid a total package of $95,148.46.

60 In relation to the claim for superannuation, however, I will allow an amount of $4,110.00. I will not allow the amount claimed in respect of the increase in superannuation of 1%, claimed from 1 July 2000, being an increase pursuant to the provisions of the *Superannuation Guarantee Charge Act 1992* (Cth). Any amounts owing in respect of that legislation cannot be claimed as a contractual obligation unless the amounts of contributions to superannuation funds form part of the contract of employment (see *Keane v Lomba Pty Ltd* (1998) 78 WAIG 810 and the recent observations of the President in *Dellys v Elderslie Finance Corporation Limited* [2001] WAIRC 04455 at [57] - [67]). As to the claim for 5 weeks superannuation claimed as compensation I am satisfied that this amount was due and owing under the contract of employment, as it arises out of the salary sacrifice arrangement agreed to by Mrs Nowland at the meeting in late 1995 between the Applicant and Mrs Nowland at which Mr Bowen was present.

(c) Payment in lieu of notice of termination

61 The Respondent argues that the Applicant is not entitled to any payment in lieu of notice because he resigned his position and was obliged to provide the Respondent with notice. It is not in issue that the contract of employment can be lawfully terminated by the party providing requisite notice has been provided to the other party, neither was it raised as an issue by the Respondent that the period of five weeks' notice given by the Applicant did not constitute a period of reasonable notice. However, the Respondent contends that it waived any requirement for notice. In relation to the Respondent's arguments, two issues arise. The first issue is whether the Respondent in fact waived the requirement for notice and the second issue is whether the factual circumstances raise a waiver at law.

62 Mrs Nowland says that she informed the Applicant that she did not wish him to serve out his notice, that she would pay him four weeks' pay in lieu and that she wanted him off the premises immediately. It is apparent from the Applicant's evidence and from Mrs Nowland's evidence that there was not a mutual waiver of the period of notice.

63 A valid notice of termination will operate according to its terms and will bring the contract of employment to an end when the notice expires. The question whether the contract can be brought to an end at an earlier time then arises. In *Riordan v War Office* [1959] 1 WLR 1046 at 1054 Diplock J observed—

> "The giving of a notice terminating a contractual employment, whether by employee or employer, is the exercise of the right under the contract of employment to bring the contract to an end, either immediately or in the future. It is a unilateral act, requiring no acceptance by the other party, and, like a notice to quit a tenancy, once given it cannot in my view be withdrawn save by mutual consent."

64 Further, it is well established that a notice of termination, once given, will operate to end the contract when the period specified therein expires unless the notice is withdrawn by mutual agreement (see the discussion in Macken, McCarry and Sappideen's *The Law of Employment* 4th edition at page 172). Given that there is no capacity for a notice to be withdrawn except by mutual agreement, it is my view that a period of notice cannot be waived by an employer unless the waiver of the period of notice is agreed to by the employee. Further, it is my view having regard to the facts set out above that it is doubtful whether, at law, Mrs Nowland waived the period of notice. Alternatively, if it could be said that she did so, then she did so on the condition that she pay the Applicant for the period of notice.

65 Having regard to my finding in respect to the period of payment in lieu of notice, I will make an order that the Applicant be paid for a period of five weeks' notice of termination. However, I will not make an order for the amount of $9,148.85, which is sought by the Applicant. The evidence establishes that the amount which is sought is calculated on the basis of the weekly wage paid to the Applicant, to Margaret Calhoun and as superannuation. The Applicant is not entitled to be paid an amount of the package that is to be paid to Margaret Calhoun. For the reasons discussed by the Chief Commissioner and Commissioner Smith in *AWI Administration Services Pty Ltd v Birnie* [2001] WAIRC 04015 at [206] - [208]; (2001) 81 WAIG 2849 at 2863 and by Commissioner Scott and Commissioner Smith in *Dellys v Elderslie Finance Corporation Ltd* op sit at [101], I am of the view that the payment for the period in lieu of notice should be five weeks' pay of the pay paid to the Applicant and the amounts that would have been paid to his superannuation fund for that period of time. Accordingly, I assess five weeks' notice as follows:

Five weeks' pay	$2,290.00
Superannuation (five weeks)	$4,742.31
Total	$7,032.31

66 In light of my findings I will make an order that the Respondent pay the Applicant $11,142.31.

2002 WAIRC 04672

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	JOHN CALHOUN, APPLICANT
	v.
	SANITAIRE PTY LTD, RESPONDENT
CORAM	COMMISSIONER J H SMITH
DELIVERED	MONDAY, 21 JANUARY 2002
FILE NO/S.	APPLICATION 154 OF 2001
CITATION NO.	2002 WAIRC 04672

Result	Claim for contractual benefits in part made out. Order made that the Respondent pay the Applicant $11,142.31.
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 the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979* hereby—

(1) DECLARES the Respondent denied the Applicant benefits under his contract of employment;

(2) ORDERS the Respondent pay to the Applicant the sum of $11,142.31 within seven days of the date of this order;

(3) ORDERS that the Application be and is otherwise hereby dismissed.

(Sgd.) J. H. SMITH,
Commissioner.

[L.S.]

2002 WAIRC 05738

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	SAVERIA COMMISSO, APPLICANT
	v.
	ROSS CHEN T/A WEST COAST LUNCHES, RESPONDENT
CORAM	SENIOR COMMISSIONER A R BEECH
DATE	FRIDAY, 14 JUNE 2002
FILE NO.	APPLICATION 21 OF 2002
CITATION NO.	2002 WAIRC 05738

Result	Application alleging unfair dismissal dismissed.
Representation	
Applicant	Mrs S. Commisso
Respondent	Mr R. Chen

Reasons for Decision

1 The application before the Commission by Mrs Commisso is that she was unfairly dismissed after an absence from work of approximately four weeks due to illness. The respondent says that Mrs Commisso left her employment and he did not know when she was returning, or whether she would be returning and for that reason when Mrs Commisso rang after approximately four weeks he believed she had left her employment and he had made other arrangements.

2 Both Mrs Commisso and Mr Chen (the proprietor of West Coast Lunches) gave evidence and each cross-examined the other. The essential facts are relatively straightforward.

3 Mrs Commisso had worked at West Coast Lunches, since early 1997. However, Mr Chen only bought the business in May 2000. Accordingly, the length of service of Mrs Commisso with Mr Chen starts from that time.

4 Mrs Commisso worked a set number of hours: she worked on Tuesdays for four and half hours and Wednesdays for two and a half hours. She would only occasionally do extra work if there was need for some relief work. By virtue of the *Restaurant, Tearoom and Catering Workers' Award, 1979*, Mrs Commisso was a casual employee. In order for her to have been a part-time employee she would have to have worked more than 20 ordinary hours per fortnight (see: Clause 12. - Part-time Workers of that award). Mrs Commisso worked less than 20 ordinary hours per fortnight and therefore she was not a part-time employee. By virtue of Clause 11. - Casual Employees of that award, Mrs Commisso was a casual employee. This is consistent with her own evidence that on occasions she would not send in a medical certificate if she was absent because as a casual employee she did not need to do so. Further, in all of her period of employment she never once asked for the annual leave or sick leave payment that would be the entitlement of a part-time employee. Therefore, I find that Mrs Commisso was a casual employee.

5 On Wednesday, 14 November 2001 Mrs Commisso had an argument with Mr and Mrs Chen. She described it at the end of her case as being "a three-way" argument. In part, Mrs Commisso was upset at Mr Chen carrying cooked bacon without using a plate. Given that, in her view, the floor was slippery and that Mrs Chen had recently had a miscarriage (accordingly to Mrs Commisso) she was upset at the grease. On the following Tuesday, 20 November 2001 Mrs Commisso drove to work but found that she could not find it in herself to enter the premises. Rather, she drove home and sent a facsimile to Mr Chen. The fax states—

> "Ross
>
> I drove to work but couldn't cope to come in.
>
> Sorry if I lost it on Wednesday but I felt like I was going to have a nervous breakdown with you and the bacon. Due to the way I am feeling I will not be able to attend work until further notice.
>
> Sara".

6 On Mrs Commisso's evidence, she next communicated with Mr Chen by a fax on 27 November 2001 stating:

> "Hope to feel better by the 18th December. Will phone you Monday 17th to confirm."

7 However, Mr Chen states that he has not seen that fax before and if it was sent, it was never shown to him. I accept his evidence.

8 On 17 December 2001 Mrs Commisso rang and spoke to Mr Chen. There is no real disagreement between them regarding what was said. Essentially, Mr Chen stated that her employment was not like "the movies" where people can come and go as they wish. He had another employee to start in the new year. If Mrs Commisso had been upset by the incident over the bacon, he still had plenty of bacon in the shop and that Mrs Commisso should find somewhere else to work which might be better for her if the issue still made her nervous. Mr Chen hung up the telephone.

9 Mrs Commisso claims that this was a dismissal. Mr Chen disagrees.

10 Mrs Commisso states that the incident regarding the bacon had indeed upset her. She still felt some upset from a fall she had had at work in July 2001 which caused her to be absent for two weeks. She felt she could not cope. In fact, she went into hospital in November 2001. She tendered in evidence a statement from her physician, Dr Ruse (exhibit A2) stating that Mrs Commisso had attended him on 16 November 2001, that she had "increasing concerns about the cleanliness and safety of her working environment. She recently had spirited exchange of views with the boss". In Dr Ruse's opinion, her then present symptoms interfered with her ability to work and were due to stresses at work.

11 I am satisfied from that exhibit that Mrs Commisso was indeed ill during part, at least, of the period of her four week absence.

12 The significant point is that she did not tell this to Mr Chen. She did not communicate with Mr Chen regarding her illness. Rather, she states that Mr Chen should have realised that she was ill from the original fax that she had sent. Further, Mrs Commisso had been ill in hospital for some of the time and therefore she had not contacted Mr Chen.

13 Mr Chen's evidence is that he was unaware that Mrs Commisso had been ill in hospital. He is frank enough to have said that had he been aware he would have reacted differently. As it is, from his point of view, he was merely aware that on her last day of work Mrs Commisso had had an argument with his wife, and perhaps with himself, and that Mrs Commisso did not then

attend on her next day of work. Rather, he received a fax saying that she could no longer attend until further notice. He assumed that Mrs Commisso did not want to return to work. Mrs Commisso had not shown any respect to him in the incident and the fax.

14 Mr Chen compares the circumstances with two earlier absences. In the earlier absence in July when Mrs Commisso had slipped over at work and been absent for two weeks, Mrs Commisso had forwarded to him regularly the workers' compensation documents she had received at her home. He understood exactly what had occurred and the situation of her absence. On an earlier occasion in November 2000, Mrs Commisso had had a car accident. Mr Chen's evidence is that Mrs Commisso had rung and kept in touch, at least to the extent of telephoning him and discussing with him that she would not return until after the usual Christmas break and reaching an agreement with him on the date for her to return to work. Mr Chen states he was quite happy with those arrangements because he understood the situation and knew what was going on.

15 Mr Chen states that in contrast on this occasion, following an argument at work, Mrs Commisso merely left and he received no contact from her for four weeks. He therefore made other arrangements to cover her vacancy by extending the hours of his two other staff members. When Mrs Commisso rang, he had been quite surprised.

16 The issue then is whether or not it could be said that Mr Chen dismissed Mrs Commisso. At one level, it would have been wrong for Mr Chen not to have offered Mrs Commisso the regular Tuesday and Wednesday shifts which she worked if she had been merely absent for a short period due to illness. However, the fact that Mr Chen did not know of Mrs Commisso's circumstances is quite significant. Although Mrs Commisso states that Mr Chen could have telephoned her if he had been concerned, I find that that is not the point. Rather, it is up to Mrs Commisso to inform her employer. The fact that this was not done makes it difficult for Mrs Commisso to accuse Mr Chen of acting unfairly. Indeed, based on the previous absences Mrs Commisso's actions in not making herself available for her casual work for four weeks without any further explanation is consistent with her not intending to return. Mrs Commisso states that that was never the case, and I accept that. Nevertheless, Mr Chen equally validly states that he was unaware of what was going on and he had made other arrangements.

17 After reviewing the evidence, I cannot find that Mrs Commisso has persuaded me that she was dismissed. Rather, by the time four weeks had passed, it is certainly arguable that her casual position no longer remained. The issue is really whether Mr Chen was obliged to re-offer her the shifts that she used to work. His decision not to do so was not a dismissal because by then Mrs Commisso's casual position no longer remained. It was Mrs Commisso's absence for 4 weeks that brought her casual employment to an end - not any decision of Mr Chen. Accordingly, Mrs Commisso's application will be dismissed.

18 Order accordingly.

2002 WAIRC 05740

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	SAVERIA COMMISSO, APPLICANT
	v.
	ROSS CHEN T/A WEST COAST LUNCHES, RESPONDENT
CORAM	SENIOR COMMISSIONER A R BEECH
DATE	FRIDAY, 14 JUNE 2002
FILE NO.	APPLICATION 21 OF 2002
CITATION NO.	2002 WAIRC 05740

Result	Application alleging unfair dismissal dismissed.
Representation	
Applicant	Mrs S. Commisso
Respondent	Mr R. Chen

Order

HAVING HEARD Mrs S. Commisso on her own behalf as the applicant and Mr R. Chen 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.] Senior Commissioner.

2002 WAIRC 05916

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	DARREN JAMES CULVERWELL, APPLICANT
	v.
	WORKPAC (WA) PTY LTD, RESPONDENT
CORAM	COMMISSIONER S WOOD
DELIVERED	FRIDAY, 5 JULY 2002
FILE NO.	APPLICATION 68 OF 2002
CITATION NO.	2002 WAIRC 05916

Result Application dismissed
Representation
Applicant Mr D J Culverwell
Respondent Mr D M Adams

Reasons for Decision

1 This is an application pursuant to section 29(1)(b)(ii) of the Industrial Relations Act, 1979 ("the Act") alleging denied contractual benefits. The applicant, Mr Darren James Culverwell claims the following contractual entitlements—

One day's pay for notice	$134.62
Holiday pay	$2,210.22
Outstanding commission	
August	$334
September	$1,242
October	$1,894.62
November estimated	$2,000
Total	$7,824.46

2 The applicant says that a loan by way of an advance of $160 per week for 23 weeks, ie a total of $3,680, was paid to him by the respondent during his employment and not repaid. He agrees this amount should be deducted from the total owed leaving a total of $4,144.46; which is the gross amount he seeks by order of the Commission.

3 Mr David Adams, a partner in Workpac, agrees that the amounts for annual leave and notice are owed to Mr Culverwell. He agrees also that the October commission of $1,894.62 is owed. The other commission amounts he disagrees with and says they are as follows—

August:	$3.62
September:	$82.68
November:	$441.54

In addition to this he says that Mr Culverwell has an outstanding debt to Workpac of $6,680. This includes the $3,680 mentioned and an amount of $3,000 being a loan made to Mr Culverwell for a motor vehicle on 25 or 26 July 2000. Therefore, when these amounts are deducted from the amounts owed to Mr Culverwell by Workpac, Mr Adams says the balance owing to Workpac by Mr Culverwell is $3,715.59. An outline of this alleged debt to the respondent appears in Attachment 7 to the Notice of Answer and Counterproposal of the respondent.

4 Mr Culverwell says that the $3,000 loan of 26 July 2000 was repaid by him progressively from commission owing to him over a three to four month period. He says an earlier amount of $3,000 was given to him by the respondent's Managing Director on 4 March 2000. This was a gift to cover the decrease in remuneration he suffered by starting employment with the respondent and was never to be repaid. Mr Culverwell says that the respondent did not register this as a debt until after his employment terminated. Mr Culverwell was employed as a sales representative with Workpace from 17 January 2000 until late November 2001.

5 The parties disagree on the contract which applied. However, they agree that Mr Culverwell was paid a retainer of $35,000 per year; paid on a weekly basis. He was also entitled to commission of 20% of the gross profit which he earned for the company. He received 20 days annual leave, 10 days sick leave, a fully maintained motor vehicle and superannuation. The retainer monies were deducted progressively from the commission payments. Mr Culverwell says this occurred at the rate of $3000 per month and some months the commission payments did not cover the retainer but that this deficit was never carried forward i.e. it was not deducted from subsequent monthly commissions. The calculation of commissions was done progressively and weekly as clients paid their bills.

6 The contract which Mr Culverwell signed on commencement is at Attachment 1 to the Notice of Answer and Counterproposal. It includes a clause (ie. clause 6.9) which reads as follows—

> "Subject to any express agreement to the contrary, upon termination of the employment all sums which may be owing by the Personnel Consultant to Workpac must be repaid or be caused to be repaid by the Personnel Consultant immediately whether such sums are then due to be paid or not. The Personnel Consultant further agrees that Workpac may deduct any sums owed by the Personnel Consultant from remuneration, commission and leave amounts owed by Workpac to the Personnel Consultant."

No other contract is present before the Commission. It is the evidence of Mr Culverwell and Mr Adams that a new contract was offered to Mr Culverwell in early 2001 which Mr Culverwell refused to sign. Mr Culverwell was however paid in accordance with the terms of the new contract as were other staff, and the new commission arrangements were more beneficial to him. Mr Culverwell accepted these payments but says he had no contract as he did not sign the new contract. The respondent in turn says that in accordance with clause 6.9 they were entitled to deduct the monies owed by Mr Culverwell to Workpac, the amounts of which Mr Culverwell disputes in part, on his resignation from the company.

7 The issues in dispute then are the amounts of commission due for August, September and November 2001 and whether a further debt of $3000 is owed by Mr Culverwell to Workpac. In essence Mr Culverwell does not dispute that clause 6.9 applies; he having conceded that that was the original contract he signed and the relevant clause I assume continued to apply as Mr Culverwell does not reject the other debt of $3,680 as being owed by him and capable of being deducted from his final monies. I find clause 6.9 to be part of the contract.

8 The respondent appends, as part of Attachment 7 to the Notice of Answer and Counterproposal, individual commission report summaries for the months of August, September, October and November 2001. With the exception of the October report, Mr Culverwell rejects the summaries. He says that when he left the employment of Workpac the "Max" computing system which tracked commission payments displayed a figure of about $1540 as remaining commission for November at that time. He then estimated the commission for the complete month to be approximately $2000. From these same weekly commission reports he also extracted the other two figures for August and September 2001. He says his weekly summaries are available through the respondent but he cannot produce them due to confidentiality arrangements in the contract. The applicant produced no documentation and no other evidence apart from his oral evidence of the commission payments. The applicant accepts the commission payments were not regular, it depended on the business earned and he accepts the October 2001 calculation for commission. The applicant says there were monthly reports in addition to the weekly reports of commission. I have nothing

other than the applicant's oral evidence to suggest the records produced by the respondent are not accurate. These records the applicant accepts as accurate in part but not in full. I am not convinced by the applicant's evidence in respect of these summaries and I find the applicant has failed to prove his case in respect of the outstanding commission payments which he claims.

9 The applicant and respondent also dispute whether the $3000 given to the applicant on 14 March 2000 was a gift or a loan. Mr Culverwell says it was a gift as when he came to be employed by the respondent he received substantially less money (that is $1000 per month less) in his new job. He says that the Managing Director met that shortfall initially by the grant of $3000 to him. This was to cover the initial loss in income. He says at no stage has the respondent raised the question of it being a loan or sought to redeem the monies. He says they only entered it into the "Max" computer system as a loan after he left their employment. Mr Culverwell agrees that he was experiencing financial difficulties and the respondent aided him by $3000 loan for a motor vehicle in July 2000 and the $160 per week advance for 23 weeks. He says that he repaid the loan for the motor vehicle from commission payments he earned.

10 Mr Adams for the respondent says in contrast that the loan of $3000 on 14 March 2000 was repaid progressively through commission payments. He says the loan for the motor vehicle was not repaid, nor were the monies for the $160 per week advance which Mr Culverwell accedes to.

11 The $3000 of 14 March 2000 is shown at Attachment 2 to the Notice of Answer and Counterproposal and listed as commission without being taxed. The print out of the advice would appear to be 5 December 2001. The respondent says that the monies for the 14 March 2000 loan were deducted and this appears in Attachment 5 to the Notice of Answer and Counterproposal. Attachment 5 displays against a date of 13/03/2000, an advance of commission deduction $3000.

12 I accept the evidence of Mr Adams over that of Mr Culverwell as more complete, logical and persuasive. It appears likely, even though Mr Adams is not precise as to when commission payments were deducted for the 14 March 2000 debt, that this was a debt not a gift and was repaid. There is no evidence that the other loan was repaid via commissions owed.

13 The applicant has failed to prove his case and the application will be dismissed accordingly.

2002 WAIRC 05917

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	DARREN JAMES CULVERWELL, APPLICANT
	v.
	WORKPAC (WA) PTY LTD, RESPONDENT
CORAM	COMMISSIONER S WOOD
DATE OF ORDER	FRIDAY, 5 JULY 2002
FILE NO.	APPLICATION 68 OF 2002
CITATION NO.	2002 WAIRC 05917

Result	Application dismissed
Representation	
Applicant	Mr D J Culverwell
Respondent	Mr D M Adams

Order

HAVING heard Mr D J Culverwell on his own behalf and Mr D M Adams 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 05769

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	LAWRENCE DELPHIN, APPLICANT
	v.
	SICILIAN (WA) PTY LTD ACN 095 478 185 T/A THE SICILIAN (SUBIACO), RESPONDENT
CORAM	COMMISSIONER J F GREGOR
DATE	WEDNESDAY 19TH JUNE 2002
FILE NO.	APPLICATION 1617 OF 2001
CITATION NO.	2002 WAIRC 05769

Result	Dismissed
Representation	
Applicant	Mr S. Gallacher (of Counsel) and with him Mr Whitehead (of Counsel) appeared on behalf of the applicant
Respondent	Ms M. Saraceni (of Counsel) appeared on behalf of the respondent

Reasons for Decision

1 On 7th September 2001 Lawrence Delphin (the applicant) applied to the Commission for an order pursuant to s.29 of the Industrial Relations Act, 1979 on the grounds that he had suffered a harsh, oppressive and unfair dismissal from Sicilian (WA) Pty Ltd t/as The Sicilian (Subiaco) (the respondent). The applicant claims the specific reasons why the dismissal was harsh, oppressive and unfair were that he was summarily dismissed on a false accusation of stealing and the respondent failed to afford him a proper opportunity to refute the allegations. The applicant had been employed as a chef by the respondent in February or March 2001 pursuant to verbal contract of employment. Later that year in July he was promoted to be a co-head chef, he shared the position of chef with Mr Todd McDonald.

2 The applicant claims that by a verbal and informal directive made in August 2001 by the management of the respondent directed that meals were not to be taken by employees unless the consent of the management had first been obtained. This however did not apply to processed food in respect of which both the co-head chefs, that is the applicant and Mr Todd McDonald were given leeway to authorise purchase by employees of such food from the respondent's suppliers on a cash on delivery basis. The applicant also contended that the senior management was aware that it was a regular practice by him to authorise such arrangements.

3 This practice continued without problems for the applicant until 3rd September 2001 when he made an arrangement with one of the suppliers to deliver a side of smoked salmon for him to use in a private dinner party he was holding on the next evening. According to the applicant such arrangement was a normal one, delivery was organised and the applicant would pay cash on delivery.

4 On the next morning, which was the applicant's day off, he telephoned the respondent's premises and spoke to Mr McDonald to ascertain whether the salmon had been delivered. He was told that the supplier had called but no extra salmon had been delivered. The applicant says he then asked Mr McDonald, who was in charge of the stock and inventory at the time, to approve him taking a side of salmon from stock for which he would pay in the morning. The applicant says Mr McDonald agreed.

5 Later the applicant attended at the premises, said hello to Mr McDonald and was directed to the cool room and collected the salmon out of the respondent's stock. He claims that he spoke briefly with some co-workers as well as to one of the Directors of the respondent, Mr Noel Forsyth, who was the senior manager of operations. Mr Forsyth made no comment at all about the salmon which he then had under his arm.

6 According to the applicant Mr McDonald was not in a position to accept payment and they arranged for it to be made at a later date. The applicant had the next day off in accordance with his roster. On his return to work on 6th September 2001 he was accused of stealing by Mr John Booth another Director of the respondent. He then says he was dismissed, with no payment in lieu of notice, effective immediately, he claims this was despite the respondent being fully aware of the prior arrangements. In the circumstances the applicant says the conduct of the respondent was unfair in the extreme. He gave evidence in person and called Mr McDonald as a witness for him.

7 Much of the examination in chief of the applicant does not need to be summarised for the purposes of these Reasons for Decision because it is plainly not relevant. It is clear that the fundamental reasons for the termination lie in the removal of the stock from the premises and any issues concerning performance are of a periphery interest. However his evidence concerning the arrangements for taking meals are relevant and I summarise below his evidence in that respect.

8 The applicant told the Commission that floor staff were entitled to receive meals discounted to 50% and kitchen staff could take meals at no charge. If food required to be purchased from outside the restaurant the staff had to pay cash on delivery, at most times the chef placed the orders on request by the staff.

9 As for the procedure for meals, these were cooked for the floor staff on order, they had to have a proof of purchase and the proof must be prepared by other staff. The applicant says that these arrangements were suitable to the respondent provided the cost was not added to its accounts. The applicant claimed that he had bought goods on COD order on several occasions for different members of the staff.

10 The applicant contends that the senior staff, of which he was one, had leeway from management, they were given favours because the staff were doing the right thing by the respondent.

11 The applicant gave evidence about video surveillance of the premises. For the purposes of these Reasons it is sufficient to say that his evidence is that all of the areas where he walked on the day that he removed the salmon from the premises, which he did not deny, were covered by video surveillance.

12 The applicant says that on 4th September 2001 he was going to have a dinner party and on the day before he rang the respondent's suppliers and ordered a side of salmon. He thought the product would be in by lunch time and he checked the next day to find out if it was. He was told the supplier had been and gone but had not left salmon for him. In view of that the applicant asked Mr McDonald if he could have smoked salmon from stock and he would either replace it or pay for it straight away. The applicant contends that Mr McDonald told him to come on in and Mr McDonald would 'see to him'.

13 The applicant says he went to the restaurant through the back door straight into Mr McDonald's office. Mr McDonald was on the phone, they acknowledged each other and the applicant was directed to the fridge to take a side of salmon. It is the applicant's contention that Mr McDonald pointed at the fridge and said to him "it's in the fridge". The applicant then collected a side of salmon and walked back into the kitchen. When he was talking to a couple of members of staff he saw Mr Niall Forsyth come through and wished him good morning, he said that Mr Forsyth greeted him, asked him what he was doing on the premises and he explained that he had collected a side of salmon. The applicant asserts that he told Mr Forsyth he was having a dinner party, he had placed an order for salmon, it did not arrive so he was taking one out of stock and would replace it.

14 According to the applicant if he had known Mr Forsyth was at work he would have gone direct to him because he was the senior manager but the applicant was not expecting him to be there because he had been ill. The applicant says that Mr Forsyth did not respond to him but his body language made the applicant feel less than good about the state of affairs. The applicant says that he told Mr Forsyth that he had already seen Mr McDonald and explained to him the circumstances, but Mr Forsyth did not respond. According to the applicant he then went to Mr McDonald and asked him to explain the situation because he felt bad about it. He did so because the applicant knew he should have gone to see Mr Forsyth first. According to the applicant all Mr McDonald said was that they ought to discuss it with management when he came back to work.

15 As for payment the applicant says he offered to pay the money but Mr McDonald said the tills were not open and he should pay it when he came back to work. The applicant says that the cameras would have recorded him talking to Mr Forsyth and to Mr McDonald before leaving the premises.

16 After two days leave the applicant came back to work, on his arrival he saw Mr Booth who he knows to be a Director of the respondent. He opened the store room which serves as the Head Chef's office. The applicant was called aside and told by Mr

Booth he was disappointed to hear he had been found stealing a side of salmon. The applicant says he was shocked because at no time had he ever intended to steal the food. Without further discussion Mr Booth asked him to collect his belongings and leave the premises. The applicant asked Mr Booth to clarify the situation with Mr McDonald. Mr Booth did not and he had been dismissed for gross misconduct. The applicant offered to pay for the salmon, the tills were not open but he paid by giving the money to Mr Booth.

17 The applicant was subject to a searching cross examination by Ms Saraceni of Counsel, who appeared for the respondent, I will not summarise that cross examination but it is important in the disposition of the case and I will refer to it when I analyse the evidence later in these Reasons for Decision. Suffice to say there are a number of differences between the evidence in chief and the cross examination and there were internal conflicts in the cross examination itself as the examination was developed by Ms Saraceni.

18 To support his contentions the applicant called Mr Todd Asky McDonald who was co-head chef with him. Mr McDonald told the Commission that he no longer works for the respondent. He had started with the respondent as a chef de partie and was later promoted to be joint head chef. He knew the owners of the business to be Mr John Booth, Mr Norman Hunt and Mr Niall Forsyth. He also knew about the employment history of the applicant and confirmed that he worked with him four to five days a week.

19 He described the relationship between both the chefs and the management as 'professional', everyone was dedicated to making the business work. He had no problems working with the applicant, if they had disagreements or grievances they sorted them out together.

20 Mr McDonald described how the head chef duties were shared with the applicant. The split was the applicant basically supervised the kitchen while Mr McDonald controlled the administration side. This took about 50% of his time. Mr McDonald gave evidence of some instances of differences of opinion between the applicant and Mr Forsyth.

21 Evidence was also led in chief concerning arrangements for taking of food or meals by staff members. Staff members, Mr McDonald said, who had been there for a long period of time through the day were entitled to a meal which had been okayed by the owners and management at the time. There was no automatic qualification, there was a specific work period that had to be completed before an entitlement to a free meal arose.

22 Authority to have meals could be given by a key holder. Mr McDonald identified key holders as the three owners and the two head chefs, there were also two senior floor staff members who held keys. Mr McDonald remembered passing on a directive from Mr Forsyth saying that no meals or food was to leave the premises without consent of one of the owners. This occurred in the situation when, to Mr Donald's recall, things were quiet and cost control was imperative. It was the rule that all food was to be eaten as a meal on the premises it could not be taken home in a plastic container. Purchasing of food was allowed on the odd occasion when the purchasing officer who, with appropriate authority, would arrange a COD delivery.

23 As to the events of 4th to 6th September 2001 Mr McDonald said that he had been going through his daily routine when he received a telephone call from the applicant who was on a day off. He said he wanted to purchase a side of salmon for a dinner party he was having that evening. Mr McDonald says his reply was words to the effect that he would see him when he arrived at work.

24 Next Mr McDonald remembers Mr Forsyth came into the office as he did every morning checking and greeting the staff. Not long after that the applicant came into his office, he was carrying a side of smoked salmon. Even though Mr McDonald was on the telephone to a supplier at the time, the applicant asked him what should he do to make payment. Mr McDonald said he was not sure because there were a few options available, he did not know which one was being followed at the time and he told the applicant he best ask Mr Forsyth. But the applicant said he had already seen Mr Forsyth, Mr McDonald was happy with that because Mr Forsyth had just walked out of his office.

25 The applicant left Mr McDonald's office and shortly after Mr Forsyth came in and said "what's going on I've just seen [the applicant] leave with a side of smoked salmon". Mr McDonald said that he responded to Mr Forsyth that he had told the applicant to see him and that his response had been he had already done so and everything was under control. During all of these events Mr McDonald was at his desk on a telephone call.

26 After Mr McDonald had said to Mr Forsyth that he told the applicant to go and see him Mr Forsyth became very upset and irate. Mr McDonald did not feel that he had given the okay for the applicant to take the salmon because he had referred him to Mr Forsyth. Mr McDonald believed the applicant when he said that he had done so. Later in that day Mr McDonald was approached by Mr Booth who enquiried whether the roster could be changed if the applicant was no longer employed.

27 During cross examination by Ms Saraceni, Mr McDonald recalled speaking to Mr Booth in relation to his version of the events, he confirmed to Mr Booth that he never gave permission for the applicant to take the salmon. He informed Mr Booth that the applicant had told him that he was having a dinner party and that he needed salmon. He confirmed that Mr Forsyth had told him that he had seen the applicant leaving with a side of salmon and had asked what was going on. He also confirmed to Mr Booth that he told Mr Forsyth that he had instructed the applicant to discuss taking the salmon with Mr Forsyth.

28 Evidence was called on behalf of the respondent from Mr Niall Watson Forsyth who is a Director of the respondent and had worked fulltime in the business as a Manager until the day the applicant removed the salmon. Coincidently on that day Mr Forsyth resigned. Soon after the current owners assumed control of the business Mr Forsyth had called a general staff meeting of all departmental heads and explained to them that the business had been taken over. He relayed the expectations of the partners for the business and reinforced company policy and procedure. The applicant was present at this meeting.

29 The meeting covered policy such as dress standards, removal of items from the premises, and the purchase of goods. Mr Forsyth had stated that the company policy was that nothing was to be removed from the premises without his express permission. If he was not available nothing could leave the premises, he was the one and only person who could give permission for goods, the property of the owners, to be taken.

30 There were discussions about discounts, this is mainly on the restaurant side because the kitchen cannot discount services. There were to be no discounts unless Mr Forsyth expressly authorised them. The attention of staff was drawn to an existing staff handbook which the respondent continued to use when it took over the business (Exhibit S1). In particular under the heading "Security" where there is a requirement that no member of staff is permitted to remove any food, alcohol or beverage from the premises unless permission to do so is given by the management.

31 Mr Forsyth recalled that on a number of occasions at the staff meetings he reinforced and reiterated the policy of the respondent that nothing was to be removed from the premises. He did so because in his twenty years of experience in the hospitality industry told him that pilfering has potential to be rife, he was concerned that this type of conduct was ongoing so he needed to reiterate often what the policy was.

32 Mr Forsyth related how the applicant and Mr McDonald had been appointed as joint head chefs. The arrangement worked pretty well but there was a need to re-balance the work load because it appeared to be biased in the applicant's favour when he was doing the rosters.

33 In June 2001 there was an incident of pilfering with removal of approximately $100.00 worth strawberries. This was brought to his attention by Mr McDonald. Investigations were made into the loss but were inconclusive. This caused Mr Forsyth to take the restaurant managers and the kitchen managers, which included the applicant, into his office and reiterate the food removal policy to them. They were told they were expected to be vigilant and apply the policy rigidly.

34 Mr Forsyth told the Commission that there is video surveillance covering all of the premises but the tapes are only kept on a weekly basis and there was no record available now of 4th, 5th and 6th September 2001, however Mr Forsyth asserted he had a clear memory of what had occurred.

35 He said that he was having a conversation with Mr McDonald in the dry store area and he turned around to see the applicant walking out the back door with a cryovac slab of salmon, he was unable to stop the applicant who was some six or seven metres away. He had asked Mr McDonald what was going on, then, he walked to the back door with the intention to speak to the applicant but could not find him or his car. He had no conversation whatsoever with the applicant.

36 He went back inside and asked Mr McDonald to report if there were goods missing from the kitchen. Mr McDonald came to him and confirmed that a side of salmon was missing from the fridge. This was some half an hour after the applicant had left. Very soon after that he went out to the respondent's office in Burswood.

37 Before he left Mr Forsyth checked with Mr McDonald to see if he had given permission for the applicant to take the salmon. Mr McDonald replied that it was not possible because he (Forsyth) was the only one who could give permission for goods to leave the premises and Mr McDonald clearly understood that.

38 Coincidentally Mr Forsyth resigned as restaurant manager on that day and Mr John Booth, who also gave evidence in these proceedings, took over the day to day management of the restaurant. Mr Forsyth briefed Mr Booth in detail on what had happened with the salmon. He told him of the conversation he had with Mr McDonald. He showed Mr Booth the policy that there was nothing to be removed from the premises unless Mr Forsyth personally had given express permission and that he had not even been asked by the applicant.

39 Evidence was also taken from Mr John Anthony Howard Booth who has been a Director of the respondent since December 2000, he continues in that position and was when the respondent purchased the Sicilian Restaurant in Subiaco in late January 2001. Mr Booth confirmed that the respondent took over running of the business in March 2001. Afterwards Mr Forsyth managed the business on site and Mr Booth visited two or three times a week to overview the operations.

40 Mr Booth knew about the decision to run the operation with the head chef position shared between the applicant and Mr McDonald and he was happy to support that arrangement. Mr Forsyth had reported to him some initial problems in the arrangement. There were some problems with the performance of the applicant however in view of the fundamental issue to be decided here I have no need to summarise those.

41 Mr Booth remembered the incident with the loss of strawberries. Mr Forsyth had informed him that he had reiterated to all staff members the policy that nothing was to be removed, without Mr Forsyth's express approval. That approval was not delegated, it was with Mr Forsyth and solely with him.

42 On 4th or 5th September 2001 Mr Forsyth had reported to Mr Booth and to his other partner that the applicant had entered the premises on his day off, walked into the cold store, taken a side of salmon, walked out of the premises and had driven off. It seemed as though he had not spoken to anyone, he just took the salmon and left, the event was witnessed by both Mr McDonald and Mr Forsyth. Mr Forsyth told Mr Booth he had not given permission and neither had Mr McDonald.

43 Mr Booth took over investigations and subsequently satisfied himself in conversation with Mr McDonald that he had not been approached by the applicant to give his approval to remove the smoked salmon. Mr Booth had asked Mr McDonald to relate the events to him and to Mr Booth's memory he related the same set of circumstances that Mr Forsyth had related to the partners.

44 The sequence of events disclosed in the investigations by Mr Booth was that the applicant came to the premises, went to the cold store, took a packet of smoked salmon and exited the premises. He did not speak to anybody. He was there expressly for the purpose of taking the salmon. That was the consistent story of both Mr Forsyth and Mr McDonald and as a result Mr Booth concluded that the applicant had taken the salmon without approval.

45 Mr Booth took over the running of the restaurant the next day due to the resignation of Mr Forsyth. He again spoke to Mr McDonald and checked his story. Mr Booth was satisfied it was the same. He said he had another conversation with Mr McDonald on that day along the lines that if the applicant had to go how would the restaurant be managed if that was to happen.

46 Mr Booth's evidence is that by the evening he had decided that unless there was an acceptable explanation from the applicant to mitigate his conduct Mr Booth was resolved to terminate his contract of employment on the following day when he returned to work.

47 On 6th September 2001 Mr Booth attended the premises, the applicant was already there, there was no other employees present although a chef did arrive some 15 minutes later as did Mr Forsyth. Until that time Mr Booth was alone with the applicant in the kitchen. Mr Booth asked for the applicant's version of events. His response was that he had approval from Mr McDonald to remove the smoked salmon. Having spoken to Mr McDonald, Mr Booth was aware that he had given no such approval, he was also aware that Mr Forsyth had consistently said that he (Forsyth) was the only person who could give approval. Mr Forsyth discussed these issues with the applicant for around about ten minutes eventually the applicant said that he would not steal and he intended to pay for the salmon asserting that Mr McDonald had given permission. Mr Booth had responded by saying that Mr McDonald could not and did not give permission only Mr Forsyth has that authority and he was not asked so the applicant did not get permission and he had therefore removed the goods without approval. So far as Mr Booth was concerned the conversation was going in circles. He thought, to break the impasse, the applicant said he was then going to pay for the salmon and produced $22.00. He put the money in the till which was open but not operating and asked for a receipt. There was another discussion for two or three minutes which again was circular in Mr Booth's view with the applicant saying that he would not steal and Mr Booth countering he did not get approval. Mr Booth then decided the applicant's explanations were unacceptable and terminated his contract of employment.

48 He did so because the applicant had breached a clear company policy, a policy of which he was well aware and that had been reinforced by Mr Forsyth as recently as after the strawberry incident some two months previously. The applicant was aware that he could not remove produce from the premises without approval, he was in the senior position and he above all should have been setting an example, on that basis Mr Booth decided that the applicant's services would be terminated. The applicant maintained that Mr McDonald had given him permission.

49 The preceding is sufficient summary of the evidence in this matter for the purposes of these Reasons for Decision.

50 The Commission is required to make findings of credibility. There were a number of incidents through the applicant's time in the witness box which give serious concern for the truthfulness of his evidence. Not only is his evidence on the fundamental issues in this case, that is, whether he removed the salmon or not, in direct conflict with his only corroborative witness, during cross examination from Ms Saraceni he changed his evidence on crucial issues. He was unable to explain his conduct in a number of circumstances for instance Ms Saraceni questioned him about him supplying CVs to perspective employers which said nothing about his employment with the respondent. He obfuscated in 'giving' answers. More seriously it took some time for him to admit to a series of questionable dealings with Social Security concerning social service payments and whether or not he had been fined for misleading the Social Security Services. After strongly denying the contrary, he eventually admitted that he had been fined. His evidence is far from satisfactory, there are grave questions as to his proberty and the veracity of what he has said to the Commission.

51 Evidence was called on the applicant's behalf from Mr McDonald who was co-head chef. Mr McDonald's clear evidence was contrary to that of the applicant and he was unswayed from that. He was unmoved by a vigorous attack on his credibility by Ms Saraceni, even though his evidence was clearly in favour her client, notwithstanding that cross examination he did not change his position, there is no reason to disbelieve anything he said to the Commission and I find him to be a credible witness.

52 The witness evidence of Mr Forsyth was unshaken in cross examination it had a logical chronology, there is no reason to disbelieve anything he said to the Commission, nor should the evidence of Mr Booth be regarded as anything other than truthful.

53 Where the evidence given by the applicant himself varies from the evidence given by all of the other witnesses in this case, including his own witness, I favour the evidence of those witnesses over the evidence given by the applicant.

54 This case raises questions whether the respondent was justified in dismissing the applicant for stealing, then lying in an attempt to justify the theft. An employer is required to conduct an investigation and the tribunals have analysed its obligations in doing so.

55 Concepts had been fully ventilated in a decision of Fielding C, as he then was, in his Reasons for Decision in an appeal to the Full Bench in *"C" v Quality Pacific Management Pty Ltd*—

> "As the Commission appears to have accepted, and in my view correctly accepted, in dealing with matters of this nature it is not necessary to establish, on balance, that the employee actually stole the money in question. Rather, as mentioned by the Court of Appeal in W. Weddel & Co. Ltd v. Tepper (1980) IRLR 96, it is sufficient that there be a reasonable and genuine belief by the employer in the guilt of the employee (see too: Dyjasek v. J. McIntyre Ltd (1987) IRLR 18; Ulsterbus Ltd v. Henderson (1989) IRLR 251). The question in such cases is that stated by Arnold J. in British Home Stores Ltd v. Burchell (1978) IRLR 379 at 380 as follows—
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> > "What the Tribunal have to decide every time is broadly expressed whether the employer who has charged the employee on the ground of the misconduct in question (usually, though not necessarily, dishonest conduct) entertained a reasonable suspicion amounting to a belief in the guilt of the employee of the misconduct at that time. That is really stating shortly and compendiously what is in fact more than one element. First of all, there must be established by the employer the fact of that belief; that the employer did believe it. Secondly, that the employer had in his mind reasonable grounds upon which to sustain that belief. And thirdly, we think that the employer at the stage at which he formed that belief on those grounds, at any rate at the final stage at which he formed that belief, had carried out as much investigation into the matter as was reasonable in all the circumstances of the case."
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> Although that test was formulated for the purposes of the Trade Union and Labour Relations Act 1974 (U.K.), in my view it is consistent with the test laid down for the purposes of the Industrial Relations Act 1979 in Undercliffe Nursing Home v. The Federated Miscellaneous Workers' Union of Australia, Hospital, Service & Miscellaneous, WA Branch (1985) 65 WAIG 385, namely whether the legal right of the employer to dismiss an employee has been exercised so harshly or oppressively against the employee as to amount to an abuse of that right. In this respect, I adhere to the observations I made in Mavromatidis v. TNT Security Pty Ltd (1987) 67 WAIG 1650. A similar view has since been expressed in Byrne & Frew v. Australian Airlines Ltd (1992) AILR 288 in respect of the Federal award provisions designed to ensure employees are not dismissed unfairly. Furthermore, the same approach has been adopted recently by the Full Industrial Commission of South Australia in Bi-Lo Pty Ltd v. Hooper (1992) 59 SAIR 342 in respect of the unfair dismissal legislation in that State, which is not dissimilar to the provisions under which the claim giving rise to these proceedings was initiated. At pages 352-3 the Full Commission said—
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> > "In a case such as the present one where the employee is dismissed for misconduct in respect of dishonest dealing with the employer's property we do not believe it is a correct test to state as did the learned trial judge that the employer must prove, on the balance of probabilities, on the evidence submitted to the Commission, that the employee actually stole the goods, before it will escape a finding that a dismissal based upon such an alleged theft is to be treated as harsh, unjust or unreasonable.
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> > Where the dismissal is based upon the alleged misconduct of the employee, the employer will satisfy the evidentiary onus which is cast upon it if it demonstrates that insofar as 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; it gave the employee every reasonable opportunity and sufficient time to answer all allegations and respond thereto; and that 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; and that, taking into account any mitigating circumstances either associated with the misconduct or the employee's work record, such misconduct justified dismissal. A failure to

> satisfactorily establish any of those matters will probably render the dismissal harsh, unjust or unreasonable."
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> Furthermore, the Full Commission in the Bi-Lo Case (supra) considered the decision of the Industrial Commission of New South Wales in Court Session in Shop, Distributive and Allied Employees' Association, NSW Branch v. Jewel Food Stores (1987) 22 IR 1 upon which the Appellant relied in these proceedings, to be "consonant" with such an approach (at p 354). In that case which, unlike this case, concerned a summary dismissal for dishonesty, it was conceded that there was no evidence to support the central allegation against the employee that she had been involved in the dishonest practices as alleged against her. There was thus no scope for it to be said that any suspicion of dishonesty was based on a reasonable belief.
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> The Commission, in cases of this nature, is not dealing with the criminal law, but with the law of employment, an integral part of which is that a contract of employment may be terminated so long as it is not done unfairly. Legislation protecting employees from unfair dismissal does not require that in the case of alleged misconduct a contractual right to dismiss only be exercised in cases of proven misconduct but, rather, requires that it be exercised fairly, that is, that it not be abused. It seems to me difficult to say that an employer who acts reasonably has abused the contractual right of termination and it seems to me impossible to say that a person who has a genuine belief based on reasonable grounds that an employee is guilty of misconduct, acts unreasonably. The legal right to terminate must mean something and I cannot see how it can be said to have been exercised unfairly in the sense referred to in the Undercliffe Case (supra) if the employer genuinely believes, on reasonable grounds, that an employee is dishonest as, in my view, occurred on this occasion."
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> (73 WAIG @ 997-998)

56 As the learned Commissioner observes in the citation above, ultimately the question is whether the applicant has been given a fair go, that is, whether there was harshness or unfairness in his treatment to the extent of the employer's right to terminate the contract of employment was abused, Undercliffe Nursing Home v Federated Miscellaneous Workers Union of Australia (1985) 65 WAIG 385.

57 I commence my analysis of the evidence by referring to my finding on the credibility of witnesses. I have found that the applicant was not a credible witness and that where his evidence differs from evidence led on behalf of the respondent, that I favour the respondent's evidence.

58 I do not accept the applicant's story that he was able to grant approval for employees to take goods from the store on a COD basis. He may well have done so in the past but he was not authorised to do so and neither was Mr McDonald his co-head chef. It is the clear evidence of Mr McDonald that he knew he was not authorised to allow goods to be taken from the store and that the authority to do so resided in Mr Forsyth or one of the other Directors. He however could authorise the consumption of meals on the premises but the clearly stated policy of the respondent was that there was to be no food, cooked or otherwise, removed from the premises.

59 This is consistent with the Employee Handbook where it is made clear under the Security section that "NO member of staff is permitted to remove **ANY** food, alcohol or any beverage from the premises unless permission to do so has been given by management". (see Exhibit S1) Emphasis added. There is no question that the applicant removed the salmon from the premises, he admits that he did so, in addition he was seen by Mr McDonald and Mr Forsyth. There was a considerable debate during the hearing about the lack of video evidence of the events. As to that I say the significant matter here is whether the applicant removed the goods, and he said he did and whether he had permission to do so. The lack of video evidence of these two crucial factors is not significant in terms of the Commission being able to properly determine the matter and no adverse inference should be drawn from the absence of the video tapes.

60 The applicant has insisted that he had telephoned Mr McDonald and arranged to pick up the side of salmon, he described quite an elaborate arrangement for him to do so. Mr McDonald, whose evidence I accept, disagrees with the applicant about the sequence of events, he knew the applicant was going to come in because the applicant had told him that he was but he had not given any permission nor had the applicant sought it. Mr McDonald was surprised when the applicant took the salmon, it seems because he knew that there was no authority for him to do so.

61 Mr Forsyth was a witness to the removal of the salmon he passed on his concerns to his fellow Directors and because Mr Forsyth had coincidentally resigned Mr Booth went to conduct an investigation.

62 The investigation conducted by Mr Booth was not as described by the applicant, I accept that Mr Booth spoke to the applicant and put the allegations to him. He had checked with Mr McDonald first to find out whether his permission had been given. Mr McDonald said that he had not, Mr Booth later checked with him again. Mr Booth described his conversations with the applicant concerning the reasons why he had taken the salmon as circular. I find that he was prepared to try and discuss the matter through with the applicant but ultimately he was unable to do so to his satisfaction. That the applicant then decided to try and pay for the salmon cannot make good his previous conduct in removing it from the premises of the respondent without proper authority.

63 The applicant's case depends upon whether or not he did have authority, the witness that he called to corroborate that he did have the said authority, repudiated him. The evidence from the applicant's witness Mr McDonald supports the contentions of the respondent that at no time did the applicant have authority from anybody, whether that authority was properly given or not. Mr Forsyth had not given the applicant authority to remove the fish, Mr McDonald had not given the authority nor was he authorised to, but even if he was not authorised there was still no authority from him so the applicant's contentions are that he was authorised by Mr McDonald to remove the stock must flounder. In this context it is surprising that the applicant did not call evidence from the supplier with whom he says, in his evidence, he placed an order, and who failed to deliver.

64 In this case there is no question that the employee actually removed the goods whether that can be categorised as stealing or not, the food was not removed with authority, and in doing so the applicant was guilty of misconduct. The respondent undertook an investigation of the matter, it honestly and genuinely believed that it had reasonable grounds to believe that the employee was guilty of misconduct. This was conduct which went to the root of the employment contract, there are no redeeming or mitigating circumstances arising from the employee's work record which should have convinced the employer to another course of action other than dismissal. It is difficult to see how the applicant could establish that the employer's conduct did not satisfactorily establish that the incidents were such that it was not unjust or unreasonable to dismiss the employee nor was it harsh.

65 The employer was entitled to a reasonable belief that the applicant had been involved in dishonest behaviour, that reasonable conduct of the employer did not give right to an abuse of the contractual right to terminate. The respondent had on those reasonable grounds the right to erect a belief that the applicant was guilty of misconduct.

66 For all of these reasons the Commission concludes that the termination was not harsh or unfair and the application will be dismissed.

2002 WAIRC 05764

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	LAWRENCE DELPHIN, APPLICANT
	v.
	SICILIAN (WA) PTY LTD ACN 095 478 185 T/A THE SICILIAN (SUBIACO), RESPONDENT
CORAM	COMMISSIONER J F GREGOR
DATE	WEDNESDAY, 19 JUNE 2002
FILE NO.	APPLICATION 1617 OF 2001
CITATION NO.	2002 WAIRC 05764

Result	Dismissed

Order

HAVING heard Mr S. Gallacher (of Counsel) and with him Mr Whitehead (of Counsel) appeared on behalf of the applicant and Ms M. Saraceni (of Counsel) appeared on behalf of the respondent, the Commission pursuant to the powers conferred on it under the *Industrial Relations Act, 1979,* hereby orders:

THAT the application be, and is hereby dismissed.

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

2002 WAIRC 05821

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	DONNA LEE ELLERY, APPLICANT
	v.
	FARMERS CARBON INTERNATIONAL LIMITED, RESPONDENT
CORAM	SENIOR COMMISSIONER A R BEECH
DATE	TUESDAY, 25 JUNE 2002
FILE NO.	APPLICATION 123 OF 2002
CITATION NO.	2002 WAIRC 05821

Result	Application alleging unfair dismissal granted.
Representation	
Applicant	Mr G. McCorry (as agent)
Respondent	Mr G. Townsend (of counsel)

Reasons for Decision

1 Ms Ellery claims that she was unfairly dismissed by the respondent on 7 January 2002. The respondent denies the claim. Ms Ellery gave evidence on her own behalf. For the respondent, evidence was given by Mr Stronach, who is the chairman, major shareholder and director of the respondent. The respondent also called evidence from Mr O'Halloran who is Mr Stronach's assistant.

2 I find the relevant facts to be that Ms Ellery answered a newspaper advertisement and was interviewed by Mr Stronach. As a result of the interview, Ms Ellery started work on 29 October 2001. Ms Ellery was employed as a sales representative to open metropolitan retail outlets for either direct sales, or on consignment, of the respondent's product.

3 Ms Ellery's emphatic insistence that she was employed for a two week trial period, and not for a four week trial period, was shown to be wrong. Ms Ellery's own letter of 7 January 2002 states that it was for four weeks. This has caused me to be cautious when considering her evidence overall. I am satisfied that Ms Ellery was employed initially for a four week trial period.

4 Her first week's remuneration was $200 cash and I therefore accept Mr Stronach's evidence of the interview whereby he states that this was the sum initially mentioned at the interview. It follows that I do not accept Ms Ellery's contention that no remuneration at all was mentioned at the time of the interview. Given Ms Ellery's evidence that she was employed at the time she accepted the offer to work for the respondent, it does strike me as odd that Ms Ellery would agree to leave her then present employment to start work for a new company with a product with which she was unfamiliar and not have any understanding of the remuneration for the position.

5 After the following week when Ms Ellery was paid $250, a discussion occurred between Ms Ellery and Mr Stronach. I am satisfied that an agreement was reached that Ms Ellery would be paid $15 per hour for five hours per day, five days per week (giving an amount of $375) together with a further $75 by way of remuneration for vehicle use, which made a total of $450 net for the week's work. This finding is quite consistent with the contents of the letter Ms Ellery wrote to Mr Stronach on 7 January 2002 (exhibit A3) regarding her conditions of employment.

6 Ms Ellery worked each of the weeks from the commencement of her employment until the two weeks for the Christmas / New Year period which ended on 7 January 2002. Ms Ellery did not work for that two-week period and the reason why she did not is controversial. It was only towards the end of the proceedings when Mr Townsend, who appeared for the respondent, stated that upon instructions he was submitting that the respondent did not dismiss Ms Ellery but rather regarded her as having abandoned her employment, that it became apparent to the Commission that there was a need to concentrate upon this two-week period.

7 The last minute instructions of the respondent to its counsel at the end of the proceedings needs to be placed in context. That context includes the fact that when the respondent lodged its first Notice of Answer in response to Ms Ellery's claim (a Notice of Answer from Mr Stronach) it denied that the respondent had ever employed Ms Ellery. It stated that she had "commenced a trial". It stated that terms of employment were to be negotiated if the trial was successful. Critically, it stated that Ms Ellery was not dismissed but rather her trial ended and she was informed that she was unsuccessful and the company would not be offering her a contract.

8 Not only is there nothing in that first Notice of Answer to suggest that Ms Ellery abandoned her employment, the Notice of Answer positively states that the reason why the "trial" came to an end was by the action of the respondent in informing her that she was "unsuccessful and the company would not be offering her a contract".

9 Following the respondent engaging Mr Townsend, a revised Notice of Answer was filed. This Notice of Answer conceded that Ms Ellery had been an employee of the respondent, albeit a "temporary casual" employee. In paragraph 7 of the revised Notice of Answer, it states that:

"… the applicant was not required to attend to the duties of employee for two weeks commencing 24 December 2001".

10 That response is directly contrary to the first Notice of Answer and also to the last minute instructions given to Mr Townsend that as a result of Ms Ellery not working for that two-week period she had abandoned her employment.

11 It necessarily follows that the contention that Ms Ellery abandoned her employment made in the closing stages of the case was found by the Commission to be somewhat startling. It was not something which had been put to Ms Ellery when the respondent cross-examined her on her evidence.

12 When Mr Stronach himself gave evidence, he was not able to recall with precision what discussion he had had with Ms Ellery on 21 December 2001 when he paid her her weekly remuneration. His evidence is that merely the following week someone asked "where's Donna?" and Mr Stronach stated that he did not know but he thought that she had "flown the coop".

13 In turn, Mr Stronach was cross-examined on his evidence and asked why his evidence was inconsistent with the revised Notice of Answer quoted above. He was unable to do so.

14 Although Mr Townsend was proper in conceding that he had not shown the revised Notice of Answer to Mr Stronach before it was filed on the respondent's behalf, that concession does not in my view adequately deal with Mr Stronach's failure to explain the inconsistency. I would naturally assume that the revised Notice of Answer prepared by Mr Townsend could only have been prepared on the instructions given to him by the respondent. Thus, even though Mr Stronach may not have seen the finished document, I have little difficulty in reaching the conclusion that the evidence given before the Commission on this point was inconsistent with the instructions the respondent had given to its own counsel for the preparation of the revised Notice of Answer.

15 I do not overlook the evidence of Mr O'Halloran that he had been unaware of the reason why Ms Ellery had not attended for that two-week period. He too believed that she had "flown the coop". Nevertheless, I have found the respondent's inconsistent position on this point disturbing and lacking credibility.

16 Further, I regard Ms Ellery's evidence that Mr Stronach had told her that there was "no point in coming in" over the Christmas period as more likely to be correct. I have little doubt that Ms Ellery's financial circumstances which she explained to the Commission would leave little incentive for her to voluntarily not work for those two weeks.

17 Furthermore, her claim that she had been informed that in the New Year she may do some limited country travelling, and that as a consequence she had booked child care arrangements for the January school holidays ending in February is, at least consistent with the claim she lodged in the Commission on 22 January 2002 and is a strong indication she did not abandon her employment.

18 On balance therefore, I regard it more likely than not that Mr Stronach told her there was no point coming in. It follows that I do not accept the respondent's submission that Ms Ellery abandoned her employment. I find that she did not do so. Rather, she returned to work on 7 January 2002 in accordance with the understanding she had received from Mr Stronach regarding the duration of her absence.

19 This brings into focus the events of 7 January 2002. Mr Stronach's evidence in the Commission, which I accept, it being consistent with Ms Ellery's evidence on this point, is that Mr Stronach telephoned Ms Ellery and said words to the effect that it was "not working out" and "not to bother coming back". I have little hesitation in find that these are words of dismissal (*Tan v. Gabriel's Café* (1999) 79 WAIG 2987).

20 Ms Ellery's claim is that the dismissal was harsh, oppressive or unfair. In assessing that issue there are two considerations. The first is the consideration arising from the reason advanced by Ms Ellery for the unfairness of the dismissal. That reason is that she had consistently requested access to her time and wages record so that she could check her payment and the components of it in order to advise Centrelink. Ms Ellery's evidence is that she is entitled to a number of allowances and she is required to declare her earnings to Centrelink. In Ms Ellery's view, she is obliged to give the details to Centrelink not just of her gross and net wage but also what is reimbursement and what is not. Mr Stronach never agreed to show her any employment record. Eventually, on her first day back after the Christmas break, on 7 January 2002, Ms Ellery gave Mr Stronach a handwritten letter requesting to view the time and wages sheets to view her taxation and superannuation deductions. I find this letter significant for two reasons.

21 The first reason is that it is written in the present tense. That is, the letter states that Ms Ellery "is" an employee. That is quite inconsistent with any notion that Ms Ellery had abandoned her employment two weeks earlier. Secondly, it is certainly proof of the sincerity with which Ms Ellery wished to view her employment records. Ms Ellery's contention is that she was dismissed after she gave Mr Stronach that letter and, chronologically, Ms Ellery is correct as to the timing of her dismissal.

22 It goes without saying that to dismiss an employee for requesting access to her or his employment records is manifestly harsh. In this State, the *Minimum Conditions of Employment Act 1993*, let alone the provisions of any relevant award, require an employer to keep employment records. Those same instruments oblige an employer to allow the employee, or the employee's representative, access to that record. Indeed, failure to do so is an offence under the *Minimum Conditions of Employment Act 1993* carrying a penalty of $5,000.

23 Therefore, if the only reason for Ms Ellery's dismissal was the evidence regarding her request for access to her employment record, a request which was not granted, this case would be quite straightforward. However, there is more to the evidence and this is the second consideration in assessing Ms Ellery's claim that her dismissal was harsh, oppressive or unfair.

24 The evidence from the respondent, which is not incredible, is that whilst it had established a market in the country for its product, it had yet to do so in nurseries in the metropolitan area. Ms Ellery's employment, therefore, was to promote a product in the metropolitan area in order to see whether there is a demand for it. Ms Ellery was therefore employed to sell the new product. The evidence from Mr Stronach and Mr O'Halloran is that sales were minimal during Ms Ellery's employment. Certainly, a significant amount of its product was given to nurseries on consignment, but it did not sell and merely involved a cost to the respondent in collecting it.

25 The evidence from Mr Stronach and Mr O'Hallaran is that other of the respondent's employees employed in repackaging the product into suitable smaller sized containers for the metropolitan area were therefore terminated. Although the respondent did not produce any financial records, or indeed any sales records or lack of them, in evidence, I was not persuaded by Ms Ellery's evidence that her sales performance was contrary to that suggested by Mr Stronach. I am quite satisfied that the questions put to Mr Stronach in cross-examination regarding issues of faulty labels, leaky containers and incorrect dilution rate instructions are all attempts at showing that poor sales may not have been Ms Ellery's fault. I conclude as a fact therefore that the respondent's attempts to market its product in the metropolitan area were indeed "not working out".

26 It follows, therefore, that if Ms Ellery had been employed to sell this particular product, and for whatever reason, sales were not working out, then it is quite likely that this was a valid reason, if not the significant reason, why Ms Ellery's employment was terminated. It also follows that if Ms Ellery was dismissed because sales were not there and the respondent was losing money then her dismissal for that reason would not be harsh, oppressive or unfair.

27 On balance, and notwithstanding Mr Stronach's inconsistent evidence on occasions, I am persuaded that the sales of the product were not working out, that it led to other staff being put off and that it formed the substantial reason for Ms Ellery's dismissal.

28 It also follows that even if, as Mr Ellery strongly deposes, she was by then a permanent part-time employee, her dismissal would not be unfair if the sales of the product for which she had been employed to sell were not working out.

29 Ms Ellery's dismissal needed to have been effected by the giving of notice (or payment in lieu of notice) and be paid in lieu of any proportionate annual leave, a point conceded by the respondent.

30 Given my finding that the substantive reason for Ms Ellery's dismissal was because the sales of the product were not working out, I have not been persuaded by her evidence that her dismissal was harsh, oppressive or unfair because she had asked to see her time and wages record.

31 I am, however, quite persuaded that it was quite harsh on Ms Ellery to firstly tell her not to attend work for two weeks and then when she returned on 7 January 2002 to merely tell her not to come in. Mr McCorry, who appeared for Ms Ellery, was quite correct to categorise Ms Ellery's dismissal as a summary dismissal without notice and without payment of any entitlements. For that reason, a reason of procedure, I find that Ms Ellery's dismissal was harsh, oppressive or unfair.

32 It is, I think, almost agreed between the parties that reinstatement is not practicable. It is not sought and is not offered. I find reinstatement is impracticable.

33 I consider that Ms Ellery's loss arising from the dismissal is the loss of the payment in lieu of notice and the proportionate annual leave (solely based upon the respondent's concession of the point). I am not persuaded that even if Ms Ellery had been allowed to work out her notice of one week she would have remained in employment beyond that further week. In the absence of any positive evidence regarding sales or any positive evidence which could allow me to conclude that the respondent's evidence regarding the fall-off in sales was not to be accepted, I find that the loss caused by the dismissal is the loss arising from the summary nature of the dismissal.

34 Accordingly, I find that Ms Ellery was unfairly dismissed by the respondent and will order the respondent to pay her as compensation for the loss caused by the dismissal the amount of wages which would have been paid to her for one week's employment plus a further $187.00 as conceded by the respondent.

35 The Minute of a Proposed Order now issues.

2002 WAIRC 05857

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	DONNA LEE ELLERY, APPLICANT
	v.
	FARMERS CARBON INTERNATIONAL LIMITED, RESPONDENT
CORAM	SENIOR COMMISSIONER A R BEECH
DATE	WEDNESDAY, 26 JUNE 2002
FILE NO.	APPLICATION 123 OF 2002
CITATION NO.	2002 WAIRC 05857

Result	Application alleging unfair dismissal granted.
Representation	
Applicant	Mr G. McCorry (as agent)
Respondent	Mr G. Townsend (of counsel)

Order

HAVING HEARD Mr G. McCorry (as agent) on behalf of the applicant and Mr G. Townsend (of counsel) on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979* hereby—

(1) DECLARES that Donna Lee Ellery was unfairly dismissed by Farmers Carbon International Limited;

(2) DECLARES that reinstatement is impracticable;

(3) ORDERS that Farmers Carbon International Limited forthwith pay Donna Lee Ellery one week's wages as compensation for the loss caused by the dismissal plus a further $187.00.

(Sgd.) A. R. BEECH,
[L.S.] Senior Commissioner.

2002 WAIRC 05701

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CHRISTOPHER JOHN GULLAND, APPLICANT
	v.
	WESTERN AUSTRALIAN TROTTING ASSOCIATION, RESPONDENT
CORAM	COMMISSIONER J H SMITH
DELIVERED	FRIDAY, 7 JUNE 2002
FILE NO.	APPLICATION 1688 OF 2001
CITATION NO.	2002 WAIRC 05701

Result	Applicant unfairly dismissed as not provided with reasonable notice. Order made the Respondent pays the Applicant $17,733.33.
Representation	
Applicant	Mr A Drake-Brockman (of counsel)
Respondent	Mr D Jones (as agent)

Reasons for Decision

1 Christopher John Gulland ("the Applicant") made an application under s.29(1)(b)(i) and (ii) of the *Industrial Relations Act 1979* ("the Act") claiming that he was harshly, oppressively or unfairly dismissed by the Western Australian Trotting Association ("the Respondent") on 10 September 2001. The Applicant was employed by the Respondent as its Promotions Manager. The Applicant commenced employment with the Respondent on 10 November 1997. The Applicant seeks six months' remuneration by way of compensation for loss and injury. The Applicant also claims under s.29(1)(b)(ii) of the Act that he is owed a benefit to which he is entitled under his contract of employment, (not being a benefit under an award or order) in that he has been denied reasonable notice of twelve months or twelve months' remuneration in lieu thereof.

Background

2 The Applicant has more than 20 years experience in marketing and promotions work. Prior to being employed by the Respondent the Applicant was the Sales and Promotions Manager for Coca Cola Amatil (WA) for a period of approximately eight years. Coca Cola Amatil were a sponsor of trotting whilst the Applicant was employed by them. Prior to that he was a proprietor of his own advertising and promotions business for approximately ten years.

3 Before the Applicant was engaged by the Respondent, the Respondent did not have a specialist promotions manager to manage its sales and marketing department. Its Finance Manager supervised the sales and marketing department which had two and a half full time positions. After the Applicant was engaged he worked full time in the position and the total number of staff under his supervision remained the same in that he supervised a total of two full time employees and one part time employee.

4 When the Applicant was appointed he was provided with a letter dated 17 October 1997 from the Respondent's Chief Executive Officer, Mr Robert Bovell, setting out the terms and conditions of his employment. Pursuant to the written terms of his contract the Applicant was provided with a motor vehicle for both business and private use at no cost to him whilst employed by the Respondent. The terms of the contract expressly required him to report directly to Mr Bovell as Chief Executive. No duties were expressly set out in the contract. The Applicant was later provided with a formal job description document which appears to have been created on 18 October 2000. In that document the key responsibilities were set out as follows—

- … responsibil[e for] promoting the WA Harness Racing industry through the effective and strategic use of media and promotions with the objectives of increasing betting turnover and attendances
- Source new and maintain good relations with existing sponsors
- Ensure the Friday Night Live programme is cost effective and operates within the guidelines set by the WATA

Under the heading "Summary of duties to be performed in descending order of performance" the duty statement provided—

"1. Budget, manage and co-ordinate marketing expenditure
2. Initiate and manage on-course advertising concepts and promotions with the objective of increasing attendances and betting turnovers
3. Manage the WATA's involvement in television through overseeing the production of the Friday Night Live programmes
4. Manage and co-ordinate the Marketing Department in respect of—
   - Staffing
   - On and off course promotions
   - Major functions and events
5. Organise the production of regular press statements in conjunction with the Racing Manager
6. Source and maintain good relations with sponsorship companies
7. Establish good working relationships with members of the media"

5 Friday Night Live is broadcast on a community television station, Channel 31. Channel 31 commenced broadcasting in June 1999. On Friday Night Live the Respondent broadcasts all its Friday night racing program. The program is designed as a marketing tool to get people interested in betting on and off courses and to increase the exposure for potential sponsors.

6 The Applicant testified that when he applied for the position that he was well aware what was expected of the Promotions Manager because whilst he worked for Coca Cola he had had quite a bit of contact with Mr Bovell. He said his duties were—

- To negotiate sponsorships and renewal of sponsorships;
- Co-ordinate race nights and attendances with the aim of improving attendances where possible; and
- To carry out events to promote harness racing in a positive manner.

The Applicant said when he first commenced employment it was not anticipated that Friday Night Live would be one of his direct duties and responsibilities. Initially the Respondent contemplated that the Friday night program would be managed by a contractor. However the Respondent was informed that if the management of the programme was contracted out the *Communications Act* (Clth) (sic) would be breached. Consequently the Respondent had no alternative but to terminate the contract with the contractors, Corporate Image Productions. Initially the Respondent appointed Ms Melanie Scholes to produce Friday Night Live. She worked with the production team from CFM Productions who ran the technical side of the program. She was also required to assist with sponsorship sales. The Applicant testified that audience surveys for Friday Night Live indicated that there was between 25,000 to 45,000 people who watched the program. The Applicant said Ms Scholes, did a very good job under very difficult circumstances to get the show up and running, but she was unsuccessful in producing income for the show through sponsorship and advertising. Consequently a decision was made in January 2000 to replace her with Mr Jay Still and he (the Applicant) was informed that the marketing department was required to sell sponsorships and advertising for Friday Night Live. He said that Mr Still was sacked in January 2001 after having a disagreement with one of the presenters on the show. Ms Lindsay Potger (who worked for the Applicant in the marketing department) then took over as producer of Friday Night Live. The Applicant said that it was still very difficult to sell advertising and sponsorships for the show. Notwithstanding those difficulties, the Applicant set a budget of $169,690.00 for sales of advertising and sponsorships for Friday Night Live for the year ended 31 August 2001. The actual sales achieved for the year however only totalled $61,360.00.

Reasons for termination

7 The Respondent says that the Applicant was dismissed for poor performance. Mr Bovell says that the Applicant was appointed to a management position with adequate staff facilities to support him in his role in promotions and marketing and he had the experience to do the work which was expected of him. He set his own budgets. The Applicant advised Mr Bovell that the budget for the Channel 31 program was achievable. The Respondent says despite constant reminders, cajoling and encouragement by Mr Bovell, there was no sign of him achieving the targets set in the budget. The Respondent says by the end of the 2001 racing year Mr Bovell had lost all confidence in the Applicant's ability to do the work which he was hired to do and made the decision to terminate the Applicant's employment. Mr Bovell suggested to the Applicant that he resign rather than be terminated. The Applicant submitted his resignation. The Respondent concedes the Applicant was summarily terminated. The Applicant was paid one month's pay in lieu of notice.

8 The Applicant says he was not informed by the Respondent that he was about to be dismissed until he was actually dismissed. He says that the Respondent did not, in any meaningful way put to him any concerns about his performance and he was given no opportunity to improve his performance. It is contended on behalf of the Applicant that the manner of dismissal was demonstrably unfair and the limited reasons given for his dismissal were not justifiable. The Respondent says in its Reply to the Applicant's claim that the Applicant has been subject to close supervision by Mr Bovell since early 1998 because of concerns about his performance. In particular the Respondent tendered a number of memorandums which it says set out the Respondent's concerns about the Applicant's performance. These memorandums are as follows—

➢ Memorandum dates 12/02/1998	Absence from the office
➢ Note dated 10/02/1999	Failure to perform duties directed by Sub-Committee of Marketing
➢ Letter dated 12/02/1999	Several issues of concern regarding Applicant's performance
➢ Memorandum dated 19/01/2000	Concerns raised about Healthway Meeting 18 January 2000
➢ Memorandum dated 25/05/2000	Messages on Hold not recorded correctly
➢ Memorandum dated 12/07/2000	Request to sort out the sponsorship sales criteria with Channel 31
➢ Memorandum dated 28/07/2000	Direction regarding advertising spots on Channel 31
➢ Memorandum dated 18/08/2000	Marketing of store room
➢ Memorandum dated 03/10/2000	Errors relating to draw for the Stallion Service
➢ Memorandum dated 03/10/2000	Failure to prepare correct speeches for Brennan Cup presentation
➢ Memorandum dated 18/01/2001	Failure to properly manage sponsorships for major events
➢ Memorandum dated 29/01/2001	Concerns raised over the level of Friday Night Live sponsorships for 2000/2001 season
➢ Memorandum dated 05/0/2/01	Directions regarding invitees for Barrier Draw Function WA Pacing Cup
➢ Memorandum dated 01/03/2001	Critical warning about failure to secure adequate sponsorships for Friday Night Live events
➢ Memorandum dated 06/03/2001	Failure to present Rugs/Sashes at two races
➢ Memorandum dated 09/03/2001	Failure to communicate with Operations about a promotion
➢ Memorandum dated 19/03/2001	Direction to appoint an additional Sales position to assist with the sale of sponsorships
➢ Memorandum dated 19/03/2001	Direction to control production costs for Friday Night Live as a result of over-expenditures
➢ Memorandum dated 19/04/2001	Various issues about matters raised in previous months
➢ Memorandum dated 25/06/2001	Failure to present AHRC Awards

➢ Memorandum dated 25/06/2001	Concerns raised about the level of sponsorships at major race meetings
➢ Memorandum dated 23/07/2001	Request for feedback about Friday Night Live events
➢ Memorandum dated 15/08/2001	Concerns raised about level of payment by CUB being below budget
➢ Memorandum dated 23/08/2001	Directions that Applicant act with urgency on several matters of concern

The Respondent in its Reply also says that it had raised verbally its concerns about the Applicant's failure to properly manage his Department.

The Applicant's Performance

9 The first memorandum from Mr Bovell to the Applicant is dated 12 February 1998. In that memorandum the Applicant was asked to advise him (Mr Bovell) or Pat Swallow when he (the Applicant), is going to be absent from the office with an estimate of when he expected to return. He was also asked to advise the Receptionist of his movements. Although the Applicant did not respond in writing to this memorandum it is apparent that after that memorandum was sent to the Applicant no further issues arose in relation to the Applicant being absent from the office. This memorandum raised an isolated matter and did not in the end form part of the Respondent's reasons for termination.

10 No further issues were raised with the Applicant until almost one year later. On 10 February 1999 Mr Bovell sent the Applicant a handwritten memorandum after it came to his (Mr Bovell's) attention that a decision made by the committee on 15 December 1998 in relation to a photography agreement had not been conveyed to the photographers. Mr Bovell in his memorandum referred to committee minutes that recorded the Applicant was to advise the photographers of the outcome of their decision. When asked about this memorandum in cross-examination, the Applicant said he had no recollection of receiving the minutes, but he thought that on receipt of the memorandum he would have immediately notified the photographers and informed Mr Bovell that the decision had been conveyed to them. It is apparent from the evidence that no further issue was raised in relation to any direction given by the committee.

11 At about that time Mr Bovell met with the Applicant to discuss a number of issues. He set those out in a formal letter to the Applicant dated 12 February 1999. The letter raised four issues. The first was an issue relating to a potential conflict of interest which was immediately rectified by the Applicant and not repeated. The second issue related to management of staff in the marketing department. Mr Bovell stated in the memorandum that it would appear the Applicant had placed an undue level of responsibility on two members of his staff, Ms Melanie Tan and Mr Tony Newton, and that they were struggling because of paucity of supervision and direction. The Applicant responded to this memorandum in writing on 19 March 1999. The written response the Applicant provided to Mr Bovell on 19 March 1999 was the only written response the Applicant ever provided to Mr Bovell in relation to any of the memorandums. In giving evidence, the Applicant said that Ms Tan was a very capable person but she was extremely temperamental and very difficult to control. In his letter to Mr Bovell he said that a combination of external pressures and daily pressures together with the extremely busy summer carnival had led to tensions between Ms Tan, Mr Newton and another person, Linda. In the letter the Applicant also said that he would ensure that if a similar situation arose in the future he would take the necessary steps to intervene so as not to disrupt the smooth running of the department. It appears from the evidence that no further issue arose in relation to conflicts between staff in the Applicant's department after this memorandum. The third issue raised by Mr Bovell in the letter dated 12 February 1999, was that the advertising budget was significantly overspent, (particularly in the first four months of the season). In his evidence the Applicant said a decision had been made to "beef up" the advertising expenditure at the start of the racing season in late November on the understanding that expenditure may cut back in some of the winter months. Apart from the Friday Night Live budget, there was no further issue raised in relation to the marketing or advertising budget. The fourth issue raised in the letter by Mr Bovell related to sponsorships. Mr Bovell said in the letter that he had written to the Applicant some time ago about the need to obtain sponsors for a number of events and that urgent attention needed to be taken to generate additional sponsorships. The Applicant says in his evidence that when he first commenced work as promotions manager in 1997 there were some major races and events that had no sponsors. In his written response on 19 March 1999 the Applicant referred to successful sponsorship agreements had been secured last year with five new sponsors together with a Woolworth's Family Day, a new Toyota car as a giveaway and a South African Airways prize to include land content. He also advised Mr Bovell that after months of negotiation they had been unsuccessful with Alinta Gas and Hytech Drillers. He also said that with the pressure of the Summer Carnival out of the way he (the Applicant) thought that they would be in a good position to retain their existing line up and secure new sponsors.

12 No further issues were raised with the Applicant until 11 months later. On 18 January 2000 the Applicant and Mr Bovell met with one of Respondent's major sponsors, Healthway. Healthway is a government agency which provides funding to sporting associations in Western Australia through sponsorships. At the meeting, officers of Healthway raised a number of issues which were of concern, including Ms Tan's performance, a failure to consult Healthway in relation to advertising, inadequate communication about on course activities and a failure to ensure that sponsors were properly acknowledged when trophies were presented. Following the meeting Mr Bovell set out all these issues in a memorandum to the Applicant on 19 January 2000. He directed the Applicant amongst other matters in relation to the Healthway sponsorship that he was personally responsible for the management of the sponsorship. It appears from the evidence that after this memorandum the Applicant developed a very good relationship with the staff of Healthway and was successful in obtaining an increase in sponsorship from $180,000.00 per annum to $200,000.00 per annum.

13 On 25 May 2000, Mr Bovell sent the Applicant a memorandum stating that the "messages on hold" tape was again out of step with events, for example the time of the first race was not correct. In the memorandum Mr Bovell directed the Applicant to ensure that in future someone checks the messages so as to ensure that what is recorded is correct. In his evidence, the Applicant conceded that the messages on hold system was under the control and management of his department, but he said he was not aware how the message tape was wrong because no one had bought it to his attention. He said it was expensive to change the tapes and that when he received the memorandum he took steps to ensure the tapes were changed. No further issue was raised in relation to "messages on hold" however it is apparent from this evidence and the Applicant's evidence in relation to other issues that his style of management was reactive rather than proactive.

14 On 12 July 2000 Mr Bovell again wrote to the Applicant in relation to Channel 31 sponsorship sales criteria and asked the Applicant to sort out the arrangements with Mark of Channel 31. Mr Bovell wrote again to the Applicant on 28 July 2000. In that memorandum Mr Bovell advised he had had several discussions with Mr Bill Duffy, a member of the Respondent's committee, about trying to achieve sales of advertising spots on Channel 31 and that he (Mr Duffy) had advised Mr Bovell that a Mr Brian Watson may be able to assist. Mr Bovell directed the Applicant to make contact with Mr Duffy, to discuss the matter with him and at the very least to speak to Mr Watson to see if he could be of assistance. The Applicant said in response to these memorandums he prepared two packages for salesmen to take out to sell spots on Friday Night Live. He said he contacted Mr Duffy. He said Mr Duffy informed him that Mr Watson was going in to hospital for about a month and he (Mr

Duffy) would follow the matter up with Mr Watson. The Applicant said that Mr Duffy came up with the idea of appointing one of the Channel 31 presenters, Mr Wes Cameron, to do sales. He (the Applicant) said he had some reservations about presenters going out and doing door knocking. He also said that Mr Watson suggested that they could look at themes to attract advertisers but they came to nothing as he heard nothing further from Mr Duffy or Mr Watson. It appears that the Applicant did not himself take any steps to initiate any new schemes or themes in an attempt to increase sales and advertising on Channel 31.

15 On 18 August 2000 Mr Bovell wrote a memo to the Applicant directing him to have the marketing storeroom cleaned up and kept properly secured. When asked about this memorandum the Applicant said that he spoke to his staff about it and it was agreed they were going to make a conscious effort to keep the storeroom tidy. When asked whether he discussed this matter with Mr Bovell the Applicant did not respond other than to say that he (Mr Bovell) would have been very pleased to have seen the area tidied up.

16 On 3 October 2000 Mr Bovell wrote to the Applicant in relation to a failure at to provide a barrel or box for the stallion service draw that was held on the previous Friday. Mr Bovell also said in the memorandum that no one had recorded the name of the winner or made any arrangements to have the winner's name broadcast over the public address system. The Applicant testified that staff concerned were quite embarrassed by the incident but he did not accept that no one knew the name of the winner. On the same day Mr Bovell also wrote another memorandum to the Applicant referring to the fact that the speech notes for the Brennan Cup were incorrect which caused the Respondent's President to be publicly embarrassed when he made the speech. In that memorandum Mr Bovell directed the Applicant to personally ensure that the speeches were factually correct in future. In his evidence the Applicant testified that one of his staff prepared the speech. He said that the speeches were virtually a "rewrite or a rehash" from the previous year's speeches. He conceded the mistake caused embarrassment but said that it was always "our endeavour to make sure speech notes are correct". It appears that no further issue was raised in relation to preparation of speeches. However, issues were raised in relation to aspects of preparations for various functions.

17 On 18 January 2001 Mr Bovell wrote to the Applicant in relation to management of sponsorships and major events. In that memorandum he stated—

> "It seems to me that there are some items relating to the organisation of sponsorships that for one reason or another are not being attended to in a timely fashion, eg—
>
> - ordering of rugs
> - timing of the distribution of invitations
> - booking of advertising, i.e. wrap-around for the *West Australian* for Cup night
> - invitations to dignitaries to present speeches
> - invitations for connections of Group 1 runners to the Committee Reserve.
>
> I have spoken to you and Frances briefly about the matter and would ask you to institute immediately a detailed check-list in date order, for each sponsorship and major function, whereby each item would be achieved by a certain date.
>
> I would request that you commence this process as soon as possible and set up a check-list for New Year's Eve, the Pacing Cup, *Be Active* Free for All and Barrier Draw Awards Night. Check-lists should also be created for all major sponsorships and events.
>
> I would hope that by the end of January you would have a check-lists *(sic)* organised for the Barrier Draw function and Pacing Cup night.
>
> I would like to have a look at the format to see what items have been included on the list."

18 On 9 March 2001 Mr Bovell sent the memorandum dated 18 January 2001 to the Applicant again with a handwritten comment on the bottom "Chris, Any progress with this request?" When questioned about this memorandum in his evidence the Applicant said there had been a failure to order some embroidery or screen printing on some horse rugs. The Applicant was informed by the usual supplier that they could not do the job. However there was a positive outcome as he (the Applicant) found a new supplier who could do a better job. As to invitations, the 500 Club Reinsmen had not been invited to the Barrier Draw Awards night. As a result a decision was made to hold a make-up function to appease the 500 Club Reinsmen. Mr Bovell wrote to the Applicant on 5 February 2001 with a copy to Mr Alan Parker, directing the Applicant to liaise with Mr Parker and check with him to finalise the guest categories for the next year's functions. This memorandum was copied again to the Applicant on 6 March 2001 by Mr Bovell with a note asking whether there was any news. When asked why he had not reported back to Mr Bovell about this issue by 6 March 2001, the Applicant said that February was a very busy month and he could not remember exactly what things were going on at that particular time but he thought that he reported back to Mr Bovell shortly after the copy of the memorandum arrived.

19 The Applicant said that he did not disagree with having a check-list in place for functions but at the time he received the 18 January 2001 memorandum they were extremely busy with the Summer Carnival and in his opinion it would take a degree of dedicated time without interruptions to adequately prepare a check-list. He said that in his view everything was being attended to in a timely fashion. He said he found the memorandum very demoralising. He said he did not take any steps to prepare a check-list and had not done so by the time his employment was terminated. Despite the Applicant's view that his department was well organised it appears from future memorandums that there were ongoing problems with the planning and management of the functions and events.

20 Mr Bovell continued to raise sponsorship issues with the Applicant. On 29 January 2001 Mr Bovell wrote to the Applicant as follows—

> "I had a conversation with Bill Duffy today and several matters arose.
>
> One in particular was the type of contract for the sale of sponsorship that we are currently utilising. Is there a form that can be signed and dated immediately a sponsor has committed, with follow-up at a later date?
>
> Also, I need a report from you on sales to the end of January 2001, including actual sponsorship sales and general sponsorships which have been added to as a result of the *Friday Night Live* component.
>
> I am very concerned about the level of *Friday Night Live* sponsorship given the memorandum you presented to Committee for the 2000/01 season.
>
> I would like to meet with yourself and Lynsey at 10.30 am tomorrow morning to discuss the sales programme for *Friday Night Live.*"

21 The Applicant met with Ms Lynsey Potger and Mr Bovell in relation to the memorandum. The Applicant said it was agreed at that meeting to produce a sales video. He said he also undertook that each member of the marketing department would visit four businesses per week to canvass for sponsorships. However it is apparent from the Applicant's evidence that at no time was that undertaking complied with by the Applicant or his staff. The Applicant said that they had engaged Mr Wes Cameron on the road and they had sent out in excess of 200 faxes to potential sponsors over a period of time.

22 On 1 March 2001 Mr Bovell again wrote to the Applicant in relation to Friday Night Live sponsorships. In his memorandum he stated—

> "Further to our numerous conversations, I wish to confirm my advice to you that it is critical for you and your department to actively market the sponsorship segments on *Friday Night Live*.
>
> We had a discussion some six or eight weeks ago whereby you were to organise your department to at least contact a number of potential sponsors per week and that individual staff members would share the load in attempting to sell *FNL* sponsorships. To date you have sent out 80 or so proposals to customers, but failed to contact anybody, which is really a waste of time in my view.
>
> I can be no more direct than to tell you that unless your department is able to secure substantial sales within the next two months, there will be serious ramifications.
>
> Ps. Its good to hear that a $9,000 deal is about to be signed."

23 The Applicant said in evidence in response to that memorandum that "selling isn't just something you can just ring up and get an appointment for. It needs a planned approach; it needs strategy". He conceded that those faxes had not been followed up by a telephone call and that Mr Bovell was critical of him and his department for not following those facsimiles up. In essence, his opinion was that selling sponsorships and advertising for Channel 31 was almost impossible. When asked why he did not go out and do cold canvassing of customers the Applicant said they were too busy to do so and it was his view that he did not think that cold canvassing was an efficient use of time. However, he did not concede that on receipt of that memorandum he knew his job was in jeopardy if the level of sales did not improve. In particular he said there was no explanation given to him of what the ramifications were or what they could be.

24 On 19 March 2001 Mr Bovell sent the Applicant a further memorandum about Friday Night Live. In that memorandum Mr Bovell noted that the Applicant was about to appoint a professional sales person to assist with the sales of sponsorships on Friday Night Live. Mr Bovell again stated that Mr Duffy had advised that Mr Watson could be of assistance. Again, the Applicant was advised to liaise with Mr Duffy and Mr Watson. The Applicant testified that he thought that it was pointless pursuing Mr Watson as he had gone into hospital. This evidence did not however make sense as there was no evidence that Mr Watson had gone into hospital on more than one occasion, other than for about one month in July 2000.

25 When asked what progress he made in relation to sponsorships generally, the Applicant said that they spent a lot of time preparing documentation for a new brewery sponsorship. He said they also spent a considerable period of time on the Healthway sponsorship. He said that he signed a new wine company, Southcorp Wines, to replace Mildara Blass. He said Toyota agreed to take some advertising on Friday Night Live and to provide a car and increase their sponsorship commitment by about $10,000.00. Further that Mr Wes Cameron was having some discussions with Ross North Homes. He said that in March 2001 he engaged two new sales persons, Mr Steve Bocksette and Mr Scott Curtis. He said that Scott Curtis only lasted about two weeks but Mr Bocksette continued on as a salesman although he had not made a sale by the time the Applicant left the Respondent's employment. The Applicant said Mr Bocksette made a personalised presentation to every advertising agency in town and he met with each of the media buyers. He said they were also negotiating with other potential sponsors including Homestyle Salads, Sealanes, Rossnorth Homes and Neverfail Springwater. They also commenced negotiations with Burswood Casino. The Applicant said that it seems negotiations with Ross North and Neverfail were successful as he has recently seen that Ross North have taken the mobile barrier and the Respondent's website indicates that Neverfail signed as a sponsor.

26 On 6 and 9 March 2001 Mr Bovell sent the Applicant memorandums in relation to presentation of rugs and sashes and communication difficulties with a promotion activity. In the 6 March 2001 memorandum Mr Bovell noted another "error" had occurred in relation to a race, namely the Sales Classics, when there were no rugs or sashes for the winners of two races on the previous Friday. He directed the Applicant to immediately have two sashes made up together with two inscribed plaques and presented to the winners. The Applicant said the error did not lay with his department as they ordered rugs and sashes from a list prepared by the Racing Secretary. He said he bought this to the attention of Mr Bovell and that Mr Bovell reviewed the list and marked several amendments. On 9 March 2001 Mr Bovell sent the Applicant a memorandum as he had received a complaint from Mr Frank Coleman, the Operations Manager, that the Applicant's department had failed to properly advise Operations of a promotion that was beginning that night, 9 March 2001. In the memorandum Mr Bovell directed marketing to produce each week a pro-forma document to be given to Operations containing a list of particular details. The Applicant said that he did not respond to this memorandum. He said that he did not do so because in his view all of the matters referred to in the list were dealt with each Monday at weekly meetings between the Marketing Department and the Operations Department.

27 On 19 March 2001 Mr Bovell sent the Applicant a memorandum with a copy to Ms Potger in relation to production costs for Friday Night Live advising that in January the budget for Friday Night Live had been overspent by $4,000.00. The Applicant said that he did not have any direct control over the expenditure on Friday Night Live as the company contracted to do the production work was CFM Productions. He said they had tried on numerous occasions to tie Ross McDonald from CFM Productions down to a contract but had been unable to do so.

28 On 19 April 2001 Mr Bovell wrote to the Applicant again in relation to various matters, in particular his earlier memorandums dated 29 January, 1 March and 19 March 2001 in relation to sponsorships for Friday Night Live. He also referred to other memorandums in respect of reconciliation of wine sales, customer surveys, Barrier Draw function invitees, management of sponsorships, major events and Westbred Logo. He also raised one new issue. The memorandum indicated that a free advertisement placed in the newspaper for a recent Derby night was "really over the top and not in the WATA's best interests". When asked why he had not responded to Mr Bovell's memorandums in a timely fashion the Applicant said that they had spent the last couple of months preparing documents for Healthway which was a very timely and extensive job. In relation to Friday Night Live he said he had regular meetings with Mr Cameron as to who could be approached and what could be done. He said he found the whole situation unsatisfactory and that he thought there was nothing that could be done that was not already being done. He said he did not think more staff would help. In his view Friday Night Live was not appealing enough for a regular number of people to advertise on the program. He also said that Mr Bovell sometimes was not available, that his (Mr Bovell's) door was often closed as he (Mr Bovell) worked very hard under a lot of pressure. The Applicant said however, that he regularly reported to the marketing sub-committee about sales and his reports were tabled at meetings of the full committee. In relation to the advertisement for free admission to Derby night he conceded that he (the Applicant) had made a decision to print a coupon in the West Australian. He said Mr Bovell was not happy with that decision and he "had to wear that".

29 Another issue was raised in relation to presentation of awards in June 2001. On 25 June 2001 Mr Bovell wrote to the Applicant after he was informed awards had been received from AHRC in November 2000 had been stored in the promotions storeroom without any action being taken to present the awards to winners. In his memorandum he said to the Applicant "Chris, this is really not good enough and will embarrass the Association enormously when the facts come to light!" The Applicant said that the trophies had arrived in a box from the Eastern States and he had no idea what the trophies were for. He said they remained in the office until someone gave them an explanation what they were for. It is apparent from his evidence that again the Applicant was not proactive but simply reactive in his management style. On the same day Mr Bovell wrote to the Applicant

advising that he (Mr Bovell) was concerned that several of the Respondent's major races had remained unsponsored for some time and he (Mr Bovell) requested the Applicant to concentrate his efforts on obtaining sponsorships for those races. He agreed that it was his responsibility to obtain sponsors. He said they had an ongoing system for obtaining sponsorship for the races but that a number of important races did not have sponsors when he commenced employment.

30 On 23 July 2001 Mr Bovell sent the Applicant a memorandum asking how was the "contra" going for Friday Night Live with radio stations and newspapers and stated that he had not had a reply to his previous memorandum. The Applicant said that Mr Bovell was very aware that "contra" arrangements with the media were virtually non-existent. In particular he said they had approached unsuccessfully approached "Austereo" and he advised Mr Bovell of that. He also testified that he approached 6PR and Channel 7 without any success.

31 On 15 August Mr Bovell wrote to the Applicant advising that Carlton United Brewery payments of 10 cents per litre of sales were well below budget. The Applicant testified that he contacted Carlton United Brewery and wrote to their General Manager informing them they had not paid their annualised rebate. A cheque had come in from Carlton United Brewery while the Applicant was on holidays in August, and on his return he found the memorandum on his desk. The Applicant said that he had not responded this memorandum by the time his employment was terminated on 10 September 2001 as he was still investigating the matter. He said he contacted the accounts department to find out how much money had been received and he was waiting for that information to be provided before he responded to Mr Bovell

32 When asked why he did not respond in writing to Mr Bovell's memorandums the Applicant said that he did not have a secretary to type letters for him, yet he conceded in cross-examination that he had a part time lady who did the typing for the department and he had his own desk top computer that he could use to type memorandums.

33 On 23 August 2001 Mr Bovell wrote a final memorandum to the Applicant. In that memorandum he stated—

"*Friday Night Live*-

FROM MEETING OF SUB-COMMITTEE 22.8.01

Matters which you are required to act upon as a matter of urgency—

1. We have discussed this on several occasions, however, you have still to organise any contra with other media, such as radio or newspapers.

   Please proceed immediately with this project. A deal with 6PR/IX would be ideal.

2. Commonwealth Bank sponsorship. Could you please approach the CBA about it taking over the lost BankWest sponsorship.

3. I wrote and spoke to you about our permanent staff selling advertising on *Friday Night Live*. To date nothing appears to have been done.

4. Please hire immediately two additional sales staff without a retainer.

   We also need to review Steve's position if he is not successful in the next two weeks.

5. We need to organise a promotion to gauge the number of people watching from the country. Can Jon Underwood tell us the numbers active on the satellite?"

34 When he gave evidence in relation to the first point the Applicant again reiterated his view that there were no opportunities to organise any contra with any media organisations. In relation to Commonwealth Bank sponsorship, he said the Respondent had recently changed banks and that he had contacted the Commonwealth Bank but had been informed in July 2001 that all their monies had been allocated for that year and to submit an application to them in February 2002. The Applicant said he had already tabled that information at the meeting of the sub-committee of 22 August 2001. In relation to Friday Night Live he said he had spoken to Mr Bovell about agreeing to pay a retainer to salesmen of $200.00 for petrol and out of pocket expenses. He said in relation to gauging the number of people watching in the country that the only way in which that could be done was to pay for a survey through an organisation such as McNair Anderson.

35 In cross-examination three issues were raised on behalf of the Respondent that were not raised in any of the memorandums sent by Mr Bovell to the Applicant. The first issue related to the Streets Ice Cream sponsorship agreement which the Respondent entered into in April 2000. The sponsorship agreement was for a three year period with a one year option. It was put to the Applicant that Streets Ice Cream did not pay their account after an invoice was sent to them on 30 May 2001. The Applicant said he did not know whether that was the case but he was aware that Streets were unwilling to continue with their sponsorship agreement. He said that he began negotiations with Peters and Brownes to replace Streets. He also said he advised Streets that the Respondent would not let them out of their sponsorship agreement but he conceded that he did not report this matter to Mr Bovell. However the Applicant did obliquely refer to it in a list of outstanding matters that he prepared after he was informed his employment was terminated.

36 The second issue raised in the proceedings related to an event that the Respondent says he (the Applicant) arranged prior to his employment being terminated which occurred after his termination. Sometime prior to the Applicant's employment being terminated the Respondent was contacted by the events coordinator for the Johnnie Walker Classic Golf Tournament to hold a function on 25 January 2002. It was put to the Applicant that the function was booked by the coordinator on the basis that the Applicant informed the coordinator that on that night there would be a big fireworks display at Gloucester Park. The Applicant denied he negotiated the arrangement with the coordinator. He testified at the time the arrangement was made it was known by the Respondent a fireworks display would not proceed on 25 January 2002 because Australia Day fireworks were planned for 26 January 2002. The Applicant said he discussed this matter with Mr Dave Brockbank who negotiated the arrangement with the coordinator. Mr Brockbank is the Manager of Spices Catering (the Respondent's on-site caterers). The Applicant testified that Mr Brockbank assumed without consulting the marketing department that there would be fireworks on 25 January because Gloucester Park usually had fireworks on or about the Australia Day weekend. However the planned fireworks were rearranged to coincide with the Toyota car draw on 8 February 2002. In support of his evidence a copy of the Respondent's calendar of events was tendered during cross-examination of Mr Bovell. The calendar was from September 2001 until August 2002. The calendar shows that a fireworks race meeting was planned for the Toyota Quality Service Summer Country Championship on 8 February 2002. The Applicant, however, conceded he advised Mr Brockbank that fireworks could be organised for 25 January 2002 if "push comes to shove" by making arrangements with the Respondent's fireworks technician for the Johnnie Walker Classic Golf Tournament function. The Applicant testified that it was his opinion that a modest fireworks display for a minimal cost could have been paid for out of the promotions budget. The Applicant did not say however whether he made any arrangement for such a fireworks display prior to his employment being terminated.

37 The third issue relates to a contract the Respondent has with Mr Ben Cousins to promote harness racing. The Applicant agreed that Mr Cousins had been engaged under a contract in writing for many years and he (the Applicant) had prepared written

contracts for Mr Cousins to sign for 1998/1999. He also agreed that no written contract had been prepared for 1999/2000 or 2000/2001. The Applicant said that he had negotiated a verbal agreement with Mr Cousins' father who was his manager. He agreed no one had given him the authority to discontinue the practice of entering into a written contract with Mr Cousins.

38 On 10 September 2001 Mr Bovell had a discussion with the Applicant in relation to a couple of minor matters, later that morning Mr Bovell asked to see him in his office. The Applicant testified that he went into Mr Bovell's office and he (Mr Bovell) informed him "I'm sorry. I've got to let you go." He said he was in shock and he asked Mr Bovell why, and Mr Bovell informed him that he (Mr Bovell) had been concerned for some time about Friday Night Live and he (Mr Bovell) did not believe he (the Applicant) had been managing his department correctly or words to that effect. He said Mr Bovell told him an example of that was the Carlton United volume rebate issue. The Applicant said Mr Bovell told him the matter should have been dealt with prior to now and that it has been hanging around for too long and that they got less than what the accounts department and he (the Applicant) had budgeted for. The Applicant asked Mr Bovell if he could stay on as long as possible and Mr Bovell informed him it was best for him and his career prospects if he left immediately. Mr Bovell asked the Applicant to write a letter advising everyone that he had found another opportunity somewhere else and to submit a resignation. The Applicant then wrote a letter of resignation and a letter advising clients that he was leaving. He then prepared a list of outstanding matters and left the office. The Applicant was allowed to keep his car for a few days. Before he returned the car he received one month's pay in lieu of notice. The Applicant said he could not understand what the problem was with the management of his department. He said, "I felt that the department was functioning extremely well. We had a new team. The girls were willing, very keen, very capable, and we had done an outstanding job". He said he was devastated by the termination. He also said he had enjoyed his job very much but he felt it was a very hard job and unrewarding insofar they did not always get the sponsorship or advertising they worked for.

39 The Applicant, after seeking employment with a number of employers, was offered and obtained work with a community based newspaper group. He commenced employment in the beginning of November 2000 on three months' probation. He was initially paid a salary of $27,390.00. He passed his probationary period and his salary was increased on 17 January 2002 to $30,080.00 per annum. He has been paid bonuses between $75.00 and $1,000.00 per month. In November 2001 he received a bonus of $450.00, in December 2001 he received a bonus of $117.00 and in January 2002 he received a bonus of $1,500.00. When this matter was heard on 6 March 2002 he was yet to receive a bonus for February 2002. In February 2002 he won the Sales Representative of the Month for the Community Newspaper Group for January 2002 and received an award of $200.00 less tax. After his employment was terminated with the Respondent, the Applicant was required to purchase a vehicle. He purchased a 1995 Honda Accord. His new employer pays him $100.00 per week and 65 litres ($60.00) per month to run the vehicle.

40 The Applicant testified that whilst employed by the Respondent he was provided with a 1996 6 cylinder Ford Falcon Futura EL. This vehicle was purchased secondhand for his use. When it was purchased it had travelled 40,000 kilometres and when his employment ceased the vehicle had travelled 140,000 kilometres over the four year period. The Applicant said he did not keep records of business and personal use but he estimated that 60%-70% would be for business and the remainder would be for personal use.

41 Mr Robert Bovell testified that he has held the position of Chief Executive Officer for eleven years. He is also the Respondent's Secretary. He said that the Respondent's primary sources of revenue are TAB distribution income, receipts from off-track betting, catering, sponsorships and gate admissions. He said in relation to the Applicant's responsibilities it was that his (the Applicant's) primary focus was to generate income principally through sponsorships. The other parts were to create and organise promotions and to be in charge of advertising.

42 Mr Bovell said that as the Chief Executive Officer he has responsibility delegated to him from the committee to hire and dismiss staff.

43 Mr Bovell said the Respondent employs 31 staff. When asked why he wrote memorandums to the Applicant, he said it is his view that memorandums are the way to confirm matters discussed orally or bring queries to the attention of people. He said he had sent more memorandums to the Applicant than any others as he was concerned about how the marketing department was being administered.

44 In relation to the first two memorandums Mr Bovell conceded that they did not lead to a decision to dismiss the Applicant. In relation to the Healthway meeting memorandum (dated 19 January 2000), Mr Bovell said after he sent the memorandum given that Heathway increased their sponsorship suggests the Applicant "lifted his game" in respect of managing this sponsorship. As to the Messages on Hold memorandum (dated 25 May 2000) he said Messages on Hold is a marketing tool of the Respondent and the fact that they were not correct was "just another ball that had been dropped'. As to the storeroom he said it was a mess, totally disorganised and a fire hazard and security risk. When asked why he sent the memorandum to the Applicant about the storeroom (dated 18 August 2000), he said the Applicant's attitude in relation to all of the memorandums was the same, "it was someone else's fault, or not his responsibility". Mr Bovell said that the Applicant was in charge of the marketing department and that it was his responsibility to ensure that his department gets it right. He said an example of this was the Applicant's response to the mistake made in the Brennan Cup speech (memorandum dated 3 October 2000).

45 In relation to the memorandum dated 18 January 2001 which raised a number of matters including compiling check-lists, Mr Bovell testified there were no systems in place and it was obvious to him (Mr Bovell) that they (the marketing department) were "flying blind on most occasions and haphazardly picking things up as they went through". He said he met with the Applicant and Ms Potger on 30 January 2001 because he was trying to get them to put in place proper systems so things would not go astray, go wrong or get forgotten. He said in relation to functions he was trying to get them to take some notes, put down the details of a function, who was to be invited, what went right and what went wrong, so when the function was run the next year there was template in place, instead of having to re-create the function from scratch. He received no reply from the Applicant in relation to this issue despite sending the Applicant a further copy of the 18 January 2001 memorandum on 9 March 2001. In cross-examination it was put to Mr Bovell that prior to the Applicant being employed, there were no such check-lists in place. He said in reply he thought they must have had such lists as there were no "such mistakes, errors and stuff-ups."

46 In relation to finding sponsors for unsponsored races, Mr Bovell testified that the Applicant's evidence in response to the memorandums in June 2001 that when he commenced employment there was not sponsorship of those specific races, was not true. He said that the "Pearl" was definitely sponsored in 1997, as was the "Gloucester Sales" but he was not sure in relation to the "Easter Cup". He said the whole point of hiring the Applicant was to generate more sponsorship income and to make sure all feature races received sponsorship.

47 As to the style of the Applicant's management, Mr Bovell said he had to push the Applicant to do things. He said an example was the Commonwealth Bank sponsorship. Mr Bovell said he was astounded and surprised by the evidence by the Applicant that he had contacted 6PR and 6IX and they had refused to provide any contra advertising because the Applicant never told him that. Mr Bovell said he was at a meeting with Austereo and that they did discuss and do "contra". He said they (Austereo)

were not happy about it but did not reject the idea totally. He said eventually they got a contra out of a function that they (the Respondent) held. He did not know that the Applicant had had contact with 6PR. He said that may have been the case.

48 As to sponsors for Friday Night Live, Mr Bovell testified that he became concerned about the lack of sponsors as early as July 2000. He said the Applicant was fairly experienced in the sales area and he (Mr Bovell) should not have had to send the memorandum dated 12 July 2000 to him. However, he did so because he was trying to get the Applicant to start sorting through the issues he needed to, to generate sponsorship sales. As to budgets (targets) for sponsorships and promotions, Mr Bovell said it was the responsibility of the Applicant to set that each year. Mr Bovell said the Applicant assured him (Mr Bovell) the 2000/2001 budget could be achieved.

49 Mr Bovell said he sent the memorandum to the Applicant on 29 January 2001 relating to the failure to sell sponsorships as it was becoming apparent to him that they had no chance of achieving budget and there was "not much in place" to achieve that. He said that memorandum and the meeting on 30 January 2001 was to follow up suggestions by Mr Duffy. One matter discussed at the meeting was a follow up "offer and acceptance type" arrangement to get potential customers to sign up then and there rather than return the following week to discuss contractual arrangements. It was Mr Bovell's opinion that the Applicant had a "very soft sell approach" with little or no follow up. At the meeting he (Mr Bovell) instructed the Applicant and his staff to visits 3 to 4 potential customers a week but he (Mr Bovell) found out subsequently that the Applicant did not comply with that direction.

50 Mr Bovell said that he informed the Applicant on a number of occasions that his job was in jeopardy, in particular that his lack of performance would cost him his position with the Respondent. However this was a matter that was not put to the Applicant in cross-examination. The only matter put arose out of the memorandum dated 1 March 2001 (set out in paragraph 22 of these reasons). Mr Jones on behalf of the Respondent put to the Applicant that the last sentence of that memorandum was a clear statement to the Applicant that his job was in jeopardy unless the promotions and marketing department secured substantial sales.

51 Mr Bovell said that the reason he decided to dismiss the Applicant was because he had lost faith in the Applicant's ability to undertake the task of promotions manager in many respects, in particular the lack of ability to organise sales for Friday Night Live, to obtain meeting and billboard sponsorship and to manage his department generally. He said he thought there is "someone better to do this task than Chris Gulland." So he said that he had to make a choice and the choice he made was to dismiss the Applicant. He said that with a great deal of regret as he got on quite well with the Applicant. He said Ms Hanks, the special projects manager of the Respondent, was appointed to fill in the Applicant's position until the appointment of new promotions manager.

52 Mr Bovell testified that after he had made the decision to terminate the Applicant's employment and spoke with him, he (Mr Bovell) received a list of work in progress that the Applicant prepared on 10 September 2001. He said he passed the list on to Ms Hanks. He said later Ms Hanks informed him that a commitment had been made that the Respondent could not keep. He also testified that Mr Brockbank informed him that a function had been booked by the Johnnie Walker Classic people because fireworks would be on at Gloucester Park that night. Mr Bovell expressed the opinion that at some point later in time the Applicant had changed the date of the fireworks (probably at the request of Toyota) so they had to arrange a makeup function at the cost of $3,000.00. He said the effect was the cost of the fireworks consumed all of the profits from the Johnnie Walker function. It was put to Mr Bovell in cross-examination that he was aware from Notes to Accompany Marketing Budget prepared by the Applicant on 31 August 2001 that the Toyota fireworks was going to be in February 2002. Further, there is a handwritten note which was written by a person which is not the Applicant "Query January fireworks". Mr Bovell conceded that he had seen that document.

53 Mr Bovell testified that after the Applicant's employment was terminated he ascertained that Ben Cousins had not signed a formal contract for services that he was providing annually for $25,000.00 per annum. He said the failure to get Mr Cousins to sign a formal contract was another example of the Applicant's bad management, lack of detail and follow-up. In cross-examination the Notes to Accompany Marketing Budget prepared by the Applicant on 31 August 2001, showed that Mr Cousins' contract was not included in the 2001/2002 budget. Mr Bovell agreed that Mr Cousins was not included because there were very few options to reduce the budget by a significant amount. He said however the budget was irrelevant as Mr Cousins' contract had not been in writing for the previous two years.

54 As to the supervision of the Applicant, Mr Bovell conceded in cross-examination he never informed the Applicant that he was going to supervise him closely. Further he conceded that there was nothing suggested in the documents that the Applicant was under close supervision since early 1998. It was also put to Mr Bovell that he did not have the authority to terminate the Applicant's employment. Mr Bovell maintained that the power to employ had been delegated to him as the Secretary of the Respondent. He said he had discussions with the President of the Respondent, Mr Fowler, prior to dismissing the Applicant and that the President concurred that the Applicant should be dismissed but that he did not take the matter to the full committee. He conceded that the Applicant did not have the opportunity to answer to the committee or discuss with the committee whether he should be dismissed or not.

55 Mr Bovell testified that the person employed to replace the Applicant had increased the sale of sponsorships and the income for Friday Night Live had increased to $110,000 by the end of February 2002. Mr Bovell, however, conceded in cross-examination that some of the new sponsors were sponsors that the Applicant had been working on prior to the termination of his employment but that he said it was the new marketing manager who "crunched" them. Mr Drake-Brockman on behalf of the Applicant requested Mr Bovell to produce documentary evidence in relation to the sales figures post employment of the Applicant. The request was made of Mr Bovell on Thursday, 7 March 2002. Mr Bovell gave an undertaking that the information would be provided. However when the Commission reconvened on Monday, 11 March 2002, Mr Bovell informed the Commission that he was unable to obtain the information as the person who could produce the records was away and the extraction of the records was a task that was more difficult than he had anticipated.

Application for an adjournment

56 At the conclusion of Mr Bovell's evidence an application was made on behalf of the Respondent for an adjournment to call Mr Brockbank and Ms Kerry Hanks. Mr Brockbank was at a conference on 11 March 2002. Ms Hanks had been available on 7 March 2002 and went on leave to the Eastern States prior to 11 March 2002. Mr Jones informed the Commission that in part her evidence would go to oral warnings given to the Applicant by Mr Bovell that his (the Applicant's) employment was in jeopardy if revenue did not increase. After hearing the parties the Commission refused the application for an adjournment.

Submissions

57 Mr Drake-Brockman on behalf of the Applicant made a submission that the Applicant was a man who carried out his role as promotions manager with relish and enthusiasm. It is contended on his behalf that the Applicant did everything possible to sell sponsorships and advertising for the Friday Night Live but it was a case of "getting blood out of a stone" and "no stone being left unturned" by the Applicant. It was submitted that Mr Bovell decided that the Applicant was to be the "sacrificial goat upon

the altar of Friday Night Live". Further the evidence given by Mr Bovell that sales have increased since the Applicant's employment had been terminated should be rejected as Mr Bovell did not produce any documents in support of his evidence.

58 As to Mr Bovell's power to employ, it is submitted that pursuant to the provisions of the Western Australian Trotting Association Act 1946 Mr Bovell did not have power to terminate the Applicant's employment as that is a decision that could only be made by the committee. The by-laws for the Western Australian Trotting Association are set out in the first schedule to the Western Australian Trotting Association Act. Clause 47(e) provides—

> "The Committee shall have power to—
>
> (e) Appoint and from time to time remove the Secretary, Stewards and all such servants and assistants as may in the opinion of the Committee be necessary and to pay such salary and wages to and to define the duties of such Secretary, Stewards, Servants, or assistants as the Committee think fit."

Further under Clause 47(f) it is provided that the Committee shall have power to—

> "(f) Delegate, subject to such conditions as they think fit, any of their powers to sub-committees, consisting of such members of the Committee as they think fit, and to make such regulations as to the proceedings of such sub-committees as may be thought desirable."

Having considered the argument put on behalf of the Applicant, it is apparent that there is some force in the Applicant's argument as the power to delegate can only be delegated to a sub-committee. However, as to the legal consequences of the argument, Mr Drake-Brockman says the Applicant should have had an opportunity to put his case to the Committee as it is only the Committee who can dismiss the Applicant but the Applicant does not press the issue other than to make an argument in relation to procedural fairness. The Applicant says when all the circumstances are considered the Respondent is unable to meet its evidentiary onus that the Applicant's dismissal was justified. In relation to reasonable notice it is submitted that objectively someone who is in a reasonably senior position with nearly four years of service, who is 48 years of age, could reasonably expect a period of notice well in excess of six months. Accordingly the Applicant claims six months' pay in lieu of notice although his claim for twelve months' pay in lieu of notice was not abandoned.

59 The submission is also made that the Applicant should be entitled to some element of compensation for injury as a result of stress and shock caused by the manner of dismissal. The Applicant has in part mitigated his loss. It is contended that in the first six months his loss was about $36,000 and his ongoing loss is about $40,000.00 per annum. When his employment was terminated he was paid $57,600 per annum including superannuation. It is claimed the value of the motor vehicle to him was $17,048.50.

Conclusions

60 I accept the Applicant's submission that in the absence of any documentary evidence in support of Mr Bovell's evidence it should be rejected in respect of the performance of Friday Night Live and sponsorship revenue generally since the Applicant's employment was terminated. I also accept the Applicant's submission that the memorandums provided to the Applicant on 12 February 1998 and 10 February 1999 should not be taken into account in relation to the Applicant's performance. Further I am not satisfied that the issue raised in relation to the Johnnie Walker function held on 25 January 2002 has not been made out as I accept the Applicant's evidence that it was Mr Brockbank who wrongly assumed that the Toyota fireworks would be held on that date and that he (the Applicant) informed Mr Brockbank it would be necessary to organise fireworks to be paid for out of the promotions budget.

61 Notwithstanding those findings I accept the Respondent's submission that when all of the evidence is considered it is plain the Applicant did not have appropriate systems in place in his department to properly plan functions and events. As set out above his management style was reactive rather than proactive. Further, he did not keep his chief executive officer properly informed or respond to many of the issues raised in the memorandums sent to him by Mr Bovell. Even if I accept the Applicant's evidence that selling sponsorships for Friday Night Live was very difficult, it seems that he (the Applicant) showed almost no initiative in this area of his duties. He did not direct his staff to follow up the facsimiles they had sent by visits, in fact he ignored his undertaking to Mr Bovell to do so. Further when he set the 2000/2001 budget for Friday Night Live he informed Mr Bovell it was achievable. In all the circumstances I am satisfied the evidence establishes that his management style was not appropriate for the position. Accordingly I am of the view that the Respondent was entitled to reach the decision to terminate the Applicant. However, I am not satisfied that the Applicant should have been summarily terminated. I am not satisfied that he was formally put on notice that if he did not respond to memorandums or put in place appropriate systems to manage his department and his work, that his employment could be terminated. However, I am of the view that from the memorandums sent to him he would have been aware that his performance was lacking and substantial improvements were required. Given the Applicant's attitude that what was being sought by Mr Bovell was not appropriate or necessary it was unlikely that the Applicant would have improved his performance to a level that the Respondent would have not made the decision to terminate. Nor am I satisfied that if he had been given an opportunity to make a submission to the Committee the outcome would have been different. Despite the requirement to accord procedural fairness, not every denial of procedural fairness will entitle an employee to a remedy. No injustice will result if after a review of all the circumstances of the termination it can be said that the employee could be justifiably dismissed *(Shire of Esperance v Mouritz* (1990) 71 WAIG 891; *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410 at 430 per Brennan CJ, Dawson and Toohey JJ, and at 466 per McHugh and Gummow JJ). I am satisfied that the Respondent was entitled to terminate the Applicant's employment by giving him reasonable notice.

62 Considering the factors set out in *Tarozzi v Italian Club* (1991) 71 WAIG 2499 at 2501 in particular the Applicant's age and the fact that he was a person of considerable experience who was employed in a senior management position, I am satisfied that he should have been given a period of notice of four months. As to the claim for unfair dismissal it is my view that the termination was unfair solely on the ground that he was not given reasonable notice. Accordingly I will make an order that the Applicant be awarded four months' remuneration as compensation less the one month's pay that has already been paid to him. I am not satisfied that the Applicant has made out a case for injury.

63 As to the value of the Applicant's remuneration, I am not satisfied that the value of the private use of the vehicle to the Applicant was $17,048.50. This figure has been calculated by using the RAC guide for a Ford Falcon that is new or up to four years old, being 48.71 cents for 35,000 kilometres per year. At the time of termination the Ford used by the Applicant had been purchased secondhand, was five years old and had travelled an average of 25,000 kilometres a year. Even if 48.71 cents is used to calculated the value, the running cost would be $12,177.50. The Respondent contends the value to the Applicant should be assessed as the amount of Fringe Benefits Tax paid by the Respondent on the use of the vehicle by the Applicant. The Commission was informed the tax paid was $10,000 per annum. Having regard to the fact that the car was secondhand, was five years old and that up to 70% of the kilometres travelled was for business use, I assess the value of the private use of the vehicle to the Applicant as $10,000. When that amount is added to the annual salary of $57,600 I assess his annual remuneration as $67,600.

64 I will make an award of compensation of $17,733.33, being four months' remuneration assessed at $67,600.00 per annum, less one month's pay assessed at $57,600.00 per annum.

2002 WAIRC 05717

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CHRISTOPHER JOHN GULLAND, APPLICANT
	v.
	WESTERN AUSTRALIAN TROTTING ASSOCIATION, RESPONDENT
CORAM	COMMISSIONER J H SMITH
DATE OF ORDER	WEDNESDAY, 12 JUNE 2002
FILE NO.	APPLICATION 1688 OF 2001
CITATION NO.	2002 WAIRC 05717

Result	Applicant unfairly dismissed as not provided with reasonable notice. Order made the Respondent pays the Applicant $17,733.33.
Representation	
Applicant	Mr A Drake-Brockman (of Counsel)
Respondent	Mr D Jones (as Agent)

Order

HAVING heard Mr A Drake-Brockman 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—

(1) DECLARES that the Applicant was unfairly dismissed by the Respondent;

(2) ORDERS that the Respondent pay the Applicant $17,733.33; and

(3) ORDERS that the application be and is hereby otherwise dismissed.

(Sgd.) J. H. SMITH,
[L.S.] Commissioner.

2002 WAIRC 05749

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	NARISSA JAYNE HRIBAR, APPLICANT
	v.
	DOUGLAS MILLAR t/a MILLAR MANAGEMENT SERVICES, RESPONDENT
CORAM	SENIOR COMMISSIONER A R BEECH
DATE	THURSDAY, 13 JUNE 2002
FILE NO.	APPLICATION 239 OF 2002
CITATION NO.	2002 WAIRC 05749

Result	Application alleging unfair dismissal granted.
Representation	
Applicant	Mr B. Stokes (as agent)
Respondent	No appearance

Reasons for Decision

(Extemporaneous as edited by the Commission)

1 The evidence of Mrs Hribar in this matter is that she commenced employment with Douglas Millar, trading as Millar Management Services on 26 November 2001. She was at that stage an assistant accountant on $22,000 per annum. On 8 January 2002 a conversation occurred between her and Mr Millar. Mrs Hribar's evidence is that Mr Millar offered Mrs Hribar additional duties following the departure of two other employees, Cathy and Klara. Mr Millar's offer involved a salary increase to $24,000 per annum. Mrs Hribar indicated that that would not be enough for the additional duties involved and Mr Millar then offered a further increase to $30,000 per annum which Mrs Hribar accepted. This was worked out between them such that Mrs Hribar would commence training in these new duties on her existing salary and her salary of $30,000 would commence on 21 January 2002. Mrs Hribar's evidence in this regard is supported by a handwritten note confirming these arrangements and signed by Mr Millar (exhibit A3).

2 Mrs Hribar then commenced training in these new duties for the remainder of that week. On Monday, 14 January 2002 Mrs Hribar was introduced to a new employee, Rhonda Dawson and Mrs Hribar was informed that Ms Dawson was to be the new office manager and Mrs Hribar was to train her. When Mr Millar confirmed that this was to be the arrangement, Mr Millar confirmed that Mrs Hribar would still receive the $30,000 salary from 21 January 2002. At 11:30am on that day Mr Millar gave Mrs Hribar a new schedule of duties. Mrs Hribar then also trained Ms Dawson.

3 On Monday, 21 January 2002 there was a further change of duties. Mr Millar informed Mrs Hribar that she would become his personal administration assistant and not be further involved in accounting. Mrs Hribar objected to this but nevertheless decided to accept the change. Therefore, from 21 January 2002 Mrs Hribar became Mr Millar's personal administrative assistant on the salary of $30,000 per annum.

4 I have considered the evidence of Mrs Hribar and I have no hesitation in accepting her evidence. Her evidence strikes me as being given in a patently honest and straightforward way and it does not strike me as being inherently improbable. Rather, I am satisfied that the events that Mrs Hribar has described have occurred in very much the way that she has recollected and as she has given in evidence this morning.

5 I include in my assessment of Mrs Hribar that she was on at least two occasions frank enough to admit events or comments that were critical of herself: They are that before her first interview, she had forgotten to ask the address of Millar Management Services and that she included in her evidence comments made to her by Mr Millar where he was critical of her work. That is very much to her credit and it has assisted me, given the absence of the respondent, to conclude that Mrs Hribar has given her evidence in a most truthful way.

6 Mrs Hribar claims that she was dismissed on 30 January 2002. As I have noted earlier, prior to that date, in fact immediately prior to that date, Mrs Hribar reached an agreement with Mr Millar that she would work as his personal administrative assistant on the same salary that had earlier been agreed that being the salary of $30,000 per annum. She worked in that position for four days until Friday, 25 January 2002. On that day, Mr Millar informed her that he could no longer afford to keep her full-time and that she was to be offered a position part-time for three days a week at $13.50 per hour. I am satisfied that this was eventually put to her on the basis that it was something for her to think about over the long weekend.

7 On the next working day, that being Tuesday, 29 January 2002, on her way to work she was telephoned by Mr Priestly on behalf of Mr Millar and informed that Mr Millar did not want her to attend for work. She therefore did not attend for work and the next conversation that occurred was on Wednesday, 30 January 2002.

8 I am satisfied from Mrs Hribar's evidence that on that day she refused the offer (as I find it to be) from Mr Millar of the part-time position, upon which Mr Millar said that it was not possible for her to continue in her role and that her final pay would be made up.

9 I am satisfied from those facts that firstly, Mr Millar indicated that he no longer intended to be bound by the contract of employment between him and Mrs Hribar for her to be employed full-time as his personal administrative assistant on $30,000 per annum and that upon her refusal of the acceptance of the alternative position he dismissed her from that full-time personal administrative assistant position. I am therefore satisfied that as at 30 January 2002 Mrs Hribar was, as she claims, dismissed.

10 As to whether that dismissal was unfair, on Mrs Hribar's evidence I find her to be to have been both a willing and dedicated employee. Willing because of her preparedness to take on the additional duties which were offered to her following the departures of Cathy and Klara. I also find that she was a dedicated employee given her evidence of the additional time that she worked over and above her paid hours because of her approach to her work.

11 Mrs Hribar's evidence is that she was told that the respondent could no longer afford to keep her in her role. However, in the absence of any evidence at all to substantiate that the respondent was unable to afford to keep Mrs Hribar, I cannot find that that was true and therefore a valid reason for her dismissal. In fact it is countered by the evidence that Mrs Hribar subsequently found from the respondent advertisements for three new positions (exhibit A5). While I note that only one of those three positions was for a full-time position, while another was for weekend work and the last was for 20 hours per week, the fact of the advertisements for those positions indicates that the respondent was in fact hiring new staff rather than experiencing any financial difficulty. That evidence causes me to reject any suggestion (if it could be said) that the respondent was unable to afford to keep Mrs Hribar in her full-time position.

12 As to any issues of poor performance, I accept Mrs Hribar's evidence that no issue of poor performance was raised with her prior to her dismissal and therefore even if there had been an issue of poor performance I would find it quite likely that her dismissal would be unfair procedurally. This is because if Mrs Hribar was to be dismissed for poor performance, fairness at least would require that Mr Millar raise the issues of poor performance with her, give her an opportunity to respond and an opportunity to improve. That did not occur. In fact, given the example that Mrs Hribar gave in her evidence (an example of poor performance put to her by Mr Millar which related to her first week of employment), there is certainly room for me to conclude, and I do conclude, that if there were any issues of poor performance and Mr Millar had put these to Mrs Hribar then her answers may well have addressed those issues in the same way that her answer to Mr Millar addressed that example. If there had been any issues of poor performance I think it more likely than not that Mrs Hribar could have either adequately explained them or if it was appropriate to do so sufficiently change her manner of work to address those issues. For those reasons any procedural failure by not putting any issues of poor performance to Mrs Hribar is, in these circumstances, a most important procedural failure.

13 For all of those reasons, I have been unable to see from the evidence any reason why Mrs Hribar's employment should have been terminated and thus I find that her dismissal was unfair.

14 I am satisfied that it is not practicable to reinstate Mrs Hribar in her employment. It is neither sought, and in the circumstances where the respondent in this matter has, I infer, treated her claim, if not this Commission, with disdain, at least any possibility of re-estabishing a working relationship is non-existent.

15 I would therefore order the respondent to pay compensation for the loss arising from the dismissal. I accept the schedule that has been lodged which sets out Mrs Hribar's loss of earnings caused by the dismissal. I am satisfied that it is accurate and that Mrs Hribar has been truthful in assessing the income that she would have earned had she had not been dismissed and from which she has subtracted the income that she has earned in that period of time.

16 Mrs Hribar was obliged to take steps to find alternative employment immediately following her dismissal. I am satisfied from her evidence that she has comprehensively done so. She has tendered in evidence a bundle of documents of the advertised positions she has responded to (exhibit A10) and two bundles of documents showing the positions she in fact applied for (exhibit A6 and A7).

17 I am also satisfied in the circumstances of this case that the three days' wages that she has claimed come within the loss caused by the dismissal. I do so for two reasons. One is that it seems to me that if Mrs Hribar was told not to attend for work on the Tuesday prior to her dismissal, that there is likely to have been some reason for that associated with Mr Millar's intention to dismiss her. That, and the evidence (as I find it to be) that Mrs Hribar was ready, willing and available to work on that Tuesday and indeed the Wednesday (for both of which she has not been paid), seem to me to properly fit within the loss that she has suffered caused by the dismissal.

18 The third day is one for which I confess some ambivalence however. Mrs Hribar claims that she should have been paid for the day that is the public holiday on 26 January 2002. In the absence of any suggestion to the contrary from the respondent, it seems to me that on the evidence overall, it is likely that she should have been paid for that day. This is because all of Mrs Hribar's evidence of her terms of employment, that is being paid monthly, payment by reference to an annual salary and the full-time nature of her employment, seems to me strongly to suggest full-time permanent employment. There has been no suggestion whatever of any casual employment. To me the absence of any suggestion that Mrs Hribar's employment was of a casual nature suggests to me that in the ordinary course of events as a full-time employee she would be paid for the public holidays. On balance, but not without some hesitation I also include that in the loss caused by the dismissal.

19 I am satisfied also that she should have been paid in lieu of one week's notice and that was not paid.

20 For all of these reasons I find that Mrs Hribar's loss caused by the dismissal, that loss comprising the income that she would have earned less the income that she has earned in the meantime, plus the one week's pay for the notice that she did not receive, together with the three days for which I believe she is entitled to be paid, then her loss is as per the schedule $6,669.37 and I propose to make an Order in those terms that Douglas Millar forthwith pay Mrs Hribar that sum of money as compensation for her loss caused by the unfair dismissal which occurred.

21 An Order now issues accordingly.

2002 WAIRC 05737

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
PARTIES	NARISSA JAYNE HRIBAR, APPLICANT
	v.
	DOUGLAS MILLAR t/a MILLAR MANAGEMENT SERVICES, RESPONDENT
CORAM	SENIOR COMMISSIONER A R BEECH
DATE	FRIDAY, 14 JUNE 2002
FILE NO.	APPLICATION 239 OF 2002
CITATION NO.	2002 WAIRC 05737

Result	Application alleging unfair dismissal granted.
Representation	
Applicant	Mr B. Stokes (as agent)
Respondent	No appearance

Order

HAVING HEARD Mr B. Stokes (as agent) on behalf of the applicant and there being no appearance on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979* hereby—

(1) DECLARES THAT Narissa Jayne Hribar was unfairly dismissed by Douglas Millar on 30 January 2002;

(2) DECLARES THAT reinstatement is impracticable;

(3) ORDERS THAT Douglas Millar forthwith pay Narissa Jayne Hribar the sum of $6669.37 as compensation for the loss arising from the dismissal which occurred.

(Sgd.) A. R. BEECH,
[L.S.] Senior Commissioner.

2002 WAIRC 05817

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
PARTIES	RENE KOSTER, APPLICANT
	v.
	VOLUTE PTY LTD TRADING AS CATT DESIGN, RESPONDENT
CORAM	COMMISSIONER S WOOD
DELIVERED	WEDNESDAY, 15 MAY 2002
FILE NO.	APPLICATION 1884 OF 2001
CITATION NO.	2002 WAIRC 05817

Result	Applicant dismissed harshly and unfairly; compensation awarded
Representation	
Applicant	Mr P Mullally as agent
Respondent	Mr T Crossley as agent

Reasons for Decision

1 This is an application pursuant to section 29(1)(b)(i) of the *Industrial Relations Act, 1979* ("the Act"). The applicant, Mr Rene Koster, worked for the respondent as a Trades Assistant sanding and gluing furniture from 20 August to 19 October 2001. He alleges that he was unfairly dismissed on 15 October 2001 by Mr Marcus Krakolinig, the Production Manager for the respondent. He says he was advised that he was being dismissed because his work was too slow and he made too many

mistakes. He worked out his notice of one week doing odd jobs, including cleaning. Both parties agree that reinstatement is impracticable. The applicant says he has been unemployed for 28 weeks since the time of dismissal and seeks the maximum compensation. Mr Koster's weekly wage was $570 gross per week.

2 Mr Koster was introduced to Mr Krakolinig by Ms Christina Giannaros, an employment consultant with Job Futures. Ms Giannaros gave evidence consistent with Exhibit R1 that the position she was asked to fill was for a cabinet maker with the respondent. Mr Koster was persistent in asking that he be put forward to the respondent as he had previous experience with woodwork in Holland. His curriculum vitae [Exhibit RK7] was given to Mr Krakolinig and they arranged to meet. The position was for a full time tradesman with a starting salary of $16 per hour to be reviewed after 3 months. The position description was for a "qualified and experienced cabinet maker" who would be using hand tools only and undertaking fine and "restoration" style work with solid timber, and producing indoor furniture.

3 In relation to whether a probationary period applied Ms Giannaros' evidence is not clear, in response to a question by Mr Mullally. She said—

> "...There was a 3 month pay review at the end of that time, yes. We - - because we're not like a private agency we don't pay any, you know, contract fees. That's between the employer and the employee once they begin. Normally we do state that. It did say there, "3 month review"". (Transcript pg 41)

Under cross examination Ms Giannaros said—

> "When Mr Markus Krakolinig approached you about the vacancy did he mention any assessment period to you for the job?---I honestly can't recall at this time. Quite often what we do is take the vacancy down directly on screen and we're limited by the fields we have on the computer." (Transcript pg 42)

4 The impression which I gained on hearing this evidence is that a salary review was to be undertaken after 3 months, not necessarily that a period of probation applied.

5 Ms Giannaros did not have the impression that the job was for restoration of antique furniture. This being a point of debate as Mr Koster's experience was in antique restoration and the conflict was as to whether he expected to be doing the type of work he was employed for, and whether he was equipped to do it.

6 Mr Daniel Sillence said that he had been with the respondent for 3 years and was the supervisor polisher. Mr Sillence said that work for the respondent was required to be of a high standard and he was familiar with the work of Mr Koster. Mr Koster's work was generally okay however he had a problem with a 2.7 metre table which had to be returned for further sanding 2 to 3 times. He said—

> "Yeah. Generally - - I mean, all across the board we - - we seemed to be okay with it. I just recall having a problem with a particular - - particular piece of furniture. That was one of the main things that I remember of him." (Transcript pg 106)

He discussed this problem briefly with Mr Koster and Mr Koster's supervisor, Mr Cheine. Under cross examination Mr Sillence stated that this was the only time he had a problem with the applicant or the applicant's work.

7 Ms Buijsson, Mr Koster's partner, gave evidence that Mr Koster and she were returning to Holland to tidy up their affairs and to decide whether they were going to live in Australia. She was less settled in Perth than Mr Koster. She approached Mr Krakolinig with Mr Koster as she was concerned about the dates of the trip and Mr Krakolinig granted Mr Koster extended leave. He was to return for work early in January 2002.

8 Mr Koster gave evidence that he was referred to the respondent by Ms Giannaros. He attended to the factory and spoke to Mr Krakolinig and Mr Chris Cheine. He was shown around the factory and familiarised with the job. This whole process took approximately three quarters of an hour. He was called two days later by Mr Krakolinig who indicated that it might be okay, and then a further two days later advised him that he had the job at the rate of $16 per hour. He was told to start on Monday, 20 August 2001. Mr Koster says that after one week Mr Krakolinig asked the applicant to reduce his pay to $15 per hour and in return received sick leave and annual leave. Mr Koster said he agreed. This pay rate was to be reviewed later.

9 Mr Koster did mostly sanding and gluing of furniture in preparation for the furniture to be polished. He says he received no complaints regarding his work, either his speed or the quality of his work. He says one table that he worked on had to be returned and redone by him.

10 Mr Koster refers to two meetings of employees organised by Mr Krakolinig. At the first one Mr Krakolinig advised employees of the potential for relocation of the factory. Mr Koster queried whether this incorporated him and was advised that it did and that he was a permanent employee.

11 At a later date Mr Koster and Ms Buijsson had a meeting with Mr Krakolinig to ask whether they could take an extended holiday to travel back to Holland. Mr Koster and Ms Buijsson were considering staying in Australia permanently. Ms Buijsson was on leave without pay from her position in Holland and they were going to use the travel time to assess whether they would stay in Australia permanently. Mr Koster says that Mr Krakolinig allowed them some additional time prior to Christmas on the understanding that he was to be back at work on 3 January 2002 as they would be busy.

12 Mr Koster says also that in early October he was given, along with all the other employees, a workplace agreement to read and to sign. He says he took it home and read it over the weekend and had no problem with it. He did not return the agreement as the following week he was sick and was off work for a week. He rang Mr Krakolinig to advise him that he was ill. He says Mr Krakolinig asked him how he was doing and wished him well. He says also that Mr Krakolinig asked him whether he was coming back as he said that some employees had indicated that they thought he might not be returning to work. He assured Mr Krakolinig that he was returning to work.

13 On his return to work on the Monday Mr Koster went to see Mr Krakolinig. He says that Mr Krakolinig did not seem interested in talking to him. He went to his work bench and found that someone else had taken it. He was directed to do other work. Later in the day Mr Koster met with Mr Krakolinig and was advised he was dismissed. Mr Koster says this was very unexpected and he was shocked. He says that Mr Krakolinig advised him that he was too slow in his work and made too many mistakes. He was then told to do cleaning duties.

14 His final payments are reflected in Exhibit RK2. Mr Koster maintains that reinstatement is impractical as he does not trust Mr Krakolinig. Exhibits RK3, RK4 and RK5 relate to the purchase of some land that Mr Koster and his partner were intending to buy. This is to re-enforce that they expected the job to continue.

15 Exhibit RK6 is a list of all the positions Mr Koster says he has sought since his termination. He did not start looking for work until 20 January 2002 as he had already booked his trip to Holland and to cancel it would have cost him money.

16 Mr Krakolinig, the Production Manager gave evidence that he was approached several times by Ms Giannaros regarding employing Mr Koster. He eventually agreed to see Mr Koster at the factory. He was shown his curriculum vitae and showed Mr Koster around the factory explaining what work was required. He says at that time he explained to Mr Koster that he would be on 3 months probationary employment and he would receive a wage of $15 per hour instead of $16 as he was not a

qualified cabinet maker. He says Mr Koster agreed to these conditions. He says all employees with Catt were employed on 3 months probation.

17 Mr Koster was assigned to the preparation area under the supervision of Mr Chris Cheine. His duties were sanding of table tops, sanding table bases, consoles and lamp tables. Mr Krakolinig says that he spoke to Mr Koster after a couple of weeks of employment as to how he was doing and whether he had any difficulties. He says Mr Koster replied that he quite liked it at Catt Furniture but that the job was fairly basic.

18 Mr Krakolinig says that Mr Koster did not complain to him at all that he had not been given sufficient instructions about his tasks. He spoke to Mr Koster about the slowness of his output. Mr Krakolinig says the company has guidelines on the amount of hours to be taken with each product. Mr Krakolinig asked Mr Koster what the problem was in terms of length of time he was taking to complete tasks. Mr Koster replied that "give me a few more weeks and everything else and I should be able to do it. I should be able to manage because I get the hang of it, how to do things better, quicker". He encouraged Mr Koster to work faster and Mr Koster assured him that it would be fine. Mr Krakolinig says it was Mr Cheine who instructed Mr Koster but on one occasion he showed Mr Koster how to sand the edges of a table top. He says it came to his attention because the table had to be taken back and re-sanded three times and the polisher complained to him about it. Mr Krakolinig says he queried Mr Koster about this piece of work and Mr Koster replied "things like this can happen, yeah".

19 At the time of the meeting with all workers to discuss the relocation of premises, Mr Krakolinig says Mr Koster did not approach him for an individual discussion. He says the only time he did approach him was about his holidays. Mr Krakolinig said he approached Mr Koster after about 5 weeks to advise him of his concern about the slowness of his work and the quality of his work. This was after the meeting regarding relocation of premises. Mr Koster and Ms Buijsson did approach Mr Krakolinig regarding the holiday in Holland and Mr Krakolinig agreed to the extra time but asked Mr Koster to come back a bit earlier as the business would be busy early in January. He did not raise any doubts about Mr Koster's employment at that time.

20 Mr Krakolinig gave Mr Koster, along with other workers, a workplace agreement for him to consider. He says this occurred on a Friday in October and he advised each employee to go home and read it through and let him know what they thought about it. Following that Mr Koster was off sick for a week. Mr Krakolinig says that he became aware on the Thursday that Mr Koster was sick and telephoned him at home. He says Mr Koster did not contact him. He says about that time in discussions with other employees about the workplace agreement he was advised by them that Mr Koster was not happy. They advised him that Mr Koster was probably not coming back to work. He asked Mr Koster why he had not received a phone call and whether he was returning to work. Mr Koster assured him that he was returning to work once he was better. Mr Krakolinig says he was not aware of Mr Koster ever being offered a supervisory position and he certainly did not offer him one.

21 On Mr Koster's return from sick leave, Mr Krakolinig asked him for a medical certificate and Mr Koster did not produce one. On his return from sick leave Mr Koster was not returned to his normal duties. Mr Krakolinig says—

> "Because I wasn't happy with certain things and I - - I thought it's okay. I tried to use his skills somewhere else or find out what other skills he got except sanding and gluing and things. I sort of realised it didn't work out what - - as the position he was employed at that present moment." (Transcript pg 84)

Mr Krakolinig had put someone else at Mr Koster's work bench and he advised Mr Koster that he would take him away from the preparation area and try him out in the fit-up area. He says Mr Koster was a bit surprised but indicated that that was okay.

22 Mr Koster worked for Mr Worsfold that day. Mr Krakolinig spoke to Mr Worsfold about Mr Koster's work performance and Mr Worsfold indicated that Mr Koster was quite slow. Mr Krakolinig called Mr Koster in for a discussion and terminated Mr Koster's employment. The reason he provided was his performance in the preparation area and the "specific task about the table" (transcript page 85). Mr Krakolinig complained about the time Mr Koster took to do tasks. He says Mr Koster was shocked and said he could not understand why he was being terminated. Mr Koster was allocated to other duties and worked out his week's notice, including cleaning toilets on the last day.

23 Under cross-examination Mr Krakolinig agreed that he had sacked Mr Koster because he could not work in the new fit-out area. He did not advise Mr Koster of this. He advised Mr Koster that he was too slow in his work. He says that his chief complaint about Mr Koster was the return of the table for polishing 3 times but there were a few other items. He says there was an oral agreement with Mr Koster that he would be on probation. He says everyone is put on probation; normally this is done in writing but he overlooked it when he did the workplace agreement. Mr Krakolinig says that at the time Mr Koster asked about his holidays, his work quality was approximately 50-50. In other words 50% of the production was of reasonable quality and on time and 50% wasn't. He says his work quality did not deteriorate after this discussion, it stayed at the same level.

24 I do not have a favourable impression of Mr Koster's evidence. It is in my view both exaggerated and inconsistent in part. He says in evidence that he was happy in his job and good at it. He says in his application that he was happy to have found a job, but that soon after starting the job he found there was no work on antique furniture and he raised this "deception" with Mr Krakolinig and Mr Catt. Yet on his own evidence he was also shown around the factory before he commenced employment. He says in cross examination that when he started Mr Cheine suggested that he would be able to take over from him as supervisor. He states—

> "When I came Chris led me around to the factory. Chris said to me, "In fact, Rene, we are looking for someone to follow me up because I want to go away as soon as possible". That's what Chris made me clear." (Transcript pg 52)

This is prior to him being employed and he was not a qualified tradesman. He then says that Mr Krakolinig later indicated that the company had big plans for him, but not to tell the other staff. He states—

> "… one day he called me into the office and spoke about my experience as a supervisor in Holland, how I felt during this and how this went and - - and at the end of this discussion which only went speaking about this experience of mine as a supervisor - - at the end of this he said, "We have big plans with you, Rene, but don't talk with the other guys about this"." (Transcript pg 37-38)

I do not have the benefit of Mr Cheine's evidence but my clear impression is that this supposed offer is improbable. All of this stretches Mr Koster's credibility as a witness. Mr Koster was new to that type of work, was unqualified in a formal sense and had actively sought the job; as opposed to being actively recruited for it.

25 Mr Koster is also inconsistent in relation to whether his work was ever supervised and the quality of it ever queried. He acknowledges at one point a problem with a table, he says—

> "Do you have any comments about a particular polish shop job that you can remember?---I can remember this occasion, yes. Can you tell the Commissioner about that?---It's true. I had to do - - it's - - it sounds not like reality, It was like - - when speaking about doing it over and over again, it's - - it has been a bad table and things like spots with glue which - - which can't be seen because they are colourless, this table was covered all over with and they only appear when the polisher starts colouring the wood. I had to take the table back because there was still some hidden spots so I had to take

> the table back and sand them off, these parts, which I did. With the same table later it appeared it had some scratches because of sanding paper, he told me, which can't be seen without being polished. I took the table back and sanded it perfectly, brought the table back and it was perfect. I learned a lot of this occasion because nobody instructed me or told me anything. It was like these occasions I learned how to look and how to do my job." (Transcript pg 12)

Under cross examination he later suggests that there was no issue with the table at least as it related to him alone.

> "He was involved in some discussions with you about that particular piece of furniture at 2.7? of the table about the quality of work. Do you remember any discussions with him?---I think it was on the occasion that Chris - - they agreed that when there was something gone wrong they called the guys to point - - spot what was going wrong. That made them clear - - more clear and there was an occasion, in general, a polisher to came to all the guys who were doing the wood preparations to draw their attention on certain kinds of features that had to be done with more attention in general. Not to me. In general to all the guys. It was a common problem that? glue which is invisible has to be taken off…" (Transcript pg 45-46)

This is also not consistent with Mr Sillence's evidence which I accept as straightforward and clear in his recollection of events.

26 I have some difficulty also with the consistency of Mr Krakolinig's evidence. However, I consider Mr Krakolinig was both clear and very straightforward in his evidence. He readily admitted to issues under cross-examination. I would prefer his evidence to that of Mr Koster.

27 A key difference in the evidence of Mr Koster and Mr Krakolinig is whether Mr Koster was under a three month probationary period at time of dismissal. Mr Krakolinig says that this term of the contract was made clear (orally) to Mr Koster when he first attended for interview. He also says under cross-examination that he would normally stipulate probationary employment in writing. Mr Crossley points to the award, which he says does not govern the employment of Mr Koster but is aligned to the employment, and the emphasis in the award on assessment. Mr Koster was not a qualified tradesman and his competencies would have to be assessed. Mr Sillence says that he was initially employed by the respondent on a three month probationary period. Mr Koster says that his salary was to be reviewed after three months but that no probationary period applied to him. Ms Giannaros, in my view, gave evidence that there was to be a salary review after three months [Exhibit R1]. This may or may not have meant a probationary period.

28 Neither Mr Krakolinig nor Mr Koster were swayed under cross-examination in their differing views that a probationary period did or did not apply. Mr Koster was not a qualified tradesman and the respondent had originally sought a qualified tradesman. Hence it might appear reasonable to expect a probationary period to apply so that an assessment of Mr Koster's competencies could be undertaken. This is the submission of the respondent. The evidence of Mr Sillence of his own probationary employment is not compelling. The evidence of Ms Giannaros and [Exhibit R1] mentions a salary review after 3 months; it does not specifically mention probationary period. The actions of Mr Krakolinig during the employment do not appear to be consistent with, or to acknowledge that, a probationary period applied. In October, Mr Koster was granted extended leave in December when the probationary period, if one applied, would have ended in November. Similarly in October 2001 Mr Krakolinig gave Mr Koster the offer of a workplace agreement [Exhibit RK1] which was to operate for 6 months and which had no mention of probationary employment. That agreement never came into force. Mr Koster says there was no mention of probation, Mr Krakolinig says it was mentioned at the interview.

29 I consider it more likely that a probationary period did apply. I have greater faith in Mr Krakolinig's evidence over that of Mr Koster. There was to be a three month review and [Exhibit RK1] refers to it as a salary review, which is not a probationary period necessarily. However, Mr Koster was unqualified and untried in the work and on balance I find that he was on probation for 3 months. The applicant argues that there are matters which occurred during Mr Koster's employment which are inconsistent with there being a probationary period. These are the granting of leave over Christmas and the offer of a workplace agreement. These actions by Mr Krakolinig are inconsistent, buy my impression is that they enhance the suddenness of the termination, and do not lead me to a conclusion that Mr Koster was not on trial from the beginning of his employment.

30 Mr Krakolinig complains that Mr Koster's performance was poor and that his mistakes were costing the company money. In essence his major complaint is that Mr Koster took too long to do his work. Mr Koster's sanding and gluing of furniture were said not to be of a standard sufficient for the respondent and Mr Koster's work was too slow. He spoke to Mr Koster about these problems and there was no improvement. When pressed on this Mr Krakolinig's major complaint related to the 2.7 metre table top which was returned several times for sanding. I accept this evidence and find that there were some performance difficulties with Mr Koster in terms of the slowness and quality of his work.

31 When Mr Koster returned from a week off work due to an illness, Mr Krakolinig says that he transferred Mr Koster to a different task and checked on Mr Koster's progress with Mr John Worsfold later that day. Mr Worsfold reported that Mr Koster was slow in his work and so Mr Krakolinig dismissed Mr Koster and required him to work his notice period of one week. In his view this was the last straw. Mr Koster disagrees and says that he had no complaints about his work except for one table which was returned to him to re-sand. His evidence about whether this was in fact a complaint against him is equivocal. In fact, from his evidence one could gain the impression that he was doing so well at his job that he was to be promoted. Mr Sillence gave evidence which in effect was that the only problem he had with Mr Koster's work was the 2.7 metre table that was returned 2-3 times for re-sanding as the quality was not adequate for polishing due to glue marks. He was aware of Mr Koster's work as he supervised the polishing operation and hence all the work of the few employees responsible for sanding and gluing came through him.

32 The evidence of Mr Sillence, a witness for the respondent, speaks against that of Mr Krakolinig in terms of whether there were serious performance difficulties with Mr Koster's work. He identifies only one episode where problems occurred, albeit that piece of furniture was reworked 2-3 times. It may be that he was not aware of the pace of Mr Koster's work as he did not supervise him directly, but it is clear from his evidence that he applied a form of quality control to the work product and so must have been aware as to whether Mr Koster's sanding and gluing were adequate. It would seem from his evidence that in the main Mr Koster's work product was of an acceptable standard. It was certainly good enough to be polished by employees under Mr Sillence's supervision.

33 The evidence of Mr Koster and Mr Krakolinig concerning Mr Koster's performance is in direct contrast to each other. Mr Koster complained that he was also not instructed in his tasks. Mr Krakolinig disagrees. Similarly, in respect of warnings Mr Koster says he did not receive any warnings, whereas Mr Krakolinig says that Mr Koster was counselled by both Mr Cheine and himself. The other evidence of relevance is the expectation which Mr Koster held about the work. Mr Koster was used to restoring antique furniture, not making reproduction furniture. The importance of this is that in the respondent's view Mr Koster was not suited to the work of the respondent.

34 Whereas I accept that Mr Krakolinig took issue with Mr Koster's performance and advised him of this, in light of the evidence of Mr Sillence, who is still employed by the respondent, and was uninvolved in either supervising Mr Koster or in his dismissal, it would appear to be more probable that Mr Koster's work performance was not so poor as to warrant dismissal at that time.

35 I accept that Mr Koster was instructed in his work and that Mr Krakolinig did complain to Mr Koster about his work. However, the nature of the complaints, with the exception of the tabletop which was returned for sanding, was that Mr Koster was too slow. Mr Krakolinig says that Mr Koster was too slow and made too many mistakes and hence cost the firm money. Mr Koster, was shifted to a new job without warning or explanation and when, in the course of less than a day, he could not do that job adequately he was dismissed.

36 Against this backdrop, Mr Krakolinig also gave Mr Koster the impression of long-term employment. Mr Krakolinig's own evidence is that he granted Mr Koster extra leave in December to return to Holland. He also gave Mr Koster a workplace agreement to consider and sign approximately one week prior to dismissal. During that week Mr Koster did not work as he was ill. On his return to work he was shifted without warning to other duties and then dismissed later that day. Mr Koster on Mr Krakolinig's evidence was shocked; and rightly so. There is nothing in the evidence of Mr Krakolinig to suggest that Mr Koster could have been aware that his employment was in jeopardy. He was counselled about his work but not warned in any way and certainly not advised that his job was in any jeopardy. In fact by the actions of Mr Krakolinig, Mr Koster could readily have formed the impression that he was needed for work on 3 January 2002 after his leave had expired. It is evident that Mr Koster did not receive a fair go all round (*Undercliffe Nursing Home –v- Federated Miscellaneous Workers' Union of Australia, Hospital, Service and Miscellaneous, WA Branch* 65 WAIG 385). I find Mr Koster's dismissal to be both harsh and unfair. Mr Krakolinig's evidence is that Mr Koster's performance was 50/50, I doubt that this was so apparent to Mr Koster even after Mr Krakolinig's counselling.

37 Probationary employment is of a different character where an employer and an employee are still assessing whether to cement a longer term employment relationship. However, Mr Koster on both his evidence and that of Mr Krakolinig, had every right to consider that his employment would be ongoing. The suddenness in the change of his duties and his dismissal add to the harshness of the dismissal.

38 I accept the submission of both parties, that reinstatement is impracticable.

39 The loss which I find that Mr Koster has suffered is from the date of termination, ie 19 October 2001 until the end of the probationary period, ie 19 November 2001. In my view, given the employer's concerns about Mr Koster's performance, the employment relationship would have ended fairly at that point in time. This should have been made more apparent to Mr Koster. His weekly income was $570 gross. This would be a total of 4.2 weeks or $2,394. I would order that the applicant be paid compensation of $2,394 less any taxation payable to the Commissioner of Taxation.

2002 WAIRC 05896

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	RENE KOSTER, APPLICANT
	v.
	VOLUTE PTY LTD TRADING AS CATT DESIGN, RESPONDENT
CORAM	COMMISSIONER S WOOD
DATE OF ORDER	TUESDAY, 2 JULY 2002
FILE NO.	APPLICATION 1884 OF 2001
CITATION NO.	2002 WAIRC 05896

Result	Applicant dismissed harshly and unfairly; compensation awarded
Representation	
Applicant	Mr P Mullally as agent
Respondent	Mr T Crossley as agent

Order

HAVING heard Mr P Mullally on behalf of the applicant and Mr T Crossley on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby—

(1) DECLARES that the applicant, Rene Koster, was harshly and unfairly dismissed by the respondent on the 19th day of October 2001;

(2) DECLARES that the applicant's employment with the respondent was subject to a 3 month period of probation;

(3) DECLARES that reinstatement is impracticable;

(4) ORDERS that the said respondent do hereby pay, as and by way of compensation the amount of $2,394.00 to Rene Koster, less any taxation that may be payable to the Commissioner of Taxation.

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

2002 WAIRC 05874

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	DAVID LEITH MOYLAN, APPLICANT
	v.
	CHAIRMAN OF COMMISSIONERS CITY OF SOUTH PERTH COUNCIL, RESPONDENT
CORAM	COMMISSIONER J F GREGOR
DATE	FRIDAY, 28 JUNE 2002
FILE NO.	APPLICATION 622 OF 2001
CITATION NO.	2002 WAIRC 05874

Result	Dismissed
Representation	
Applicant	Mr G. Stubbs (of Counsel) appeared on behalf of the Applicant
Respondent	Mr J. Sher (of Counsel) appeared on behalf of the Respondent

Reasons for Decision

1 On 19th October 2001 the Commission delivered Reasons for Decision in this matter (No. 2001 WAIR 03981).

2 In those Reasons for Decision in paragraph 2 the Commission noted that—

> *2. It is common ground that there are matters relating to the employment relationship between the Applicant and the City which have not been or are not capable of being examined in these proceedings. Those are the subject of an enquiry constituted under the provisions of section 8.13 of the Local Government Act 1995 (the LG Act) into matters concerning the City of South Perth and later by a Panel Enquiry, which enquiries are ongoing. The enquiries by this Commission relating to this application are limited to events commencing circa 10 April 2000 up until the date of termination on 3 April 2001.*

And further in paragraphs 32, 33 and 34 as follows—

> 32. *I intend to deal with the facts and to apply the law to them. It is common ground that the Applicant had been a General Manager for a short period, that position became redundant, he became CEO. These events gave rise to a range of difficulties between the parties which had been the subject of proceedings first by an enquiry by Mr Gary Martin and then by way of a Panel Enquiry appointed pursuant to the LG Act.*
>
> *33. The Commission has only superficial knowledge of the events which were subject of enquiry before Mr Martin and now by the Panel Enquiry. The Commission understands from the submissions of Mr Sher, of Counsel, who appeared for the City that the Panel Enquiry has been reconstituted, is continuing its work and in due course one can anticipate that it will report its findings.*
>
> 34. *If that Panel Enquiry is dealing with the recommendations of the Martin Report, it will make findings concerning what action ought to be taken concerning the Applicant arising from his conduct in the matters which are subject to the enquiry.*

Ultimately the Commission concluded that the dismissal of the Applicant in the circumstances which then existed for gross misconduct was unfair. The Commission observed that was not to say that the Applicant's conduct might not have justified the City of South Perth (City) in bringing the relationship to termination in a normal manner, but that was not what was before the Commission. It eventually concluded that the City did not meet the onus of proof to establish the evidentiary basis for the dismissal, because in important areas it "confused the intention to act with an act". In short the dismissal was unfair for procedural reasons. The Commission went on in its Reasons for Decision in paragraph 53, 54 and 55 to comment as follows—

> 53. *The conclusion that the Applicant has been unfairly dismissed raises another set of issues for the Commission. The Applicant seeks reinstatement and only reinstatement. There have been no submissions put to the Commission on behalf of the Applicant seeking compensation.*
>
> 54. *In the Answer filed, the City makes it clear that they do not think a viable relationship can be recreated, though there was little, if any, evidence of that given to the Commission in the proceedings. What is clear, though, is that there is a continuing investigation into the matters of the Applicant's conduct as an employee which are beyond the knowledge of this Commission and which may, in due course, affect the employment relationship. There is a clear dilemma created by that situation in the Commission's mind as to the viability of reinstatement as a remedy in this matter.*
>
> 55. *It could well be that the appropriate remedy is reinstatement but the Applicant continues on suspension until the Panel Enquiry is completed and the City has had the opportunity to consider and apply whatever findings that the Panel makes. However, neither of the parties have addressed the potential outcome nor have they addressed any alternative remedy.*

In the circumstances the Commission decided to issue a minute of an order that the Applicant had been unfairly dismissed and re-list the matter to hear the parties further in the future.

3 On 19th October 2001 the Commission wrote to the parties concerning listing of the Speaking to the Minutes. That letter prompted a reply from the solicitors for the City on 19th October 2001. The reply in effect takes issue with that part of the order which related to the matter being re-listed to hear arguments as to remedy. The attention of the Commission was drawn to a conference held on 21st June 2001 when it was agreed that the issue of fairness or otherwise of the Applicant's dismissal would be investigated at an initial hearing and if a finding of unfair dismissal was made the Commission would grant the parties leave to be heard on the issue of remedy at a later time as a discreet matter. This procedure was based on the expectation that the Panel of Inquiry under the Local Government Act would have by then reached its conclusions. The application was eventually listed for hearing on 26th October 2001, primarily to accomplish the purpose of completing the processes in s.35 of the Act, and that time the parties were invited to address the Commission on how they envisage the application being brought to a conclusion.

4 At those hearings Mr Stubbs, of Counsel, who continued to appear for the Applicant, raised the question of whether it was necessary to issue an order at all. There was some discussion between Counsel and the Commission during which the Commission raised the option of making a finding under s.24 of the Act in order that the City may exercise the right of appeal should it so wish. After further discussion it was decided that in the circumstances there was no need to issue an order at all and none has. Relevantly too Mr Stubbs raised the question of contractual benefits and at page 249 of the transcript said *"…that perhaps is best left to another day. I mean we have ample time in relation to denied contractual benefits. We don't have a 28 day limit. We've got six years in which to deal with it."* And on page 249a he said *"We can file again or we can just leave that bit and ultimately an order can issue in relation to the unfair dismissal aspect."*

5 The Commission concludes from those submissions that there is no live issue before it concerning contractual benefits.

6 Thereafter there were various attempts made to list the matter, these culminated with a conference between the parties on 5th February 2002, at which there was consent to vacate the dates which had been set aside to hear the matter and that it would be reviewed following the anticipated issue of the Panel of Inquiry Report.

7 The next event in the history of the application is that the Commission received a notice of application from the Respondent seeking orders from the Commission pursuant to s.27(1) of the Industrial Relations Act, 1979 relating to—

1. *Receiving into evidence the Report of the Inquiry into the City of South Perth ("McIntyre Inquiry") delivered by Mr G McIntyre QC in March 2002, and released on 16 April 2002 ("McIntyre Report");*
2. *Amending its (unsealed) finding of 19 October 2001 that the Applicant was unfairly dismissed to read that the Applicant was fairly dismissed; and*
3. *Dismissing the Applicant's application.*

8 After other interlocutory proceedings which I need not recite in these Reasons for Decision the matter was brought on for hearing on 24th June 2002 to hear submissions on the application which had been filed on 7th June 2002 and which related to the receipt of the McIntyre Inquiry into evidence and a motion to alter the unsealed finding that the Applicant's dismissal was unfair to one that he had been fairly dismissed.

9 At the commencement of the hearing on 24th June 2002 the status of the proceedings was that no order had issued out of the decision of the Commission on 19th October 2001; it had been agreed by the parties in speaking to the minutes on 26th October 2001 that was not necessary. There was no question raised that the Commission is functus officio in the matter.

10 Mr Sher, of Counsel, who continued to appear for the City gave the Commission a background to the McIntyre Inquiry. He drew attention to some of its findings and discussed the Commission's power to introduce new information. He submitted that the McIntyre Report should be introduced as a document before the Commission because it has a high probative value, it clearly established the Applicant's serious misconduct on the balance of probabilities and is directly relevant to the fairness of his dismissal both in fact and in law. In other submissions, Mr Sher examined the City's entitlement to tender the McIntyre Report to the Commission, asserting it was a public document, and admissible in evidence. That to refuse to admit it would be contrary to equity, good conscious and substantial merits of the case and to the interest of the persons immediately concerned whether directly affected or not and the interests of the community of Western Australia as a whole.

11 Attention was also drawn by Mr Sher to the s.20 of the Royal Commission's Act 1968 (RCA) which inter alia provides '*that a statement or disclosure made by a witness in answer to any question put to him by a Commission or any of the Commissioners shall not…be admissible in evidence against him in any civil or criminal proceedings in any Court in the State*'. Mr Sher emphasised that the Respondent did not intend to tender into evidence any of the Applicant's evidence to the McIntyre Inquiry. It sought to rely purely on the findings which was outside the compass of s.20 of the Royal Commission's Act.

12 In response Mr Stubbs argued that the application should be refused for two reasons. Concerning the introduction of the McIntyre Report into evidence he had a contrary view of the effect of s.20 of the RCA to that of Mr Sher. Mr Stubbs argued that it would be in breach of the provisions of the RCA to receive the document into evidence. There was a second limb to his argument that addressed the weight that be given to the McIntyre Report in the event it was introduced into evidence. Mr Stubbs submitted the document was fatally flawed, there are doubts about the efficacy of the findings in that it was his client's contention that he did not receive a fair hearing before the McIntyre Inquiry. I understand from the submission this was mainly because he was refused funding therefore he could not afford to have continual representation. Further there was a question as to the standing of the Inquirer, Mr Greg McIntyre. Mr McIntyre was not Senior Counsel as had been suggested in the application by the City, he was "just a barrister". There had been nothing led from the City in these proceedings to establish the credibility and capacity of Mr McIntyre to conduct the Inquiry.

13 Simply, Mr Stubbs position was the McIntyre Report should not be introduced into evidence but even if it was, it provides little probative value to support the contention that the Commission should alter the finding of unfairness it made in its decision of 19th October 2001.

14 I deal first with the McIntyre Report. A copy of the report has been submitted to the Commission. The report is certified as one of the original printings of the Report of the Inquriy into the City of South Perth, printed under the authority of the Parliament of Western Australia. The certification is made by the former Executive Officer of the Inquriy, Mr B. Paton. There is no doubt in my mind that the document is a public document and it contains information which could or may be of assistance to the Commission in determining the matter before it. How it is used by the Commission and the weight to be attached to it are issues to be dealt with by the Commission in its analysis of the matters which follow later in these Reasons for Decision. There has been valid no reason advanced why the document cannot be admitted as a matter of law. In my opinion s.20 of the RCA does not prohibit the document being entered as information before this Commission.

15 In any event it would be strange now if the document was not allowed to become information before the Commission because this proceeding has been delayed since at least 19th October 2001 by consent of the parties awaiting the outcome of the McIntyre Inquiry. It seems that the Applicant's position regarding the efficacy of its presentation to the Commission has changed following its publication. That might well be because of its contents. I mention that there was consent and the consent has been abroad for a long period of time and in my view there has been no good reason put to me by the Applicant why his consent should now be withdrawn. I intend to accept the McIntyre Report as Exhibit A.

16 This case gives rise to the question of whether the City was entitled to a genuine belief based on reasonable grounds that the Applicant was guilty of misconduct. The concepts were fully ventilated in the decision of Fielding C as he then was in his Reasons for Decision in an appeal to the Full Bench in *C v Quality Management Pty Ltd*—

> "As the Commission appears to have accepted, and in my view correctly accepted, in dealing with matters of this nature it is not necessary to establish, on balance, that the employee actually stole the money in question. Rather, as mentioned by the Court of Appeal in W. Weddel & Co. Ltd v. Tepper (1980) IRLR 96, it is sufficient that there be a reasonable and genuine belief by the employer in the guilt of the employee (see too: Dyjasek v. J. McIntyre Ltd (1987) IRLR 18; Ulsterbus Ltd v. Henderson (1989) IRLR 251). The question in such cases is that stated by Arnold J. in British Home Stores Ltd v. Burchell (1978) IRLR 379 at 380 as follows—
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> > "What the Tribunal have to decide every time is broadly expressed whether the employer who has charged the employee on the ground of the misconduct in question (usually, though not necessarily, dishonest conduct) entertained a reasonable suspicion amounting to a belief in the guilt of the employee of the misconduct at that time. That is really stating shortly and compendiously what is in fact more than one element. First of all, there must be established by the employer the fact of that belief; that the employer did believe it. Secondly, that the employer had in his mind reasonable grounds upon which to sustain that belief. And thirdly, we think that the employer at the stage at which he formed that belief on those grounds, at any rate at the final stage at which he formed that belief, had carried out as much investigation into the matter as was reasonable in all the circumstances of the case."

Although that test was formulated for the purposes of the Trade Union and Labour Relations Act 1974 (U.K.), in my view it is consistent with the test laid down for the purposes of the Industrial Relations Act 1979 in Undercliffe Nursing Home v. The Federated Miscellaneous Workers' Union of Australia, Hospital, Service & Miscellaneous, WA Branch (1985) 65 WAIG 385, namely whether the legal right of the employer to dismiss an employee has been exercised so harshly or oppressively against the employee as to amount to an abuse of that right. In this respect, I adhere to the observations I made in Mavromatidis v. TNT Security Pty Ltd (1987) 67 WAIG 1650. A similar view has since been expressed in Byrne & Frew v. Australian Airlines Ltd (1992) AILR 288 in respect of the Federal award provisions designed to ensure employees are not dismissed unfairly. Furthermore, the same approach has been adopted recently by the Full Industrial Commission of South Australia in Bi-Lo Pty Ltd v. Hooper (1992) 59 SAIR 342 in respect of the unfair dismissal legislation in that State, which is not dissimilar to the provisions under which the claim giving rise to these proceedings was initiated. At pages 352-3 the Full Commission said—

> "In a case such as the present one where the employee is dismissed for misconduct in respect of dishonest dealing with the employer's property we do not believe it is a correct test to state as did the learned trial judge that the employer must prove, on the balance of probabilities, on the evidence submitted to the Commission, that the employee actually stole the goods, before it will escape a finding that a dismissal based upon such an alleged theft is to be treated as harsh, unjust or unreasonable.
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> ...
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> ...
>
> Where the dismissal is based upon the alleged misconduct of the employee, the employer will satisfy the evidentiary onus which is cast upon it if it demonstrates that insofar as 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; it gave the employee every reasonable opportunity and sufficient time to answer all allegations and respond thereto; and that 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; and that, taking into account any mitigating circumstances either associated with the misconduct or the employee's work record, such misconduct justified dismissal. A failure to satisfactorily establish any of those matters will probably render the dismissal harsh, unjust or unreasonable."

Furthermore, the Full Commission in the Bi-Lo Case (supra) considered the decision of the Industrial Commission of New South Wales in Court Session in Shop, Distributive and Allied Employees' Association, NSW Branch v. Jewel Food Stores (1987) 22 IR 1 upon which the Appellant relied in these proceedings, to be "consonant" with such an approach (at p 354). In that case which, unlike this case, concerned a summary dismissal for dishonesty, it was conceded that there was no evidence to support the central allegation against the employee that she had been involved in the dishonest practices as alleged against her. There was thus no scope for it to be said that any suspicion of dishonesty was based on a reasonable belief.

The Commission, in cases of this nature, is not dealing with the criminal law, but with the law of employment, an integral part of which is that a contract of employment may be terminated so long as it is not done unfairly. Legislation protecting employees from unfair dismissal does not require that in the case of alleged misconduct a contractual right to dismiss only be exercised in cases of proven misconduct but, rather, requires that it be exercised fairly, that is, that it not be abused. It seems to me difficult to say that an employer who acts reasonably has abused the contractual right of termination and it seems to me impossible to say that a person who has a genuine belief based on reasonable grounds that an employee is guilty of misconduct, acts unreasonably. The legal right to terminate must mean something and I cannot see how it can be said to have been exercised unfairly in the sense referred to in the Undercliffe Case (supra) if the employer genuinely believes, on reasonable grounds, that an employee is dishonest as, in my view, occurred on this occasion."

(73 WAIG @ 997-998)

It is this concept of a genuine belief reasonably established which needs to be examined here. I think it is clear that such a belief could be generated even though the misconduct was unknown at the time of the termination. *Shepherd v Felt and Textiles of Australia Ltd 1931 45 CLR 359 at 373* which was reviewed and approved in *Concut Ltd v Worrell 2000 103 IR 160* are authorities for this contention. Of course the ultimate question in this jurisdiction is whether the Applicant has been given a fair go, that is whether there was harshness or unfairness in his treatment to the extent that the employer's right to terminate the contract of employment was abused (*Undercliffe Nursing Home v Federated Miscellaneous Workers Union of Australia (1985) 65 WAIG 385)*.

17 In reaching the conclusion whether an employee has been reasonably treated or not by his employer where there is conduct similar to that complained of in this matter the Commission should apply the following principles which I have extracted from *Blyth Chemicals Ltd v Bushnel (1933) 49 CLR 66.*

- The ordinary relationship with employer and employee at common law is one importing implied duties of loyalty, honesty, confidentiality and mutual trust at common law…conduct which in respect of important matters is incompatible with the fulfilment of an employees duty, or involves in an opposition, or conflict between his interest and his duty to the employer, or impedes the faithful performance of his obligations, or is destructive of the necessary confidence between employer and employee is a ground of dismissal.
- The conduct of an employee must itself involve incompatibility, conflict or an impediment, or be destructive of confidence. An actual repugnance between his acts and his relationship must be found; it is not good enough that ground for uneasiness as to its future conduct arises.
- It cannot be disputed that acts of dishonesty or similar conduct destructive of the mutual trust between the employer and the employee, once discovered, ordinarily fall within the class of conduct which authorises summary dismissal.

Exceptions to this general position are trivial breaches of the express or implied terms of a contract of employment. Other exceptions may arise when breaches are ancient in time or may have been waived in the past although known to the employer; but these exceptional cases apart the establishment of important relevant instances of misconduct such as dishonesty will normally afford legal justification for summary dismissal. Such a case would be classified as amounting to a relevant repudiation or renunciation by the employee of the employment contract thus giving warrant to summary action by the employer (see *Clouston & Co Ltd v Corry (1906) AC 122 at 129) and Boston Deep Sea Fishing and Ice Co v Ansell (1888) 39 ChD 339*.

18 In analysing the submissions before the Commission and applying the law to the facts I need to examine the McIntyre Report. Not for the purpose of reviewing the findings of Mr McIntyre themselves but to form an opinion about whether it was reasonable for the City to rely upon the report and to deal with the complaints raised by Mr Stubbs concerning the weight the report should attract. This is necessary because it is not for the Commission to substitute its own views for those of the employer *(AMWSU v Robe River Iron Associates (1989) 69 WAIG 988*). It is not the province of the Commission to take over the functions of the employer in relation to selection and retention of employees it will only intervene to protect an employee against an unfair and unjust exercise of an employer's right of dismissal *(re Barrett and Women's Hospital Crown Street (1997) AR 565)*.

19 The Inquirer (Mr McIntyre) was appointed by an instrument dated 17th October 2001 under the hand of the Minister of Local Government to conduct an inquiry into aspects of the City of South Perth its operations and affairs. The instrument required the Inquiry to have regard to a Report of Mr Gary Stevens to the Executive Director of the Department of Local Government dated 22nd November 2000 concerning his inquiry into the City of South Perth, (Martin Report). The Inquirer was to inquire into those matters arising between 1st January 2000 and 28th November 2000 concerning, inter alia, the conduct of David Moylan in respect of his dealings with the Council as a body, the Mayor and individual councillors. The Inquiry Panel was required to make recommendations it considered appropriate including, without limiting its discretion, that the Council be dismissed or that the Council be reinstated. The Inquirer under s.8.20 of the Local Government Act has the powers of a Royal Commission including the powers of a Chairman of a Royal Commission and the provisions of the Royal Commission's Act 1968 applied to the Inquriy.

20 In his Report, Mr McIntyre detailed under several headings his understanding of requirements of procedural fairness in a matter of the kind he was investigating and the variety of steps that he had taken to ensure procedural fairness was accorded to all participants. The Inquirer proceeded on the basis which was common to administrative inquires of this kind. Mr McIntyre supported his writing on the processes of the inquiries and the application of the rules of natural justice or procedural fairness by reference to appropriate case law. The task of the Inquiry was analysed carefully by reference supporting and appropriate legal authorities and to submissions of experts.

21 The Inquiry was conducted in public, its hearings commenced on 3rd December 2001 and concluded on 20th February 2002. The decision by Mr McIntyre to hold the matter in the open is supported by the authorities. There was an issue raised by Mr Stubbs in his submissions concerning the limitations of funding on his client's behalf which, he says, caused him to have a lower level of representation at the Inquiry than he would have desired. The Report makes it clear that notwithstanding efforts by the Inquirer there was no public funding for reasons which are set out and to deal with that situation Mr McIntyre put in place procedures to allow witnesses the right to examine other witnesses through the office of Counsel Assisting the Commission.

22 The parties were advised where adverse conclusions might be drawn from the evidence they were given the access to written submissions by Counsel Assisting on adverse conclusions. The Inquiry Panel considered the submissions before they were delivered to the affected parties. The parties were told those submissions would comprise the outer limits of any adverse conclusions and comments which might be included in the Report. Submissions were invited in response to the adverse findings issued by Counsel Assisting and closing submissions in writing were allowed together with the opportunity to address orally. The report records that Mr McIntyre had received an oral application for further time from the Applicant in this matter which was granted. There was a letter complaining of a lack of detailed reference to transcript and generalisation in the submissions of Counsel Assisting to which Mr McIntyre replied and eventually a written submission was received from Counsel for the Applicant.

23 It is within this framework that Mr McIntyre addressed the issues which had been referred to him for examination. Ultimately the McIntyre Report publishes findings which are adverse to the Applicant in this matter. Those findings are summarised in Annexure 1 which is attached to the City's outline of submissions. I do not intend to recite those findings here but they include conduct which in my opinion when reviewed by the City could have led it to conclude that conduct was incompatible with the Applicant's fulfilment of his duty, involving opposition or conflict between his interest and that of his employer and contained actual repugnance between his acts and his relationship.

24 According to the information before the Commission in the various affidavits which have been filed, the City obtained the McIntyre Report, it satisfied itself on legal advice that the report was a document on which it was able to rely. It appears that it has asked itself whether the Inquiry was conducted in such a way as to ensure that there was natural justice. It concluded because the Applicant knew the matters raised regarding him, had the opportunity to address them, was represented by Counsel and had the opportunity to review and answer adverse criticisms, that the fundamental tenants of natural justice had been met in so far as the Applicant was concerned. It formed the belief that the Applicant's conduct was incompatible with his continued employment in that he owed the City a fundamental contractual and statutory duty which he had breached. His conduct was destructive of trust and confidence, he failed to avoid conflicts of interests and so therefore breached his fiduciary duties. He breached his obligations under the City's code of conduct and there was general repugnance between his acts and his employment relationship with the Respondent. I find that on the balance of probability it was reasonable for the City to reach all of these conclusions.

25 What an employer has to do is make a reasonable inquiry into the alleged misconduct of an employee and satisfy itself on reasonable grounds that he is guilty of misconduct.

26 In doing so the employer is not required to conduct an investigation as if it were a police officer or a lawyer, what it must do is take reasonable steps to ascertain that the conduct complained of actually occurred. In this instance I conclude that far more than reasonable steps an employer might normally take to ascertain whether misconduct occurred were taken. What the City had to rely on was the product of an Inquiry with the powers of a Royal Commission conducted over a period of three months, an Inquiry conducted in accordance with the rules of natural justice by a person appointed with the confidence of the Minister to conduct such an inquiry. Mr Stubbs said in his submissions that Mr McIntyre was not Senior Counsel and that he was "just a barrister'. He then complained that the Applicant was dissatisfied with the outcome of the Inquiry but he led no evidence to support the contention, if it can be said it was a contention, that Mr McIntyre was ill-equipped to do the task. In fact it is probably better to categorise Mr Stubb's comments on these two matters as ruminations rather than submissions, in any event I cannot see that I should give them such weight that they should displace the City's right to rely upon the outcome of the Inquiry as a reasonable indicator of the Applicant's behaviour.

27 On my understanding of the authorities to be applied the City was entitled to rely upon the findings for the reasons I have outlined above. It was authorised by the authorities (*Concut ibid*) to apply the outcome of the McIntyre Report in its consideration of the Applicant's continued employment relationship with it. It was clear from the Martin Report that there were issues between the Applicant and the City which were subject to inquiry even before the matter was before the Commission in October 2001. The paragraphs I have cited from my Reasons for Decision of 19th October 2001 have been provided for the purpose of demonstrating this. It came as no surprise to the City that the Applicant had been indulging in conduct which was contrary to its interests. It did not act upon its suspicions in that regard however until after the McIntyre Report was issued, that was in accordance with the arrangements made between the parties. In my view it cannot now be said that the City was not authorised by the law to dismiss the Applicant for misconduct. It has done so. There has been no abuse of the right to terminate on the authority of *Undercliffe (ibid)*, there has been no unfairness in the decision to terminate.

28 The City seeks three Orders. I deal with these as follows. First there is no need for an Order to issue that the Commission receive into evidence the McIntyre Report. That it is before the Commission is clear from these Reasons for Decision. Second no finding or Order was made subsequent to the issue of the Reasons for Decision on 19th October 2001. This was at the express wish of the parties. The effect of this was that the application remained part heard until the hearing on 24th June 2002. Third, these Reasons for Decision now complete the hearing process and the only Order that need issue is one which reflects the ultimate disposition of the application.

29 The Commission has found that the dismissal was not unfair and the Applicant's application will be dismissed. There is no live issue before the Commission relating to contractual benefits and no orders relating to benefits will be made.

30 An order dismissing the application that the applicant was unfairly dismissed will issue.

2002 WAIRC 05870

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
PARTIES	DAVID LEITH MOYLAN, APPLICANT
	v.
	CHAIRMAN OF COMMISSIONERS CITY OF SOUTH PERTH COUNCIL, RESPONDENT
CORAM	COMMISSIONER J F GREGOR
DATE	FRIDAY, 28 JUNE 2002
FILE NO.	APPLICATION 622 OF 2001
CITATION NO.	2002 WAIRC 05870

Result	Dismissed

Order

HAVING heard Mr G. Stubbs (of Counsel) on behalf of the applicant and Mr J. Sher (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.

[L.S.]

(Sgd.) J. F. GREGOR,
Commissioner.

2002 WAIRC 05906

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
PARTIES	LLOYD THOMAS, APPLICANT
	v.
	SULLIVANS FLEET SERVICES, RESPONDENT
CORAM	COMMISSIONER J F GREGOR
DATE	FRIDAY, 5 JULY 2002
FILE NO.	APPLICATION 693 OF 2002
CITATION NO.	2002 WAIRC 05906

Result	Dismissed
Representation	
Applicant	Mr L. Thomas on his own behalf
Respondent	No appearance

Reasons for Decision

1 This is a decision arising from a preliminary hearing which the Commission has listed to determine whether an application made by Lloyd Thomas (the applicant) that he had been unfairly dismissed from Sullivans Fleet Services (the respondent) was filed within the statutory time limit that is prescribed in s.29(2) of the *Industrial Relations Act, 1979* (the Act).

2 By that section a referral by an employee under subsection (1)(b)(i) of s.29 of the Act cannot be made more than 28 days after the date of which the employee's employment terminated.

3 The application form contains three separate stamps, one which appears to be a stamp of the Registrar dated 22nd April 2002 which stamp has the numbers 22 deleted with the initial YD beside the deletion. The other two stamps are both dated 23rd April 2002 one is the stamp of the Registry of the Industrial Relations Commission where the document is stamped as having been received at 8:45am, the other stamp is the stamp of the Registrar, containing the date 23rd April 2002, which appears to have been applied at circa 4:00 o'clock in the afternoon.

4 The particulars of claim in paragraph 14 Length of Employment, show that the date the applicant started work was 13/2/2002 and the date of termination was 24/3/2002.

5 On the face of those dates the application was out of time and this caused the Commission to write to the applicant and advise him of such. He was told that the claim needed to be in by 21st April 2002. The date of referral was 23rd April 2002 and accordingly the application was out of time. The applicant was invited to advise the Commission if he believed that the dates were incorrect and was told that if he did not his application may be dismissed for want of jurisdiction.

6 In due course the applicant wrote to the Commission and in a letter dated 29th May 2002 advised that he had made an error in stating the date of the dismissal in his application claiming that he was in fact dismissed on 25th March 2002 and that his last working day was on 24th March 2002, he asked that the application to be amended and for his claim to be registered.

7 The Commission then listed the matter to give the applicant an opportunity to be heard. The hearing took place in Kalgoorlie on 19th June 2002.

8 At that hearing the applicant appeared in person. There was no appearance on behalf of the respondent. The applicant told the Commission that even though the application form stated that his last working day was 24th March that was a mistake and in fact the last working day was Monday, March 25th.

9 He was told by the Commission during the hearing that still created a problem as the application was still out of time by a day. The applicant then argued that the Commission really received the document on 22nd April 2002 as shown by the stamps. He drew the Commission's attention to a Declaration of Service which carries the date 16th April 2002. He asserted that he had posted the application shortly after the 16th April 2002 from Kalgoorlie to Perth. He believed that 22nd April 2002 was the date the application would have reached the Commission through the mail and therefore that was the date the Commission should accept as a referral date and if it did so the application was in time.

10 The Commission asked the applicant if he could produce any proof and he advised the Commission that he had a receipt which would prove the date.

11 In due course the Commission received a photocopy of a Australia Post purchasers receipt which the applicant says assists in establishing the date on which he posted the application to the Commission.

12 Concerning this receipt the first thing I need to say is the date is indecipherable but even if it was not the date that the application was received into the Registry for filing under the signature of the Registrar is the date of referral (see *STW Channel Nine Perth v Giselle Satie (1990) 79 WAIG 1863)*.

13 The Notice of Application shows that the fee was received on 23rd April 2002 at 08:58 this coincides thereabouts the time that is shown on the stamp of the Registry. The stamp of the Registrar also contains the date of 23rd April 2002 and was attached in the afternoon at 4:00pm.

14 It is clear from those stamps that the date on which the matter was before the Commission was 23rd April 2002 not 22nd April 2002 as the applicant claims. The applicant produced no information to prove that the last day that he worked was 25th March 2002. In any event even if one accepts what he says to be true the application is still out of time. There is no ability of the Commission to vary the time the Act prescribes in s.29(2). It is mandatory a referral cannot be made more than 28 days after the date on which the employee's employment terminated.

15 One of the confusions arising here is that the Notice of Application contains three separate stamps. One of them dated 22nd April 2002 has the numbers 22 crossed out and it appears that this created confusion for the applicant. If the stamp was incorrectly applied it should be clearly cancelled and the Registrar or the Registrar's delegate's signature attesting to the fact of the cancellation, clearly visible.

16 There is also potential for confusion if the stamp of the Registry and the stamp of the Registrar appear on the same document. The Commission makes the observation that every attempt should be made to make filing processes as simple as possible with the aim of avoiding confusion in the mind of the public.

17 This application will have to be dismissed as a nullity and orders will issue accordingly.

2002 WAIRC 05905

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	LLOYD THOMAS, APPLICANT
	v.
	SULLIVANS FLEET SERVICES, RESPONDENT
CORAM	COMMISSIONER J F GREGOR
DATE	FRIDAY, 5 JULY 2002
FILE NO.	APPLICATION 693 OF 2002
CITATION NO.	2002 WAIRC 05905

Result Dismissed

Order

HAVING heard Mr L. Thomas on his own behalf and there being no appearance on behalf of the respondent, the Commission pursuant to the powers conferred on it under the *Industrial Relations Act, 1979,* hereby orders:

THAT the application be, and is hereby dismissed.

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

2002 WAIRC 05925

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
PARTIES	DAVID CHARLES THOMPSON, APPLICANT
	v.
	BITUMINOUS PRODUCTS PTY LTD AND ANOTHER, RESPONDENT
CORAM	COMMISSIONER J H SMITH
DATE OF ORDER	TUESDAY, 9 JULY 2002
FILE NO.	APPLICATION 769 OF 2001
CITATION NO.	2002 WAIRC 05925

Result	Application to make orders in terms of an alleged compromise dismissed.
Representation	
Applicant	Mr M Cox (of counsel)
Respondent	Mr M Cuerden (of counsel)

Reasons for Decision

1 David Charles Thompson ("the Applicant") made an application under Section 29(1)(b)(i) of the *Industrial Relations Act 1979* ("the Act") claiming that he was harshly, oppressively or unfairly dismissed by Bituminous Products Pty Ltd ("the Respondent") on 12 April 2001.

Background

2 The Commission file records a s.32 conciliation conference was held by the Commission in respect of this matter on 12 June 2001. In a letter to the parties from Mrs Kathy Edwards, the Associate to Commissioner J H Smith, dated 12 June 2001, it is recorded that at the conference the Applicant made an offer to the Respondent to settle his claim for unfair dismissal. It is also recorded in that letter, that at the conference the Applicant's solicitors advised the Respondent's representative that the Applicant has a claim for underpayment of wages, however the Applicant's solicitors did not have instructions to deal with that claim as it was being dealt with by ″the Union″.

3 The Commission file records that on 13 September 2001, the Applicant's solicitors advised the Commission that the parties had come to an agreement. Following a number of enquiries by its staff, the Commission was advised that once the settlement was effected the Applicant would file a notice of discontinuance. On 28 May 2002 the Applicant's solicitors wrote to the Commission and advised that the Respondent had informed the Applicant's solicitors that the Respondent did not intend to pay the settlement sum to the Applicant. On receipt of the letter the Commission listed this matter for a further conciliation conference under s.32 of the Act.

4 At a s.32 conference on 5 June 2002 an issue was raised as to whether a "deed" prepared on behalf of the Applicant reflected the terms of the agreement reached between the parties and whether in fact the parties had reached a concluded agreement. The matter in dispute is whether the Respondent agreed to pay the Applicant a sum of money (the agreed sum) in compromise of the Applicant's claim under s.29 of the Act, or whether the agreed sum is to be paid in compromise of all claims including a claim for underpayment of award entitlements claimed on behalf of the Applicant by the Construction, Forestry, Mining and Energy Union in the Industrial Magistrate's Court (proceedings M 162 of 2002). The Applicant says that the agreement reached was to compromise the s.29 application only. The Respondent says it agreed to pay the agreed sum in full and final settlement in respect of both applications. At the conclusion of the conference the Commission determined it would hear and determine the issue whether the parties had reached an agreement as a preliminary issue.

5 Prior to the matter preceding on 19 June 2002 the Respondent's requested an adjournment of the hearing in part as its principal witness was ill and was unable to attend the hearing. In support of the Respondent's application, the Respondent provided a medical certificate to the Commission. The Respondent's solicitors however, advised the Commission that they had raised a jurisdictional issue with the Applicant's solicitors which should be heard and determined by the Commission prior to hearing any evidence whether a concluded agreement had been reached. The jurisdictional issue raised by the Respondent is whether the Commission—

(a) Has the power to hear and determine whether the application before it has been compromised by the agreement between the parties;

(b) Has the power to make a declaration as to whether the parties have by this agreement, compromised the application; and

(c) Has the power to make any orders to enforce an alleged compromise agreement.

6 The jurisdictional issue raised by the Respondent was heard by the Commission on 19 June 2002.

Respondent's Submissions

7 The Respondent makes the following submissions—

1. Because the Commission is not a superior court of record, it has no inherent jurisdiction, and its jurisdiction is limited to that explicitly provided by the Act *(Robe River Iron Associates v Federated Engine Drivers and Firemen's Union of Workers of Western Australia* (1987) 67 WAIG 315; *Australian Glass Manufacturing Co Pty Ltd v Transport Workers Union of Australia, Industrial Union of Workers, Western Australian Branch* (1992) 72 WAIG 1499). The Commission's powers are circumscribed by statute. In respect of an application under s.29, powers to make orders are confined to the express provisions of the Act (see *Qantas Airways Ltd v Gubbins* (1992) 28 NSWLR 26). It is conceded however on behalf of the Respondent that the Commission does have implied powers that arise by necessary implication out of the effect of exercise of a jurisdiction which is expressly conferred (*Grassby v The Queen* (1989) 168 CLR 1 at 16-17 per Dawson J).
2. This application is one commenced by the Applicant pursuant to s.29(1)(b)(i) of the Act. Therefore the Commission in hearing and determining the application only has the powers conferred by s.23A. There is nothing in s.23A of the Act that would permit the Commission to make a declaration as to whether the parties have, by agreement, compromised the application, or to enforce any alleged compromise agreement. The Respondent contends the Applicant is seeking to enforce the alleged compromise agreement. It is contended that the Commission's power to

arbitrate in this matter confined to only making orders under s.23A (1)(a) or s.23A (1)(ba) of the Act in that the Applicant seeks an order that the Respondent pay a sum of money to the Applicant.

Section 23A(1)(a) and (ba) provide—

"On a claim of harsh, oppressive or unfair dismissal, the Commission may —

(a) order the payment to the claimant of any amount to which the claimant is entitled;

(ba) subject to subsections (1a) and (4), order the employer to pay compensation to the claimant for loss or injury caused by the dismissal;"

The Respondent says that orders made by the Commission pursuant to section 23A (1)(a) are confined to amounts that arise out of the employment relationship and has to be an amount an Applicant is entitled to at the time the employment was terminated. Further, orders reflecting a compromise agreement cannot be characterised as an order for payment of compensation within the meaning of s.23A(1)(ba) of the Act.

3. The Respondent contends that the Commission cannot exercise any of its powers to make an order under s.32 of the Act in relation to this matter because of the operation of s.23 (3)(h) of the Act which provides—

"The Commission in the exercise of the jurisdiction conferred on it by this Part shall not—

On a claim of harsh, oppressive or unfair dismissal make any order except an order that is authorized by section 23A."

4. By way of contrast the Respondent says that the Commission's jurisdiction in respect of an unfair dismissal would be different if the application had been made under s.44 of the Act. Pursuant to s.44 (8) of the Act the Commission may, at a s.44 conference, make an order in terms of an agreement reached between the parties that is binding only on those parties who consented thereto.

5. Decisions of the Commission where orders have been made in respect of compromised agreements can be distinguished. In particular, the decision made by Commissioner Beech as he then was, in *MacLeod v Paulownia Trees Pty Ltd* (1997) 78 WAIG 1057 should not be followed by the Commission. In that matter following a s.32 conference the Respondent did not comply with the terms of an agreement that had been reached during the conference. After hearing from the Applicant, the Commission made orders in terms of the agreement which had been reached during the conference. The Respondent says the decision in *MacLeod v Paulownia Trees Pty Ltd* (*op cit)* can be distinguished. In that matter the agreement to compromise was made at a s.32 conference, whereas in this matter the parties are said to have reached the alleged agreement after a conference was convened by the Commission. Further the issue whether the Commission had jurisdiction to make orders in terms of a compromise was not fully ventilated in those proceedings as there was no appearance on behalf of the Respondent. In *Bradbury v Jos Van Baren* (1995) 75 WAIG 2927 the Full Bench heard an appeal against the decision of the Commission to dismiss an application under s.29 of the Act that had been made after an agreement was reached between the parties to compromise the application. In that case the parties agreed at an s.32 conference that the Respondent pay the Applicant a sum of money and to retract any accusation of theft. At a later s.32 conference the Applicant informed the Commission he had been paid the sum of money and provided a notice of discontinuance to the Respondent but did not file it. Sharkey P held at 2928 that the Commission had properly exercised its discretion under s.27 of the Act to dismiss the application as the agreement reached had been partly performed by the Respondent, and partly performed by the Applicant by the delivery of a notice of discontinuance. Sharkey P also held (at 2928) that the application had been extinguished by binding accord and satisfaction.

6. As the Commission has discretion to make orders enforcing a compromised agreement, if the Commission were to conclude the compromise reached was in respect of both this application and the Industrial Magistrate's proceedings, the Commission cannot make orders to bind the Industrial Magistrate's Court.

7. The Commission should not exercise its discretion to make orders to enforce a compromise agreement where there is a dispute as to the terms of the agreement. The Respondent argues that even the Supreme Court, which has jurisdiction to summarily enforce a compromise within proceedings, would not do so where there are disputes of fact and questions of law (*Seaman, Civil Procedure in Western Australia* [24A 8.3]; *Dalmation Nominees Pty Ltd v Marinovich* unreported SCt WA; Lib No: 980670; del 20 November 1998).

8. The Respondent also makes submissions as to the terms of the alleged settlement. In particular that the document prepared by the Applicant's solicitors has not being executed as a deed pursuant to ss.9(2), 9(3) and 10(2) of the *Property Law Act 1969 (WA)*. These are issues in my view which do not go to the jurisdictional or discretional arguments raised in points 1 to 7 above. Accordingly, I do not intend to deal with these arguments as the arguments relate to the question of whether a concluded agreement was reached, and if so the terms of that agreement.

Applicant's Submissions

8 The Applicant makes the following submissions—

1. It is contended that the orders he seeks are not in the nature of a summary judgement and that this is not an application for enforcement. The orders sought by the Applicant are orders in terms of an agreement reached between the parties.

2. The Applicant says that s.23(1) of the Act gives the Commission jurisdiction to deal with any industrial matter. Pursuant to s.24 of the Act the Commission is empowered to determine whether a matter is an industrial matter for the purposes of the Act. A settlement agreement made between parties to an application under s.29(1)(b) of the Act raises an "industrial dispute" for the purposes of the Act because it arises out of the termination and the unfair dismissal application before the Commission. In other words, the Applicant contends that merely because the parties have sought to settle the matter and a dispute has arisen as to whether they have settled, does not remove the matter from the Commission's jurisdiction. Under s.26(2) the Commission is not restricted to the specific claim made or the subject matter of the claim in granting relief or remedy. In support of his argument the Applicant argues it is inherent in the objects of the Act that the parties be bound by their agreements and that the Commission should endeavour to ensure this as expeditiously as possible.

Section 6(b), (c) and (d) of the Act provide—

"The principal objects of this Act are —

(b) to encourage, and provide means for, conciliation with a view to amicable agreement, thereby preventing and settling industrial disputes;

(c) to provide means for preventing and settling industrial disputes not resolved by amicable agreement, including threatened, impending and probable industrial disputes, with the maximum of expedition and the minimum of legal form and technicality;

(d) to provide for the observance and enforcement of agreements and awards made for the prevention or settlement of industrial disputes;"

The Applicant also contends that the Commission must have regard to s.26(1)(a) of the Act which requires the Commission to act according to equity, good conscience and the substantial merits of the case. The Applicant argues it is inequitable for the Respondent to claim that the Commission had no power to require them to comply with an agreement to compromise.

3. The decision by Commissioner Beech in *MacLeod v Paulownia Trees Pty Ltd (op cit)* is correctly decided and should be followed. Further that this matter cannot be distinguished from the issues raised in *MacLeod v Paulownia Trees Pty Ltd (op cit)* and *Bradbury v Jos Van Baren (op cit)*.
4. The order sought by the Applicant can be characterised as orders within s.23A(1)(a) of the Act as being payment of an amount to which he is entitled.
5. Moreover, the orders he seeks can be made by the Commission pursuant to its powers under s.32(3)(c) and (d) of the Act. Section 32(2), (3)(c) and (d) of the Act provide—

"(2) In endeavouring to resolve an industrial matter by conciliation the Commission shall do all such things as appear to it to be right and proper to assist the parties to reach an agreement on terms for the resolution of the matter.

(3) Without limiting the generality of subsection (2) the Commission may, for the purposes of that subsection —

(c) give such directions and make such orders as will in the opinion of the Commission —

(i) prevent the deterioration of industrial relations in respect of the matter until conciliation or arbitration has resolved the matter;

(ii) enable conciliation or arbitration to resolve the matter; or

(iii) encourage the parties to exchange or divulge attitudes which in the opinion of the Commission would assist in the resolution of the matter;

(d) give any direction or make any order or declaration which the Commission is otherwise authorized to give or make under this Act."

6. Further, the orders sought by the Applicant can be made under s.32(6) and (7) of the Act which provide—

"(6) Where the Commission does not endeavour to resolve a matter by conciliation or, having endeavoured to do so —

(a) is satisfied that further resort to conciliation would be unavailing; or

(b) is requested by all the parties to the proceedings to decide the matter by arbitration,

the Commission may decide the matter by arbitration.

(7) Where a matter is decided by arbitration the Commission shall endeavour to ensure that the matter is resolved on terms that could reasonably have been agreed between the parties in the first instance or by conciliation."

7. Alternatively, the Commission can also rely on s.27(1)(v) to make the orders sought. Section 27(1)(v) provides—

"(1) Except as otherwise provided in this Act, the Commission may, in relation to any matter before it—

(v) generally give all such directions and do all such things as are necessary or expedient for the expeditious and just hearing and determination of the matter."

8. Given that this matter has been on foot for a substantial period of time and the Applicant has negotiated and reached an agreement it is unfair to allow the Respondent not to give effect to the agreement. Accordingly the Commission should hear and determine whether a binding agreement exists between the parties in this matter.

Conclusion

9 I accept the Respondent's submission that the Commission has no power to make orders under s.32 of the Act. The alleged compromise was not made during the course of conciliation proceedings before the Commission. The alleged agreement to compromise was reached after the first conciliation conference and before the Commission had referred the matter for arbitration. Further, I accept all orders must be authorised by s.23A of the Act. Further, I accept the Respondent's submission that the Commission has no power to make the orders sought by the Applicant pursuant to s.23A(1)(a) which empowers the Commission to make orders in favour of a claimant of any amount to which the claimant is entitled. In *City of Geraldton v Cooling* [2000] WASCA 346 (2000) 80 WAIRG 5341 at [18]; 5344 Kennedy J with whom Scott and Parker JJ agreed held that s.23A(1)(a) is intended to relate to a claimant's accrued rights at the time of dismissal.

10 However, I am of the view that the Commission is empowered in appropriate cases to make an order—

(a) Declaring that the parties have compromised a s.29(1)(b)(i) application;

(b) Ordering a Respondent to pay the Applicant a sum of money equivalent to the amount agreed to in the compromise, as compensation that the Respondent has agreed to pay.

It is my view that these orders can be made pursuant to the Commission exercising its powers under s.23A(1)(ba) and (1)(a) of the Act. In my view these powers arise both expressly and from the implied powers that necessarily arise out of the jurisdiction which is conferred by those sections when regard is had to the objects set out in s.6(b), (c) and (d) of the Act. The powers in s.23A are not confined to where the Commission makes a finding that an employee has been harshly, oppressively or unfairly dismissed. The opening words of s.23A provide, "On a claim of harsh, oppressive or unfair dismissal the commission may –". Further, s.23A(1a) provides—

"The Commission is not to make an order under subsection (1)(ba) unless —

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

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

11 Where an employer enters into an agreement to pay an Applicant an amount of money in compromise of a claim under s.29(1)(b)(i) of the Act, such an agreement is contemplated within the meaning of s.23A(1)(ba) of the Act. Further, it is my view that such orders can be characterised as orders contemplated by s.23A(1a) as being amounts an employer has agreed to pay as compensation. An order declaring that the parties have compromised an application comes within the powers of the

Commission under s.23A(1)(c) of the Act which provides that upon a claim for harsh, oppressive or unfair dismissal, the Commission may—

> "make any ancillary or incidental order that the Commission thinks necessary for giving effect to any order made under this sub-section."

12 Although I have concluded that the Commission does have the power to hear and make a declaration as to whether the parties have, by agreement, compromised an application and to make orders to enforce a compromise agreement, it is my view that the Commission should not exercise its power to hear and determine whether this application has in fact been compromised by an agreement between the parties. The reason I have reached this view is that it is clear that the remedy the Applicant seeks is in the nature of a summary judgement or relief. In an application for enforcement of a compromised agreement in the Supreme Court in *Chesterton International (WA) Pty Ltd v Interchange Holdings Pty Ltd* unreported; SCt of WA; del. 21 February 1995 Heenan J at page 7 observed—

> "Bearing in mind that the power to order summary or final judgment is one that should be exercised with great care and should never be exercised unless it is clear that there is no real question to be tried (see *Fancourt and Another v Mercantile Credits Ltd* (1983) 48 ALR 1 at 10) I am satisfied that this is a case in which the power should be exercised. On the material before me it is clear not only that the Court has the power in these proceedings to enforce an agreement compromising the action but also that the agreement in question is binding upon the first defendant."

Further in *Chesterton International (WA) Pty Ltd v Interchange Holdings Pty Ltd (op cit)* Heenan J at page 5 observed that if there was a substantial dispute as to the terms of the agreement in question the summary procedure would be inappropriate. Murray J in *Dalmation Nominees Pty Ltd v Marinovich (op cit)* made similar observations at page 14 of his reasons for decision. In my view the order sought by the Applicant is an order enforcing the agreement. In *Roberts v Gippsland Agricultural Earthmoving Contracting Co Pty Ltd* [1956] VLR 555 at 561 Smith J observed—

> "And it is to be observed, at the outset, that what we are concerned with here is not the class of case in which, following upon the making of an agreement for the compromising of an action, an order has been pronounced with the real or apparent consent of both parties, and one of them then says that the order should not be drawn up or should be set aside. What we are concerned with is the class of case in which, following upon the making of such an agreement, and at a stage when no order has been pronounced, one of the parties comes to Court, with the other opposing, and asks the Court to make an order to which, by the agreement, the other party undertook to give his consent, or an order directing the other party to pay money or do some other act which, by the agreement, he undertook to do. In other words it is the class of case in which a party to an action comes to the Court seeking what is, in effect, an order enforcing the agreement specifically."

Smith J dealt with a number of rules of practice in relation to enforcement of compromise action and summary procedure at page 562-563. At 563 he observed that it would not be appropriate to make orders in terms of an agreement if there was a—

> "(d) …substantial question to be determined as to what were the terms of the agreement, or as to whether it was valid or specifically enforceable, as for example where a substantial case was put forward of material mistake or of other circumstances such as would afford a defence to a suit for specific performance, a party would ordinarily be left to proceed by separate bill so that the matters raised might be fully investigated: see *Askew v Millington (supra); Richardson v Eyton (supra); Edwards on Compromises,* p. 186; *Fry on Specific Performance* (6th ed.), p.720."

13 In light of the matters set out above, the Commission will make an order that the Applicant's application for orders in terms of an alleged compromise agreement be dismissed. The Commission will take steps to list the application under s.29(1)(b)(i) of the Act for hearing and determination whether the Applicant was harshly, unfairly or oppressively dismissed by the Respondent.

2002 WAIRC 05927

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
PARTIES	DAVID CHARLES THOMPSON, APPLICANT
	v.
	BITUMINOUS PRODUCTS PTY LTD AND ANOTHER, RESPONDENT
CORAM	COMMISSIONER J H SMITH
DATE OF ORDER	TUESDAY, 9 JULY 2002
FILE NO.	APPLICATION 769 OF 2001
CITATION NO.	2002 WAIRC 05927

Result	Applicant's application to make orders in terms of alleged compromise dismissed.
Representation	
Applicant	Mr M Cox (of counsel)
Respondent	Mr M Cuerden (of counsel)

Order

HAVING heard Mr M Cox on behalf of the Applicant and Mr M Cuerden on behalf of the Respondent, the Commission pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders—

> THAT the Applicant's application to make orders in terms of an alleged compromise agreement be and is hereby dismissed.

(Sgd.) J. H. SMITH,
[L.S.] Commissioner.

2002 WAIRC 05736

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MICHAEL DANIEL VAN HEEK, APPLICANT *v.* A WHISTLE AND CO. PTY LTD T/A ELECTRODRY CARPET DRY CLEANING, RESPONDENT
CORAM	COMMISSIONER J F GREGOR
DATE	THURSDAY, 13 JUNE 2002
FILE NO.	APPLICATION 639 OF 2001
CITATION NO.	2002 WAIRC 05736

Result	Dismissed
Representation	
Applicant	Mr R. Warner (of Counsel) appeared on behalf of the applicant
Respondent	Mr J. Davies (of Counsel) appeared on behalf of the respondent

Reasons for Decision

1 Michael Daniel Van Heek (the applicant) has applied to the Commission for orders pursuant to s.29 of the *Industrial Relations Act, 1979* following what he claims was an unfair termination of his employment by A Whistle and Co Pty Ltd t/as Electrodry Carpet Dry Cleaning (the respondent) on or about 27 March 2001.

2 According to the applicant he was employed for a period of about 1½ years commencing on 7 October 1999. He was engaged as a carpet cleaning technician, apparently under the terms of the State Contracting Cleaners Award.

3 In addition to the contractual entitlements prescribed in that Award the applicant claims that he became entitled to a holiday to the value of $4,000.00. There is controversy between the parties about the applicant's entitlement to the holiday. He says the entitlement was established in November 1999 when he was told by the respondent's National Manager, Mr Rich Nash, that there was going to be a competition amongst employees in Western Australia. The employee with the best combined sales and performance would win $4,000.00, there would also be a national competition where the winner would accompany a National Manager to the United Kingdom, the value of the national prize was $10,000.00.

4 In October 2000 the applicant was told by the State Manager, Mr Gary Burgess, that although the competition had not been finalised that the applicant would be the winner.

5 The applicant also says that he had a dispute with the respondent about his entitlement to annual leave and as a result of that dispute he was dismissed. When he had raised the matter with Mr Burgess he was told that if he did not like the situation he could leave.

6 Prior to this he at his request had received a reference from the respondent to assist him in obtaining other work (see Exhibit W1). The applicant's evidence is he was trying to find work as he had decided that it was time to move on. The dispute between him and Mr Burgess continued to develop which resulted in some sanctions being applied against the applicant such as removing his access to company transport. During this period the applicant had continued to apply for other work.

7 In December 2000 there was a staff Christmas party at which the $4,000.00 bonus was discussed. This took place in a restaurant where all staff members who were then employed were present including the State and National Manager. It is the applicant's contention that he spoke with the National Manager, Mr Nash, and asked him why he was not getting the holiday prize. He alleges that Mr Nash had replied along the lines that he was not getting it because he had been making enquiries with Wageline about his entitlements. According to the applicant he debated the matter of holiday pay with Mr Nash and was eventually told that he would get paid two weeks holiday pay as long as he did not tell other employees.

8 A week or so later the applicant raised the question of holiday pay with Mr Burgess who would not give him an answer. About this time he applied for work with Delucko Brothers. In searching for work he took some time off, unpaid, for interviews. He found out later he did not get that job, he told Mr Burgess that he had been unsuccessful but a few days later he says he was dismissed.

9 The applicant says the circumstances of the dismissal were that he was called in to the office by Mr Burgess and told his services were going to be terminated and that Mr Nash should have done it while he was in Perth. The applicant claims that he asked Mr Burgess why he was being dismissed and he was told to the effect that he had been looking for other work, there was no other reason offered.

10 The termination letter is incorporated hereunder—

"Wednesday, March 21, 2001

TERMINATION OF EMPLOYMENT

MICHAEL VAN HEEK

Effective as of Monday 19th of March 2001.

It is unfortunate that we have to give you two weeks notice of termination of employment.

Reason's(sic) being as you have informed Mr. Gary Burgess that you are seeking other employment because you were not happy with your terms of employment with Electrodry Carpet Dry-cleaning.

We feel that we have treated you fairly in this matter as Mr. Gary Burgess has at you (sic) request allowed you time off to attend interviews with the type employment that you desire i.e. Real Estate (sic).

If you are in need of further time of (sic) during the two week termination period please advise Mr Burgess and we will do our best to accommodate you in this matter.

Signed on behalf of

Rich Nash

Gary Burgess" *(Exhibit W2)*

11 During his evidence the applicant speculated that he may have been dismissed because he would not enter into a subcontract arrangement. He had been given drafts of an arrangement that the respondent wanted to enter into with him as a subcontractor but he never signed prior to his dismissal.

12 After his dismissal the applicant says he asked the respondent if he could leave straight away and not serve out his notice. Because of his family responsibilities he needed to find work as soon as possible. The respondent through Mr Burgess declined to release him immediately but agreed that he could work for the first week of the two week notice period and have the second week off to look for work.

13 After the applicant had left the employ of the respondent he made attempts to obtain work by sending out resumes to likely employers and checking on the Centrelink job search system as well as searching on the Internet. He was able to obtain some work, the details of which he gave to the Commission.

14 Also in his evidence the applicant told the Commission that his work standards had not diminished as the respondent had alleged, if there were deficiencies they were because the respondent failed to supply the correct equipment and if the work was faulty, that was because the wrong chemicals were being used. He believed that all of the respondent's technicians were receiving similar complaints.

15 As for the allegation that he informed the respondent that he was looking for alternate employment, that was correct, but he says his conduct was a response to the respondent failing to deal with his questions concerning his entitlements in a proper manner. He admitted too that he wanted to get into an industry that paid more money. As for his entitlement to the prize he says that there were two competitions, one National and the other State. He knew he was nominated for the National competition but did not receive that prize, but he was certain that he was entitled to the $4,000.00 for the State competition because he had been told by Mr Burgess that he had won the prize.

16 In cross examination Mr Davies, of Counsel, who appeared for the respondent questioned the applicant about his entitlement to the prize for the so called State competition. The applicant denied that he asked for the reference which had been given to him in November 2000 for the purpose of a housing loan.

17 The applicant admitted that the respondent received complaints about the standard of his work during the first 12 months of his employment and Mr Davies took him to a number of those complaints in his cross examination. It is not necessary to summarise those for the purposes of these Reasons for Decision. The applicant claimed that even though he was unhappy at work his quality did not drop off, he always tried to do his best.

18 The applicant was cross examined about complaints that he had used offensive language to Mrs Tracy Burgess who works in the office as an Administrator. He denied that the issue was raised with him by Mr Burgess, but he opined that the environment was very blokey and commensurate language was used. He admitted that he did use foul language but he did not remember addressing the language to Mrs Burgess. If Mr Burgess had raised the question of the use of that language he did not do it to him individually. According to the applicant Mr Burgess would have warned everybody. There were other instances involving foul language when Mrs Burgess allocated the applicant a series of jobs in the Mandurah area. He admitted he did not like doing the Mandurah run and he may have complained.

19 The preceding is a sufficient summary of the applicant's evidence for the purpose of these Reasons for Decision. To support his contentions he called evidence from Mrs Cleo Rose Laughton who is his sister-in-law. Mrs Laughton attended the Christmas function run by the respondent at the North Bridge restaurant in company with her husband Mr Tim Laughton. She remembered the applicant asking Mr Nash work related questions about holiday pay and a competition. She claimed that when the conversation started the rest of the table fell silent. The conversation revolved around the applicant asking questions of Mr Nash about holiday pay and why it was not paid.

20 Mrs Laughton says she had a distinct memory of the applicant asking Mr Nash whether he had won the competition and she says he was told he had. She understood the competition to be based on sales and general performance as a technician, she claims the applicant was told that he had won it but that it had been cancelled. Mrs Laughton claimed that Mr Nash had told the applicant he had not won the competition because of his enquiries about his annual leave. Mrs Laughton thought the prize was to the value of $4,000.00 with Mr Nash to go along with the winner. She had heard about the competition in vague terms mainly in conversations between her husband and the applicant. In cross examination Mrs Laughton said that the only competition she knew about was one involving a $4,000.00 holiday and she did not remember anything specifically about a State based competition.

21 Mr Timothy James Laughton also gave evidence, Mr Laughton is an employee of the respondent, he was also present at the Christmas function, he remembered a conversation between the applicant and Mr Nash in relation to the prize. Mr Laughton heard that the applicant was not going to get it because of his enquiries about underpayment of annual leave. Mr Laughton says there were two competitions one was National to the value of $10,000.00 and the other was $4,000.00. Each of these were redeemable by flying for a holiday somewhere with either the State or National Manager or for $2,000.00 the winner could go with his partner or friend.

22 The final witness on behalf of the applicant was Mrs Katie Beth Van Heek who is the wife of the applicant. She says at the dinner held in North Bridge there was a discussion about a State competition. The discussion was between her husband and Mr Nash. She claims everyone else made a contribution but the discussion was mainly between them. The applicant was upset and asked Mr Nash if he had won the State competition and if it had been withdrawn. She says that Mr Nash had told him that because of allegations made by the applicant he would forego the prize. Mrs Van Heek says there was only discussion of one competition but she knew of another one which was not discussed then. She claims that Mr Burgess said the State competition had been "squashed" and the applicant's name had been put up for the National competition but he had "not won that". Mrs Van Heek did not have much detail about the competition. She also gave some evidence about her experience in working for the respondent for three or four weeks. During that time she had received complaints from customers about the standard of work by technicians.

23 Evidence was taken on behalf of the respondent from Mr Gary Burgess, he recalled employing the applicant and remembered a sales incentive scheme. It was to be based upon the combined assessment of sales, work quality and keeping the van and equipment in good condition. It was to be judged in late October 2000. The State Manager from each Branch would pick a candidate and put forward the name to the National Manager, Mr Rick Nash, who would then choose a National winner. The prize was to be $2,000.00 if the winner undertook travel on their own or $4,000.00 with Mr Nash. Ultimately the prize was won by Mr Peter Billings from an Eastern States branch. The applicant had been nominated as the candidate from Western Australia, he was unsuccessful in the National prize, he was not entitled to a prize as a State nominee. There was no State sales scheme, nor was there any announcement of a prize of $10,000.00. The announcement of the winner was made late November or in December 2000.

24 Mr Burgess said in 1999 there were changes in the terms of remuneration introduced by the respondent. During that time an employment manual was introduced. It contained a base wage and sales commission was raised from 25% to 28%. The new

salary structure incorporated payments for annual leave, this was done by paying the leave out of the increased commission. Employees were paid above the Award rates, but apart from the absorbed annual leave all other Award entitlements for sick leave and public holidays were paid (see Exhibit D1 – Terms of Remuneration).

25 Mr Burgess says in November 2000 the applicant approached him for a two references, one to be used as support for a mortgage the other for work purposes. The applicant told Mr Burgess he needed the latter because he was looking for alternative employment. Mr Burgess swears that the reference was drafted by Mrs Van Heek.

26 Mr Burgess also gave evidence about the system for dealing with complaints and examples relating to the work of the applicant. The applicant also used foul language to Mr Nash, however Mr Burgess decided not to take any action on that issue. Mr Burgess also discussed the prize night at North Bridge restaurant, one employee was given a television set, however Mr Burgess did not hear the conversation between Mr Nash and the applicant.

27 According to Mr Burgess around about this time the applicant's quality of work changed radically, for the first twelve months he had not received very many complaints, at least none out of the ordinary, then from November 2000 the respondent started to receive a growing number of complaints from clients. There was also complaints about the applicant from other technicians, as a result a meeting was called by the applicant, apparently to clear the air. At this time Mr Burgess already knew about the obscene language used by the applicant to Mrs Burgess, this was compounded when he used further foul language when he refused to go back and do a job. Mr Burgess says he confronted the applicant on both of the issues on separate occasions, he told him that it was unacceptable to speak to Mrs Burgess the way he did and gave him a first and final warning over his conduct. He warned him again after the second incident and told him that was his 'absolute last' warning.

28 The meeting between the applicant and the other employees was unsuccessful for him, a number of them voiced complaints about him, telling him that they were sick and tired of his whingeing. Mr Burgess also took the opportunity to tell the applicant if he spoke to his wife like he had in the past he would be dismissed on the spot. Subsequently there were other problems with the applicant which led Mr Burgess to comment that perhaps he had 'lost the plot' and did not care about his job anymore.

29 Mr Burgess remembered that the applicant had told him that he was not happy that annual leave had been taken away and he wanted it to be reinstated. Mr Burgess told him that was out of his hands, but he made telephone numbers of the National Directors available to the applicant to follow up with them if he so desired. As far as Mr Burgess was concerned the applicant was continuing to look for other employment. He was asking for time off and Mr Burgess concluded that he was leaving soon. Although there was no time frame it was agreed that he was leaving. Mr Burgess took this as a resignation which he accepted, because that was the understanding it was okay with Mr Burgess for the applicant to be out looking for work with other employers. Mr Burgess contacted Mr Nash and let him know that the applicant intended to leave, he was instructed to contact Wageline and check the position, which he did.

30 Later there were other incidents involving poor performance by the applicant which resulted in clients refusing to pay, as far as Mr Burgess was concerned the applicant was not working properly and it was clear he did not care about the job. The result of one incident was a loss to the respondent of a substantial client.

31 In February 2000 the applicant had asked for another reference. The respondent concluded it would soon need to replace him so it placed a recruitment advertisement. This was necessary because it takes about four weeks to train a new technician. It was done in the expectation that the applicant would be leaving and the respondent did not know whether it would get any notice from him.

32 Incidents involving the applicant writing obscene language on the notice board and having difficulties with jobs continued. His conduct with clients was unacceptable so on 19th March 2001 the respondent concluded that the applicant was costing them too much money, it had lost a valuable client, so he was given notice of termination.

33 Evidence was taken from Mr Richard Nash who is the National Manager of the respondent. He recalled a visit to Perth in December 2000 when the applicant addressed him with foul language he instructed Mr Burgess to deal with it. Mr Nash could not remember discussions about prizes on the night of the Christmas party at the North Bridge restaurant, but he said the terms of the competition were that each State would nominate a candidate based on sales, cleanliness of truck and equipment work skills and that Western Australia had nominated the applicant. At the time of the function no award of the prize had been made. There was later and it was won by Mr Peter Billing of Victoria. The award was made after the function in Perth, it was announced at a staff Christmas party in Victoria.

34 Mr Nash related how the prize was decided. It consisted of getting a feed back from clients, checking work sheets and records, the prize was a $4,000.00 trip to be taken either with the State Manager or Mr Burgess to the value of $4,000.00. If the candidate chose to go on his own the value would be $2,000.00. Mr Nash denied that he had ever said to the applicant that he had not won the prize because of his complaints about his annual leave. He cannot recall exactly what happened at the dinner because he regarded it as a social event, there was a lot of joking and good humour and plenty of alcohol was consumed. Mr Nash said the applicant had been drinking considerably although he did not monitor it, he himself had been drinking over a period of twelve hours.

35 Mr Nash told the Commission that the applicant announced in January that he would be leaving the respondent, he was trying to find work elsewhere in real estate. Mr Nash knew nothing of any State competitions, there was only ever one prize. There was a television set given away at a Christmas function that was awarded by Mr Burgess in his capacity as State Manager but it had nothing to do with the National office.

36 Mr Nash knew that the quality of the applicant's work was deteriorating rapidly. Eventually he was told that the applicant in effect handed in his resignation. He thought this was sometime in late January. In March when Mr Burgess was in Perth the applicant again reiterated he would be leaving the respondent. When Mr Burgess eventually confirmed the applicant was leaving Mr Nash asked him to check the respondent's obligations with Wageline. The respondent applied the guidelines which were given. As far as Mr Nash was concerned the respondent had every reason to bring the relationship to an end not the least being that the applicant had informed them on a number of occasions he was going to leave. His work quality thereafter deteriorated rapidly, there were numerous complaints from clients and the respondent could not allow that situation to continue. It needed four weeks lead time to train someone to replace him so it was inappropriate to allow the situation to develop to a stage where the applicant would just walk out. In all of the circumstances the respondent thought the best setting for the applicant would be to release him on two weeks notice and that is what occurred.

37 The Commission heard evidence from Mr Christopher William Easterbrook a senior technician employed by the respondent. Mr Easterbrook recalled that the applicant had told him in November 1999 that he was starting to look for other work. Mr Easterbrook's memory of the National bonus scheme was that there was a sales competition for a couple of thousand dollars, the State Manager from each State would pick his best technician and put him up as a candidate. He knew that in year 2000 a technician from Melbourne won the prize, there was not a State prize just a nomination of the best technician, there was no prize for that. In November 2000 he became aware of increasing numbers of 'redo' jobs coming through and there were discussions at the respondent's premises about this problem. The applicant had expressed unhappiness about some of these repeat jobs and complained about them.

38 Mr Easterbrook said that in January 2000 he witnessed a conversation between Mrs Burgess and the applicant where the applicant had sworn at her using foul language. It might have been that the language was directed to the client but it was certainly said to Mrs Burgess, it was certainly unusual for that type of language to be used in the office. As a result Mr Easterbrook mentioned to Mr Burgess on the quiet that if it had happened to his wife he may well have thumped the applicant.

39 Mr Easterbrook said that in the beginning of 2001 the applicant asked for a meeting of the staff to have a discussion with them to see what their problems were with him. In effect the applicant invited people to air their grievances about him and that happened. The applicant was told that some of his work mates were sick of his whinging and that he was lazy. Mr Easterbrook later heard Mr Burgess tell the applicant that if he used foul language again to office staff he would be instantly dismissed.

40 There was an incident involving a notice board where the applicant had written a message in foul language which message gave offence to Mr Easterbrook so much so that he invited him to go out the back and 'sort it out'. The applicant declined and later they had a discussion and resolved their differences.

41 The final witness on behalf of the respondent was Mrs Tracy Burgess, the wife of Mr Gary Burgess the State Manager. Mrs Burgess works in the business and related that the applicant had used foul and offensive language when she had raised issues with him about his work. As far as she was concerned his swearing was directed at her, there was no doubt about that at all. She knew about the National competition. It was won by a man from the Eastern States.

42 The Commission has heard evidence on behalf of the applicant from himself, his wife, his brother-in-law and sister-in-law. As for the applicant I have unease about the quality of the evidence that he gave the Commission. He appeared to me to adjust his evidence in Chief when subject to probing cross examination from Counsel from the respondent. I would not go so far as to say that he told untruths to the Commission but he certainly omitted a number of events which would have the effect of having the Commission conclude that his story is one that should be believed. If they were included one might find had reached a different conclusion.

43 The evidence of his wife Katie Van Heek supports that of the applicant but that is not surprising in the circumstances. She had worked with respondent, albeit for a short time but had been subject at all times to the applicant's perceptions of how the respondent was treating him. The evidence of Mr and Mrs Laughton can be similarly categorised. This family view, if one can call it that, seems to pervade the evidence and I will comment more about that later on.

44 The Commission also heard evidence from Mr Gary Burgess there is no reason to disbelieve his version of events, the evidence of his wife Tracy does not suffer from the same difficulty that the evidence of the applicant does because her contentions have independent corroboration from Mr Easterbrook. His evidence was blunt and to the point but I have no doubt at all that he told the Commission exactly what he thought and believed had happened. The evidence of Mr Nash was straight forward, he was unable to help the Commission much concerning what was said at the Christmas party, mainly because he did not remember it, probably because of alcohol consumption. I only mention that because he did not try and give information to the Commission about matters about which he had no knowledge.

45 Taken on a whole the evidence of the applicant suffers in comparison to that presented on behalf of the respondent and where there are conflicts I find they should be resolved in favour of the respondent.

46 It is for the applicant to establish the dismissal was unfair on the test contained in *Undercliffe Nursing Home v FMWU (1985)* 65 WAIG 385. Essentially the test is whether there has been a fair go all round, that is, has the right of the employer to terminate the employee been exercised harshly or oppressively and unfairly as to amount to abuse of the right. The Commission is required to weigh all of the matters in the balance, a dismissal will not be found to be bad if one element in its determination is missing *Shire of Esperance v Mouritz (1991)* 71 WAIG 891.

47 I carefully considered the evidence in this matter and have reached the following conclusions. The respondent runs a business cleaning carpets in both commercial and domestic settings, it trains its own operators to attend homes or offices to clean carpets and upholstery. The operatives are supplied with equipment, cleaning fluids and training which allowed them to carry out the work, they do so from a van which contains all of their equipment.

48 The respondent advertises and canvasses for business by the telephone, quotes are given and the technicians are sent to the work. They are required to repeat the work if it is not done properly and certain penalties can apply in those circumstances such as loss of commission (see Exhibit D1).

49 It is open to find that the applicant worked satisfactorily for some twelve months after he joined the respondent but thereafter the quality of his performance began to deteriorate. He became dissatisfied with the way the respondent ran its business. It appears that when he was first employed there was a verbal arrangement between the parties as to the terms and conditions of employment. That arrangement was formalised on 18th April 2000 when the applicant signed terms of remuneration, those terms became the contract from then on. Whether they changed the circumstances of the employment arrangements substantially I am unable to conclude because I have no evidence about what they were before this time.

50 I accept the evidence of Mr Burgess that the arrangement caused an increase in commission and the intent of the document was that increase in commission was over an overaward payment which would swallow up annual holiday leave while payments for public holidays and sick leave would continue. I must say that on a reading of the [so called] contract that is not what it says on a plain interpretation of the words, however it is open to conclude that it was intended that annual leave would be paid as part of normal earnings. I make no comment as to the efficacy of that arrangement, however an arrangement it was.

51 It appears that along with becoming dissatisfied with his job the applicant also was worried about whether he was entitled to annual leave or not. He raised the issue with Mr Burgess and made external enquiries as to his entitlements. The question of annual leave and his entitlements though is just part a series of relationship difficulties that the parties were then having. Apart from the annual leave issue the applicant's clear desire was to obtain better paid work somewhere else. He was not getting on with his work mates. He took the unusual step of convening a meeting to allow them to express any views about him. That they did and described him as whinging and lazy. Mr Easterbrook the senior technician had additional problems with him so much so that his conduct caused Mr Easterbrook to invite him outside to settle the issue in physical combat. That fortunately never took place but it is an indication of the uncomfortable surroundings in which the applicant then found himself. He was a person who was looking for other work, he was concerned about whether he was being paid properly, he was at odds with his fellow employees.

52 In addition to this the applicant's work had clearly deteriorated. I find that he did use foul language in the presence of Mrs Burgess and on the balance of probabilities directed it to her. I find that his conduct in this respect was taken up with him by Mr Burgess who warned him about the consequences of a repeat and when he did repeat it he had received a final warning about his conduct. All in all the relationship between the parties was delicate and this led the respondent to decide that for the good of its business that it ought to exercise its right to bring the employment relationship to an end. It did so because of the lack of input the applicant was making to the business and because of the disruption that he was causing it. The respondent did not do it because it thought that it had some legal obligation to him concerning annual leave. I find that however misguided, the respondent thought that annual leave was being paid as part of an aggregate wage. As I mentioned earlier whether or not

that is a proper conclusion it is for a Court otherwise constituted to determine. However notwithstanding the legality of the arrangement the respondent thought it was operating correctly in absorbing the annual leave payment.

53 Coupled with the applicant's dissatisfaction about his lot in life with the respondent was his state of mind that he thought he had been deprived of a prize he had won denying him a bonus. The evidence about the bonus from the applicant's point of view is not convincing, he thought that there was a State prize and a National prize with differing amounts of money. It is not surprising that his wife, his brother-in-law and sister-in-law and her husband might have a similar view because they clearly discussed their view of what the arrangement was in a family group, that does not mean that was the arrangement, in fact the evidence of Mr Laughton as to what consisted as the prize was equivocal to say the least.

54 The evidence that the Commission has before it concerning the form of the prize comes from Mr Burgess, Mr Nash and supported by Mr Easterbrook. It is clear that the respondent offered a prize for a technician on a National basis, each State Manager was to nominatean employee, there was no prize for the State nomination and a National prize winner was selected out of the State nominees. There was no prize to which the applicant was entitled that has been denied by any subterfuge, certainly not because he made a claim about annual leave. It is admitted by Mr Burgess and Mr Nash and supported by Mr Easterbrook that the applicant was the person then nominated as the West Australian nominee for the National prize but at the time of the party attended by Mr Nash the National prize winner had not been decided so it is difficult to understand how he could have said that the applicant was not the National prize winner. Mr Nash could well have said that the applicant did not win any prize merely for being nominated as the representative from Western Australia. However what actually was said at the Christmas function is very difficult to decide from the evidence, clearly the event was attended by a considerable intake of alcohol, only one witness Mrs Laughton said that there was any silence around the table; everyone else said the conversation was loud. Mr Nash had been drinking for twelve hours, it is clear that he did not remember much of what was said and it would not be surprising that the applicant having indulged in considerable alcoholic intake only remembers that part of the conversation which suits his contentions now.

55 The onus of proof is on the applicant to establish that there has been unfairness in this dismissal on the test to be applied. Even though some of the evidence might point to the respondent as being less than a model employer on balance there is not sufficient evidence to establish any of the contentions of the applicant. I find that the applicant had been dissatisfied with working for the respondent for some time, he had been looking for work, his dissatisfaction appears to be seated both in the need to earn more money and generally the type of work that he was doing. He clearly did not want to do some of the work anymore, his standards of work fell away, he became confused about his right to a bonus through a prize. This enhanced his dissatisfaction and he made that dissatisfaction well known to the respondent by his conduct and demeanour.

56 Eventually the respondent decided that if the applicant was going to leave it ought to ensure that a replacement was available and so it advertised for a new technician. It then gave the applicant notice to terminate and reached an accommodation with him concerning how that notice would be worked out. There are no connotations in this dismissal of gross misconduct but there are notions that here was a relationship which had run its course, that the applicant was decided in his mind that he needed to go and do something else. His conduct and performance at work where indicative of this and the respondent decided that in all of those circumstances it was in their best interests that they exercise their right to terminate the contract of employment. That is what happened. There has been no unfairness on the test to be applied. As for an entitlement to contractual benefit for a bonus I find that the applicant misunderstood the bonus arrangement it was a Nationally based bonus with a State nominee, he was the State nominee but he did not win the National prize and there was therefore no contractual entitlement due to him. This application will be determined by an Order of dismissal.

2002 WAIRC 05735

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MICHAEL DANIEL VAN HEEK, APPLICANT
	v.
	A WHISTLE AND CO. PTY LTD T/A ELECTRODRY CARPET DRY CLEANING, RESPONDENT
CORAM	COMMISSIONER J F GREGOR
DATE	THURSDAY, 13 JUNE 2002
FILE NO/S.	APPLICATION 639 OF 2001
CITATION NO.	2002 WAIRC 05735

Result Dismissed

Order

HAVING heard Mr R. Warner (of Counsel) on behalf of the applicant and Mr J. Davies (of Counsel) on behalf of the Respondent, the Commission pursuant to the powers conferred on it under the *Industrial Relations Act, 1979,* hereby orders:

THAT the Application be, and is hereby dismissed.

(Sgd.) J. F. GREGOR,

[L.S.] Commissioner.

2002 WAIRC 05907

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	WA ACCESS PTY LTD, APPLICANT
	v.
	MARK ROBERT VAUGHAN, RESPONDENT
CORAM	COMMISSIONER J F GREGOR
DATE	FRIDAY, 5 JULY 2002
FILE NO.	APPLICATION 1873 OF 2001
CITATION NO.	2002 WAIRC 05907

Result	Dismissed
Representation	
Applicant	Ms E. McCloskey (of Counsel) appeared for the applicant
Respondent	No appearance

Reasons for Decision

1 This application arises in somewhat unusual circumstances. WA Access Pty Ltd (the applicant) has by this application applied to the Commission for orders under s.23A(1)(c) of the *Industrial Relations Act, 1979* (the Act) that Mark Robert Vaughan (the respondent) pay to it the sum of $8,362.08.

2 The short history to the matter is that in 2001 Mr Vaughan applied to the Commission pursuant to s.29 of the Act for orders under s.23A on the grounds that he had been unfairly dismissed from his employment with the applicant in this matter. The Commission heard the claim and disposed of it by an order in favour of Mr Vaughan in the sum of $9,477.00. That order was perfected by lodgement in the Registry on 23rd June 2000.

3 The Commission has been told that the applicant in this matter paid Mr Vaughan the sum ordered in three separate payments, on 16th August, 20th September and 16th October 2000 the sums of $3,159, $3,154 and $3,190.

4 Within the prescribed period the applicant appealed to the Full Bench against the award that the Commission had made against it in Application No. 1394 of 1999. It then applied for a stay order which, according to submissions before the Commission, was refused.

5 In due course the Full Bench heard the appeal in Application No. FBA 34 of 2000 and on 14th November 2000 delivered a decision in which the order of the Commission of 23rd June 2000 in Application No. 1394 of 1999 was varied by deleting the figure of $9,477.00 and inserting the sum of $1,114.92. The effect of the variation was that the applicant overpaid the respondent by $8,363.08.

6 The applicant made demands for payment of the $8,363.08 by way of a letter dated 27th November 2000 to the respondent from its then advocate Workplace Relations and Management Consultants Pty Ltd; and in telephone conversations between the financial officer of the applicant Mr David Maxwell and the respondent on or about 20th November 2000. A further conversation occurred between the same persons on 11th December 2000 then by letter of demand dated 11th December 2000. There were further discussions between Mr Maxwell and the respondent on 15th December 2000 and further telephone conversations between Mr Maxwell and the respondent on 24th January 2001. According to the evidence of Mr Maxwell all of those efforts to recover the money have failed even though the respondent had promised to make payments. According to Mr Maxwell's evidence the matter was then taken to the Local Court which refused to make an order, apparently on the grounds that the issue was one within the jurisdiction of this Commission.

7 It is argued by Ms McCloskey, of Counsel, on behalf of the applicant that the operation of s.49 of the Act is such that an order varied is varied as if it took effect in the first instance. By inadvertence on the part of the representatives of the applicant in the Appeal proceedings no order was sought for the respondent to repay the difference between the $9,477.00 paid to the respondent following the decision at first instance and the $1,114.92 following the orders of the Full Bench of the Commission. It is argued by Ms McCloskey that as there has been a claim and an order made under s.23A of the Act, the Commission has express power in s.23A(1)(c) to make an ancillary or incidental order that the Commission thinks necessary for giving effect to that order.

8 Ms McCloskey contends that the Commission while not possessing inherent jurisdiction does possess an implied power to do all that needs to be done to give effect to its express statutory powers (*DJL v Central Authority (2170) ALR 679*). She also says that it is well settled that an amendment can be made to orders following an admission or an error by Counsel (*Esther Investments Pty Ltd v Markalinga Pty Ltd (1992) 8WAIR 4000)*. These cases are authority for the contention that court decision makers are fallible human beings and occasionally make errors or oversights. If it can be clearly demonstrated, or would produce a result that would be manifestly unjust, if the judgement was allowed to stand, then they can be altered. That is the oversight can be remediated.

9 According to Ms McCloskey this principle applies to the present proceedings. The applicant is not seeking a variation of the Full Bench's orders instead it submits that there is power in the Commission to make a supplementary order requiring the respondent to pay $8,363.08 that he has retained because to do so would give proper effect to the orders of the Full Bench. This would comply with the principles of equity, good conscious and merit.

10 It was argued the Commission has power to re-open the matter and do all that is necessary and expedient for the expeditious and just hearing and determination of the matter. The Commission is not functus officio in relation to the claim under s.23A particularly as the issue of repayment has previously not been raised by the applicant's then representative.

11 Ms McCloskey says there is no comfort for the applicant in the fact that it made a stay order application. The question of stay is not relevant to the matters presently under consideration. The applicant has exhausted all avenues it sought to explore to gain restitution. It went to the Local Court seeking summary judgement. The Local Court dismissed that application and expressed the view that this Commission is the proper forum to obtain orders for recovery of the disputed amount.

12 In dealing with this matter among the issues that need to be considered is whether the Commission is functus officio. This ought be viewed in two separate contexts in my respectful view. Clearly in respect of this Application No. 1873 of 2001 the Commission is not functus officio; it has a live application to deal with, whether or not it can give the relief sought depends upon whether it has jurisdiction and power to do so and I will deal with that later.

13 What is clear is that insofar as Application No. 1394 of 1999 is concerned the Commission is functus officio on the authority of *Robe River Iron Associates v Amalgamated Metals and Shipwrights Union of Western Australia and Others* in that case in his Reasons Brinsden J said that "*justices do not become functi officio unless and until they have completed all the judicial functions in the case before them*." What happened in Application No. 1394 of 1999 was the Commission issued a dispositive order; that order was reviewed as a Decision of the Commission by the Full Bench in FBA 34 of 2000 and in due course the Full Bench on 13th November 2000 issued an order the second paragraph to thereof providing "*THAT the Decision of the Commission in No. 1394 of 1999 made on 23rd June 2000 be and is hereby varied by deleting the figure of '$9,477.00' in order (3), and inserting the figure of '$1,114.92' (sic).*"

14 The order of the Full Bench varies the Decision of the Commission ab initio. It was not a quashing of the order so that it could be said that the Commission had not made a decision at all. Therefore on these facts the explanation of functus officio expounded by Brinsden J in the Robe Case (ibid) is applicable.

15 The question is, whether there is power under s.23A(1)(c) for the Commission to make an order of the type sought in this case. On the authority of the Full Bench in the *City of Geraldton v David John Cooling* (2000 WAIR Comm 169) Ms McCloskey says there is because that Decision says that the Commission is empowered to make ancillary orders and the type of order sought by the applicant in these proceedings is one of that nature.

16 In the *City of Geraldton v David John Cooling* (ibid) the Commission dealt with the interpretation of s.23A of the *Industrial Relations Act, 1979*. In his reasons for Decision His Honour the President interpreted s.23A by 'ascribing to the words used their ordinary and natural meaning unless to do so would create ambiguity or absurdity or give rise to interpretation which is not consonant with the tenure and purposes of the Act'. The argument therein was focused on whether the Commission at first instance had power to make orders ancillary or incidental to an order for reinstatement. The section was closely analysed by His Honour the President, both of the other members of the Bench, Chief Commissioner W.S. Coleman and Senior Commissioner G.L. Fielding also published Reasons for Decision.

17 Of help is a comment that Senior Commissioner Fielding makes in paragraph 99 of the Reasons of the Full Bench where he says "*It seems clear as Counsel for the appellant contends that the provisions of s.23A of the Act constitutes a code in respect of relief which the Commission can grant as a result of a successful claim of harsh, oppressive or unfair dismissal…the section does not authorise the Commission to make an order that an employer pay to the aggrieved former employee, compensation of a loss or injury caused by the dismissal and at the same time order that the employer reinstatement or re-employ the former employee*". The learned Senior Commissioner observed that it is a misconception to suggest that the Commission can order the appellant to reinstate the respondent and to pay compensation for loss or injury caused by the dismissal. Instead the Commission had only ordered the appellant to reinstate the respondent and to give effect to the order he ordered that the appellant be paid remuneration he would have earned had he not been dismissed, taking into account his earnings since dismissal. This was an example of where the power of the Commission to make ancillary orders was brought to bear.

18 The Decision of the Full Bench was the subject of appeal before the Industrial Appeal Court in *City of Geraldton v Cooling (2000) WASCA 346* delivered on 16th November 2000.

19 The Industrial Appeal Court overturned the Reasons for Decision of the Full Bench ibid but not, in my respectful view, in any way that assists the applicant in these proceedings.

20 In short the Industrial Appeal Court in the leading Decision of the President Kennedy J held there was no basis for arguing that an order for compensation for loss or injury caused by dismissal may be made as an ancillary or incidental order and further that s.23A(1)(ba) is a specific provision covering claim for compensation for loss or injury caused by the dismissal. Claims for compensation for wage loss following dismissal come within that provision and are subject to the restrictions imposed by s.23A.

21 It is clear from both of these Reasons that s.23A(1)(c) has to be viewed within the context of the rest of the section and which creates powers of the Commission to be applied in assessing loss or injury in a situation where a person has been unfairly dismissed.

22 The application before the Commission raises no issue whatsoever of unfair dismissal it is in effect a claim for an order that the respondent repay a debt.

23 It is obvious that the equity of the situation is that the respondent in this matter has a windfall gain to which he is not entitled and he should repay it, however there is no power residing in the Commission to make an order for him to do so in my respectful view.

24 I find the Commission is without jurisdiction or power to make the order sought and the application will be dismissed.

2002 WAIRC 05908

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	WA ACCESS PTY LTD, APPLICANT *v.* MARK ROBERT VAUGHAN, RESPONDENT
CORAM	COMMISSIONER J F GREGOR
DATE	FRIDAY, 5 JULY 2002
FILE NO.	APPLICATION 1873 OF 2001
CITATION NO.	2002 WAIRC 05908

Result Dismissed

Order

HAVING heard Ms E. McCloskey (of Counsel) on behalf of the applicant and there being no appearance for the respondent, the Commission pursuant to the powers conferred on it under the *Industrial Relations Act, 1979,* hereby orders:

THAT the application be, and is hereby dismissed.

(Sgd.) J. F. GREGOR,
Commissioner.

[L.S.]

2002 WAIRC 05788

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	DION WATT, APPLICANT
	v.
	CITY OF SWAN, RESPONDENT
CORAM	COMMISSIONER J H SMITH
DELIVERED	FRIDAY, 21 JUNE 2002
FILE NO.	APPLICATION 234 OF 2002
CITATION NO.	2002 WAIRC 05788

Result	Application for denial of contractual benefit dismissed.
Representation	
Applicant	Mr A Johnson (as Agent)
Respondent	Mr S White (as Agent)

Reasons for Decision

1 This is an application made under s.29(1)(b)(ii) of the *Industrial Relations Act 1979* ("the Act"). Dion Alex William Watt ("the Applicant") claims that he has been denied a benefit under his contract of employment, not being a benefit under an order, award or industrial agreement made by this Commission. The benefit that the Applicant says that he has been denied is a position in the Transport and Waste Services Business Unit, a Department of the City of Swan ("the Respondent") as a Driver on Full Roster or as a Driver on Partial Roster.

Background

2 The Applicant was employed by the Respondent as a General Hand in Parks and Gardens which is part of the Operations Business Unit of the Respondent. The Applicant applied for the position of General Hand and after being interviewed by a selection panel was appointed as a Level 3 General Hand and paid in accordance with the terms of the Municipal Employees' (Western Australian) Award 1999 ("the MEU Award"), an award made by the Australian Industrial Commission. The Applicant commenced employment in Parks and Gardens on or about 27 September 2000. The terms and conditions of his employment were also covered by an Enterprise Agreement that applied to work in Parks and Gardens. In early March 2001 the Applicant was asked whether he would transfer to the Transport and Waste Services Business Unit to work as a front-end loader (" the loader") operator to relieve the loader operator who was on sick leave and was unable to carry out the duties of driving a loader for an extended period. The Applicant had a B Class Licence and had experience in driving a loader. He also holds a loader ticket.

3 Shortly after the Applicant commenced working as a loader operator he says that he had a conversation with the manager of the Transport and Waste Services Business Unit, Mr Douglas Meadows who informed him (the Applicant) that if the loader operator was unable to return to work on the loader, "I will have to find you a position in waste". The Applicant says that he accepted that offer of work in the Waste Services Business Unit. In particular he says by accepting the offer it became a term and condition of his (the Applicant's) employment that if the permanent loader driver returned to his position he would be transferred into a position as a Driver on Full Roster or a Driver on Partial Roster in the Waste Services Business Unit.

4 It is common ground that the holder of the loader operator's position returned to his position and that the Applicant was transferred back to Parks and Gardens.

5 The Respondent denies that an offer of permanent work in the Waste Services Business Unit was made to the Applicant. The Respondent says that even if such an offer was made, Mr Meadows had no authority to enter into such a contract on behalf of the Respondent. Further that even if an "offer" was made, the terms were too uncertain to have any binding force at law.

The Applicant's Evidence

6 The Applicant testified that prior to working for the Respondent he had worked for two other councils, one in Australia and one in New Zealand. When he applied for the position as General Hand he submitted a resume and was interviewed by a panel who were the Operations Manager Mr Robert Coten, the Manager of Parks and Gardens Mr Rod Strang and the Leading Hand/Supervisor, Mr Peter Morris. The Applicant said whilst he worked in Parks and Gardens he had a number of supervisors, including a Mr Mark Denning. The Applicant testified that in March 2001 Mr Denning came to see him and said to him that if he was willing to go and work on the loader for a period of six months "this may turn into something more" because the person who held the position of loader driver, Mr Peter Cunningham, was off work ill.

7 The Applicant said that he worked as the loader operator in March 2001. Shortly after he commenced working as the loader operator he was classified from a General Hand Level 3 to a General Hand Level 4 because of his skills in operating a loader. He said whilst working as a loader operator he saw a notice on the notice board asking people who were interested in receiving training on the refuse trucks to put their name down for training. He said he put his name down and he did the training for a period of six weeks and whilst working and carrying out the training he was paid as a "Driver on Partial Roster." It appears from a memo written to Mr Coten the Operations Manager from Mr Meadows dated 9 April 2001 that the Applicant commenced training on 3 April 2001 and finished training on 11 May 2001.

8 The Applicant said about three weeks after he commenced work as a loader operator and before he commenced training in Waste Management he had a conversation with Mr Meadows and made notes of the conversation the next day. He said that Mr Meadows spoke to him about the loader operators' position and said "As far as I am concerned the job is yours if you want it because between me and you I don't think Peter will be going back on the loader. If Peter does go back on the loader I will have to find you a position in waste." The Applicant said at that time they had this conversation Mr Cunningham was working in the store on light duties and it appeared that there was little prospect of him coming back to work on the loader. After training ceased the Applicant was put on a roster for relief duties within Waste Services and he worked from time to time collecting rubbish. Whilst not doing relief work he worked on the loader. In about early August 2001 Mr Cunningham returned to work as the loader driver. The Applicant said when he was first informed by Mr Meadows that Mr Cunningham was coming back to work that he (Mr Meadows) informed him (the Applicant) that he did not know whether he (the Applicant) would go back to Parks and Gardens or would work in the store. However a couple of days after Mr Cunningham returned the Applicant was transferred back to Parks and Gardens. He was dissatisfied with being transferred back to Parks and Gardens and he consulted the Union. After he returned to Parks and Gardens the Applicant continued to be on the roster for relief refuse truck duties from time to time.

9 The Applicant claims he should have transferred into a position in the Waste Management after Mr Cunningham returned to work as the loader operator. He seeks an Order from this Commission requiring the Respondent to transfer him into a Driver on Full Roster position or a Driver on Partial Roster. Alternatively he seeks an Order requiring the Respondent to pay him compensation as the rate of pay for a Driver on Full Roster or a Driver on Partial Roster is higher than the rate paid to him as a Level 4, General Hand.

10 Mr Denning testified that he is employed as a Supervisor in Parks and Gardens. He has held that position for three years. He has a total of eleven years experience as a supervisor in Parks and Gardens work. Mr Denning said prior to the Applicant being transferred to the Transport and Waste Management Services Unit he (Mr Denning) was the Applicant's supervisor. He said that in late 2001 he had a conversation with Mr Coten in which Mr Coten advised him that the Applicant wasn't coming back to Parks and Gardens so that it would be necessary to replace the Applicant by filling the Applicant's position with a full time employee as the permanent loader driver was not returning to his position. The Applicant's General Hand position was advertised in accordance with recruitment and selection policies and the Applicant's position in Parks and Gardens was filled. Mr Denning said that several months later he was informed that the Applicant was coming back to the Parks and Gardens Department and he was surprised as he (Mr Denning) thought the Applicant was staying in Waste. He said the Applicant's performance since he returned has been "hit and miss" because the Applicant was very unhappy about returning to Parks and Gardens. Mr Denning conceded that for the Applicant to be given a position in Waste Management it is likely that he would have to go through the selection process.

The Respondent's Evidence

11 Mr Robert Coten testified that he is the Respondent's Operations Manager and has held that position for about two and a half years. He said that when the Applicant was transferred to the position of loader operator he (the Applicant) remained under the Parks and Gardens Enterprise Agreement. He said historically the loader operator position was in the operations section but the workshops, plant maintenance and depot area is physically located in the Waste Services Business Unit area. He also said that although the position of loader operator was under the Parks & Gardens Enterprise Agreement the position of loader operator was actually under the control of Mr Meadows and the Transport and Waste Services Business Unit.

12 Mr Coten said he replaced the Applicant's position as a General Hand in the Fast Attack Team in Parks and Gardens as it appeared unlikely that Mr Cunningham would return to work. He said he replaced the Applicant in around about March 2001 which was not long after the Applicant started relieving on the loader. Mr Coten said that the filling of the Applicant's position was an administrative error and in hindsight his position should not have been filled until more definite information was available. He said after Mr Cunningham returned to his position as loader operator there was no difficulty finding work for the Applicant as a General Hand in Parks and Gardens as the work load in that area had and is increasing.

13 Mr Coten said that the Applicant was transferred temporarily to the position of loader driver pursuant to Clause 13 of the City of Swan Operation Business Unit Parks and Engineering Workforce Enterprise Bargaining Agreement 2000 which was certified by Commissioner O'Connor on 8 June 2001. Mr Coten testified that that agreement became operative according to its terms on 20 or 21 March 2001 and it replaced a previous enterprise agreement that applied to the Parks and Gardens area. It was put to Mr Coten in cross examination that the position of loader operator did not come under that agreement until June 2001. In a letter dated 27 June 2001 Mr Coten advised the Union the EBA Committee at the City of Swan had met on 15 June 2001 and unanimously agreed to extend the EBA to include staff employed in the Transport and Waste Services Business Unit, which is covered by the MEU Award, in particular the positions of loader operator and yardman. Mr Coten said it was an oversight that those positions were not included in the new enterprise bargaining agreement as they were included in the previous agreement.

14 Mr Douglas Meadows testified that he is the Manager of the Transport and Waste Services Business Unit. He said that he has been employed by the Respondent for thirteen years. He said the Applicant came to work in the Transport section of the Transport and Waste Services Business Unit on the loader to relieve an employee on sick leave who was away for an extended period. He said that the Applicant was provided to him as a relief from Parks and Gardens and that he (Mr Meadows) informed the Applicant that he could be relieving for a considerable period of time, perhaps three months or more.

15 Mr Meadows said that the Applicant came to him in March 2001. When he (the Applicant) first commenced work in the Waste Department he said that he was unhappy about being "pushed and shoved to different positions and no one cared about him and things like that." Mr Meadows said that he tried to give the Applicant some encouragement and informed him "We could not guarantee that the position of depot yard loader operator would become available, but if he looked after the position then he could be favourably considered for the depot yard loader operator's position." Mr Meadows testified however; if the loader operator position became permanently available it would have to be advertised on the notice board and the Applicant would have to apply for the position. Mr Meadows denied that he ever informed the Applicant that he could have a position in Waste Management. He said that he did not have the authority to give that undertaking as all positions in Waste Management have to go through a recruitment process and a panel selects a successful applicant. He said all Driver on Full Roster or Driver on Partial Roster positions are under a different wage structure and as such must be advertised. He said he had no authority to depart from the provisions of the Respondent's Employee Recruitment Policy. He said he was very familiar with the terms of that policy as he regularly sat on interview panels. Mr Meadows said he was not aware that the Applicant's position as a General Hand in Parks and Gardens had been filled while he was working as the Loader Operator. He said the nature of Waste Management is that waste must be collected every day and the Respondent must have a cell of people to relieve for absences and that is why the Applicant, along with others who applied, were accepted for training as a relief driver.

16 Mr Meadows said that he was not impressed with the Applicant's performance as Loader Operator. He said that the Applicant had a poor attitude and did not get on well with other staff. He said that even if he could offer a job to someone without going through the recruitment process it would not have been the Applicant, as he had seen the Applicant to be speeding and it had been reported to him that he (the Applicant) was a person who would not accept instructions.

17 When Mr Meadows was cross-examined he was asked whether he was aware that the Applicant was unhappy about being transferred to Parks and Gardens and had made a complaint to the Union about not being given a position in Waste Management. Initially Mr Meadows said that he wasn't aware that the matter was disputed by the Applicant. He was then asked to recall a telephone conversation that he had with Mr Johnson in which he advised Mr Johnson that he did not see any point in meeting with the Applicant. After considering what was put, Mr Meadows slowly recalled that conversation. It was also put to Mr Meadows that if Mr Meadows had attended meetings with the Applicant, the Respondent and the Union after this dispute arose the matter could have been resolved. Mr Meadows said in response that once the Applicant returned to Parks and Gardens Mr Coten was the Applicant's manager and he (Mr Meadows) had not been asked by the Respondent to attend any meetings with the Applicant or the Union.

18 It was suggested to Mr Meadows in cross-examination that it was possible that the Applicant could have formed the belief from the conversation with Mr Meadows when he first commenced working as the relief loader operator that he was being offered a permanent position. Mr Meadows said that could not be right as it was made very clear to him (the Applicant) he was to work on the loader as a relief driver until it was known whether Mr Cunningham would return.

19 Paragraph 3 of the Respondent's Employee Recruitment Policy provides—

"**Recruitment responsibility**

The recruitment of employees is the responsibility of line management of the respective Business Unit. Managers wishing to initiate recruitment must work through the process and are responsible for adhering to this recruitment policy. Refer to: Recruitment and Selection Guidelines and Flowchart

Authority to approve vacancy

Prior to seeking approval to recruit the Manager is required to undertake a Job Analysis and ensure the Position Description is valid.

Recruitment of staff requires the approval of the relevant Manager, Executive Manager and Chief Executive Officer in accordance with procedure: Position Replacement Approval

Once approval is received the relevant documentation must be forwarded to the Human Resources Manager. No recruitment will be progressed until this information is submitted to the HR Business Unit.

Assessment of Shire of Swan personnel to fill vacancy

The availability or otherwise of internal candidates to fill a vacancy is determined jointly by the Business Unit Manager and the Human Resources Manager. Under no circumstances is a manager to make a direct approach to an employee in another area of the organisation.

Advertising

All vacancies will be advertised internally unless special circumstances exist. It is the responsibility of the Human Resources Manager to ensure the advertisement conforms with the Shire of Swan style guide and EO principles. The need to utilise an external recruitment agency is to be determined in conjunction with the Business Unit Manager and the Manager, Human Resources and must be endorsed by the relevant Executive Manager.

Selection Procedures

A Selection Panel consisting of a minimum of two but preferably three people will be responsible for the Selection Process. One of the interviewers will always be the person to whom the position reports.

The Selection process includes

Shortlisting of Applications, Development of Interview Questions,

Conducting of Interview Process, Reference Checks,

Selection Documentation, Recommendation

Making the Offer

All formal offers of employment, including the salary, must first be approved by the Chief Executive Officer. Under no circumstances should a Manager or any member of the Selection Panel verbally offer or imply an offer of employment to any applicant."

Credit

20 Having heard the evidence given by the Applicant and the evidence given by Mr Meadows, I prefer the evidence given by the Applicant to the evidence of Mr Meadows where their versions of events depart. The Applicant was not shaken in cross examination. His evidence of his conversation with Mr Meadows was clear and supported by contemporaneous notes that were not challenged by the Respondent. Whilst Mr Meadow's gave clear evidence in relation to his recollection of the conversation he had with the Applicant, in relation to other matters, Mr Meadows' recollection of events was vague.

Conclusion

21 In an application for contractual benefits under s.29(1)(b)(ii) of the Act, the onus is on the Applicant to establish that the subject of the claim is a benefit to which the Applicant was entitled under his contract of employment. In that regard, it is for the Commission to determine the terms of the contract of employment and to ascertain in a juridical manner, whether the claim constitutes a benefit which has been denied under the contract of employment, having regard to the obligations on the Commission to act accordingly to equity, good conscience and the substantial merits of the case, pursuant to s.26 of the Act (*Belo Fisheries v Froggett* (1983) 63 WAIG 2394; *Waroona Contracting v Usher* (1984) 64 WAIG 1500; *Perth Finishing College v Watts* (1989) 69 WAIG 2307).

22 The central issue in this matter turns on what are the terms of the Applicant's contract. The Applicant says it is a term of his employment that he is entitled to and has been denied appointment to a position as Driver on Full Roster or a Driver on Partial Roster in the Transport and Waste Services Business Unit and be paid in accordance with the rates of pay specified in the Shire of Swan Waste Management Services 2000 Enterprise Agreement, certified by the Australian Industrial Relations Commission on 30 March 2000 ("the Waste Management EBA").

23 The Applicant's evidence is not that he was promised a specific position in Waste Management but in the event Mr Cunningham returned to work as a loader operator, Mr Meadows would find him a position in waste management. In my view such an offer is at its highest an offer, if accepted as a contract to enter into a contract. At law, often such contracts are unenforceable. As President Kirby P in *Coal Cliff Collieries Pty Ltd v Sijehama Pty Ltd* (1991) 24 NSWLR 1 at 26 at 27 observed—

"… In many contracts it will be plain that the promise to negotiate is intended to be a binding legal obligation to which the parties should then be held. The clearest illustration of this class will be cases where an identified third party has been given the power to settle ambiguities and uncertainties: see *Foster v Wheeler* (1888) LR 38 Ch D 130; *Axelsen v O'Brien* (1949) 80 CLR 219 and *Biotechnology* (at 136). But even in such cases, the court may regard the failure to reach agreement on a particular term as such that the agreement should be classed as illusory or unacceptably uncertain: *Godecke v Kirwan* (at 646) and *Whitlock v Brew* (1968) 118 CLR 445 at 456. In that event, the court will not enforce the arrangement.

In a small number of cases, by reference to a readily ascertainable external standard, the court may be able to add flesh to a provision which is otherwise unacceptably vague or uncertain or apparently illusory: see, eg, *Powell v Jones* [1968] SASR 394 at 399; *Sweet and Maxwell Ltd v Universal News Services Ltd* [1964] 2 QB 699; cf *Meehan v Jones* (1982) 149 CLR 571 at 589; *Jillcy Film Enterprises* (at 521); *Ridgeway Coal Co* (at 408).

Finally, in many cases, the promise to negotiate in good faith will occur in the context of an 'arrangement' (to use a neutral term) which by its nature, purpose, context, other provisions or otherwise makes it clear that 'the promise is too illusory or too vague and uncertain to be enforceable': see McHugh JA in *Biotechnology* (at 156) and *Adaras Development Ltd v Marcona Corporation* [1975] 1 NZLR 324 at 331."

24 The question is whether the terms of the contract are uncertain. As Kirby P observed a Court or a Tribunal can find the agreement enforceable where it is open to imply the necessary terms to complete the agreement.

25 In this matter, under the Waste Management Enterprise Bargaining Agreement there are only two classifications, Driver on Full Roster and Driver on Partial Roster. Consequently it is open to the Commission to ascertain the nature of the position offered. However it is clear from the evidence that such positions can only be offered in accordance with the Employee Recruitment Policy. Accordingly the Commission finds that the offer made to the Applicant was subject to the Applicant being selected for a position in accordance with the selection procedures set out in the Policy.

26 If I am wrong about the terms of the offer then it is my view that the offer made to the Applicant is unenforceable as it was made without authority. In *Powell v Ronin Security Pty Ltd* [2001] WAIRC 03700; (2001) 81 WAIG 2605 at [83]; 2611 Gregor C applied the rules formulated by Diplock J in *Freeman & Lockyer v Buckhurst Park Properties (Mangal) Ltd* [1964] 2 QB 480 in respect of the acts of an agent in binding a company. At 506 Diplock L J observed;

> "(1) That a representation that the agent had authority to enter on behalf of the company into a contract of the kind sought to be enforced was made to the contractor;
>
> (2) Such representation was made by a person or persons who had 'actual' authority to manage the business of the company either generally or in respect of those matters to which the contract relates;
>
> (3) The contractor was induced by the representation to enter into the contract, that is that he/she in fact relied upon it; and
>
> (4) That under the memorandum of articles of association the company was not deprived of the capacity either to enter into the contract of the kind sought to be enforced or to delegate authority to enter into the contract of that kind to the agent."

27 Clearly Mr Meadows had no "actual authority" in that he had no power to make an offer to employ without ensuring the selection process set out in the Policy had been complied with.

28 In light of my findings the application will be dismissed.

2002 WAIRC 05789

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	DION WATT, APPLICANT
	v.
	CITY OF SWAN, RESPONDENT
CORAM	COMMISSIONER J H SMITH
DATE OF ORDER	FRIDAY, 21 JUNE 2002
FILE NO.	APPLICATION 234 OF 2002
CITATION NO.	2002 WAIRC 05789

Result	Application for denial of contractual benefit dismissed.
Representation	
Applicant	Mr A Johnson (as Agent)
Respondent	Mr S White (as Agent)

Order

HAVING heard Mr A Johnson on behalf of the Applicant and Mr S White on behalf of the Respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act 1979, hereby orders—

THAT this application be, and is hereby dismissed.

(Sgd.) J. H. SMITH,
Commissioner.

[L.S.]

Section 29(1)(b)—Notation of

Applicant	Respondent	Number	Commissioner	Result
Altmeier-Mort P	Lumen Christi College & Others	633/2002	HARRISON C	Order Issued
Anderson JA	Rod Collins (BGC Fibre Cement)	759/2002	WOOD C	Discontinued
Axisa M	Hamersley Iron Pty Limited ACN 004 558 276	2040/2001	BEECH SC	Discontinued
Bagas EA	Peerless Industrial Systems	604/2002	HARRISON C	Discontinued
Baker C	Luxe Bar Management	681/2002	BEECH SC	Dismissed
Beutel TR	Rentokil Initial Pty Ltd	354/2002	GREGOR C	Discontinued
Boyd WJ	P.R. Hepple and Sons Pty Ltd	409/2002	HARRISON C	Order Issued
Brendish GW	West Hillfarm Pty Ltd	697/2002	KENNER C	Discontinued

Applicant	Respondent	Number	Commissioner	Result
Broadley DK	Mandurah Home and Community Care (Inc) t/a Home and Community Care H.A.C.C	475/2002	SMITH C	Discontinued
Bruni AE	Glam Enterprises Pty Ltd Trading as Hector Real Estate	393/2002	HARRISON C	Withdrawn by Leave
Burns GJ	Breakwater Tavern	867/2002	GREGOR C	Discontinued
Cannon EJ	OPS Farms Pty Ltd	561/2002	KENNER C	Discontinued
Carvalho RJG	Transport Management Group t/a Southern Coast Transit	370/2002	KENNER C	Discontinued
Cauchi KE	Jones Lang LaSalle Management Services Pty Limited ACN 001 381 844	2098/2001	GREGOR C	Discontinued
Curry (Jr) WE	Phillips Petroleum Company/Phillips Petroleum Company Australia Pty Ltd (ACN 086 092 288 376)	1653/2000	SMITH C	Discontinued
Davey T	Paul Raroa t/a Gaels for Maels	765/2002	GREGOR C	Order Issued
Dewar S	Industrial Progress Corporation P/L T/A Roofmart	706/2002	HARRISON C	Order Issued
Dorey M	Adaptable Panel Beaters	407/2001	SMITH C	Discontinued
Doust EM	Australian Plantation Timber Ltd (Receivers & Managers Appointed) (Administrator Appointed) ACN 054 653 057 ("The APT Group")	579/2002	GREGOR C	Discontinued
Dunell PD	M.G. Kailil Group t/a Exmouth Pearls	2080/2001	KENNER C	Discontinued
Fitzsimmons K	Goldfields Medical Fund Inc	2155/2001	BEECH SC	Discontinued
Georgianis AM	Global Office Network Pty Ltd ABN 56 001 986 563	397/2002	HARRISON C	Discontinued
Glick LL	Detections Systems Australia Pty Ltd	164/2002	HARRISON C	Discontinued
Golding DG	Dardanup Butchering Company Nominees Pty Ltd	319/2002	GREGOR C	Discontinued
Greig AJ	Kraus Fishing Company Pty Ltd	2028/2000	SMITH C	Discontinued
Hawker AJ	Mincor Operations Pty Ltd	676/2002	GREGOR C	Discontinued
Hodge FJ	Newmont Golden Grove Operations Plty Ltd (ACN 008950178)	646/2002	KENNER C	Discontinued
Hodgson NJ	Sotico Pty Ltd	578/2001	HARRISON C	Discontinued
Hutchins MC	Melville Motors	596/2002	GREGOR C	Dismissed
Jackson MP	Novek Pty Ltd T/A Shell Combined	1905/2001	GREGOR C	Discontinued
Jones SA	Rushmore Australia Trading as Archie Martin Vox	1390/2001	KENNER C	Discontinued
Kelly P	TIWEST PTY LTD	405/2002	KENNER C	Discontinued
Kelly SB	Earthwise enterprises Pty Ltd	559/2002	GREGOR C	Order Issued
Kent JA	Westralian Pty Ltd	261/2002	KENNER C	Discontinued
Kerec T	Barminco Pty Ltd	1765/2001	GREGOR C	Discontinued
Kimber K	Collex pty Ltd	462/2002	KENNER C	Discontinued
Kounis AI	WA Freightlines Pty Ltd	1866/2001	SMITH C	Discontinued
Leafe PJ	The Calix Group	2000/2001	HARRISON C	Discontinued
Ledingham PD	Poly Tuff (W.A.) Pty Ltd	338/2002	HARRISON C	Discontinued
Lees RJ	Jo Jo's River Restaurant and Cafe	139/2002	KENNER C	Discontinued
Leete N	JDS Group of Companies	480/2002	KENNER C	Discontinued
Leonard SM	House of Stuart	363/2002	GREGOR C	Order Issued
Lewis F	Family Planning Association of WA Inc	258/2002	HARRISON C	Discontinued
Loaring S	Mr Tom Clark & Mrs Eileen Murphy - Kalamunda Community Care	256/2002	HARRISON C	Discontinued
Lyon G	Taylor Woodrow (Australia) Pty Ltd & Others	2315/2001	KENNER C	Discontinued
MacKenzie I	Phillips Petroleum Company Australia Pty Ltd	542/2002	GREGOR C	Order Issued
McCombie BA	Consolidated Enterprise Group Pty Ltd	170/2002	GREGOR C	Discontinued
McDermott SK	CSR Emoleum (Partnership between CSR Ltd,Vacuum Oil Company)	216/2001	HARRISON C	Discontinued
McGough P	BFP Management Principals Pty Ltd	565/2000	BEECH SC	Discontinued
Mettam G	Jim Kennedy J.N.P. Electrical	451/2002	SCOTT C	Order Issued
Moody JA	City Toyota	763/2002	KENNER C	Discontinued
Murray A	Rosendorff's Diamond Jewellers	2248/2001	GREGOR C	Discontinued
Nanic WJ	Freemasons Hotel	943/2000	BEECH SC	Dismissed
Ourangui R	Clinipath (Subilabs Pty Ltd)	533/2002	KENNER C	Discontinued
Passmore FJ	Armani Aluminium Windows	102/2002	BEECH SC	Discontinued
Paulin E	Ezy Plus Food Stores Pty Ltd	120/2002	GREGOR C	Discontinued
Pace PA	Newmount Yandal Operations Limited	764/2002	KENNER C	Discontinued
Payne AM	Julpath P/L ACN 009 419 309 T/AS Halls Head Small Animal Clinic	2075/2001	SMITH C	Discontinued

Applicant	Respondent	Number	Commissioner	Result
Perry GJ	Pieman Australia Pty Ltd T/AS Bovells Bakery & Others	555/2002	GREGOR C	Discontinued
Pratt MC	Alintagas Networks Pty Ltd	2278/2001	BEECH SC	Discontinued
Purdue SL	Kalgoorlie Car Wash	211/2002	GREGOR C	Dismissed
Radford MJ	Grant Halvorson	1088/2001	BEECH SC	Discontinued
Riley AM	Keedac Kaata-Koorling Enterprise & Employment Development Aboriginal Corporation	858/2002	SCOTT C	Discontinued
Rimell D	Michael Henry Services Pty Ltd	1825/2001	SMITH C	Discontinued
Sackers D	Ashton Mining Limited	381/2002	SMITH C	Discontinued
Sassine E	Palm Flag P/L	569/2002	WOOD C	Discontinued
Scott DF	Fred DeJong	446/2002	HARRISON C	Order Issued
Scott EJ	Stock R	2188/2001	HARRISON C	Dismissed
Scott J	Kondinin Shire Council	2088/2001	COLEMAN CC	Discontinued
Scott JB	Alintagas Networks Pty Ltd	2279/2001	BEECH SC	Discontinued
Silich RJ	Alps Promotions	216/2002	KENNER C	Discontinued
Silke DW	Mr L Cransberg - Spokesperson for Challenge Dairy Co-Op Ltd	144/2002	GREGOR C	Discontinued
Singh JNO	St Patrick's Community Support Centre	1917/2001	SCOTT C	Order Issued
Skayman S	Chubb Guard Services	584/2002	HARRISON C	Order Issued
Smith JR	Protection 1 Pty Ltd	74/2002	KENNER C	Discontinued
Snape CRD	Station Motors 1974 Pty Ltd	885/2002	SCOTT C	Discontinued
Spratt DM	Murchison United NL	2022/2001	SMITH C	Discontinued
Stark SM	Swan Hygiene Services Pty Ltd (ABN 66563125071)	535/2002	KENNER C	Discontinued
Sullivan HM	Balmain Enterprises Pty Ltd	359/2002	HARRISON C	Discontinued
Thorneloe LA	Australian Training Institutes	2229/2001	SCOTT C	Discontinued
Threnoworth GJ	Drilling Services International Pty Ltd	1653/2001	SMITH C	Discontinued
Thuys Y	Doric Management Pty Ltd	143/2002	KENNER C	Discontinued
Tidy S	Mr John Webb (Consolidated Business Media)	378/2002	KENNER C	Discontinued
Tomlinson A	James Hardie Australia Pty Ltd	692/2001	KENNER C	Discontinued
Wells MA	Jiffy Foods - Celeste Corporation Pty Ltd	779/2002	WOOD C	Discontinued
Whyte RC	Messrs Clive, Greg & Les Page t/a Narrogin Brick	651/2001	WOOD C	Dismissed
Willey B	Rexel Australia Ltd	1903/2001	WOOD C	Discontinued
Williams RJ	Doric Management Pty Ltd ABN 97 080 922 489	116/2002	KENNER C	Discontinued

CONFERENCES—Matters arising out of—

2002 WAIRC 05751

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES UNITED MAINTENANCE PTY LTD, APPLICANT

v.

THE AUTOMOTIVE, FOOD, METALS, ENGINEERING, PRINTING AND KINDRED INDUSTRIES UNION OF WORKERS - WESTERN AUSTRALIAN BRANCH, RESPONDENT

CORAM COMMISSIONER S J KENNER

DATE MONDAY, 17 JUNE 2002

FILE NO/S. C 124 OF 2002

CITATION NO. 2002 WAIRC 05751

Result Recommendation issued.

Representation

Applicant Ms J Wesley as agent

Respondent Mr J Ferguson

Recommendation

WHEREAS by application dated 13 June 2002 the applicant made application to the Commission for an urgent conference pursuant to s 44 of the Industrial Relations Act 1979 ("the Act");

AND WHEREAS the Commission convened a conference pursuant to s 44 of the Act on 17 June 2002 at which conference the Commission was informed that the parties were in dispute in relation to certain terms and conditions of employment at the HBI plant in Port Headland;

AND WHEREAS the Commission was informed that approximately 49 employees of the applicant, members of or eligible to be members of the respondent, commenced indefinite industrial action on Wednesday 12 June 2002 in pursuit of the matters in dispute, including an increase in the casual loading from 20% to 25%; an increase in hourly wage rates; the provision of bluey jackets; night shift loading to be paid on all hours worked; and the R & R cycle to be reduced from seven weeks and one week off to six weeks and one week off;

AND WHEREAS the applicant informed the Commission that the parties are bound by and subject to an industrial agreement known as the United Maintenance Pty Ltd HBI Agreement 2000 ("the Agreement");

AND WHEREAS the applicant submitted that a number of the respondent's claims are contrary to the no extra claims provision of the Agreement and the respondent submitted that work was being performed including thermal lancing warranting additional consideration;

AND WHEREAS the Commission, in an endeavour to assist the parties in a resolution of the dispute, determined that it would issue a recommendation;

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 question, in accordance with the provisions of the Act 1979 hereby recommends –

(1) THAT the employees of the applicant presently engaged in industrial action concerning matters the subject of these proceedings cease such industrial action to ensure a return to work as soon as possible following a meeting of employees scheduled for 10.00 hours on 17 June 2002.

(2) THAT the applicant and the respondent immediately confer in relation to the issues the subject matter of the present dispute and that those discussions progress in accordance with clause 7 - Avoidance of Disputes of the Agreement.

(3) THAT the Commission's Deputy Registrar - Karratha be available to assist the parties in accordance with clause 7 of the Agreement and to investigate and report to the Commission accordingly.

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

2002 WAIRC 05885

BREAKDOWN IN NEGOTIATIONS FOR 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	FRIDAY, 28 JUNE 2002
FILE NO.	C 64 OF 2000
CITATION NO.	2002 WAIRC 05885

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 obtained a further extension by consent until 30 March 2002; and

WHEREAS the parties obtained a further extension by consent until 30 June 2002; and

WHEREAS the parties by correspondence dated 26 June 2002 sought a consent order to extend the period of operation of the agreement until 31 August 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 31 August 2002.

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

CONFERENCES—Matters referred—

2002 WAIRC 05797

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE AUSTRALIAN WORKERS' UNION, WEST AUSTRALIAN BRANCH, INDUSTRIAL UNION OF WORKERS AND OTHERS, APPLICANTS
	v.
	BHP IRON ORE LTD, RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	FRIDAY, 21 JUNE 2002
FILE NO/S.	CR 40 OF 2001
CITATION NO.	2002 WAIRC 05797

Result	Application dismissed.
Representation	
Applicants	Mr M Llewellyn
Respondent	Mr T Power of counsel and with him Mr H Downes of counsel

Reasons for Decision

1. This matter is one referred pursuant to s 44(9) of the Industrial Relations Act 1979 ("the Act"). The subject matter of the referral is a dispute between the applicant and the respondent concerning the issuance of disciplinary notes to file to members of the applicants employed by the respondent at its operations in Newman as a result of their attendance at a stop work meetings held on 1 February 2001.

2. In short, the applicants contended that the attendance by their members at the stop work meeting was authorised either by the terms of what the applicants say was the relevant Industrial Relations Agreement or alternatively, by the giving of express authorisation by the respondent to attend the stop work meeting. It was therefore contended that the notes to file ought to be removed and an order is sought accordingly.

3. The respondent claimed that the attendances at the stop work meetings by members of the applicants were unauthorised and accordingly, the disciplinary notes to file were warranted and they ought not to be removed by order of the Commission.

4. Mr Llewellyn appeared on behalf of the applicants and Mr Power of counsel and with him Mr Downes of counsel, appeared on behalf of the respondent. Both parties presented detailed and carefully argued cases.

The Issues

5. There are two issues that arise in relation to these proceedings. Those issues are—

(a) Whether the terms of the unregistered Industrial Relations Agreement (revised 1997) ("the 1997 Agreement") are incorporated into the BHP Iron Ore Enterprise Bargaining Agreement 1997 ("EBA 3") and/or the employees' contracts of employment; and

(b) If the answer to (a) is no, whether as a matter of fact, the employees concerned attended the relevant stop work meeting with the consent of the respondent.

6. I first turn to the incorporation issue.

Incorporation of 1997 Agreement

7. The thrust of the applicants' argument in relation to this issue was as follows. By clauses 1 and 2 of EBA 3, reference is made to the parties "commitment" to the 1997 Agreement. It was submitted that the incorporation, expressly, of this "commitment" to the 1997 Agreement, has the effect of incorporating the terms of the 1997 Agreement itself into EBA 3. The applicants also contended that as by clause 2 of EBA 3, it is a condition of employment for every employee of the respondent covered by EBA 3 that they comply with the terms of the 1997 Agreement this means that the 1997 Agreement provisions are also incorporated into the employees' contracts of employment.

8. The significance of this issue is that by the terms of the 1997 Agreement at clause 6.0, there is the ability for stop work meetings to be held as required, for a maximum duration of two hours. This is in contrast to the terms of the unregistered Industrial Relations Agreement (1997 - as Amended) ("the 1999 Agreement"), that succeeded the 1997 Agreement, which at clause 6.0, makes no provision for stop work meetings.

9. The applicants' submission therefore was that if its contention that the 1997 Agreement is incorporated into EBA 3 as a matter of law is correct, then the employees' attendance at the stop work meeting must be regarded as duly authorised, as it occurred consistent with the terms of the 1997 Agreement.

10. The respondent submitted that the 1997 Agreement is not incorporated by reference into EBA 3 and it was not, at any material time, bound by the 1997 Agreement. The submission of the respondent was that clauses 1 and 2 of EBA 3 do not have the effect contended by the applicants. Counsel's submission was that the reference to the incorporation of a "commitment" to the 1997 Agreement should be construed as a descriptive provision, similar to recital provisions in a formal contract. The thrust of the submission therefore being that the references to the 1997 Agreement in EBA 3 are, in essence, statements of intent and were not intended nor should they be taken to be, express incorporation by reference.

11. Furthermore, counsel submitted that the provisions of clause 2 dealing with employees' conditions of employment should be read as referring to the 1997 Agreement as long as that agreement remained in effect. It was submitted there would be some serious unintended consequences, if this were not so, given the history of the development of various registered and unregistered industrial instruments applicable to the respondent's operations. This submission had significance because it was contended by the respondent that in or about July 1999, the respondent retired from the 1997 Agreement, by giving 30 days notice in accordance with the retirement provision contained in that agreement.

12. Clauses 1 and 2 of EBA 3 provide as follows—

"1.0 Summary of Agreement

On 15 September 1997, the parties to this Agreement began negotiations that have concluded with this Agreement. As with previous agreements three objectives guided discussions. These three objectives were—

- *Cost Efficiency*
- *Reliability*
- *Flexibility*

This Agreement, with a term of two years incorporates the following—

- *A commitment to the Industrial Relations Agreement (Revised 1997) and the Programme to Maintain Good Industrial Relations (Revised 1997) to maintain Continuity of Operations.*
- *Changes to the Ongoing Change Agreement*
- *A commitment to Continuous Improvement.*
- *Improvements in the employment benefits available to employees.*

The union parties to this Agreement have formed a Single Bargaining Unit. The Single Bargaining Unit has concluded negotiations with the Company. Combined mass meetings have occurred at each site. The majority of employees across the three sites have agreed to the proposed changes. This document details the agreed changes.

This Agreement covers approximately 800 employees at Newman, 600 employees at Nelson Point and 200 employees at Finucane Island.

2.0 Continuity of Operations

The parties acknowledge the need for BHP Iron Ore Pty Ltd (BHP Iron Ore) to be a reliable producer and supplier of quality iron ore.

Further to this the parties acknowledge that market pressures from direct competitors in the area of reliability means that industrial action diminishes BHP Iron Ore's credibility in the world market.

To address this issue the parties have renewed their commitment in the form of the Industrial Relations Agreement (Revised 1997) and the programme to Maintain Good Industrial Relations (Revised 1997).

It is a condition of employment for every employee of BHP Iron Ore employed at the Mount Newman Joint Venture will comply with the terms of the Industrial Relations Agreement (Revised 1997).

It is a condition of employment for every employee of BHP Iron Ore employed at the Mount Goldsworthy Mining Associates Joint Venture will comply with the Programme to Maintain Good Industrial Relations (Revised 1997)."

13. The relevant principles in relation to the interpretation of awards and other industrial instruments are well established. This involves a reading of the instrument itself and the words being given their ordinary and natural meaning: *Norwest Beef Industries Limited v Australian Meat Industries Employees' Union WA* (1985) AILR 73; *Nationwide News (trading as Sunday Times) v Printing and Kindred Industries Union (WA Branch) and Anor* (1988) AILR 358. Additionally, industrial instruments are to be generously construed and this is particularly the case when considering the terms of an industrial agreement, which arises from the consensus of the parties: *AITCO v Federated Liquor and Allied Industries Employees' Union* (1988) AILR 382.

14. In the case of industrial agreements, with which the Commission is here concerned, the principle of "generous construction" has even more relevance. In *AITCO*, noted above, the South Australia Industrial Court, when dealing with the issue of interpretation of an industrial agreement said—

> "We are here construing not an award of the Commission but an industrial agreement, which results from consensus between the parties. In construing such a document we must, by viewing the matter broadly and giving heed to every part of the agreement, endeavour to give it a meaning which is consistent with the general intention of the parties to be gleamed from the document as a whole."

15. In my opinion, it is beyond doubt that as with the position concerning contracts at common law it is open for parties to an industrial agreement to incorporate by reference, the terms of another instrument. As with contracts, whether or not such express incorporation has been effective, will depend upon the construction to be given to the relevant provisions of the contract or industrial agreement, as the case may be. In general terms however, because of the consequences of incorporation by reference, as substantially extending the terms of the instrument under consideration, for there to be incorporation this needs to be supported by plain words to that effect.

16. Having considered the arguments of both the applicants and the respondent, in my view, the respondent's submissions as to the incorporation issue are to be preferred to those advanced by the applicants.

17. Firstly, it is significant to note that in the second paragraph of clause 1 of EBA 3, express reference is made to incorporating a number of things, including "A commitment to the Industrial Relations Agreement (Revised 1997)..." In my opinion, the draftsperson of the clause did not incorporate the 1997 Agreement itself, but rather, a commitment to it. Had the intention been to actually incorporate the 1997 Agreement itself into EBA 3, then words to that effect could easily have been included. They were not.

18. Secondly, it is also apparent that the balance of the second paragraph of clause 1 refers to a number of other matters being incorporated including "changes to the Ongoing Change Agreement". It is not insignificant to note that in relation to this matter, there is a specific clause, that being clause 3 referring to and setting out the Ongoing Change Agreement. This is to be compared and contrasted to the position regarding the 1997 Agreement, in relation to which the only reference is to "a commitment".

19. Thirdly, also referred to in the second paragraph of clause 1, is a reference to the incorporation of "A commitment to Continuous Improvement". Again in my opinion, the reference to "commitment", consistent with the reference to the commitment to the 1997 Agreement, is of a descriptive character affirming the parties' acceptance and promotion of continuous improvement.

20. Furthermore, the reference to "improvements in the employment benefits" is again by contrast, clearly a reference to express terms of EBA 3, which contain such improvements.

21. Moreover, it is not inconsequential to note in my opinion, that clause 1 is entitled "Summary of Agreement". This title of the clause is more consistent with a provision of a descriptive character rather than a prescriptive, operative part of the agreement. It provides a form of statement of intent as to the operation of the agreement, no doubt because it arose from extensive negotiations. Additionally, the substantive provisions of the agreement then follow.

22. In the alternative, if clauses 1 and 2 of EBA 3 are to be read as an incorporation of the actual terms of the 1997 Agreement, then this must also be taken in my opinion, to include an incorporation of the respondent's right of retirement from the 1997 Agreement, as contained in clause 9.0 of that agreement, by the giving of 30 days notice. The respondent cannot be bound to an industrial instrument in respect of some of its provisions and not others, unless this is expressly provided. There is no such express provision contained in EBA 3, as it refers to the 1997 Agreement.

23. Furthermore in my opinion, consistent with the nature of unregistered industrial instruments, if express incorporation was effected, then the reference to the 1997 Agreement ought be read as the 1997 Agreement as amended from time to time and whilst that agreement remains in effect. In my opinion, the implication of these words into the relevant provisions of clauses 1 and 2 is necessary to give effect to the intention of the parties to EBA 3 and the 1997 Agreement when it was made. It is almost inconceivable that the parties would have intended that they be bound by two unregistered industrial agreements, containing largely the same subject matter, with one of them clearly being later in time. This is also consistent with the nature of industrial instruments generally, that they reflect industrial and workplace arrangements as they may develop over time. If these words were not implied into the provisions of clauses 1 and 2, then there would be some extraordinary consequences which in my opinion, could never have been intended by the parties.

24. As a matter of interpretation principle, where there are two competing interpretations, that which avoids an absurd result is to be preferred: *Cooper Brookes (Wollongong) Pty Ltd v FCT* (1981) 35 ALR 151.

25. I am therefore not persuaded that the first issue is to be resolved in the applicants' favour. Accordingly, consideration must now be given to the second issue that being, whether as a matter of fact the relevant employees attended the stop work meeting with the consent of the respondent.

Attendance by Consent

26. Extensive evidence was led by both the applicants and the respondent in relation to the factual issues. Both oral and written evidence was adduced from 15 employee witnesses, three of whom are also union officials who attended the stop work meeting. The respondent called evidence from nine witnesses.

27. The evidence from employees came from those in the mine maintenance and ore processing departments respectively.

28. Mr Kumeroa is a production worker level 4 in the mine production department of the respondent. He is also a union representative for the Transport Worker's Union. Mr Kumeroa gave evidence in relation to a dispute between the unions and the respondent in relation to the introduction of contractors in the mine production department in late 2000 and early 2001. This matter concerned the contracting out of cleaning and maintenance of signs and reflectors. The matter was the subject of proceedings before the Commission as presently constituted, which determined the matter in the respondent's favour. (See (2001) 81 WAIG 721 and 723).

29. Immediately following that decision, the respondent advised the union that it was intending to proceed with bringing contractors on to site very shortly thereafter. At about that time apparently, the union were considering and indeed did file an appeal against the Commission's decision and sought a stay of operation of the Commission's declaration. Mr Kumeroa testified that at about this time, the unions sought the agreement of the respondent that the status quo be applied and that the respondent not bring the contractors on to site until the appeal proceedings were concluded. The respondent indicated that it would not agree to this. On 1 February 2001 Mr Kumeroa and Mr Beggs, another union representative, met with Mr Spoonhiem and Mr Lohse of the respondent to discuss the matter. At that meeting Mr Kumeroa indicated that in light of the respondent's refusal to hold off on bringing the contractors to site, the unions had no option other than to take industrial action.

30. Some discussion took place as to what this would involve and Mr Kumeroa advised that he would be speaking to all of the employees on the "hill". For safety reasons, the respondent advised the unions that it would bring the employees off the hill for the purposes of the meeting.

31. Mr Kumeroa testified that at no stage in this meeting was he advised that the stop work meeting would be unauthorised or would be regarded as a breach of the employees' contracts of employment. The meeting took place and at approximately 4.30pm Mr Kumeroa met again with representatives of the unions and the respondent's management. At this meeting the respondent undertook that if the unions' stay application was successful then the contractors would be removed from site. This was in turn relayed to the employees at the stop work meeting and on this basis there was to be a return to work which occurred at some time after 6.00 pm that evening. Mr Kumeroa also said that at no point during the second meeting with the respondent's management, was there any mention of the employees' contracts of employment being breached by the stop work meeting nor that the employees would receive warnings for attending.

32. The next day on 2 February, employees, members of the applicants, were called into disciplinary meetings which Mr Kumeroa attended. He testified that there were about 28 employees involved. Mr Kumeroa took notes of these meetings, and the meetings with management previously, which were annexures RK 1, 3 and 4 respectively. As to the content of the disciplinary meetings, Mr Kumeroa testified that employees were asked the same questions from what appeared to him to be a prepared list of questions. Those questions included whether attendance at the stop work meeting was—

    (a) a breach of the employees' contract of employment;

    (b) a breach of the federal court injunction; and

    (c) a breach of the Industrial Relations procedure.

33. Questions were also asked as to who the employees told about their attendance at the meeting. According to Mr Kumeroa, all the employees answered no to the questions asked at par 32 above. As to the question of authorisation, Mr Kumeroa testified that answers to these questions varied with some employees saying the unions told them to go and others said they were told to "park up" their vehicles by their supervisor.

34. Disciplinary notes to file were subsequently issued. The disciplinary notices were in a common form and were to the effect that the attendance at the stop work meeting from approximately 3.00 pm to 6.00 pm on 1 February 2001 was not approved and was contrary to the respondent's Industrial Relations procedures and constituted a breach of the employee's contract of employment. Employees were warned that any further breach of their contracts of employment may lead to further disciplinary action.

35. On 1 February 2001 Mr Greaves was acting as a charge hand. Mr Greaves testified that he was contacted by a shop steward who told him that there was a meeting at shift change at 2.30 pm. He did not attend the meeting until 3.00 pm. Mr Greaves said that he told Mr Tuke that he was attending the stop work meeting. Mr Greaves gave evidence that at that time Mr Tuke asked him if everything was "all right". He completed the shift hand over and proceeded to the meeting.

36. The next day Mr Greaves was called into a disciplinary meeting involving Mr Tuke and other representatives of the respondent. Mr Greaves testified he was asked a number of questions at the meeting. He was asked by Mr Tuke who he had told that he was going to the meeting and said that it was Mr Tuke. Mr Greaves was issued a written warning following the investigation meeting.

37. Mr Stead is employed as a mechanical tradesperson in the field maintenance department of the respondent at Newman. He also holds the position of site convener for the AMWU and has held that position for some years. Mr Stead outlined the background to issues between the union and the respondent concerning the use of contractors in the maintenance department. Mr Stead testified that on 31 January 2001 he was contacted by his unions' acting shop steward and the AWU convener Mr Beggs, about issues arising with notification of contractors. The employees in the maintenance area wanted to discuss the matter with the relevant union officials.

38. As a result, Mr Stead arranged a meeting to take place at 3pm that day. He testified that he informed the relevant supervision that there would be a stop work meeting that afternoon in order for discussions to take place with employees concerning the contractor issue, which meeting would not take more than 30 minutes or so. It was Mr Steads' evidence that he considered that such a meeting was permitted under "the IR Procedure 1997". Mr Stead said he thought the person he notified was a supervisor Mr Banks, who did not comment that the meeting, if it took place, would attract any discipline.

39. Mr Stead also said that he understood that the meeting would be an unpaid stop work meeting, consistent with a practice that he said had developed at the respondent since July 1999. Mr Stead informed his own supervisor that he was attending the mine engineering workshop to conduct the meeting with the employees. Apparently, no comment was made to Mr Stead as to whether he could or could not attend the meeting. The meeting took place. A motion was carried unanimously from the meeting. This motion called upon the respondent to deal with contractor notification in a manner different to that adopted by them of recent times. The following day on 1 February, it became apparent to Mr Stead and other union officials, that the question of contractor retention was a matter of wide spread concern to the workforce. Accordingly, a stop work meeting was arranged for all of the work areas, those being the MEW, mine production and ore processing maintenance to take place at about 3.15pm that afternoon. Mr Stead testified that he notified human resources of this meeting at about 2.30pm. He was not told, according to Mr Stead, that this meeting would attract any special consideration or disciplinary action for those employees who attended.

40. This meeting then took place. The meeting adjourned to enable representatives of the unions and management to discuss the matter, as outlined in Mr Kumeroa's evidence. Mr Stead said at no time were the union representatives advised of any problems in holding this meeting.

41. The following day, Mr Stead was also notified that there would be disciplinary inquiries undertaken concerning the attendance by employees at the stop work meeting on 1 February. As with Mr Kumeroa, Mr Stead attended these meetings and confirmed that the same questions were asked of all employees. It was Mr Stead's evidence that in relation to who told the employees of the meeting, the answers given were predominantly either the relevant shop steward or himself. As to who the employees informed that they were attending the meeting, according to Mr Stead, the responses were either that the employees told the supervisor or the shop steward informed the supervisor. None of the employees, according to Mr Stead, were advised not to attend the meeting.

42. In cross examination, Mr Stead confirmed that when he spoke with Mr Lohse from human resources on 1 February, he told him of the meeting to take place that afternoon and was not asking for his permission to hold it.

43. Because of the nature of the factual issues in dispute, it is necessary for me to set out the evidence given by each of the employee witnesses called, in relation to the permission issue, which I do as follows.

44. Mr Williams is presently employed as a production worker level 4 in the mine production department at Newman. He has been employed by the respondent for over 15 years. He testified that on 1 February he was moving cable in the east pit, which is located approximately 3 km from the hill crib room. At about 2.30pm he was instructed by his supervisor to take the loader he was using back to the crib room as it was needed in another area. He did so and arrived at the crib room at about 3.00pm and noticed that there were a number of trucks "parked up". He contacted a Mr Gengell in the truck control to ask what was happening. He testified that he was informed by Mr Gengell that all of the award employees had a meeting at the shift change. Mr Williams testified that he told Mr Gengell that he could not at that time go down to the meeting, as he had to proceed to the east pit to make the cable truck he was working with safe.

45. Mr Williams testified that he could recall Mr Manson, one of the respondent's team leaders, coming down to see him but denied that any comment was made about whether he could attend the meeting or not. Mr Williams said that he then went to the meeting, and left the hill at about 3.30pm.

46. The next day, Mr Williams was called to attend a disciplinary meeting about his presence at the meeting. He testified that he was asked a series of questions including whether he knew that attendance at the stop work meeting was a breach of his contract of employment; if he knew that he had breached the IR procedure and if he knew that he had breached the Federal Court injunction. Mr Williams said he answered no to these questions. Mr Williams also said that he told the respondent he left the hill at about 3.30pm but was advised that he would have his pay docked from 2.30pm instead. He also subsequently received a final written warning from the respondent.

47. Mr Kemp said in his witness statement tendered as exhibit A3—

> *"On 1st February 2001 at approximately 1500 hours I had a phone call from my convenor Doug Stead informing me that there was a stop work meeting at the shift change on the mine, concerning contractors.*
>
> *I then informed my work group of the meeting that was to take place. I then informed my immediate supervision Ray Wacker that we were going to a stop work meeting. Ray asked me how long the meeting would be, and I replied that I did not know at that stage. The work group then went to the stop work meeting."*

48. Mr Lenihan in his witness statement tendered as exhibit A5 said:

> *"My shop steward Dave Dewar notified me of a stop work meeting on the 1st February 2001. I was working on the hill at the time so I let Tanya McKendry (production) know what I was going to attend the meeting, I then made my way back to the workshop. When I parked my truck (MT 10) in the workshop I saw my Foreman Ian Banks and told him that I was going to the stop work he replied "OK but you realised that it is not a paid meeting" I replied "I am aware of that" he then asked me to leave the truck in the workshop.*
>
> *I left the workshop approximately 15 minutes later than the rest of the work group and arrived at the meeting late.*
>
> *I was never told by Supervision that I could not attend the stop work meeting."*

49. Mr Ashford, in his witness statement which was exhibit A14, said as follows—

> *"On the 1st February 2001 at approximately 3.00pm the shop steward Vic Kemp told me that we had a stop work meeting at the mining shift change area.*
>
> *After he had informed me he said he would go and tell the foreman Ray Wacker.*
>
> *He came back a short time after and stated that he had told Ray and we were ok to attend the stop work meeting.*
>
> *At the time no company representative had seen me and told me I was in breach of my contract of employment."*

50. Mr Thomas, in his witness statement which was exhibit A15, said—

> *"On the 1st February 2001 there was a stop work meeting regarding contractors. Dave Dewar informed us there was a meeting at amenities 4 and he would inform I. Banks. I was working in front of the office. A short time later I. Banks came out of the office and told me to make sure my tags were not left on the machine. I passed this message on to other people as we packed and washed up."*

51. Mr Chadwick in his witness statement, which was exhibit A16, said as follows—

> *"I am employed by BHP as a boilermaker in the General Workshop.*
>
> *On the 1st February 2001 at approximately 2.30pm I was told by Doug Stead my Convenor a meeting was going to be held down the bottom shift change. I removed my tag and drove my truck down to my work area and walked across to the meeting at 3.00pm.*
>
> *I was not approached by Supervision prior, during or after the meeting."*

52. Mr Ryman, said in his witness statement which was tendered as exhibit A17—

> *"I am employed by BHP and work in the field maintenance group as a leading hand mechanical fitter.*
>
> *On the 1st February 2001 my Convenor Doug Stead who also works in the same area informed me we were having a stop work meeting down at Production shift change area. Doug had also told me he had informed our foreman Ron Brown. We left the hill and attended the meeting at 3pm.*
>
> *When the meeting concluded we went back onto the hill removed my tags, left the shovel in a safe condition and packed up my tools.*
>
> *At no time was I informed by Supervision that I was breaching my contract of employment."*

53. Additionally, a number of employees filed witness statements in reply to those of the respondent. I will deal with that evidence after the respondent's evidence.

54. Mr Lohse is the senior employee relations adviser for the respondent at Newman. Mr Lohse has been employed with the respondent in this role since March 1999. Mr Lohse gave evidence about his involvement with the various industrial relations agreements applicable at the respondent. He testified that when he commenced his employment, he became aware shortly thereafter that there were negotiations on foot to conclude a new industrial relations agreement to replace the 1997 Agreement. Mr Lohse said that he maintained a file in relation to the 1997 Agreement and the new proposed agreement. He testified that he was advised by either Mr Keddie or Mr Wheeler, two of his colleagues in human resources, that the respondent had given notice to the various unions of its intention to withdraw from the 1997 Agreement, with effect from 1 June 1999.

55. Mr Lohse referred to a letter dated 19 April 1999 in this regard, from Mr Wheeler to the representatives of the various unions. A copy of this letter was annexed to Mr Lohse witness statement and it referred to the respondent's need to review its industrial relations arrangements in view of changes to its business. Attached to this letter, was a copy of the new industrial relations agreement which was the subject of discussions between the parties at a meeting earlier on 9 April 1999. Also annexed to Mr Lohse's witness statement, were two letters from the single bargaining unit on behalf of the joint unions. In one of these letters, dated 2 June 1999 to Mr Wheeler, the single bargaining unit notified its intention to implement a number of changes in the operation of the current industrial relations agreements. The single bargaining unit stated that in return for these changes, it expected that the respondent would withdraw its 30 day notice of intention to withdraw from the 1997 Agreement.

56. Mr Lohse testified that following this, at a meeting between the respective unions and the respondent, the respondent agreed to extend the date on which it was to withdraw from the 1997 Agreement from 1 June to 1 July 1999. According to Mr Lohse, despite further meetings between the parties, no consensus was reached as to the new industrial relations agreement. An application was then made by the combined unions to this Commission on 28 June 1999 to deal with the issue. At that time, Mr Lohse testified that the respondent was of the view that it had withdrawn from the 1997 Agreement, with effect from 1 July 1999.

57. There was no evidence before the Commission as to what arose out of the proceedings before the Commission, arising from the unions' application. There was also no evidence before the Commission that the respondent had at any time, formally withdrawn its 30 day notice given pursuant to the 1997 Agreement.

58. Mr Lohse testified that following, on 2 July 1999, Mr Keddie circularised around the site a memorandum to all union convenors and stewards, advising them that the 1997 Agreement had been replaced by the proposed 1999 Agreement. Thereafter, on 23 July 1999, Mr Bartlem, on behalf of the single bargaining unit, sent a facsimile letter to Mr Wheeler confirming that mass meetings of union members on 21 and 22 July 1999 had endorsed proposed changes to the industrial relations agreement.

59. Mr Wheeler by letter dated 27 July 1999, notified all relevant unions of the advice from the single bargaining unit and that the 1999 Agreement would therefore immediately apply at the respondent's sites at Newman, Nelson Point and Finucane Island.

60. Mr Lohse also gave evidence that following this, a number of briefing sessions were held on site with the relevant union officials, explaining the operation of the 1999 Agreement and differences between it and the 1997 Agreement. It was Mr Lohse's evidence that he understood that the 1999 Agreement entirely replaced the 1997 Agreement, which ceased to have effect because the respondent formally retired from it. Also, he testified that from the conduct of the parties since about July 1999, it was clear that only the 1999 Agreement had been applied.

61. The procedure for holding mass stop work meetings under the 1999 Agreement was also described by Mr Lohse. He testified that the 1999 Agreement contains no reference to stop work meetings. Instead, it refers to mass meetings, which is a term that was not used in the 1997 Agreement. Mass meetings under the 1999 Agreement can be held no more than on a monthly basis for a maximum duration of 2 hours. Those meetings must be authorised and can be held on either a paid or unpaid basis. Mr Lohse was unable to recall any such mass meetings which have been authorised and paid. He testified however, that there have been a number of authorised and unpaid mass meetings which he referred to. Annexed to Mr Lohse's witness statement were various written requests from the unions and written authorisation from the respondent to hold mass meetings on an "authorised unpaid" basis. Mr Lohse said that this was the process for holding mass meetings that is, a written request was received from the relevant union and there was a response from the respondent.

62. Mr Lohse gave evidence about meetings prior to 1 January 2001. He said that all such meetings were held in accordance with the 1999 Agreement in that they were authorised and either paid or unpaid. He referred to only two exceptions to this that being industrial action which occurred on 13 and 14 December 1999 and on 17 and 21 January 2000 in relation to the

workplace agreements dispute. Mr Lohse understood that this industrial action was protected industrial action under Commonwealth law and accordingly, no disciplinary action was taken.

63. Mr Lohse outlined the chronology of events in relation to the 1 February stop work meeting. In particular, he referred to the meeting on 1 February between himself, Mr Spoonhiem and Mr Kumeroa and Mr Beggs in relation to the unions request for a meeting. Mr Lohse gave evidence that during the course of this meeting, following a break in the meeting where advice was sought from other senior management of the respondent, that Mr Spoonhiem, in the presence of Mr Lohse, advised both Mr Kumeroa and Mr Beggs that if there was any withdrawal of labour by the employees over this issue, then this would be regarded as a breach of the Industrial Relations Agreement, the Federal Court injunction and of employees' contracts of service. Annexed to Mr Lohse's witness statement, was a record of this meeting referring to the issues raised, including the comments by Mr Spoonhiem as to the consequences of a withdrawal of labour.

64. As a result of the union's intention to hold a meeting, management discussed the need to have employees come off the hill in a safe manner, leading to the respondent's decision that supervision would escort employees off the hill. Mr Lohse said that during the afternoon, he began receiving reports from supervisors and management that employees were being brought off the hill in accordance with the arranged procedure. Apparently, a "script" was prepared which was to be given to supervisors to read to employees to ensure that they understood the respondent's position in relation to the stop work meeting. It was common ground that the "script" read as follows—

> "*Why are you leaving the hill?*
>
> *I am instructing you to remain on the job and not leave the hill.*
>
> *We believe the unions have called a stop work meeting.*
>
> *This meeting has not been authorised by the company.*
>
> *Should you attend this meeting you will be in breach of—*
>
> - *Your contract of employment*
> - *IR Agreement (Clause 2 – Continuity of Operations)*
> - *Federal Court injunction on Industrial Action*
>
> *Should you attend this meeting you will be subject to disciplinary action.*
>
> *If you now require transport to attend this unauthorised meeting the company will provide transport purely on a safety basis. This in no way condones the unauthorised meeting.*
>
> *Do you understand this?"*

65. At about 2.35pm that afternoon, Mr Lohse received a telephone call from Mr Stead. A note was made of that telephone discussion. This note, which was annexed to Mr Lohse's witness statement as "MDL9" recorded that Mr Stead telephoned him to advice of a stop work meeting at 3.00pm that afternoon. Mr Lohse asked Mr Stead whether he was asking him if he could have a meeting or was telling him that a meeting was to take place, in response to which Mr Stead said he was telling him. The note also records that Mr Lohse advised Mr Stead to the effect that any withdrawal of labour would be a breach of the "IR Agreement".

66. At approximately 4.00pm Mr Lohse received a further telephone call from Mr Stead. Mr Stead requested a meeting with management to discuss some issues. At approximately 4.35pm a meeting took place with the union representatives and representatives of management. At that meeting, the issue of contractors coming on to site to perform maintenance work on signs and reflectors was discussed and according to Mr Lohse, dealt with fairly quickly. The respondent undertook to provide a letter confirming its position, that being if the union's application for a stay of the Commission's declaration issued in application CR 308 was successful, then the contractor would be removed from site. According to Mr Lohse, the rest of this meeting dealt with the use of contractors generally.

67. Mr Lohse received advice that the stop work meeting ended at about 5.30pm but was also advised that some production employees remained in or around the shift change area until the end of shift rostered to occur at 6.30 pm. The following day, on 2 February, Mr Lohse took part in a telephone conference with site and senior management of the respondent. It was decided that there would be disciplinary investigations conducted with every employee who attended the unauthorised stop work meeting, in the respondent's view. A further "script" was prepared for each of the relevant supervisors and managers in their particular work areas. It was common ground that the text of this "script" was as follows—

> *"This is an investigation into your unauthorised absence from the job yesterday.*
>
> *1) Why did you leave the job?*
>
> *2) Who called the meeting?*
>
> *3) What was the meeting about?*
>
> *4) You were told prior to the meeting that it was unauthorised, weren't you?*
>
> *5) Do you understand that your unauthorised attendance at the meeting was a breach of your*
>
> - *Contract of Employment*
> - *The IR Agreement Clause 2 which states no industrial action will occur*
> - *The Federal Court injunction on Industrial Action*
>
> *6) Will advise our findings in writing."*

68. Mr Lohse said that following the disciplinary investigations, all of the forms containing the questions and answers were returned to him. A further telephone conference took place between Mr Lohse and other senior management of the respondent. Mr Lohse said that the employee responses during the disciplinary investigations were discussed and considered. A decision was taken as a result of this telephone conference that the employees who attended the 1 February 2001 unauthorised stop work meeting would be given a note to file.

69. Mr Dunbar is the respondent's manager mining. During the period relevant for the purposes of these proceedings, he was mines services supervisor. Mr Green is employed by the respondent as supervisor operations training. Mr Dunbar gave evidence that at about 1.30pm on 1 February 2001 Mr Spoonhiem, to whom he reported, telephoned him and requested that he attend a meeting in his office. Also at this meeting were Mr Green and Mr Manson, team leaders employed by the respondent. Mr Dunbar testified that Mr Spoonhiem told those at the meeting that the union shop stewards had called a stop work meeting and that they were to go up onto the hill and safely escort employees from the hill. He also advised those present, according to Mr Dunbar, that employees were to be told that the meeting was unauthorised. The supervisors were to attend the hill in pairs with Mr Dunbar to accompany Mr Green and Mr Manson would accompany the respondent's

mining co-ordinator. A copy of the "script" that contained the relevant questions, set out above, was given to the supervisors. Additionally, two mining engineers, Mr Varpins and Mr Kohn, were to form a third pair to go on to the hill.

70. According to Mr Dunbar, Mr Spoonhiem told those at the meeting that it was important that the employees who were going to leave the workplace were aware of the respondent's position and that the purpose of escorting employees off the hill was to ensure for that this was done safely. Mr Dunbar gave evidence that when he and Mr Green were proceeding to the hill, they decided to change the first question slightly to the effect that "we believe the unions had called a stop work meeting, do you know about it?"

71. Mr Dunbar and Mr Green arrived at the bottom of the pit at about 1.40pm. Mr Dunbar had a notebook with him and he made notes as he went. Mr Dunbar and Mr Green were directed by the dispatcher to attend Bench 24 where they found Mr Ross, a mine worker. He was parking truck 268. Mr Dunbar testified that when they parked next to his truck, Mr Ross walked over to their vehicle and asked them what was going on. Mr Green asked him whether he knew his convenors had called a stop work meeting. Apparently, Mr Ross replied that he wasn't aware of this. Mr Green asked Mr Ross whether he wanted to attend the meeting and Mr Ross indicated he did. Mr Green then informed Mr Ross that the meeting was unauthorised and unpaid and that disciplinary action would follow if he attended. Mr Dunbar asked Mr Ross if this was understood and he replied that it was. Mr Green advised him of the various breaches contained in the "script". Mr Ross was instructed to shut down the truck and to collect his gear so he could be safely escorted off the hill.

72. Mr Dunbar said he was in no doubt that Mr Ross understood what was being put to him.

73. At about 1.45pm Mr Dunbar and Mr Green saw Mr Western. Mr Green testified that he went over to Mr Western's truck and asked the first question. Mr Western asked what was it all about. Mr Green said that he told Mr Western he was not sure and would prefer if he remained at the job. Mr Western replied that he would go to the meeting. Mr Green read the "script" to Mr Western and when he was asked whether he understood this he replied he did but was going to the meeting anyway. Mr Western got into the vehicle with Mr Ross.

74. Mr Dunbar and Mr Green next encountered Mr Kirwan at approximately 1.50pm in truck 143. Mr Green went over to Mr Kirwan and asked the first question. Mr Kirwan advised that he had not heard of the meeting and asked who had called it. Mr Green said that he told him he thought it was Mr Kumeroa and also told him that it was their preference for him to stay on the job. Mr Kirwan asked what would happen if he did not to which Mr Green advised him of the various breaches set out on the script. Mr Kirwan said that he would attend the meeting, collected his gear, shut down the vehicle and got into the land cruiser. All three employees were then dropped off at the shift change area.

75. Mr Dunbar and Mr Green made a second trip to the hill at about 2.15pm. They encountered Mr Brown who was waiting at the front of his truck. Mr Dunbar asked him the first question. Mr Brown replied he did not know of the meeting. He asked Mr Dunbar what the meeting was about to which Mr Dunbar replied he was not sure. Mr Brown advised that he had better go to the meeting, following which Mr Dunbar read the script to him and asked whether he understood what was being said and he replied that he did.

76. At the time that Mr Dunbar was speaking with Mr Brown, another truck driver Mr Laidlaw arrived in truck 141. Mr Green went over to speak with him. He asked the first question to which Mr Laidlaw replied that he was not aware of the meeting but he was a member of the union. Mr Green told Mr Laidlaw that he would prefer if he remained on the job but if he went to the meeting, the company would take disciplinary action as the meeting was unauthorised. According to Mr Green, Mr Laidlaw advised that if the issue was important enough to call a stop work meeting he was going to it. Mr Laidlaw was instructed to shut down his truck, gather his belongings and to get into the land cruiser. Mr Laidlaw did so and got into the vehicle with Mr Brown who was picked up at the same time.

77. The next employee spoken to was Mr Cocodis at about 2.20pm. Mr Green spoke to him and asked whether he knew about the stop work meeting and why it was being called. Mr Cocodis replied he did not know anything about it but indicated he did wish to attend the meeting. Mr Green said that he told him about the meeting being unauthorised and a breach of his contract of employment etc. Despite this, Mr Cocodis wished to attend the meeting and as with the others, he was directed to collect his personal gear and get into the vehicle for travel off the hill.

78. Both Mr Dunbar and Mr Green then took Messrs Brown, Laidlaw and Cocodis down off the hill.

79. They then made a third trip. They travelled to waste dump 29 where two employees were working, they being Mr Smith and Mr Dorrigo. They had been directed to that area because the dispatch operator had advised them that two other supervisors, when they had tried to speak to Mr Smith and Mr Dorrigo, had been told to "piss off". Mr Dunbar testified that he got out of the vehicle and walked over to Mr Smith. According to Mr Dunbar, Mr Smith appeared angry and told him that he had already been spoken to by Mr Kohn. Mr Dunbar said that it would be preferred if he stayed at the meeting but if he did attend, disciplinary action was warranted. Mr Dunbar said he read the script. Mr Smith got into the land cruiser and was apparently upset.

80. Whilst Mr Dunbar was talking to Mr Smith, Mr Green went to talk to Mr Dorrigo. Apparently, Mr Dorrigo was also quite upset. When asked whether he was going to attend the meeting Mr Green gave evidence that Mr Dorrigo said that he supposed he would have to go. The vehicle then travelled to the shift change to escort the employees of the hill.

81. On the way to the shift area, contact was made by dispatch and Mr Dunbar and Mr Green were requested to pick up Mr Moon who was working at the ROM 2 area. Mr Dunbar went over to him and asked him whether he was aware that a stop work meeting had been called. Mr Moon advised that he was not aware of this. Mr Dunbar told him that the respondent would prefer that he stayed at work but if he did not, disciplinary action would be taken and the content of the script was put to him. Mr Moon, according to Mr Dunbar, said he was going to attend the meeting and that the company could add another note to his file. He was instructed to shut down his front end loader, collect his gear and get into the vehicle for transporting off the hill.

82. Whilst they were parked at this location, Mr Nash driving truck 135 pulled up. Mr Dunbar spoke to him and asked him if he was aware that a stop work meeting had been called. Mr Nash replied that he was not aware of this but he would attend it. Mr Dunbar said that he explained the consequences of this to Mr Nash as he had done with the other employees. It was said that Mr Nash responded to the effect "will this note to file get lifted like the other one I got?" Mr Dunbar testified he did not know about this, instructed him to shut down his vehicle, collect his belongings and get into the land cruiser to be taken off the hill. They arrived at the shift change area at approximately 3.15pm.

83. Mr Dunbar testified that every employee that he spoke to during this period was told that the meeting was unauthorised and would result in disciplinary action. He said that none of the employees he spoke to asked him for permission to leave the hill. He further said in evidence that he had no doubt in his mind at all that the employees knew that in attending the meeting there would be disciplinary consequences and the respondent did not want them to leave the workplace.

84. Both Mr Dunbar and Mr Green said in cross-examination that they understood the purpose of the script was to convey to the employees that the meeting was unauthorised, there may be disciplinary action and to encourage employees to stay on the job.

85. Mr Manson was employed at the material time, as a pit foreman with the respondent. Mr Carroll is a shift supervisor. Both of them gave evidence about the employees they brought off the hill, similar to Mr Dunbar and Mr Green. Mr Manson said that he and Mr Carol headed into the western section of the mine, an area known as shovel 23. They entered the pit at about 1.40pm. Mr Manson testified that on their way into the pit he and Mr Carol discussed how they were going to approach each employee and decided, so that no mistakes were made as to what was said, they would read out precisely the words contained on the script that had been given to them by Mr Spoonhiem.

86. On their first trip in, they picked up Mr Walton, Mr Lockyer, and Mr Temoananui. Mr Manson said that when the employees got into the vehicles, they had the script read to them. Each of them said they did want to attend the meeting. Apparently, Mr Walton responded to the script to the effect that he did not agree that he was in breach of his contract of employment as he understood that there was provision in the IR agreement for stop work meetings. He also believed that there was continuity of operations as there were workplace agreement employees left on the hill still working. Mr Manson said he made a note of this on the afternoon of 1 February 2001, along with comments made by other employees, which document was annexure SLM 2 to his witness statement. All employees were off the hill by 2.00pm that afternoon.

87. A second trip into the pit was made by Mr Manson and Mr Carol. Mr Manson said they picked up Mr Buckilic, Mr Biksmarti, Mr Bates and Mr Cumbers. Mr Manson testified that he again read the script to all of these employees who indicated that they would attend the stop work meeting. These employees were then dropped off at the shift change area at about 2.30pm.

88. On the way down the hill, two other employees, Mr Woodland and Mr Williams were seen. The vehicle stopped and Mr Manson went over to speak with them. He read the content of the script to the employees. According to Mr Manson, both employees said they would go to the meeting to see what was going on. Mr Woodland remarked that he believed he was entitled to attend the meetings because the workplace agreement employees get many paid meetings. Mr Manson said he noted this comment. They got to the shift change area at approximately 2.30pm.

89. A third trip into the pit was made. Two employees, Mr Reid and Mr Kobiessi were picked up. Both employees had the script read to them. Apparently, Mr Reid made a similar comment to that made by Mr Walton that he believed that there was continuity of operations as workplace agreement employees on the hill were still working. They then collected Mr Carter. He was working on bench 23. Mr Carol waved him down and he got into the vehicle with his personal gear. Mr Manson read the script to him and Mr Carter kept saying he could not understand what was being said. Mr Carol tried to explain to him what the document meant. Mr Manson gave evidence that it appeared to him that Mr Carter may have been "schooled". Apparently Mr Carter requested to see his shop steward in response to which he was told that could occur down at the shift change area. These employees were dropped off at the shift change area at approximately 3.15pm.

90. Additionally, Mr Manson gave evidence about an incident with Mr Williams on or about 3 May 2001. On this day, there was an unauthorised work stoppage. The respondent's response at the time to what was a series of ongoing work stoppages, was to stand the employees down for the remainder of the shift during which the stoppage occurred. All employees taking part in the stoppage were gathered at shift change and handed a notice advising them that they were stood down for the remainder of the shift. Mr Manson testified that on this occasion, he noticed that both Mr Williams and Mr Wakefield were not present at the shift change and the stop work meeting. He testified that he took two of the notices and drove to the place where he had seen both employees previously working. Mr Manson found them using the cable truck to lower the cable bridge over a road.

91. Mr Manson said he got out of his vehicle and walked over to the cable truck. Both employees were operating the controls at the back of the truck. He spoke to Mr Williams and asked him whether he was aware there was a stop work meeting taking place. Mr Williams replied that he was aware of this. Mr Manson said he told Mr Williams that he did not have to attend the meeting and if he did not he would be paid for a full day if he continued working. Mr Williams responded that both he and Mr Wakefield were going to attend the meeting but were making the cable truck safe before proceeding to it. Mr Manson could not recall if he read out the notice to Mr Williams but did recall that the handed a notice to him. The significance of this matter was that Mr Williams testified that he was working on the cable truck on 1 February and whilst admitting that he saw Mr Manson, he denied any comment was made about whether he could attend the stop work meeting or not.

92. Mr Carol also gave evidence about his participation in the disciplinary meetings the next day. Mr Bancilhon is the superintendent maintenance in the ore processing department at Newman. He occupied that position in January 2001. Mr Bancilhon gave evidence about the usual process in relation to stop work meetings. He testified that he and other members of supervision and management would receive an e-mail from the human resources department to advise that a stop work meeting had been authorised to take place on a certain date at a certain time. It would also be indicated whether the meeting was to be on an authorised - unpaid or authorised - paid basis. It was Mr Bancilhon's evidence that save for some industrial action in December 1999 and January 2000, he could not recall any stop work meetings attended by employees from the ore processing department which were unauthorised, prior to 1 February 2001.

93. He testified that after the 1 February unauthorised stop work meeting, there was a flurry of unauthorised stop work meetings which took place over a couple of months however, that has since stopped and his view was that things were back to the normal procedure of stop work meetings being held on an authorised and either paid for unpaid basis. Mr Bancilhon testified that this meant that the system of human resources notifying of unions intention to hold a stop work meeting, and permission for that meeting, continued.

94. Mr Bancilhon was at work on 1 February 2001. He could not recall how he became aware that there was a site wide stop work meeting on the afternoon of that day. He did testify however, that he was upset by the fact that a number of ore processing department vehicles were missing. He made inquiries as to their whereabouts, and found out that they had been taken by some of the employees from the department who were attending the stop work meeting at the shift change area.

95. Evidence was also given by Mr Bancilhon that he was concerned at this time, that employees had abandoned their workplaces to attend the meeting. He did not know the state that equipment had been left in and whether it was safe.

96. Mr Bancilhon was involved in disciplinary investigations held on 2 February. He requested two of his colleagues and a Mr Wilson to provide him with names of all employees who had attended the stop work meeting the day before. He also asked them to advise whether any employee had been given permission to attend the meeting. Mr Wilson told Mr Bancilhon that an employee, Mr Warren had contacted him by mobile telephone. Mr Warren had apparently advised that there was a union meeting on and it would take about half an hour. Mr Wilson, who was a contractor, was unfamiliar with the process but was aware that Mr Warren was a shop steward. Because of this he gave his consent. This consent was accepted as having been given by Mr Bancilhon.

97. Mr Bancilhon was also informed that Messrs Ashford, McKean, Long and Kemp had told Mr Wacker that they were leaving work to attend a stop work meeting and did not seek permission.

98. Mr Bancilhon testified that he sent an e-mail to Mr Daines, reporting on the above. A copy of this e-mail was annexure APB 1 to his witness statement. Mr Bancilhon attended the disciplinary investigations held in the ore processing department with Mr Daines. As with the investigations in the other areas, notes of answers given to pre-prepared questions were recorded. In the case of ore processing, those notes were annexures APB 2 (a) to (h) of Mr Bancilhon's witness statement. Both Mr Kemp, an AMWU shop steward and Mr Stead, were present during the interviews. It was Mr Bancilhon's evidence that he recalled both Mr Kemp and Mr Stead giving assistance to many of the employees with their responses to questions, either by nodding for shaking their heads to indicate a yes or no response to the questions being put. He testified that there was no attempt to conceal this and Mr Bancilhon thought that guidance was being given to employees in their answers.

99. In relation to Mr Warren, Mr Bancilhon said he accepted that the communication between Mr Warren and Mr Wilson was an honest request and an honest permission for the purposes of the inquiry. As a result, Mr Warren was given a letter that did not contain a warning but only a note of his attendance at the stop work meeting as being unpaid.

100. Mr Knuckey is employed as manager mine maintenance at Newman. He testified that on a 1 February 2001, from a source he could not recall, he heard that an application to this Commission to prevent contractors being used in the production department to repair and clean reflectors and signs had been dismissed. He said he also came to hear that the production employees had left the work site and were meeting in the shift change area.

101. Later in the afternoon, Mr Knuckey received a telephone call from Mr Keddie who told him that a request had been received from the union for a meeting with operational management to discuss some issues. In that telephone call, Mr Keddie advised him that all the employees in his department were participating in an unauthorised stop work meeting and were with the production and ore processing employees at the shift change area. Mr Knuckey then attended a meeting in the human resources building with Mr Keddie, Mr Spoonhiem, Mr Daines and Mr Lohse. They met with union representatives. Mr Knuckey said that a note of this meeting prepared by Mr Lohse, which was annexed as GAK 1 to his witness statement, was an accurate account of the meeting.

102. After the meeting with the union representatives, Mr Knuckey took part in a telephone conference with site and Perth based senior management. He testified that the outcome of this telephone conference was a decision that disciplinary investigations would be held in each of the departments, in relation to the stop work meeting. Mr Knuckey was given a copy of the hand written script prepared by Mr Keddie in relation to the questions to be asked in the disciplinary meetings. Mr Knuckey then made arrangements for the meetings to take place. Mr Knuckey and Mr Banks commenced the investigation meetings at approximately 12.50pm in the mine maintenance conference room on 2 February. Mr Knuckey said he asked the questions and Mr Banks noted the answers. Copies of the notes taken in these meetings were marked IJB 1 (a) to (l).

103. It was Mr Knuckey's evidence that he did not recall any of the employees he interviewed saying that they had been instructed by members of supervision to attend the stop work meeting. He said the responses generally were that the employees had been advised by their union convener to attend the meeting.

104. Other sets of investigations meetings were conducted by Messrs Carr, Brown and Bechelli. Copies of notes of these meetings were marked IJB 1 (m) to (p) and IJB 1 (q) to (s) respectively. These documents were then sent to the human resources department. Following this, Mr Knuckey received a draft letter dated 5 February 2001, addressed to each of the mine maintenance employees, containing their written warning. Mr Knuckey said that although he received a draft letter prepared by human resources, it was his decision to issue the letters.

105. Mr Knuckey in cross-examination said that it was a known fact that employees could not leave the workplace without permission from their foreman. He did say that it was not a case that employees always asked their supervisor for permission to attend union meetings, because in the case of authorised meetings, prior notice of authorisation was received from human resources. In the case of unauthorised meetings, Mr Knuckey testified that supervisors are told, not asked, if they can attend. He said that in circumstances such as these, supervision do not have time to check whether a meeting is authorised or not, because by the time this occurs, employees had left the floor and are attending the meeting. Mr Beggs came to him and simply told him a meeting was on and he left.

106. Mr Khon is a mine services team leader and a mining engineer. On 1 February 2001 he attended a meeting with Mr Dunbar along with another engineer, Mr Varpins. They were told by Mr Dunbar that the union convenors had called an unauthorised stop work meeting for that afternoon. He wanted them to escort the drill crew and any other employees who wanted to attend the meeting, off the hill. Mr Dunbar gave them a typed script which they were told to memorise. Mr Khon said that Mr Dunbar wanted them to understand that employees who were going to leave their work stations to attend the meeting, would be in breach as outlined in the script.

107. Mr Khon and Mr Varpins then proceeded to the hill and saw three drillers Mr Eddy, Mr Keats and Mr Chambers. Mr Khon said he had memorised the script and recited it to each of the employees. He testified that the only change he made to the script was to ask the employees whether they were aware that a stop work meeting had been called. Apparently, none of them were so aware. Mr Varpins made a note of responses from employees at the time, which Mr Khon said he had read and regarded as accurate. A copy of the note was annexure JJK 1 to his witness statement. Mr Chambers got into Mr Khon's vehicle and the other employees drove down the hill in their own drill vehicles.

108. Mr Khon was then directed to go to waste dump 29 where Mr Smith and Mr Dorrigo were working. He read the script to them. Mr Dorrigo responded to the effect that he was not going down for every childish little thing and that if they wanted him, they could come and get him. Mr Smith responded to the effect that he would see what Mr Dorrigo was going to do. These responses were recorded on annexure JJK 1. Mr Khon did not recall Mr Dorrigo telling him to "piss off".

109. Mr Khon then left that area and said he did not know if either of the two employees were going to attend the stop work meeting.

110. They were then directed to area W33 where Mr Schultz and Mr Russell were working. Mr Khon read the script to them. Their comments were recorded in annexure JJK1. Both employees then got into the vehicle, along with Mr Chambers and they were driven to the shift change.

111. Mr Khon said that both he and Mr Varpins then drove directly to their office in the mining building and had Mr Varpins note was then sent to human resources.

112. Evidence was also given by Mr Tuke. He is the team leader electrical field maintenance. He described the usual process in relation to site wide stop work meetings as involving receipt of an e-mail from human resources to advise that such a meeting was to take place. The e-mail would usually indicate whether the stop work meeting was either authorised - paid or authorised - unpaid. Mr Tuke could not recall any unauthorised stop work meetings other than during the period of industrial action at the end of 1999.

113. Mr Tuke gave evidence that as to the events of 1 February 2001, he could not recall being asked for permission by any employee, to attend the stop work meeting. Nor could he recall having given such permission. He also said that he did not believe that he would give such permission without first checking the matter either with Mr Knuckey or someone in human resources.

114. Mr Tuke gave evidence about the disciplinary investigations held on 2 February. Both he and Mr Bechelli conducted investigations with Messrs Thompson and Evans. This was done with the script given to him by Mr Knuckey. A copy of the script, with the employee responses, was marked IJB 1 (q) to (s). Of the responses, only that of Mr Evans suggested that he had permission, that being from Mr Greaves who was described as his direct supervision.

115. In cross- examination Mr Tuke said that on the day of the meeting Mr Greaves came to see him. He told him there was a meeting on. Mr Tuke said he did not say much in response and did not indicate whether he could or could not go. Mr Tuke testified that he did not see Mr Thompson before the meeting. He did say that Mr Greaves was acting foreman and he understood he said some employees could go to the meeting. Mr Tuke agreed that he may have said to Mr Greaves, when Mr Greaves told him there was a meeting on and he was going to it, to the effect "OK see you later". But he could not specifically recall this.

116. A number of witness statements in reply were filed by the applicants and disputed a number of matters raised in Mr Bancilhon's witness statement. Mr Kemp said that he informed Mr Wacker that he was going to a stop work meeting. He also asked Mr Wacker if he could take the department utility vehicles for this purpose. According to Mr Kemp, Mr Wacker asked Mr Kemp how long the meeting would be in response to which Mr Kemp said he would be back before 6.00pm. Mr Wacker was alleged to have said that words to the effect "OK then off you go." Mr Kemp took this to mean both permission to attend the meeting and taking the vehicles.

117. Mr Lenihan reaffirmed his understanding that Mr Banks had approved his attendance at the meeting. Mr Thompson reaffirmed his evidence that he spoke to Mr Tuke and advised him that he was going to the stop work meeting and Mr Tuke replied to the effect "no worries see you later". Mr Thompson said that whilst Mr Tuke did not say yes or no he took his comment to mean that he could attend the meeting. Mr Carter reiterated that when he was spoken to by Mr Manson he questioned what the matter was about and said he did not understand what was being read to him and wanted his convener or shop steward present. Mr Carter thought that he would get this opportunity at the shift change area however Mr Carroll and Mr Manson dropped him off and left the area. Mr Walton said when he was picked up by Mr Manson and Mr Carol and told that if he went to the meeting he would be reaching his contract of employment, he requested he wanted to see his contract. He also said at no stage did anyone from the respondent explain to him where in his contract of employment it provided that he was unable to attend union meetings. Further, he could recall being read part of the script, but not whether all of it was read to him.

118. Mr Smith disputed a number of statements made by Mr Dunbar. He denied that he was angry. He said that when he asked Mr Dunbar if he had to attend the meeting, the response was that if he did not go "he knew what he would be". Mr Smith took this to mean that he would be considered a "scab". Mr Smith said this confirmed his decision to attend the meeting. Mr Thomas said that in respect of the disciplinary interview, when the question of permission came up, he indicated that Mr Banks did not say to him he could not attend the meeting and this was quite normal.

119. Mr Dorrigo confirmed that Mr Green spoke to him and read from the piece of paper he had. He confirmed that he was told that the meeting was unauthorised and if he attended there would be disciplinary action. He also said that Mr Green had read the same thing to him on approximately four other occasions and he had never before received a warning. Mr Dorrigo also disputed other comments attributed to him in both Mr Green's and Mr Dunbar's witness statements.

Consideration

120. There was a substantial body of evidence adduced in these proceedings. This was necessary by reason of the allegations made by the applicants in respect of each and every employee who attended the stop work meeting on 1 February 2001 and in relation to which, received a disciplinary letter. One matter arising on the evidence can be shortly disposed of. That matter relates to the circumstances of Mr Warren. On the evidence I am satisfied and I find, indeed the respondent did not challenge it, that Mr Warren was given express permission to attend the meeting by Mr Wilson, on behalf of the respondent. Accordingly therefore, any disciplinary letter in relation to the circumstances of Mr Warren ought be removed from his personal file.

121. The second matter to deal with arising from the factual allegations is that a number of employees the subject of disciplinary letters, were not called to give evidence. These employees were engaged in the mine maintenance department and mine production. Some issue was taken during the course of these proceedings, as to whether it was agreed between the parties that evidence in the nature of "sample" evidence be led by the applicant, and be regarded as sufficient for the purposes of all of the employees claiming authorisation. There was no agreement between the parties that this was indeed the understanding, and the applicants did not press the matter further nor seek leave of the Commission to reopen their case to adduce further evidence. Whilst it is perhaps unfortunate that the applicants thought they had such an understanding, the fact remains that the Commission must determine the matter upon the evidence before it.

122. Accordingly, in respect of those employees in relation to whom there was no evidence as to authorisation having been given by the respondent, the applicants' claim must be refused. Those employees include the following—

C Chadwick
D Dewar
M Howson
A Porro
D Stead
N Walton
R Beggs
G Carroll
K Eu
M Evans
L Fannon
G Neale
K O'Halloran
C Smith
G Stevens
G Bates
S Biksmarti

B Brown
M Buckilic
M Chambers
D Cocodis
P Cumbers
R Eddy
G Keats
E Kirwan
A Kobeissi
R Laidlaw
D Moon
K Nash
S Reid
B Ross
C Russell
V Schultz
J Te Moananui
E Wakefield
K Weston
R Woodland
M Lockear

123. I turn now to consider whether there was evidence of consent having been given to the remaining employees to attend the stop work meeting. For the purposes of determining this matter, I adopt the view that for consent to have been given by the respondent, then such consent must have been informed consent. By that I mean that consent was given to the employee to attend the stop work meeting in the sense that the supervisor or manager concerned was fully aware of a request for permission having been made and consent to that permission having been freely and properly given. In its ordinary and natural meaning the Shorter Oxford English Dictionary defines "consent" as *"agree, accord, 1. To agree together, or with, 2. To act or be affected in sympathy 3. Voluntarily to accede to or acquiese in a proposal, request, etc.; to agree, comply, yield. 4. To allow, agree to, consent to..."*

124. It is clear from this ordinary and natural meaning of the concept of consent, that it requires more than a unilateral understanding. Where two parties are involved, the understanding or agreement must be mutual, with both parties fully understanding the agreement, proposal, or request as the case may be. In my opinion, it could never be the case that the mere telling by one person to another, of an event present or future, could be regarded as consent, unless the other party, by his or her words or conduct, made it clear that he or she was acquiescing in the subject matter of the telling.

125. There was some conflict on the evidence between what some employees said was told to them by representatives of the respondent at the time of being taken off the hill, and the respondent's version of these events. I have considered these matters carefully. I am also mindful of the passage of time that has passed between the events in question and the time at which witnesses were giving their evidence. I have no doubt that all witnesses who gave their evidence did so to the best of their ability and to the extent that their memories would permit. However, it was the case that supervision who attended the hill to speak with employees and to escort them off the hill, generally took contemporaneous notes of the events as they unfolded or alternatively, shortly after the events in question. Whilst Mr Llewellyn attacked some of the witnesses in relation to notes that they took, I am satisfied that where the evidence conflicts between the versions given by a number of the applicants' witnesses and the respondent's witnesses, that the respondent's version is to be preferred. To their credit, those employee witnesses who were cross-examined on this point, quite readily conceded that in the main no notes were taken by them of these events, the events occurred a long time ago and in some cases, the witnesses could not clearly recall what occurred.

126. I make the following findings. In relation to Mr Greaves I find that he informed Mr Tuke of his attendance at the stop work meeting and he went to it. I do not regard the evidence, even taken at its highest, about using the department utility vehicles, as constituting informed consent by Mr Tuke for Mr Greaves to attend the stop work meeting in the sense that it constituted an authority to do the same. In my opinion, the discussion between Mr Greaves and Mr Tuke is typical of the sort of shop floor banter that often occurs in a mining environment and in my view, could be put no higher than consent to take the vehicles as requested by Mr Greaves.

127. In relation to Mr Stead, it was clear and I find that he told the supervisor that there was to be a stop work meeting and that he was attending it. Additionally, Mr Stead informed Mr Lohse that there was a stop work meeting to be held and made it plain that he was telling Mr Lohse this and not seeking his permission. I have no doubt in passing, that Mr Stead adopted this approach based upon a belief, albeit a misconceived one, that the 1997 Agreement applied and permitted the stop work meeting that he proposed. Additionally, Mr Stead's evidence was and I find, that at the disciplinary investigations which he attended on behalf of members, the employees said they either told the supervisor they were attending the stop work meeting or the shop steward did.

128. In relation to Mr Williams, I am satisfied and I find that he told Mr Gingell, at truck control, that there was a meeting on. I also accept that Mr Manson did tell him that the meeting was not authorised.

129. As to Mr Kemp, I am satisfied and I find that he was informed about the meeting by Mr Stead. I also except on the evidence that Mr Kemp then in turn said that his work group was going to attend the stop work meeting. It follows that given that evidence by other employees in Mr Kemp's work group relied upon the conclusion that Mr Kemp got permission, then the same conclusions as to Mr Kemp must follow for the other members of his work group. I am not satisfied on all of the evidence, that Mr Kemp's dialogue in relation to the use of the department vehicles, could support a finding that supervision gave him informed consent to attend the stop work meeting.

130. As for Mr Lenihan, again, I am satisfied on the evidence that he told Mr Banks he was attending the meeting. He did not ask for permission to do so. I do not consider the evidence of the response from Mr Banks, acknowledging that he was not called, could constitute informed consent.

131. I am satisfied on the evidence that Mr Ashford, was told of the stop work meeting by Mr Kemp. In light of my findings about Mr Kemp, Mr Ashford did not receive informed consent.

132. In relation to Mr Thomas, the evidence is and I find he was told of the meeting by Mr Dewar, the shop steward. He in turn told Mr Banks. The fact that Mr Banks did not say he could not attend, again, consistent with Mr Lenihan, could not be regarded as informed consent.

133. In relation to Mr Chadwick, he simply went to the meeting after being told about it by Mr Stead. He received no approval from the respondent and I find accordingly.

134. In relation to Mr Ryman, I find that he was told of the meeting by Mr Stead and he in turn told his foreman Mr Brown. There was no informed consent.

135. On the evidence of Mr Thompson, he stated to Mr Tuke that he was going to the stop work meeting. I do not accept Mr Tuke's response in simply saying even as alleged at its highest "no worries", that this constituted informed consent. Indeed, in the investigation Mr Thompson agreed that Mr Tuke did not say yes or no to his attendance at the meeting.

136. In relation to Mr Carter, I am satisfied and I find he got into the vehicle driven by Mr Carroll and confirmed that the script was read to him and he was made aware that the meeting was an illegal meeting and he would be subject to disciplinary action if he attended it. The same conclusion applies in relation to Mr Walton, who conceded in cross examination that the "bosses" made it clear that the meeting was not authorised.

137. Mr Smith did not deny, and I find, that the script was read to him by Mr Dunbar and there was no other evidence of any authority given to him.

138. As to Mr Walton, there was no evidence he obtained any authority to attend the meeting. I am also satisfied that he had the script read to him by Mr Manson.

139. Finally, in relation to Mr Dorrigo, he admitted in evidence and I find that Mr Green read the script to him. There was no other evidence of informed consent.

140. In relation to the evidence from the respondent from supervision who travelled to the hill to escort employees to the shift change area, I accept that evidence that a script was prepared which contained a number of predetermined questions and statements which were either read verbatim or there effect put. The employees were told by supervision that it was the respondent's preference that if they attend the meeting it would be regarded as a breach of the various instruments referred to in the script and disciplinary action would follow.

141. In my opinion, consistent with its health and safety obligations, the respondent decided to arrange for employees to be escorted from the work site to ensure that this occurred in an orderly fashion. I do not consider that this action was in any way tacit approval of what it regarded as an unauthorised stop work meeting. I accept on the evidence that employees were clearly told in no uncertain terms about the possible consequences of their actions.

142. Whilst the applicants were somewhat critical of the respondent's investigation process following the stop work meeting, I am not persuaded on all of the evidence and the submissions that there was any thing unfair or untoward in the process adopted. At the end of the day, the inquiries to be undertaken were fairly simple. They involved ascertaining from the employees concerned, the source of their alleged authority to attend the stop work meeting. To the extent that the investigation meetings raised questions of breaches of various legal instruments, in the final analysis, whether such breaches occurred or not, was not challenged by the applicants in these proceedings given their reliance upon firstly the 1997 Agreement, and secondly, there being consent to attend the meeting as a matter of fact.

143. Finally, even if it could be said that my conclusions of the continued application of the 1997 Agreement are in error, then in my opinion, on the evidence of in particular Mr Lohse, which was largely uncontradicted, I am satisfied that there has been no reliance on the 1997 Agreement from about mid 1999 to date. The evidence was and I find that the parties have conducted their workplace relationships based solely upon the 1999 instruments. In my view, as a matter of equity and good conscience pursuant to s 26(1)(a) of the Act, it would be inequitable to now permit the applicants to rely upon the 1997 Agreement, in circumstances where by their conduct, the respondent has clearly been led to believe a state of affairs exists such that the 1997 Agreement was no longer relied upon, in practical terms.

144. In the alternative, and additionally to consideration under s 26(1)(a) of the Act, I am of the view that an equitable estoppel by conduct would arise in these circumstances, such that the applicants cannot now rely upon the 1997 Agreement to the detriment of the respondent. (See generally *Equity Doctrines and Remedies* 3rd Ed Meagher, Gummow and Lehane ch 17).

145. For all of the foregoing reasons, the application is dismissed.

2002 WAIRC 05794

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE AUSTRALIAN WORKERS' UNION, WEST AUSTRALIAN BRANCH, INDUSTRIAL UNION OF WORKERS & OTHERS, APPLICANT *v.* BHP IRON ORE LTD, RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	FRIDAY, 21 JUNE 2002
FILE NO/S.	CR 40 OF 2001
CITATION NO.	2002 WAIRC 05794

Result	Application dismissed.
Representation	
Applicant	Mr M Llewellyn
Respondent	Mr T Power of counsel and with him Mr H Downes of counsel

Order

HAVING heard Mr M Llewellyn on behalf of the applicant and Mr T Power of counsel and with him Mr H Downes 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. J. KENNER,
[L.S.] Commissioner.

2002 WAIRC 05819

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	AUSTRALIAN LIQUOR, HOSPITALITY AND MISCELLANEOUS WORKERS UNION, WESTERN AUSTRALIAN BRANCH, APPLICANT
	v.
	RECREATION CAMPS AND RESERVE BOARD, RESPONDENT
CORAM	SENIOR COMMISSIONER A R BEECH
DATE	TUESDAY, 25 JUNE 2002
FILE NO.	CR 268 OF 2000
CITATION NO.	2002 WAIRC 05819

Result	Application for a Declaration granted.
Representation	
Applicant	Mr D. Schapper (of counsel)
Respondent	Mr R. Bathurst (of counsel)

Reasons for Decision

1 The matter referred for hearing and determination, and as amended by consent, is the claim by the union for a Declaration—

> "(1) That since the time of her employment as a cleaner at the Recreation Camps and Reserve Board, Lyn Watters' employment has been on an on-going, part-time basis and not as a casual as claimed by the Recreation Camps and Reserve Board; and
>
> (2) That since the time of her employment as a cleaner at the Recreation Camps and Reserve Board, Mary Nelson's employment has been on an on-going, part-time basis and not as a casual as claimed by the Recreation Camps and Reserve Board.
>
> Alternatively, the union seeks an Order that the employment of Lyn Watters' and Mary Nelson shall be deemed to be, and deemed to have been from commencement, part-time employment and not casual employment."

2 The respondent objects to and opposes the claim.

3 Both Mrs Nelson and Mrs Watters gave evidence. Their evidence is not disputed in any significant way. As a result of their evidence I find the facts to be as follows.

4 Mrs Nelson and Mrs Watters have worked for the respondent at the Noalimba Reception Centre from 3 July 1985 and 19 October 1987 respectively. They both work as cleaners.

5 They were both told they would be casual employees when they were appointed. Further, they both regarded themselves as casual employees.

6 They have been paid the relevant first year wage rate pursuant to the *Cleaners and Caretakers (Government) Award, 1975* together with the 20% loading prescribed by that award for casual employees. On occasions, they have received the penalty rate for weekend work as prescribed by that award.

7 They have always worked according to a roster drawn up a week ahead. Very occasionally, the roster may have been drawn up a fortnight in advance.

8 They each worked regularly every week throughout the year unless the facility was closed (for example during quiet periods at Christmas for two weeks), or if one of them asked for time off for personal reasons. However, the days of the week which they worked were irregular. Whenever either of them took leave, it was always unpaid leave.

9 Both employees worked a shift which commenced either at 7:00am, finishing at 11:00am or started at 10:00am finishing at 2:00pm.

10 Each of them, together with the other four employees who were employed as cleaners, were able to swap shifts according to an informal internal arrangement between themselves without recourse to the administration officer, Margaret Jordan, although Mrs Jordan knew, and approved of the informal arrangement.

11 Both employees had no expectation of receiving a minimum number of hours in the sense that there was no guarantee of employment. Correspondingly however, in fact they each received regular employment and made themselves available for it. As Mrs Jordan's evidence indicated, she had an expectation that the employees would come in and that they had an obligation to attend unless it was by some domestic arrangement between themselves to swap a shift. This was the understanding between the employees and the administration officer irrespective of the legal position.

12 Neither of the two employees was ever paid for time not worked nor receive any paid sick leave.

13 I add, although for the record only, that the evidence is that both employees have been, and still are, exceptionally good employees, together with their fellow cleaners. The evidence is clear that they have all worked exceptionally well as a team and have shown great loyalty both to each other and to their employer.

Award coverage

14 Although the evidence is that both employees have been paid in accordance with the *Cleaners and Caretakers (Government) Award, 1975*, the respondent submits it is not bound by it. Clause 3. - Scope of the award states—

> "This award shall apply to the callings of workers mentioned herein who are employed by the Respondents in any part of the State of Western Australia."

15 There is a Schedule B attached to the award which is headed "Respondents". The Recreation Camps and Reserve Board is not in that Schedule. It is not suggested that the employer of these employees is a body other than the Recreation Camps and Reserve Board.

16 Section 37(1) of the Act states—

> "(1) An award has effect according to its terms, but unless and to the extent that those terms expressly provide otherwise it shall, subject to this section —
>
> (a) extend to and bind —
>
> (i) all employees employed in any calling mentioned therein in the industry or industries to which the award applies; and

(ii) all employers employing those employees;

and

(b) operate throughout the State, other than in the areas to which section 3(1) applies.

17 Therefore in the absence of any term in the award which expressly provides otherwise, the award extends to and binds all employees employed as cleaners in the "industry" represented by the Premier, Ministers of the Crown and the departments and commissions and the like listed in the schedule.

18 Therefore, I am surprised that the submission is made that the award did not, and does not apply.

19 However, the submissions of both parties largely proceeded on the assumption that the award does not apply and I assume, without deciding the point, that the award does not apply as of law to the employment of Mrs Watters and Mrs Nelson.

20 The consequence of this is that the answer to the union's claim lies in assessment of the employees' position at common law untrammelled by the award.

Their employment status

21 The evidence is clear, and accepted by both parties, that both employees were paid the rate of a casual employee and that they were regarded by the employer, and regarded by themselves (at least until recently) as casual employees. The essential difficulty with this evidence is that the word "casual employee" is a word of indefinite meaning. The difficulty arises when it is necessary to put a label upon the particular employment in question. In the 1996 decision of the Full Bench of this Commission in *Metal and Engineering Workers' Union v. Centurion Industries* (1996) 76 WAIG 1287; 66 IR 312, the Full Bench stated that the parties cannot by use of a label make the nature of an employment relationship something different to what it is in fact. The concept of casual employment within the common law of employment is generally taken to connote an employee who works under a series of separate and distinct contracts of employment entered into for a fixed period to meet the exigencies of particular work requirements of an employer rather than under a single and on-going contract of indefinite duration.

22 Applying that rationale to the facts of this matter, the fact that both employees were paid as casuals, and even were regarded by their employer and themselves as casuals, cannot make them casuals if they were truly not casual employees. Indeed, the evidence of the continuity of their employment for some 17 and 15½ years respectively is more suggestive of a single and on-going contract of indefinite duration rather than a series of separate and distinct contracts of employment entered into for a fixed period to meet the exigencies of a particular work requirements of an employer.

23 Looking at the indicia set out by the Full Bench at page 1288, and using the numbering in that decision—

(a) The employees were classified as casual and were told that they would be casual when they gained their employment.

(b) To the extent that the *Cleaners and Caretakers (Government) Award, 1975* does apply, I note that a casual employee is to be employed for a period of no more than four weeks.

(c) I find on the evidence that both employees had a reasonable expectation that work would be made available to them. Both employees made it clear that they were not obliged to accept work if offered and there was no guarantee that work would be offered. Nevertheless, the evidence is that consistently over the period of their employment, the employees understood that work would be offered to them. The amount of work would depend upon the requirements of the Centre.

(d) The number of hours worked by the employees is available from the documentation painstakingly prepared by the respondent's human resource officer, Mrs Levay. The Commission appreciates the considerable amount of work it has taken Mrs Levay to compile this document. That evidence (exhibit No. R1) shows that other than for the Christmas period when approximately two weeks was not worked by any staff, both employees consistently worked every week, subject to the occasional absence at the initiative of each of the employees due to personal circumstances, such as a hospital appointment. The number of hours worked each week may have varied (exhibit A1) according to the requirements for cleaning at the Centre. Nevertheless, hours were regularly worked each week, subject to the exceptions mentioned before.

(e) In the above context, the employment of both employees was regular. They worked each week, subject to the exceptions mentioned before.

(f) Further, both employees worked in accordance with a roster published one week in advance. Furthermore, although there was an informal arrangement allowing employees to swap shifts, the evidence of Mrs Jordan that there was an expectation that once the employees' names were on the roster they would have an obligation to attend reflects, I suspect, the understanding of the employees themselves.

(g) Although both employees acknowledge that there was no guarantee of continuing employment, the evidence of both employees' work histories, and the expectations of Mrs Jordan, show that there was a reasonable and mutual expectation of continuity of employment. Thus, and this brings in point (h) of the Full Bench indicia, the evidence of Mrs Watters is that if she wanted time off she would give two weeks' notice. While that was not a requirement, on the evidence of Mrs Jordan, the working arrangement between the employees and the administration officer on site demonstrates a reasonable and mutual expectation of continuity of employment. This conclusion is assisted by the evidence that the roster was drawn such that the work was divided evenly between the employees. Thus, there was an expectation that not only would the employment be continuous, but it would also be evenly spread between the six cleaning staff.

(h) (Whether notice is required by an employee prior to being absent on leave. This has been dealt with in (g) above).

(i) The evidence also is, from Mrs Jordan, that it was expected that work would be available other than for the quiet times of the Christmas period and subject to even on those occasions, the occasional large international sporting group which would require cleaning of the facilities. The evidence is that the Noalimba Reception Centre operates all year round and as long as it is operational it requires cleaning.

(j) The employees also had consistent starting and set finishing times. The evidence is that the starting times were either 7:00am or 10:00am. Finishing times were set, but would be exceeded due to the requirements on any given day.

24 I add to the above indicia the fact that there is no evidence that the respondent regarded the casual employment of the two employees as sufficiently casual that they would not be offered any work in any particular week and other employees employed in their place. Rather, the evidence suggests that the respondent understood that both employees would hold themselves available for the work to be offered. Both employees were paid fortnightly on a regular basis. This does not assist a finding that the two employees were for example employed hourly, or daily.

25 Indeed, there is no suggestion in the evidence that each shift worked was seen by the Board as separate and distinct warranting separate payment at the end of each shift. The frequency of the payments, fortnightly, and the regularity of their payday which

did not vary if, for example, one of the employees was unavailable during a week due to for example a hospital appointment, is quite consistent with employment on a permanent part-time basis.

26 Indeed, given that each employee knew when she had finished work on any particular day, and the respondent knew that her services would again be required in the following week, apart from the fact that the precise hours might not be known although the starting time would, and because a roster was prepared outlining the number of hours which would be worked, the evidence is compelling that the employees were employed under a contract of service and not a series of contracts (*ER Lanyon and Lockleys Hotel Pty Ltd*, 27 Industrial Information Bulletin No. 10, page 2161 at 2165 (as quoted in *Mitchell v. The Totalisator Administration Board of Queensland* (1979) QGIG 926 at 927).

27 Thus, although the evidence to the contrary, particularly the receipt of casual rates of wage, the absence of paid leave and even the lack of guarantee of employment, is inconsistent with the finding, nevertheless, on the history of the work performed by these two employees, the work has in fact been performed according to one continuous contract of employment.

28 I find for those reasons that the evidence establishes that the union has made out the first part of its claim. The evidence shows that since the time of the commencement of their employment as cleaners by the respondent both employees' employment has been on on-going part-time basis. They are not casual employees and have not been casual employees in the sense of a series of separate and independent contracts of employment based upon an irregular pattern of employment. Accordingly, the union is entitled to a Declaration in its favour.

29 In my view, even if the award applied as of law, there would not be a different result. This is because the award merely states that a casual employee shall not be employed for more than 4 weeks. It does not, of itself, assist in attempting to define what a casual employee is in contrast to the common law understanding of that word.

30 I add, although it is not necessary to do so, that had it been necessary for me to consider the alternative claim promoted, for the Commission to deem both employees as part-time and not casual employees introduces the notion of equity, good conscience and substantial merit. This brings into focus particularly the evidence that until recently, both employees and their employer regarded their employment as casual and have treated themselves accordingly. In particular, both employees have received a 20% loading. To the extent that a 20% loading is paid, and received, in lieu of certain benefits which would attach to part-time employment, the merit of the issue might lie against declaring them retrospectively to be part-time employees if by doing so it would introduce double counting. However, neither party in these proceedings sought to explore the basis upon which the 20% casual loading is paid and the conditions of employment it covers. Evidence would need to be brought regarding that for a final determination to be made on this particular issue.

31 Accordingly, the Commission proposes to issue a Declaration as sought by the union and the Minute of that Declaration now issues.

2002 WAIRC 05856

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	AUSTRALIAN LIQUOR, HOSPITALITY AND MISCELLANEOUS WORKERS UNION, WESTERN AUSTRALIAN BRANCH, APPLICANT
	v.
	RECREATION CAMPS AND RESERVE BOARD, RESPONDENT
CORAM	SENIOR COMMISSIONER A R BEECH
DATE	WEDNESDAY, 26 JUNE 2002
FILE NO.	CR 268 OF 2000
CITATION NO.	2002 WAIRC 05856

Result	Application for a Declaration granted.
Representation	
Applicant	Mr D. Schapper (of counsel)
Respondent	Mr R. Bathurst (of counsel)

Declaration

HAVING HEARD Mr D. Schapper (of counsel) on behalf of the applicant and Mr R. Bathurst (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 since the time of their employment as cleaners at the Recreation Camps and Reserve Board, Lyn Watters' and Mary Nelson's employment has been on an on-going, part-time basis and not as a casual as claimed by the Recreation Camps and Reserve Board.

(Sgd.) A. R. BEECH,
[L.S.] Senior Commissioner.

CONFERENCES—Notation of—

PARTIES		COMMISSIONER/ CONF. NO.	DATES	MATTER	RESULT
Australian Rail, Tram and Bus Industry Union	Western Australian Government Railways Commission	BEECH SC C163/1999	19/07/1999 13/08/1999	Safe Working Infringement Demerit System	Concluded
Australian Rail, Tram and Bus Industry Union	Western Australian Government Railways Commission	BEECH SC C186/1999	13/08/1999	Training, Additional Responsibilities & Transitional Provisions including Relief Work	Concluded
Australian Rail, Tram and Bus Industry Union	Western Australian Government Railways Commission	BEECH SC C242/1999	N/A	Award or Workplace Agreement	Concluded
Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union	K.D.B. Engineering Pty Ltd	GREGOR C C107/2002	10/06/2002	Alleged termination	Concluded
Civil Service Association	Commissioner of Police	SCOTT C PSAC21/2001	19/12/2001 21/12/2001 18/01/2002	Restructuring activities being implemented by the Police Service	Concluded
Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing, and Allied Workers Union	CorpseC Re Pty Ltd	GREGOR C C83/2002	N/A	Proper award entitlements	Concluded
Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing, and Allied Workers Union	King Edward Memorial & Princess Margaret Hospitals	SCOTT C C112/2002	18/06/2002	Concerning a Higher Duties allowance	Concluded
Construction, Forestry, Mining & Energy Union	B & F Holdings (WA) Pty Ltd t/a Art & Building	GREGOR C C122/2002	24/06/2002	Alleged failure to provide amenities as provided by award	Concluded
Construction, Forestry, Mining & Energy Union	CS Maintenance Pty Ltd	GREGOR C C21/2002	5/03/2002	Dismissal of Union member	Referred
Construction, Forestry, Mining & Energy Union	CS Maintenance Pty Ltd	GREGOR C CR21/2002	N/A	Dismissal of Union member	Discontinued
Construction, Forestry, Mining & Energy Union	Giorgi Group Pty Ltd	GREGOR C C123/2002	N/A	Dispute over alleged failure to provide amenities on site as provided by clause 30, Building Trades (Construction) Award 1987 No. 14 of 1978	Concluded
Construction, Forestry, Mining & Energy Union	Jazzstar Investments trading as Dependable Roofing	GREGOR C C19/2002	1/02/2002	Alleged unfair dismissals/reinstatements	Referred
Construction, Forestry, Mining & Energy Union	Jazzstar Investments trading as Dependable Roofing	GREGOR C CR19/2002	N/A	Alleged unfair dismissals/reinstatements	Discontinued
Construction, Forestry, Mining & Energy Union	J-Corp Pty Ltd t/a J-Corp	GREGOR C C121/2002	24/06/2002	Dispute in regards to alleged failure to provide amenities provided by clause 30, Building Trades (Construction) Award 1987 No. 14 of 1978	Concluded
Construction, Forestry, Mining & Energy Union	Moltoni Corporation Pty Ltd t/a Mainline Demolition	GREGOR C C116/2002	N/A	Dispute relatinf to inaccurate identification of Workers Compensation payments on pay slips and non-payment of accident pay to union memeber	Concluded
Construction, Forestry, Mining and Energy Union (Federal Union)	Anderson Formrite Pty Ltd	GREGOR C C125/2002	N/A	Time and wages records	Concluded
Construction, Mining, Energy, Timberyards, Sawmills and Woodworkers Union	BHP Iron Ore Ltd	KENNER C CR204/2001	9/11/2001 14/03/2002	Removal of unions member from site	Discontinued

PARTIES		COMMISSIONER/ CONF. NO.	DATES	MATTER	RESULT
Construction, Mining, Energy, Timberyards, Sawmills and Woodworkers Union	BHP Iron Ore Pty Ltd	KENNER C C299/2001	7/02/2002	Proposed introduction of job sharing arrangements	Concluded
Construction, Mining, Energy, Timberyards, Sawmills and Woodworkers Union	BHP Iron Ore Pty Ltd	KENNER C C300/2001	7/02/2002 21/03/2002	Issues resulting from proposed amendments to expected dress standards and company clothing	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
Construction, Mining, Energy, Timberyards, Sawmills and Woodworkers Union	Metropolitan Health Service Board	SCOTT C CR229/2001	18/02/2002	Dispute over the foreshadowed forced transfer of a carpenter from PMH to KEMH	Dismissed
Forest Products, Furnishing and Allied Industries Industrial Union	Sotico Pty Ltd	COLEMAN CC C240/2000	25/09/2000	Dispute over the termination of Mr Colin Hunt	Referred
Forest Products, Furnishing and Allied Industries Industrial Union	Sotico Pty Ltd	COLEMAN CC CR240/2000	N/A	Dispute over the termination of Mr Colin Hunt	Dismissed
Hospital Salaried Officers Association	The Metropolitan Health Services at Fremantle Hospital and Health Service	SCOTT C PSAC1/2002	14/03/2002	Proposed reinstatement of position and privileges to terminated employee	Concluded
Independent Schools Salaried Officers' Association	Pitos A & Others	KENNER C C288/2001	29/01/2002	Transfer of supervisory roles and discussion of related issues.	Concluded
Independent Schools Salaried Officers' Association	The Most Reverend B Hickey, Archbishop of Perth & Others	KENNER C C44/2002	14/03/2002	Long service leave payments and alleged threatened dismissal	Concluded
Liquor, Hospitality and Miscellaneous Workers Union	Ethnic Child Care Resource Unit Inc.	HARRISON C C79/2002	N/A		Concluded
Liquor, Hospitality and Miscellaneous Workers Union	Activ Foundation (Inc)	HARRISON C C95/2002	10/05/2002	Termination of employment	Discontinued
Liquor, Hospitality and Miscellaneous Workers Union	Activ Foundation Inc.	BEECH SC C104/2002	12/06/2002	Alleged unfair dismissal	Referred
Liquor, Hospitality and Miscellaneous Workers Union	Burswood Hotel Pty Ltd	COLEMAN CC C81/2001	30/03/2001	Extension of time beyond award requirements	Concluded
Liquor, Hospitality and Miscellaneous Workers Union	Minister for Education	KENNER C C221/2001	25/10/2001 19/11/2001 19/12/2001	Alleged retirement of union member on the grounds of ill health	Concluded
Police Union	Commissioner of Police	SCOTT C PSAC12/2002	18/04/2002 11/06/2002	Normal wages to be paid to a police officer	Concluded
Plumbers and Gasfitters Employees' Union	King Edward Memorial Hospital & Others	SCOTT C C134/2002	N/A	Employment of "Licensed Plumber" at KEMH	Concluded

CORRECTIONS—

2002 WAIRC 05938

ARGYLE DIAMONDS PRODUCTION AWARD

No A7 of 1996

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE AUSTRALIAN WORKER'S UNION, WEST AUSTRALIAN BRANCH, INDUSTRIAL UNION OF WORKERS,
	THE AUTOMOTIVE, FOOD, METALS, ENGINEERING, PRINTERS AND KINDRED INDUSTRIES UNION (WESTERN AUSTRALIAN BRANCH), AND
	THE COMMUNICATIONS, ELECTRICAL, ELECTRONIC, ENERGY, INFORMATION, POSTAL, PLUMBING AND ALLIED WORKERS UNION OF AUSTRALIA, ENGINEERING AND ELECTRICAL DIVISION, (WESTERN AUSTRALIAN BRANCH), APPLICANTS, APPLICANT
	v.
	ARGYLE DIAMOND MINES PTY LIMITED, RESPONDENT
CORAM	CHIEF COMMISSIONER W S COLEMAN
DATE	THURSDAY 13 JUNE 2002
FILE NO.	APPLICATION 752 OF 2001
CITATION NO.	2002 WAIRC 05938

Result Correction Order

Correction Order

WHEREAS an error occurred in the Order dated 25 July 2001 issued in Application 752 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 the Variation Schedule in respect of the "Argyle Diamonds Production Award 1996, No. A7 of 1996" attached to the said Order be corrected by the insertion of the following after clause "1B – Minimum Adult Award Wage"—

23. - RATES OF PAY

(1) An employee, other than a casual or an apprentice, in the classification specified in the table hereunder shall be paid, on commencement, as follows—

(a)

Operator	**Per Hour $**
Level 1	$13.77
Level 2	$14.60
Level 3	$15.44
Level 4	$15.91
Level 5	$16.30
Level 6	$16.98
Level 7	$17.67
Level 8	$18.36
Level 9	$19.02
Level 10	$19.72

(b)

Mechanical & Electrical Trades	**Per hour $**
Level 1	$15.72
Level 2	$16.72
Level 3	$17.49
Level 4	$18.01
Level 5	$18.39
Level 6	$19.08
Level 7	$19.69
Level 8	$20.26

(2) A casual employee shall be paid at the hourly rate appropriate to Level 1 of the classification plus a loading of twenty percent (20%) in lieu of the leave provided under Clause 15. - Annual Leave, 16. - Sick Leave, 17. - Bereavement and Compassionate Leave and 18. - Parental Leave of this Award.

(3) (a) Employees shall progress between levels in the classification after earning points by participating in the Skills Extension Programme provided in Clause 25. - Training of this Award or gaining the TAFE qualifications as specified for the higher levels.

(b) Employees in all classifications shall on commencement of employment with the employer enter Level 1. Where the employee has previously been employed by the employer or has participated in training programmes similar to those set out in Clause 25. - Training of this Award the employee may be reclassified to higher levels in accordance with the following—

(i) Previously employed by the employer and absent for a period up to Six Commute Cycles.

All points shall be reinstated for modules the employee successfully completed previously, that are in the matrix applying on re-engagement. Provided that the employer may require that the employee be reassessed with respect to any module, and if the criteria are not met the points will not be reinstated.

(ii) Periods of Absence of more than Six Commute Cycles or Never Previously Employed by the Employer.

The employee shall commence at Level 1 and shall work for three commute cycles and during those cycles shall be assessed for all modules that the employee seeks recognition for that are in the matrix applying upon engagement. The employee shall be awarded points for all modules where the criteria are met and the points shall be deemed to have been awarded upon engagement.

(iii) Where on engagement the points awarded exceed the points required for a level, discussions between the employer and employee will take place in relation to the number of commute cycles required before progression to the next level. In the absence of agreement as to the number of commute cycles, this issue will be referred to the Training Review Committee established under Paragraph (c) of subclause (4) of Clause 25. - Training.

(c) Operator—

(i) Subject to paragraph (ii) hereof, progression from Level 1 shall be in accordance with the following scale—

Level 1 to Level 2	After earning a total of 175 points.
Level 2 to Level 3	After earning a total of 425 points.
Level 3 to Level 4	After earning a total of 700 points.
Level 4 to Level 5	After earning a total of 1000 points and therefore completing the Argyle Diamonds Skills Extension Programme Certificate.
Level 5 to Level 6	After completion of the TAFE Mining Skills Course.
Level 6 to Level 7	After completion of 50% of the TAFE Certificate in Mining Operations.
Level 7 to Level 8	After completion of the TAFE Certificate in Mining Operations.
Level 8 to Level 9	After completion of 50% of the TAFE Advanced Certificate in Mining Operations.
Level 9 to Level 10	After completion of the TAFE Advanced Certificate in Mining Operations.

(ii) Until an operator attains Level 5 the employee must complete at least ten commute cycles of duty in each level before progression to the next level, except where an alternative number of cycles is determined pursuant to paragraph (iii) of subclause (b) of this clause.

(d) Mechanical or Electrical Trades—

(i) Subject to paragraph (ii) hereof, progression from Level 1 shall be in accordance with the following scale—

Level 1 to Level 2	After earning a total of 175 points.
Level 2 to Level 3	After earning a total of 425 points.
Level 3 to Level 4	After earning a total of 700 points or possessing an appropriate TAFE Post Trades Certificate.
Level 4 to Level 5	After earning a total of 1000 points and therefore completing the Argyle Diamonds Skills Extension Programme Certificate.
Level 5 to Level 6	After completion of the appropriate TAFE Post Trades Certificate.
Level 6 to Level 7	After completion of 50% of the additional requirements for the TAFE Advanced Trades Certificate.
Level 7 to Level 8	After completion of the appropriate TAFE Advanced Trades Certificate.

(ii) Until a mechanical or electrical trades employee attains Level 5 the employee must complete at least ten commute cycles of duty in each level before progressing to the next level, except where an alternative number of cycles is determined pursuant to paragraph (iii) of subclause (b) of this clause.

The rates of pay in this award include the arbitrated safety net adjustment of $10.00 per week under General Order No. 970 of 1997 in the State Wage Decision October 1997. This arbitrated safety net adjustment shall be offset against any equivalent amount in rates of pay received by employees since 1 November 1991 whose wages and conditions are regulated by this Award and which are above the wage rates prescribed in it, provided that above award payments include wages payable under an enterprise agreement in which absorption is not contrary to the terms of the enterprise agreement. Increases made under State Wage Principles prior to November 1997 except those resulting from enterprise agreements, are not to be used to offset this arbitrated safety net adjustment of $10.00 per week.

Further the rates of pay in this award include the $12 per week or $10 per week arbitrated safety net adjustments payable from the beginning of the first pay period on or after 1st August, 1999.

This arbitrated safety net adjustment shall be offset against any equivalent amount in rates of pay received by employees since 1 November 1991 whose wages and conditions are regulated by this award and which are above the wage rates prescribed in it, provided that the above award payments include wages payable under an enterprise agreement in which absorption is not contrary to the terms of the enterprise agreement.

Increases made under State Wage Case Principles prior to July 1999, except those resulting from enterprise agreements, are not to be used to offset this arbitrated safety net adjustment of $12 per week or $10 per week.

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

[L.S.]

2002 WAIRC 05772

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	GARY JOHN THRENOWORTH, APPLICANT
	v.
	DRILLING SERVICES INTERNATIONAL PTY LTD, RESPONDENT
CORAM	COMMISSIONER J H SMITH
DATE OF ORDER	WEDNESDAY, 19 JUNE 2002
FILE NO.	APPLICATION 1653 OF 2001
CITATION NO.	2002 WAIRC 05772

Result	Correction Order
Representation	
Applicant	Mr N Pillay (of counsel)
Respondent	Mr C Primerano (of counsel)

Order

WHEREAS an error occurred in the Order dated Tuesday, 18 June 2002 issued in Application 1653 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 Minutes of Proposed Order dated Tuesday, 18 June 2002 in Application 1653 of 2001 be amended to read Order.

(Sgd.) J. H. SMITH,
[L.S.] Commissioner.

2002 WAIRC 05762

BREADCARTERS (COUNTRY) AWARD 1976

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	TRANSPORT WORKERS' UNION OF AUSTRALIA, INDUSTRIAL UNION OF WORKERS, WESTERN AUSTRALIAN BRANCH, APPLICANT
	v.
	ACME BAKERY AND OTHERS, RESPONDENTS
CORAM	COMMISSIONER J H SMITH
DATE OF ORDER	MONDAY, 17 JUNE 2002
FILE NO.	APPLICATION 79 OF 2002
CITATION NO.	2002 WAIRC 05762

Result	Correcting Order
Representation	
Applicant	Mr N Hodgson
Respondents	Mr J Uphill

Correcting Order

WHEREAS on the 3rd day of May 2002, an order in this matter was deposited in the office of the Registrar; and

WHEREAS the schedule attached to the said order contained an error—

NOW THEREFORE, the Commission, pursuant to the powers conferred on it under Section 27 of the Industrial Relations Act 1979 hereby orders—

THAT the following correction be made—

1. Under instruction 5. **Clause 16 – Engagement: Delete subclause number, paragraph number and heading** "(1) (b) Notice of termination by employee" and insert the following in lieu thereof—

(b) Notice of termination by employee

(Sgd.) J. H. SMITH,
[L.S.] Commissioner.

2002 WAIRC 05760

BREADCARTERS' (METROPOLITAN) AWARD

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	TRANSPORT WORKERS' UNION OF AUSTRALIA, INDUSTRIAL UNION OF WORKERS, WESTERN AUSTRALIAN BRANCH, APPLICANT
	v.
	BREAD MANUFACTURERS (PERTH AND SUBURBS) INDUSTRIAL UNION OF EMPLOYERS OF WESTERN AUSTRALIAN, RESPONDENT
CORAM	COMMISSIONER J H SMITH
DATE OF ORDER	MONDAY, 17 JUNE 2002
FILE NO.	APPLICATION 81 OF 2002
CITATION NO.	2002 WAIRC 05760

Result	Correcting Order
Representation	
Applicant	Mr N Hodgson
Respondents	Mr J Uphill

Correcting Order

WHEREAS on the 3rd day of May 2002, an order in this matter was deposited in the office of the Registrar; and

WHEREAS the schedule attached to the said order contained errors—

NOW THEREFORE, the Commission, pursuant to the powers conferred on it under Section 27 of the Industrial Relations Act 1979 herby orders—

THAT the following corrections be made—

1. Delete instruction **"2. Clause 6 – Wages: Delete subclause (3)(a), (b) and (c) of this clause and insert in lieu thereof"** and insert the following in lieu thereof—

2. Clause 6 – Wages: Delete subclause (1)(a), (b) and (c) of this clause and insert in lieu thereof—

2. Under instruction 4. **Clause 8 – Overtime: Delete subclauses (5) and (6) of this clause and insert in lieu thereof:**

Delete insertions and insert new subclauses (5) and (6) as follows in lieu thereof—

(5) A worker required to work overtime for more than one and one half hours without being notified on the previous day or earlier that he will be so required to work shall be supplied with a reasonable meal by the employer or paid $7.60 for a meal.

(6) If the amount of overtime required to be worked necessitates a second or subsequent meal, the employer shall, unless he has notified the worker concerned on the previous day or earlier that such second or subsequent meal will also be required to provide such meals or pay an amount of $5.25 for each second or subsequent meal.

3. Under instruction 6. **Clause 16 – Engagement: Delete subclause number, paragraph number and heading** "(1) (b) Notice of termination by employee" and insert the following in lieu thereof—

(b) Notice of termination by employee

[L.S.]

(Sgd.) J. H. SMITH,
Commissioner.

2002 WAIRC 05761

TRANSPORT WORKERS' (BURSWOOD ISLAND RESORT) AWARD 1987

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	TRANSPORT WORKERS' UNION OF AUSTRALIA, INDUSTRIAL UNION OF WORKERS, WESTERN AUSTRALIAN BRANCH, APPLICANT
	v.
	BURSWOOD NOMINEES PTY LTD, RESPONDENT
CORAM	COMMISSIONER J H SMITH
DATE OF ORDER	MONDAY, 17 JUNE 2002
FILE NO.	APPLICATION 80 OF 2002
CITATION NO.	2002 WAIRC 05761

Result	Correcting Order
Representation	
Applicant	Mr N Hodgson
Respondent	Mr J Uphill

Correcting Order

WHEREAS on the 3rd day of May 2002, an order in this matter was deposited in the office of the Registrar; and

WHEREAS the schedule attached to the said order contained an error—

NOW THEREFORE, the Commission, pursuant to the powers conferred on it under Section 27 of the Industrial Relations Act 1979 hereby orders—

THAT the following correction be made—

1. Under instruction 3. **Clause 12 – Contract of Service: Delete subclause number, paragraph number and heading** "(1) (b) Notice of termination by employee" and insert the following in lieu thereof—

(b) Notice of termination by employee

(Sgd.) J. H. SMITH,
[L.S.] Commissioner.

2002 WAIRC 05759

TRANSPORT WORKERS (MOBILE FOOD VENDORS) AWARD 1987

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	TRANSPORT WORKERS' UNION OF AUSTRALIA, INDUSTRIAL UNION OF WORKERS, WESTERN AUSTRALIAN BRANCH, APPLICANT *v.* CAPTOR NOMINEES AS TRUSTEE FOR THE WEST COAST CATERERS UNIT TRADING AS JIFFY FOODS AND OTHERS, RESPONDENTS
CORAM	COMMISSIONER J H SMITH
DATE OF ORDER	FRIDAY, 14 JUNE 2002
FILE NO.	APPLICATION 85 OF 2002
CITATION NO.	2002 WAIRC 05759

Result	Correcting Order
Representation	
Applicant	Mr N Hodgson
Respondent	Mr J Uphill

Correcting Order

WHEREAS on the 3rd day of May 2002, an order in this matter was deposited in the office of the Registrar; and

WHEREAS the schedule attached to the said order contained errors—

NOW THEREFORE, the Commission, pursuant to the powers conferred on it under Section 27 of the Industrial Relations Act 1979 herby orders—

THAT the following corrections be made—

1. Delete the instruction **"6. Clause 13 – Sick Leave: Delete sub clause 1(b) and insert in lieu thereof:"** and delete inserted subclause and insert the following in lieu thereof—

6. Clause 15. – Sick Leave: Delete sub clause (1)(b) and insert the following in lieu thereof—

(b) Entitlement to payment shall accrue on a pro rata weekly basis.

2. Under instruction 7. **Clause 16 – Contract of Service: Delete subclause number, paragraph number and heading** "(1) (b) Notice of termination by employee" and insert the following in lieu thereof—

(b) Notice of termination by employee

(Sgd.) J. H. SMITH,
[L.S.] Commissioner.

2002 WAIRC 05758

TRANSPORT WORKERS' (NORTH WEST PASSENGER VEHICLES) AWARD, 1988

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	TRANSPORT WORKERS' UNION OF AUSTRALIA, INDUSTRIAL UNION OF WORKERS, WESTERN AUSTRALIAN BRANCH, APPLICANT *v.* FORTESQUE BUS SERVICE PTY LTD AND OTHERS, RESPONDENTS
CORAM	COMMISSIONER J H SMITH
DATE OF ORDER	MONDAY, 17 JUNE 2002
FILE NO.	APPLICATION 86 OF 2002
CITATION NO.	2002 WAIRC 05758

Result	Correcting Order
Representation	
Applicant	Mr N Hodgson
Respondents	Mr J Uphill

Correcting Order

WHEREAS on the 3rd day of May 2002, an order in this matter was deposited in the office of the Registrar; and

WHEREAS the schedule attached to the said order contained errors—

NOW THEREFORE, the Commission, pursuant to the powers conferred on it under Section 27 of the *Industrial Relations Act 1979* herby orders—

THAT the following corrections be made—

1. Delete the instruction **"3. Clause 14 – Contract of Service."** and insert the following in lieu thereof—

3. Clause 14 – Contract of Service: Delete subclause (1) and insert in lieu thereof—

2. Under instruction 3. **Clause 14 – Contract of Service: Delete subclause number, paragraph number and heading** "(1) (b) Notice of termination by employee" and insert the following in lieu thereof—

(b) Notice of termination by employee

(Sgd.) J. H. SMITH,
[L.S.] Commissioner.

2002 WAIRC 05757

TRANSPORT WORKERS' (PASSENGER VEHICLES) AWARD NO. R 47 OF 1978

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	TRANSPORT WORKERS' UNION OF AUSTRALIA, INDUSTRIAL UNION OF WORKERS, WESTERN AUSTRALIAN BRANCH, APPLICANT
	v.
	SOUTHWEST COAST LINES AND OTHERS, RESPONDENTS
CORAM	COMMISSIONER J H SMITH
DATE OF ORDER	MONDAY, 17 JUNE 2002
FILE NO.	APPLICATION 87 OF 2002
CITATION NO.	2002 WAIRC 05757

Result	Correcting Order
Representation	
Applicant	Mr N Hodgson
Respondents	Mr J Uphill

Correcting Order

WHEREAS on the 3rd day of May 2002, an order in this matter was deposited in the office of the Registrar; and

WHEREAS the schedule attached to the said order contained errors—

NOW THEREFORE, the Commission, pursuant to the powers conferred on it under Section 27 of the Industrial Relations Act 1979 herby orders—

THAT the following corrections be made—

1. Delete the instruction **"2. Clause 10 – Leading Hand: Delete sub clause (2) and insert in lieu thereof:"** and insert the following in lieu thereof—

2. Clause 10 – Wages: Delete sub clause (2) and insert in lieu thereof—

2. Under instruction 3. **Clause 14 – Leading Hand: Delete subclause number, paragraph number and heading "(1) (b) Notice of termination by employee"** and insert the following in lieu thereof—

(b) Notice of termination by employee

(Sgd.) J. H. SMITH,
[L.S.] Commissioner.

PROCEDURAL DIRECTIONS AND ORDERS—

2002 WAIRC 05753

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CHAIRMAN OF COMMISSIONERS CITY OF SOUTH PERTH COUNCIL , APPLICANT
	v.
	DAVID LEITH MOYLAN, RESPONDENT
CORAM	
DATE	MONDAY, 17 JUNE 2002
FILE NO.	APPLICATION 622 OF 2001
CITATION NO.	2002 WAIRC 05753

Result	Consent discovery of documents
	Consent shortened time

Order

WHEREAS the applicant in this matter has applied for discovery of documents and the shortening of time to in which the respondent answer interlocutory applications filed on 7 June 2002; and

WHEREAS on 14 June 2002 Mr G. Stubbs Counsel for the respondent advised the Commission he would consent to discovery of bank statements in the power and possession of the applicant between 3rd April 2001 until the date hereof and to the shortening of the time for his Answer to the application which deals with the 'McIntyre Report' to be filed in the Commission by Friday 21 June 2002; and

WHEREAS the applicant, herein, through its Counsel Mr J. Sher consents to the issuance of orders.

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

(1) THAT David Leith Moylan discover to the Chairman of Commissioners City of South Perth Council bank statements between 3rd April 2001 until the date hereof.

(2) THAT David Leith Moylan file in the Commission his Answer to the application which deals with the 'McIntyre Report' by Friday 21st June 2002.

(Sgd.) J. F. GREGOR,

[L.S.] Commissioner.

2002 WAIRC 05724

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	PATRICK DAMIAN DUNELL, APPLICANT
	v.
	M.G. KAILIL GROUP T/A EXMOUTH PEARLS, RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	MONDAY, 10 JUNE 2002
FILE NO/S.	APPLICATION 2080 OF 2001
CITATION NO.	2002 WAIRC 05724

Result	Direction issued.
Representation	
Applicant	No appearance on behalf of the applicant
Respondent	Mr G Bartlett of counsel

Direction

THERE being no appearance on behalf of the applicant and Mr G Bartlett of counsel on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby directs—

1. THAT each party provide informal discovery by serving its list of documents by 14 July 2002 and inspection of documents from the next business day thereafter upon reasonable notice.
2. THAT the parties shall use their best endeavours to agree and file an agreed statement of facts by 21 July 2002. The respondent shall provide the first draft for review by the applicant.
3. THAT evidence in chief in this matter be adduced by way of signed witness statements which will stand as the evidence in chief of the maker. Evidence in chief other than that contained in the witness statements may only be adduced by leave of the Commission.
4. THAT the parties file and serve any signed witness statements upon which they intend to rely no later than 28 July 2002.

5. THAT the parties file and serve upon one another any signed witness statements in reply upon which they intend to rely by 7 August 2002.
6. THAT the parties shall file and serve an outline of submissions and any list of authorities upon which they intend to rely by 11 August 2002.
7. THAT the parties give notice to one another of witnesses they require to attend at the proceedings for the purposes of cross-examination and any objections taken to evidence contained in the witness statements by no later than 11 August 2002.
8. THAT the applicant shall provide to the respondent a schedule of losses claimed as a consequence of his dismissal including amounts received as workers compensation payments since the dismissal.
9. THAT the parties have liberty to apply on short notice.

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

2002 WAIRC 05723

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	JOHN DOUGLAS H. TERRY, APPLICANT
	v.
	CITY FINANCE PTY LTD, RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	FRIDAY, 7 JUNE 2002
FILE NO/S.	APPLICATION 181 OF 2002
CITATION NO.	2002 WAIRC 05723

Result	Direction issued.
Representation	
Applicant	Mr A Atkinson of counsel
Respondent	Mr R Grayden of counsel

Direction

HAVING heard Mr A Atkinson of counsel on behalf of the applicant and Mr R Grayden of counsel on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby directs—

1. That the respondent shall give an informal discovery of the following documents or classes of documents by 25 June 2002—
   (i) All documents comprising or relating to applications for finance ("the finance Application") made through the respondent by the following persons—
   Adams, Hurst, Maslin, Mayer, Rickman, Sherrard, Ireland, Highland, Penno/Ponton, George, Edwards, Boyce, Boyce/Vince, Diamond, Dillon, Kerr/Cairnduff, Knight, Lloyd, Lawson, Bryne, Gooch, Woodman, Tucek, Schneider, Palmer, McCall, Madsen, Johnstone, Hartman, Winter, Hender, Stephens, Smallacombe.
   (ii) All documents comprising or relating to the approval of finance by financial institutions in respect of the Finance Applications.
   (iii) All documents evidencing or relating to the payment of commissions by financial institutions to the respondent in relation to the Finance Applications.
2. THAT the parties have liberty to apply on short notice.

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

NOTICES—Appointments—

APPOINTMENT

ADDITIONAL PUBLIC SERVICE ARBITRATOR

I, the undersigned Chief Commissioner of the Western Australian Industrial Relations Commission, acting pursuant to the provisions of section 80D(2) of the Industrial Relations Act 1979, hereby appoint Senior Commissioner A.R. Beech to be an additional Public Service Arbitrator for a further period of one year from the 19th June, 2002.

Dated the 19th day of June, 2002

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

APPOINTMENT

RAILWAY CLASSIFICATION BOARD

CHAIRPERSON

I, the undersigned Chief Commissioner of the Western Australian Industrial Relations Commission, acting pursuant to section 80N(2)(a) of the Industrial Relations Act, 1979, having consulted with the Minister and the Union, hereby appoint Commissioner J.H. Smith to be Chairperson for a period of two years with effect from the 11th day of June, 2002.

Dated the 11th day of June, 2002

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

[L.S.]

APPOINTMENT

RAILWAY CLASSIFICATION BOARD

DEPUTY CHAIRPERSON

I, the undersigned Chief Commissioner of the Western Australian Industrial Relations Commission, acting pursuant to section 80O(7) of the Industrial Relations Act, 1979, having consulted with the Minister and the Union, hereby terminate the appointment of Commissioner S.J. Kenner and pursuant to section 80O(7) appoint Commissioner J.L. Harrison to be Deputy Chairperson for a period of two years with effect from the 11th day of June, 2002.

Dated the 11th day of June, 2002

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

[L.S.]

APPOINTMENT

PUBLIC SERVICE ARBITRATOR

I, the undersigned Chief Commissioner of the Western Australian Industrial Relations Commission, acting pursuant to the provisions of section 80D(2) of the Industrial Relations Act 1979, hereby appoint, subject to the provisions of the Act, Commissioner S J Kenner to be an additional Public Service Arbitrator for a period of one year from the 19th June 2002.

Dated the 19th day of June, 2002.

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

[L.S.]

PUBLIC SERVICE APPEAL BOARD—

2002 WAIRC 05818

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
PARTIES	VICTOR WALKER, APPLICANT
	v.
	DEPARTMENT OF JUSTICE, RESPONDENT
CORAM	PUBLIC SERVICE APPEAL BOARD
	SENIOR COMMISSIONER A R BEECH
	MS D ROBERTSON – BOARD MEMBER
	MR M. BOWLER – BOARD MEMBER
DATE	MONDAY, 24 JUNE 2002
FILE NO.	PSAB 6 OF 2002
CITATION NO.	2002 WAIRC 05818

Result	Appeal to the Public Service Appeal Board upheld.
Representation	
Appellant	Mr K. Trainer (as agent)
Respondent	Mr E. Rea (as agent)

Reasons for Decision

1 The appeal brought by Mr Walker against his employer, the Department of Justice, is an appeal against the severity of a penalty imposed upon him. The penalty imposed is a reduction in classification level from Level 5.4 to Level 4.1. He seeks

reinstatement immediately. The Public Service Appeal Board sat on 17 June 2002 and what follows are the Reasons for the Decision which it gave at the conclusion of the hearing.

Background

2 On 26 July 2001, Mr Walker was advised that an investigation was initiated into suspected breaches of discipline pursuant to s.81(2) of the *Public Sector Management Act 1994*. On 31 January 2002 Mr Walker was informed that the investigation resulted in him being charged with downloading two programmes from a website on the Department's computer, the circumstances of which were regarded as a serious breach of discipline. Further, Mr Walker was advised that the Department had accepted that he had committed 10 minor breaches of discipline by inappropriately using the Department's computer to download other material. The letter advised Mr Walker that the Director General was considering imposing the penalty of a fine of one day's pay for each of the minor breaches in accordance with s.83(1)(a)(ii) of the *Public Sector Management Act 1994*. Mr Walker replied admitting the charges as being valid.

3 On 12 February 2002, Mr Walker was advised that the Director General was considering reducing the level of his classification from Level 5 to Level 3 in relation to the first two charges, and, due to Mr Walker's personal circumstances, reducing the fines to be imposed in relation to each of the 10 minor breaches to $150 each. Mr Walker made a further reply.

4 On 25 March 2002, the decision was made by the Director General which is the subject of this appeal. That decision was that Mr Walker be reduced in classification from Level 5.4 ($57,042.00 per annum) to Level 4.1 ($46,387.00 per annum). The Director General noted that it is the Department's view that fines for these matters would not be a sufficient penalty given the seriousness of the charges. The Director General informed Mr Walker that his personal records would be adjusted accordingly and advised that any similar breaches of discipline committed by Mr Walker in the future may result in the termination of his employment.

Decision

5 The Public Service Appeal Board placed weight upon the submission made by Mr Trainer which showed that the cumulative affect of the reduction in the classification amounted to a loss to Mr Walker of $10,655 in the first year, $9,344 in the second year and $8,006 in the third year. Given Mr Walker's age (he is aged 51) his loss when calculated to age 55 would be $36,011. If Mr Walker worked until aged 60, his loss would be $74,703 arising from the imposition of this penalty.

6 We also placed weight upon the effect of this on Mr Walker's superannuation entitlement. Ultimately, the Public Service Appeal Board found the total financial impact of the de-classification of Mr Walker to be manifestly excessive.

7 The Public Service Appeal Board is to decide this matter according to equity, good conscience and the substantial merits of this case taking into account, relevantly for this matter, the interests of Mr Walker and of the Department (s.80L(1) of the *Industrial Relations Act 1979*).

8 The Public Service Appeal Board takes into account the circumstances leading to the imposition of the penalty. The Public Service Appeal Board regards with the utmost seriousness the downloading by Mr Walker of two copyright protected programmes from the internet on the Department's computer. The downloading of copyrighted material carries with it a significant risk to the Department. The Public Service Appeal Board considers that Mr Walker, as an employee of the Department, has, by his actions, exposed the Department to a claim by the copyright holder for breach of copyright. In that regard, the Public Service Appeal Board accepts that the downloading of the two copyrighted programmes are acts of greater seriousness than what were referred to as the "10 minor breaches".

9 Nevertheless, on the facts of this matter, the action taken by the Department has, apparently, reassured the copyright holder such that in fact, the Department will not suffer any detriment. Further, Mr Walker has a long 34 year working history, a working history with an unblemished record. It is appropriate for the Public Service Appeal Board to take these facts into account in assessing Mr Walker's appeal.

10 We have also had regard to Mr Walker's circumstances arising from the length of the suspension without pay (a period which followed him being allowed to take his accrued leave) and the other financial issues which were set out on page 30 of Mr Walker's book of documents being page two of a letter to the Director General of the Department of Justice from Mr Walker of 4 February 2002.

11 Our conclusion is that the balancing of these factors against the penalty shows, because of the ongoing nature of the penalty, that the penalty imposed on 25 March 2002 was manifestly excessive. Mr Walker's financial loss, and ongoing financial loss, seems quite out of proportion to the offences and the actual consequence to the Department of them.

12 Accordingly, our decision is that we now quash the reduction in classification decided by the Director General of the Department of Justice in the letter of 25 March 2002.

13 In considering the penalty now to be imposed, and taking into consideration the fines eventually imposed in relation to each of the 10 minor breaches of discipline, the Public Service Appeal Board decides to impose—

(1) A fine of 5 days' remuneration pursuant to s.86(3)(b)(iii) for each of the two charges referred to by the Director General in that letter; and

(2) A reprimand pursuant to s.86(3)(b)(i) of the *Public Sector Management Act 1994*,

the imposition of these two penalties being authorised by s.86(3)(b) of that Act.

14 A Minute of the Order to issue is distributed the parties.

2002 WAIRC 05859

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	VICTOR WALKER, APPLICANT
	v.
	DEPARTMENT OF JUSTICE, RESPONDENT
CORAM	SENIOR COMMISSIONER A R BEECH
DATE	THURSDAY, 27 JUNE 2002
FILE NO.	PSAB 6 OF 2002
CITATION NO.	2002 WAIRC 05859

Result Appeal to the Public Service Appeal Board upheld.
Representation
Appellant Mr K. Trainer (as agent)
Respondent Mr E. Rea (as agent)

Order

HAVING HEARD Mr K. Trainer (as agent) on behalf of the appellant and Mr E. Rea (as agent) on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979* hereby orders—

(1) THAT the reduction in classification from Level 5.4 to 4.1 decided by the Director General of the Department of Justice as set out in the letter of 25 March 2002 is hereby quashed.

(2) THAT Victor Walker be fined 5 days' remuneration pursuant to s.86(3)(b)(iii) for each of the two charges referred to by the Director General in that letter.

(3) THAT Victor Walker is hereby reprimanded pursuant to s.86(3)(b)(i) of the *Public Sector Management Act 1994* for the two charges referred to by the Director General in that letter.

(Sgd.) A. R. BEECH,
[L.S.] Public Service Appeal Board.

RECLASSIFICATION APPEALS—

File Number	Appellant	Respondent	Decision	Finalisation Date
PSA 13 of 2000	Kerry Dawn Blaize	Metropolitan Health Service Board at Fremantle Hospital	Withdrawn by Leave	19/06/2002
PSA 14 of 2000	Kathleen Roberta Bridger	Metropolitan Health Service Board at Fremantle Hospital	Withdrawn by Leave	19/06/2002
PSA 15 of 2000	Judith Ann Clements	Metropolitan Health Service Board at Fremantle Hospital	Withdrawn by Leave	19/06/2002
PSA 16 of 2000	Maureen Joy Greer	Metropolitan Health Service Board at Fremantle Hospital	Withdrawn by Leave	20/06/2002
PSA 17 of 2000	Pamela Ann Meehan	Metropolitan Health Service Board at Fremantle Hospital	Withdrawn by Leave	20/06/2002
PSA 18 of 2000	Carole Gwenyth Morgan	Metropolitan Health Service Board at Fremantle Hospital	Withdrawn by Leave	20/06/2002
PSA 19 of 2000	Yvonne Marilyn Nelson	Metropolitan Health Service Board at Fremantle Hospital	Withdrawn by Leave	20/06/2002
PSA 20 of 2000	Faye Thelma Rogers	Metropolitan Health Service Board at Fremantle Hospital	Withdrawn by Leave	20/06/2002
PSA 21 of 2000	Colleen Anne Skudder	Metropolitan Health Service Board at Fremantle Hospital	Withdrawn by Leave	20/06/2002
PSA 22 of 2000	Jennifer Anne Woodthorpe	Metropolitan Health Service Board at Fremantle Hospital	Withdrawn by Leave	20/06/2002
PSA 28 of 2001	Kingsley Flett Wake	Board of Management of Bunbury Health Service	Withdrawn by Leave	20/06/2002
PSA 31 of 2001	Murray Glenn Philipps	Board of Management of Bunbury Health Service	Withdrawn by Leave	20/06/2002