Western Australian

Industrial Gazette

PUBLISHED BY AUTHORITY

Sub-Part 7 WEDNESDAY, 23 OCTOBER, 2002 Vol. 82—Part 2

THE mode of citation of this volume of the Western Australian Industrial Gazette will be as follows:—
82 W.A.I.G.

CUMULATIVE CONTENTS AND DIGEST APPEAR AT THE END OF THIS PUBLICATION

INDUSTRIAL APPEAL COURT—

[2002] WASC 219

JURISDICTION	:	WESTERN AUSTRALIAN INDUSTRIAL APPEAL COURT
CITATION	:	BURSWOOD RESORT (MANAGEMENT) LTD -v- AUSTRALIAN LIQUOR, HOSPITALITY AND MISCELLANEOUS WORKERS UNION, WESTERN AUSTRALIAN BRANCH [2002] WASC 219
CORAM	:	ANDERSON J (Presiding Judge)
HEARD	:	29 AUGUST 2002
DELIVERED	:	29 AUGUST 2002
FILE NO/S.	:	IAC 10 of 2002
BETWEEN	:	BURSWOOD RESORT (MANAGEMENT) LTD Applicant AND AUSTRALIAN LIQUOR, HOSPITALITY AND MISCELLANEOUS WORKERS UNION, WESTERN AUSTRALIAN BRANCH Respondent

Catchwords—
Industrial law - Appeals - Stay - Application for stay of proceedings pending appeal - Need to show exceptional circumstances
Legislation—
Industrial Relations Act 1979
Industrial Relations (Western Australian Industrial Appeal Court) Regulations 1980
Result—
Application dismissed
Category: B
Representation—
Counsel—

Applicant	:	Mr T H F Caspersz & Mr D Brajevic
Respondent	:	Mr D H Schapper

Solicitors—

Applicant	:	Blake Dawson Waldron
Respondent	:	Derek Schapper

Case(s) referred to in judgment(s)—
Nil
Case(s) also cited—
Nil

1 **ANDERSON J (Presiding Judge)**: There is an appeal pursuant to s 90 of the *Industrial Relations Act 1979* against the decision of the Commission in Court Session made yesterday declaring that it had jurisdiction to deal with an application for an award. The matter that is before me this morning, sitting alone pursuant to s 87(3) of the Act, is an application for a stay of proceedings on that decision.

2 The application is ostensibly brought pursuant to reg 6 of the *Industrial Relations (Western Australian Industrial Appeal Court) Regulations 1980* which provides—

> "An appeal to the Court does not operate as a stay of proceedings on the decision being appealed from unless the Court or a Judge of the Court directs otherwise."

3 On behalf of the union Mr Schapper submitted that reg 6 is inapplicable to this application for a stay. I do not accept that submission. I do not go into the details of the argument which he presented, but in my opinion reg 6 is applicable to this application. It is an application for a stay of proceedings on a decision being appealed from.

4 It is well established that a stay of proceedings on a decision being appealed from will not be ordered unless the circumstances are exceptional. On behalf of the employer applicant, Mr Caspersz sought to contend that the rule that there is a need for exceptional circumstances does not apply to a case in which the application is to stay proceedings for want of jurisdiction on a decision by the Commission that it did have jurisdiction. I do not accept that submission.

5 I think that the rule that the applicant for a stay must show exceptional circumstances is a rule of general application. The reason for the rule is that, were it not for the rule, the general rule in reg 6 that an appeal does not operate as a stay of a decision appealed from would be eroded to vanishing point.

6 These proceedings concern an application by the union for a new award. The application was filed on 10 July last and the proposed new award is titled Burswood Island Resort Employees Award 2002. The proposed new award is a mirror image of a new award applied for by the union in March last, 8 March, I think, in an earlier application. That application was dismissed by the Commission on the ground that there was in place an industrial agreement, popularly called the Casino Agreement, which was not due to expire until 30 June 2002, and in which there was a clause, cl 45, I think, by which the parties agreed to defer extra claims for the term of the agreement.

7 As I understand the papers that have been put before me, the Commission in Court Session held that it was in the public interest to enforce that clause and it therefore dismissed the application by the union for extra payments or for an award which would provide for payments extra to the payments provided for in the Casino Agreement. Now, I may be wrong about all of that, but that is broadly as I understand the background to this application.

8 There is also in existence an award known as the Burswood Island Resort Employees Award of 1985. That award coexists with the Casino Agreement. The reason why the Casino Agreement continues in operation notwithstanding the term expired on 30 June 2002, is that there is provision in the *Industrial Relations Act* for the continuation of registered industrial agreements beyond the expiration of them until one party or the other files notice of retirement from the agreement.

9 It is proposed by the union that the new award, the award which is presently before the Commission by way of application, should replace both the old award (the 1985 award) and the Casino Agreement, and should commence from the first pay period after 1 July of this year. Burswood Resort objects to the making of a new award and alternatively, as is usual in cases such as this, submits that a new award should be in terms of a draft put forward by it, so there is the usual claim and counterclaim which is to be arbitrated by the Commission.

10 When the matter came on before the Commission in Court Session a few days ago, Burswood Resort took a preliminary jurisdiction point. Mr Caspersz on behalf of Burswood Resort argued that the Commission had no jurisdiction and I think he also argued that the Commission had no power to entertain an application for a new award covering the ground covered by the Casino Agreement in the circumstances which prevailed, they being that no party had filed notice of retirement from the agreement.

11 The basis of that contention essentially was that the Casino Agreement remains in force by force of the provisions in the *Industrial Relations Act* and because it remains in force the matters covered by it cannot be industrial matters. There can be no bone of contention in respect to them, if I might use Mr Caspersz' phrase. There was also an argument that in the circumstances as they stood the Commission had no power under the Act to bring down an award to replace a subsisting industrial agreement.

12 The contention that the Commission has no jurisdiction and has no power to make a new award was put in a number of ways, the details of which I do not need to go into. It is sufficient for me to say that in my opinion the submission that there is no jurisdiction as things presently stand is at least arguable. It has at least some prospects of success.

13 I am not so sure about the argument with respect to the power of the Commission. As I understood Mr Caspersz in oral argument and as I have tried to understand his written submissions, the argument seems to be highly semantic. I would rate it as having something less than reasonable prospects of success. That the jurisdiction point is arguable is not nearly enough to invoke my jurisdiction to order a stay. No doubt there may be cases in which the appeal grounds are so strong as to compel a conclusion that the appeal must inevitably succeed, and it may be - and I make no final decision on it - that this will constitute exceptional circumstances, but this case is not in that category.

14 The other matters said to constitute exceptional circumstances may be summarised as follows, and I hope I do not do injustice to counsel in so briefly summarising them. It is not in the public interest, so it is said, that awards and orders should be made without jurisdiction and in excess of power. To allow that to happen is, so it is said although perhaps not in these words, inimical to the proper administration of justice. Furthermore, if the proceedings leading to the making of an award are beyond jurisdiction and the award itself is *ultra vires* and a nullity, there will have been a big waste of resources and money and effort. It was also submitted that the making of an award in the circumstances as they presently exist, which award turns out to be a nullity, would cause problems downstream with respect to workplace agreement benchmarks and matters such as that, and an award which provides for higher rates would have to be complied with, at least until it was set aside should it ultimately be set aside, and that would cause prejudice to the employer who would not really have any practicable means of recovering overpayments.

15 These are undoubtedly matters which do require consideration. They are matters of prejudice. There are complications which would arise if an invalid award is made in due course by the Commission in Court Session. However, the question remains whether these are matters which constitute exceptional circumstances and I am not persuaded that they are.

16 They are consequences which must be regarded as commonplace where the Commission in Court Session is proceeding to make an award where its jurisdiction to do so or its power to do so is in doubt and where one party or the other wishes to challenge its jurisdiction to do so, with the prospect that the Industrial Appeal Court might decide the award is of no effect.

17 Because the matters referred to do not constitute exceptional circumstances and because I am firmly of the opinion that exceptional circumstances must be shown before this Court should intervene to exercise its jurisdiction under reg 6 to stay the proceedings below, I decline to stay the proceedings. The application for a stay must be dismissed.

2002 WAIRC 06728

WESTERN AUSTRALIAN INDUSTRIAL APPEAL COURT

PARTIES	BURSWOOD RESORT (MANAGEMENT) LTD, APPLICANT *v.* AUSTRALIAN LIQUOR, HOSPITALITY AND MISCELLANEOUS WORKERS UNION, WESTERN AUSTRALIAN BRANCH, RESPONDENT
CORAM	**ANDERSON J (Presiding Judge)**
DATE OF ORDER	THURSDAY, 29 AUGUST 2002
FILE NO/S.	IAC 10 OF 2002
CITATION NO.	2002 WAIRC 06728

Result	Application for stay of proceedings pending appeal – Application dismissed.
Representation	
Applicant	Mr T H F Casperz & Mr D Brajevic (both of Counsel)
Respondent	M D H Schapper (of Counsel)

Order

Having heard Mr T H F Casperz and Mr D Brajevic (both of Counsel) for the Applicant and Mr D H Schapper (of Counsel) on behalf of the Respondent, THE COURT HEREBY ORDERS THAT—

The Application be dismissed.

(Sgd.) JOHN SPURLING,
[L.S.] Clerk of the Court.

FULL BENCH—Appeals against decision of Commission—

2002 WAIRC 06727

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	DAVID LEITH MOYLAN, APPELLANT —and— CHAIRMAN OF COMMISSIONERS CITY OF SOUTH PERTH COUNCIL, RESPONDENT
CORAM	FULL BENCH HIS HONOUR THE PRESIDENT P J SHARKEY CHIEF COMMISSIONER W S COLEMAN COMMISSIONER S WOOD
DELIVERED	TUESDAY, 8 OCTOBER 2002
FILE NO/S.	FBA 33 OF 2002
CITATION NO.	2002 WAIRC 06727

Decision	Application granted and appeal dismissed
Appearances	
Appellant	Mr G T Stubbs (of Counsel), by leave
Respondent	Mr J L Sher (of Counsel), by leave

Reasons for Decision

THE PRESIDENT—

INTRODUCTION

1 This is an application to the Full Bench made by the abovenamed respondent and said to be pursuant to s.27(1)(a)(iv) and s.49(5) of the *Industrial Relations Act* 1979 (as amended) (hereinafter referred to as "*the Act*").

2 The application was not a hearing and determination of the appeal proper, but was an application directed to the allegation that the appeal as pleaded in its grounds demonstrated no merit, and that accordingly and implicitly what were submitted to be defects in the grounds (or particulars) of appeal could not be remedied by an order that further and better particulars be provided.

3 There was, of course, an alternative allegation that the grounds of appeal as pleaded did not comply with regulation 29(2) of the *Industrial Relations Commission Regulations* 1985 (hereinafter referred to as "*the Regulations*").

4 The relevant grounds of this application are grounds (3) and (4), which read as follows:-

> "3 The Purported Appeal is incompetent and inadequate in that it fails to comply with Regulation 29(1) and 29(2) of the Industrial Relations Commission Regulations 1985 (WA) ("**Regulations**"), in that it fails to set out (either adequately or at all)—
>
> (a) the grounds relied on in support of an appeal;

(b) particulars as required by Regulation 29(2) of the Act; and

(c) the specific reasons why the Decision is alleged to have been wrong at law.

4. As to item 3(b), an order for further and further particulars pursuant to reg. 81 of the Regulations is inappropriate, as there has been a total failure to provide any particulars whatsoever, rendering the Purported Appeal both inadequate and incompetent."

5 The most relevant regulation is regulation 29(2), which reads as follows:-

"(2) Without affecting the specific provision of the foregoing subregulation, it is not sufficient to allege that a decision or part of it is against the evidence or the weight of evidence or that it is wrong in law; the notice must specify the particulars relied on to demonstrate that it is against the evidence and the weight of evidence and the specific reasons why it is alleged to be wrong in law."

6 No application to amend the grounds has been filed. No particulars of the grounds have been filed.

7 Quite correctly, if I might say so, Counsel for the appellant conceded that the grounds of appeal were not pleaded in the form required by regulation 29(2) of *the Regulations*, and that, to put it briefly, no attempt has been made to remedy that situation.

8 This Commission is, of course, not a court of pleading.

9 S.27(1)(m) of *the Act* and regulations 92 and 93 of *the Regulations* give wide powers to the Commission in relation to *the Regulations*. Regulation 3(5) clearly required the Registrar or an officer of the Commission to reject the notice of appeal when the grounds were obviously defective, as they were, but there was no rejection.

BACKGROUND

10 An order was made in the Commission by a single Commissioner on 28 June 2002. By that order, he dismissed the application made at first instance by the abovenamed appellant pursuant to s.29(1)(b)(i) of *the Act*.

11 A notice of appeal was filed herein on 16 July 2002, and the grounds of appeal were and are expressed as follows (see page 8 of the appeal book (hereinafter referred to as "AB")):-

"1. The learned Commissioner erred concluding section 20 of the Royal Commissions Act did not preclude admitting the McIntyre Report into evidence.

2. The learned Commissioner erred in finding that the McIntyre Inquiry process afforded the applicant procedural fairness.

3. The learned Commissioner erred in finding that the respondent in its use of the McIntyre Inquiry report afforded the applicant procedural fairness in that the respondent did not afford the applicant the opportunity to respond to the finding/conclusions of the report before the respondent concluded it would have terminated the applicant on the basis of the report.

4. The learned Commissioner erred in concluding the respondent could use the McIntyre Inquiry Report to retrospectively support its decision to terminate the applicant the respondent having waived that right by suspending the applicant on full pay pending the handing down of the report.

5. The learned Commissioner erred concluding the Applicant was not seeking compensation in the alterative to reinstatement.

6. The learned Commissioners discretion miscarried in that he failed to act in accordance with equity and good conscience.

Orders Sought

That the decision and Order of Commissioner Gregor be quashed and the matter be remitted to the Commission to be dealt with in accordance with law."

12 This application to dismiss was filed on 6 August 2002.

13 It is fair to observe that there is correspondence on the file, whereby the solicitors for the respondent sought, after the notice of appeal had been filed and served, to have the Registrar reject the notice of appeal, a request which was inappropriate and incompetent, the matter clearly being one within the jurisdiction of the Full Bench alone.

14 For the respondent, it was submitted that there was no evidence adduced to establish that the application to dismiss the appeal should fail. No evidence, of course, was adduced.

15 It was submitted, and it is clear, that, as a matter of merit, no evidence was adduced on behalf of the appellant at first instance in opposition to the respondent's application to have the application dismissed, in the light of the findings made by the McIntyre Inquiry, an inquiry conducted under the *Local Government Act* 1995.

16 There were, it was not disputed, detailed affidavits filed on behalf of the respondent at first instance.

17 The background in fact, which I now express, is based, for the most part, on facts found by the Commissioner at first instance, which findings were not challenged on appeal. Other matters of background recite submissions and other findings.

18 The appellant, David Leith Moylan, as found, and as not challenged on appeal, was the Chief Executive Officer of the Council of the City of South Perth. He was dismissed from his employment on 3 April 2001.

19 The respondent is named as the Chairman of Commissioners City of South Perth Council, who administered the municipality of the City of South Perth. The respondent was Mr Moylan's employer until his dismissal.

20 On 5 April 2001, the appellant applied to the Commission, pursuant to s.29 of *the Act*, claiming that he had been dismissed from his employment, harshly, oppressively or unfairly, and seeking reinstatement.

21 The respondent opposed the application.

22 It was common ground that there were matters relating to Mr Moylan's employment which were not capable of examination in the proceedings at first instance. Those, it was observed by the Commissioner at first instance, in his reasons for decision (see page 488 (AB), the reasons for decision dated 19 October 2001), were the subject of an inquiry conducted by Mr G McIntyre, a barrister, pursuant to s.8(16) of the *Local Government Act* 1995 into matters concerning the City of South Perth, and later by a panel inquiry conducted within the McIntyre Inquiry framework.

23 As at 19 October 2001, the inquiry (which I shall call the "McIntyre Inquiry") was still proceeding.

24 Paragraph 19 of the reasons for decision of the Commissioner at first instance described the nature of the inquiry and its constitution, and I reproduce hereunder paragraphs 19, 20, 21 and 22 of the reasons for decision (see pages 623-624 (AB), the reasons for decision dated 28 June 2002):-

"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 (sic).

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 (sic) 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."

(Other findings about the McIntyre Inquiry and the report issued by it which I shall call "the McIntyre Report" appear in those paragraphs).

25 The matters which the Commissioner at first instance heard about in evidence and determined arose out of events which took place from about 10 April 2000 to 3 April 2001.

26 Having canvassed the matter and heard and determined it, the Commissioner found that Mr Moylan was unfairly dismissed and that he, the Commissioner, would hear the parties on the question of remedy (see page 497 (AB)).

27 Minutes of Proposed Orders to reflect those findings issued on 19 October 2001. Those minutes did not issue, and never issued, as a perfected order.

28 As I relate hereinafter, further reasons for decision relating to a further hearing were delivered on 28 June 2002 (see pages 617-625 (AB)), and, on the same date, an order was then delivered dismissing the application. I later summarise in these reasons the reasons for that dismissal in their relevant parts and relevant findings.

29 On 19 October 2001, the Commission wrote to the parties concerning the listing of a speaking to the minutes in relation to the Minutes of Proposed Orders referred to above.

30 By a letter dated 19 October 2001, the solicitors for the respondent wrote to the Commission and took issue with that part of the order relating to the matter being relisted to hear arguments about remedy.

31 Following submissions which were made to the Commission on 26 October 2001, the Commissioner decided that no order should issue.

32 The next significant occurrence was that the respondent applied for the Commissioner at first instance to receive into evidence the report of the McIntyre Inquiry. (This report was delivered by Mr McIntyre, of Counsel, in March 2002, and released on 16 April 2002).

33 An order was also sought that the finding of 16 October 2001 "be amended" and a finding that Mr Moylan was fairly dismissed be made in lieu of the finding that he had been unfairly dismissed, and that, further, that application by Mr Moylan be dismissed.

34 After first hearing submissions, the Commissioner at first instance:-

(a) Admitted the report in evidence finding that s.20 of the *Royal Commissions Act* 1968 (as amended) did not prevent his doing so. (The McIntyre Inquiry, constituted by Mr McIntyre, had been brought into being by the Minister pursuant to the *Local Government Act* 1995 on 17 October 2001 by the appointment of Mr McIntyre).

(b) Found that the proceedings had been "delayed" since at least 19 October 2001 by consent of the parties awaiting the outcome of the McIntyre Inquiry which had the powers, it was not in issue, of a Royal Commission, and that Act applied to the inquiry.

(c) Found and gave detailed reasons for finding that Mr McIntyre had afforded Mr Moylan natural justice in the conduct of the inquiry (see page 624 (AB), paragraphs 21 and 22 of the reasons for decision dated 28 June 2002, and see paragraphs 21 and 22 reproduced above in these reasons).

(d) Found in paragraph 23 as follows (see page 624 (AB)):-

"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."

(e) Found in paragraph 24 as follows (see page 624 (AB)):-

> "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."

(f) Then went on to make findings that the dismissal was unfair for the reasons which he expressed in paragraphs 26 and 27 of the reasons for decision dated 28 June 2002. Put shortly, the Commissioner found that he was entitled, having regard to the reasons for judgement in *Concut Ltd v Worrell* (2000) 103 IR 160, to use the findings made in the McIntyre Report in considering whether to dismiss Mr Moylan. Those findings included findings that Mr Moylan had acted contrary to the interests of the Council. The findings were the result, it was found, of an inquiry conducted according to natural justice in the conduct of powers conferred on it under the *Royal Commissions Act* 1968. The respondent, therefore, for the reasons expressed in paragraph 24 of the reasons for decision of the Commissioner at first instance dated 28 June 2002, and quoted above, dismissed Mr Moylan, as the Commissioner found, and the Commissioner went on to find that such a dismissal was not unfair, since, to paraphrase it, the employer had made reasonable inquiry into alleged misconduct by Mr Moylan and satisfied itself on reasonable grounds that Mr Moylan was guilty of such misconduct.

PRINCIPLES

35 It is trite to observe that the provision of particulars cannot remedy a defect in the pleading, nor can it make a case or a strong case where no case or a flimsy case only exists.

36 Further, the Commission is not a court of pleading, and interlocutory applications which might proliferate in other jurisdictions do not, except in essential cases, have a place as a mere tactical instrument in this Commission, particularly on appeal.

37 In the normal course of events, an application for particulars, for example, where no request has been made first, would not, on the face of it, have merit. Frequently and desirably, defective pleadings are and should be cured by the delivery of particulars usually voluntarily and without recourse to the court. If the failure to give the particulars renders the pleading defective, the application is properly to strike it out, although an application for particulars is often made in the same summons as an alternative claim to strike it out (see *Rubenstein v Truth and Sportsman Ltd* [1960] VR 473 and *H 1976 Nominees Pty Ltd v Galli* (1979) 40 FLR 242).

38 This application is akin to an application for the summary determination of an action before trial, because s.27(1)(a)(iv) of *the Act* enables any matter, and for the purposes of argument, any appeal, to be dismissed for "any other reason". Such a reason, of course, in my opinion, properly includes the reason that the appeal will not succeed within the tests which I recite hereinafter, but such an application is not to be used as a substitute for the hearing and determination of an appeal on the merits.

39 It was not submitted that s.27(1)(a)(iv) does not apply to an appeal. That, of course, would only be the case if the words "Except as otherwise provided in this Act" in s.27(1) excepted an appeal under s.49 from the operation of s.27. It was not submitted that that is the case.

40 Since this was an application, in effect, to summarily determine the appeal before the hearing proper for the reasons that the grounds of appeal disclosed no merit and that leave to file further and better particulars would not remedy that situation, then the test most applicable is the test to be applied in determining whether to terminate an action summarily before trial, which seem to have been approved, in any event, in relation to appeals by Gummow and Hayne JJ dissenting in *Jackamarra v Krakouer and Another* [1998] 195 CLR 516 at 527-529. Tests applicable to applications to extend time are not relevant for the determination of this sort of application, because their nature is, as was recognised by Gummow and Hayne JJ, somewhat different. I quote from the test referred to in passages from the judgment of Gummow and Hayne JJ at pages 527-529:-

> "Reference was made to the cases dealing with summary determination of actions before trial. In *General Steel Industries Inc v Commissioner for Railways (NSW)* (50) Barwick CJ set out, in an appendix to his reasons (51), a list of cases dealing with the test to be applied in determining whether to terminate an action summarily before trial. As Barwick CJ pointed out (52)—
>
> > "The test to be applied has been variously expressed; 'so obviously untenable that it cannot possibly succeed'; 'manifestly groundless'; 'so manifestly faulty that it does not admit of argument'; 'discloses a case which the Court is satisfied cannot succeed'; 'under no possibility can there be a good cause of action'; 'be manifest that to allow them' (the pleadings) 'to stand would involve useless expense'.
> >
> > At times the test has been put as high as saying that the case must be so plain and obvious that the court can say at once that the statement of claim, even if proved, cannot succeed; or 'so manifest on the view of the pleadings, merely reading through them, that it is a case that does not admit of reasonable argument'; 'so to speak apparent at a glance'."
>
> Although various expressions have been employed in this context, all of them may be seen as different ways of saying that a court should not exercise its power of summary determination of a proceeding except in clear cases (53). The statements referred to in *General Steel Industries (Inc)* were all made about the summary determination of a proceeding without trial. The present matter arises in a different context. Here there has been a trial of the appellant's claim and the question is not whether she should be denied access to a determination of her claim in the ordinary way but whether she should now be denied access to a review of that decision.
>
> …
>
> We do not think it useful to fasten upon one verbal formula in preference to all others as a description of the necessary degree of satisfaction. What must be shown is that it is clear that the appeal will fail and in that sense is not "arguable" or not "fairly arguable". Each of the formulae mentioned by Barwick CJ in the passage we have quoted from *General Steel Industries Inc* intends to convey that meaning. But, of course, if formulae of the kind set

out in *General Steel Industries Inc* are applied in the case of an appeal, it is important to recall that the context is different. The boundaries of the field for debate between the parties on appeal have been set at trial. Before a proceeding has been tried there may well be considerable uncertainty about what evidence will be given and how that will affect the final identification of issues to be decided. Those uncertainties should have been largely resolved at trial and the material and the issues for consideration on appeal will ordinarily be readily identifiable. Is it clear, then, that those issues will be resolved against the appellant?

The parties submitted here that the Full Court should have decided whether the appeal was "arguable". It is important to understand what is meant in this context by "arguable". If it means no more than that counsel, acting responsibly, can formulate an argument which can properly be advanced in support of the appeal, the test is too loose; if it is clear that that argument will fail, the appeal should not proceed. To permit it to proceed is to subject the respondent to the many costs of litigation (54) needlessly and is to occupy the courts when they could be occupied more productively. No doubt, as Barwick CJ said in *General Steel Industries Inc* (55)—

> "… great care must he exercised to ensure that under the guise of achieving expeditious finality a plaintiff is not improperly deprived of his opportunity for the trial of his case by the appointed tribunal."

But as he also said (56)—

> "On the other hand, I do not think that the exercise of the jurisdiction should be reserved for those cases where argument is unnecessary to evoke the futility of the plaintiff's claim. Argument, perhaps even of an extensive kind, may be necessary to demonstrate that the case of the plaintiff is so clearly untenable that it cannot possibly succeed."

Inevitably, then, courts will sometimes have to balance competing considerations. If the futility of an appeal can be demonstrated only by hearing the whole argument there may be no advantage in bringing that argument forward to the time at which some application is made to cure a minor procedural default. But that is not the present case."

41 *Jackamarra v Krakouer and Another* (op cit) involved an application to extend time within which to appeal, and therefore a different test was applied (see the discussion of this by Kennedy J in *Cousins v YMCA of Perth* 82 WAIG 5 (IAC)). However, the exposition of the relevant tests to which I have referred above provides a useful guide to High Court authority which I will apply.

ISSUES AND CONCLUSIONS

42 I now turn to the merits of the appeal in the context of the applicable test, as I have expressed it above. I should say that it is an important fact which overshadows the grounds of appeal in this matter, but no evidence was adduced at first instance on behalf of Mr Moylan in relation to the matter which eventually decided the application when there was affidavit evidence adduced on behalf of the respondent Council. Another important matter is that there was no submission that the finding was unfair, on any cogent basis.

43 By ground 1, it is alleged that the Commissioner at first instance erred in concluding that s.20 of the *Royal Commissions Act* 1968 did not preclude the admission of the McIntyre Report into evidence. The Commissioner did so, as I have said, on the basis that, in the end, the findings which were relied on were admissible within the prescription of s.20 of the *Royal Commissions Act* 1968. It is fair to observe that that section contains no prohibition on its face, upon the admission of a Royal Commission report and its findings. Whether the recordings in such a report of a statement or disclosure made by a witness in answer to any question put to him by a Commission or any Commissioner is not admissible against him in any criminal or civil proceedings is another matter. However, that was not argued or raised before the Full Bench upon appeal, and would not seem to have been argued at first instance.

44 Further, no submissions were made that the finding that the report should be admitted into evidence was wrong in the face of what I have observed. Most significantly, the Commissioner took cognisance of and made his finding based only on the findings in the McIntyre Report and the employer's use of them.

45 Ground 2 recites that the Commissioner erred in finding that the McIntyre Inquiry process had afforded the applicant procedural fairness. The Commissioner did so for the reasons which I have expressed above. There was no complaint of any substance about the process at first instance, save and except that Mr Moylan was refused funding for legal representation. The findings that there was procedural fairness were substantial and were not attacked by detailed submissions before the Full Bench (see paragraph 19 above of the reasons for decision of the Commissioner at first instance dated 28 June 2002). Nothing was submitted to the Full Bench to establish any real substance for that submission. It was not submitted either that any other result would have been obtained as far as the findings which were made against Mr Moylan were concerned if the procedural fairness alleged to have been denied had, in fact, been afforded. (*Stead v State Government Insurance Commission* [1986] 161 CLR 141 was not cited).

46 By ground 3, it was alleged that the Commissioner at first instance erred in finding that the respondent, in the use of the McIntyre Report, had not denied the Appellant procedural fairness. This complaint was based on an assertion that the Respondent, before it acted contrary to the Appellant's interests on the findings contained in the report, did not allow the Appellant an opportunity to be heard in relation to those matters. I do not understand the force of that submission, given that no submissions seem to have been made to that effect at first instance, the submissions being directed to the admissibility of the report.

47 Further, and, in any event, at that time, it was not sought to adduce evidence in relation to those findings when the Commission reconvened, nor was it sought to adduce evidence in answer to the affidavits filed on behalf of the respondent.

48 In any event, it will be noteworthy from paragraphs 15 and 22 of the reasons for decision at first instance dated 28 June 2002 that ample opportunity seems to have been given to deal with both aspects of the matter to Mr Moylan through his Counsel.

49 By ground 4, it is asserted that the Commissioner at first instance erred in concluding that the respondent could use the McIntyre Inquiry Report to retrospectively support the decision to terminate his employment, since he had waived that right by suspending him on full pay. Such suspension occurred pending the handing down of the report. No substantial argument was advanced to the Full Bench as to why that might constitute waiver, and I have difficulty understanding that it could be said that it was so.

50 Further, it might be added, as the Commissioner at first instance found in paragraph 15 of the reasons for decision dated 28 June 2002, as follows:-

> "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."

51 That finding was not sought to be challenged on appeal.

52 What occurred was held by the Commissioner to be able to be used to justify a dismissal within the principles approved in *Concut Ltd v Worrell* (op cit) (see paragraph 16 of the reasons for decision at first instance dated 28 June 2002, page 622 (AB)). It is not therefore clear how a decision to suspend constituted the waiver of a right of dismissal, which was justifiable in the light of later acquired knowledge within the principles in *Concut Ltd v Worrell* (op cit).

53 I did not understand ground 5 to be pressed, so I did not deem it necessary to decide it.

54 As to ground 6, there was nothing in the reasons which has been identified, having particular regard to the elements which I have identified above to at all provide any real ground for an allegation that the Commissioner at first instance failed to act in accordance with equity, good conscience and the substantial merits of the case.

55 Thus, I do not understand, on the grounds as drafted, that it was submitted that there was any error in finding that the dismissal was unfair on any cogent basis.

56 I would make the following further observations about the grounds of appeal including ground 6.

57 Indeed, there was no detailed submission, which is noteworthy, nor was there any ground pleaded in detail to allege that the finding of fairness on the basis that there was substantial fairness, or at least no substantial unfairness, was wrong (see *Shire of Esperance v Mouritz* 71 WAIG 891 (IAC) at page 895 where Kennedy J said:-

> "In my opinion, any breach of the rules of natural justice was a relevant circumstance in the determination of the critical question as to whether the dismissal was harsh or unjust. Whether an employer, in bringing about a dismissal, adopted procedures which were fair to the employee is an element in determining whether the dismissal was harsh or unjust – see *The Law of Employment, Macken, McCarry &Sappideen*, 3rd ed, 277-278, and the authorities there cited. In some cases, this can be a most important circumstance. But in a case such as the present, no question of the invalidity of a decision, as such, falls for determination. The case does not turn simply upon the respective legal rights of the parties."

58 There was no serious reason advanced to the Full Bench why the findings made by an inquirer appointed under the *Local Government Act* 1995 should not have been received. It was not submitted that they were irrelevant. It was not alleged in the grounds of appeal, nor was it submitted, that the findings were irrelevant. It was further not submitted with any force that the conduct of the McIntyre Inquiry did fail to afford the appellant procedural fairness. That was the case, even if the Commission were required to or competent to make such a finding (see *Shire of Esperance v Mouritz* (IAC) (op cit) where a similar inquiry's findings were considered along with their examination by the Full Bench).

59 Further, there was no submission, in accordance with *Stead v State Government Insurance Commission* (op cit), that any denial of procedural fairness by the Commission deprived the appellant of a favourable result.

60 Within the principles laid down in *General Steel Industries Inc v Commissioner for Railways (NSW)* [1964] 112 CLR 125, as summarised in *Jackamarra v Krakouer and Another* (op cit), that a court should not exercise its power of summary determination of a proceeding, except in clear cases (see also *Dey v Victorian Railways Commissioners* [1949] 78 CLR 62 at 91 where Dixon J said:-

> "A case must be very clear indeed to justify the summary intervention of the court to prevent a plaintiff submitting his case for determination in the appointed manner by the court with or without a jury."

61 The question really is this, as Gummow and Hayne JJ identified it in *Jackamarra v Krakouer and Another* (op cit), in considering what I might call summary determination of appeals (at page 529):-

> "Is it clear, then, that those issues will be resolved against the appellant?"

62 For the reasons which I have advanced above, upon a careful examination of the grounds of appeal and the submissions made on behalf of both parties, it is clear that those grounds will be resolved against the appellant.

63 It is not necessary to say a great deal about s.26(1)(c) grounds of the application, save and except that the imminence of Council elections in South Perth or the fact that these proceedings are the end of a long forensic track, are not at all reasons to dismiss the appeal if it has merit.

FINALLY

64 In this case, it is clear that it would fail for the reasons which I have advanced. For those reasons, I agreed with my colleagues to dismiss the appeal acceding to the application by the respondent.

CHIEF COMMISSIONER W S COLEMAN—

65 I have had the advantage of reading the draft of His Honour's reasons for decision.

66 Notwithstanding the appellant's failure to comply with the requirements of Regulation 29(2) of the Industrial Relations Commission Regulations 1985, there were no cogent submissions that the grounds of appeal, either on the facts of matters considered by the Commission in first instance, or as a matter of law, amounted to what could be construed as an arguable case giving any reasonable prospect of success.

67 For the reasons set out by the Hon. President I join him in dismissing the appeal pursuant to section 29(1)(a)(iv) of the Act.

COMMISSIONER S WOOD—

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

THE PRESIDENT—

69 For these reasons, the appeal is dismissed.

2002 WAIRC 06560

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES DAVID LEITH MOYLAN, APPELLANT

—and—

CHAIRMAN OF COMMISSIONERS CITY OF SOUTH PERTH COUNCIL, RESPONDENT

CORAM FULL BENCH

HIS HONOUR THE PRESIDENT P J SHARKEY

CHIEF COMMISSIONER W S COLEMAN

COMMISSIONER S WOOD

DELIVERED	MONDAY, 23 SEPTEMBER 2002
FILE NO/S.	FBA 33 OF 2002
CITATION NO.	2002 WAIRC 06560

Decision	Application granted and appeal dismissed.
Appearances	
Appellant	Mr G T Stubbs (of Counsel), by leave
Respondent	Mr J L Sher (of Counsel), by leave

Order

This application by the abovenamed respondent having come on for hearing before the Full Bench on the 23rd day of September 2002, and having heard Mr J L Sher (of Counsel), by leave, on behalf of the respondent, and Mr G T Stubbs (of Counsel), by leave, on behalf of the appellant, and the Full Bench having determined that the respondent's application should be granted, and that reasons for decision will issue at a future date, it is this day, the 23rd day of September 2002, ordered that appeal No FBA 33 of 2002 be and is hereby dismissed.

By the Full Bench

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

[L.S.]

FULL BENCH—Appeals against decision of Industrial Magistrate—

2002 WAIRC 06654

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
PARTIES	BELL-A-BIKE ROTTNEST PTY LTD, APPELLANT
	- and -
	AUTOMOTIVE, FOOD, METALS, ENGINEERING, PRINTING AND KINDRED INDUSTRIES UNION OF WORKERS – WA BRANCH, RESPONDENT
CORAM	FULL BENCH
	HIS HONOUR THE PRESIDENT P J SHARKEY
	CHIEF COMMISSIONER W S COLEMAN
	COMMISSIONER J H SMITH
DELIVERED	FRIDAY, 27 SEPTEMBER 2002
FILE NO/S.	FBA 31 OF 2002
CITATION NO.	2002 WAIRC 06654

Decision	Appeal upheld and decision at first instance quashed
Appearances	
Appellant	Mr J H Brits (of Counsel), by leave
Respondent	Mr T R Kucera (of Counsel), by leave

Reasons for Decision

THE PRESIDENT—

INTRODUCTION

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

2 This is an appeal by the abovenamed appellant company against the decision of the Industrial Magistrate made in the Industrial Court at Perth. By the decision given on 21 June 2001 in matter No M 269 of 2001, His Worship found that the appellant had committed breaches of the Metal Trades (General) Award No 13 of 1965 (hereinafter referred to as "the award"). He ordered the respondent to pay the sum of $8,176.89 being "underpayments" to the claimant, together with costs fixed at $40.00.

3 It is against that decision that the appeal is now brought under s.84 of the *Industrial Relations Act* 1979 (as amended) (hereinafter referred to as "the Act").

GROUNDS OF APPEAL

4 There is an appeal against what purports to be a decision on the following grounds:-

"**Grounds of appeal**

1. The Magistrate erred in law in holding that the first question to be determined was the calling of the employee and the second question whether the Award applies to the employment relationship.
2. The Magistrate erred in law in holding that both the employer's industry and the employee's calling require consideration in determining the industry to which the Award applies.
3. The Magistrate erred in law in holding that the Respondent's internal repair shop to maintain its own fleet, places them in the 'Cycle Manufacturers and Repairers' industry, when the vast majority of the Respondent's business was 'bike hire'.

A. The Magistrate should have first determined the industry by interpreting the scope clause in the Award according to the words used. The words used are "… *applies to all employees employed in each such industry* ...", the industry being "*Cycle Manufacturers and Repairers*". The Appellant's main business was not in this industry. The Appellant's internal repairs of its own fleet of bicycles, does not determine its business for the purposes of Award coverage.

B. The Magistrate misinterpreted the decision in *Eltin Open Pit Operations Pty Ltd v MEWU* 73 WAIG 1466, and it can be distinguished. Eltin was clearly found to have been in the earthmoving business and the category of Respondents was described as "*Earthmoving Contractors*". Earthmoving was Eltin's main business, unlike the Appellant's internal cycle repair shop."

5 The appellant seeks the following order:-

"That the Magistrate's decision be quashed and substituted with an order that the Appellant did not operate in the Cycle Manufacturers and Repairers Industry as defined in Clause 3 of the Metal Trades (General) Award No 13 of 1965."

BACKGROUND

6 The respondent organisation of employees alleged that one Lenard (sic) Christie was an employee of the abovenamed appellant company "inclusive of the period week ending 2nd November to the week ending 13 September 2000", and that he was employed as an engineering/production employee as defined in clause 5 and Appendix 1 of the award.

7 The agreement to which we refer was entered into on 12 April 1997. In clause 88.5 of the agreement the word "business", meaning the business to be carried on by the appellant, is designed to mean "the business of hiring bikes for use on the Island and ancillary retail sale and repair activities".

8 The respondent organisation alleged that the appellant company was operating in the cycle manufacturing and repairers and retail and wholesale stores industries, which are industries described in clause 3. - Area and Scope and the Second Schedule of the award. That the respondent was engaged in the retail and wholesale stores industry was not contended before the Full Bench. It is not therefore necessary to deal with that point.

9 As a result, the respondent organisation alleged that by virtue of the matters alleged in the above paragraphs the appellant company was an employer bound by the award.

10 The background in fact and in other matters was little in issue upon this appeal.

11 The appellant company (hereinafter referred to as "Bell-A-Bike"), at all material times, carried on business on Rottnest Island in the State of Western Australia. Bell-A-Bike was party to a management agreement with the Rottnest Island Authority, the statutory authority administering the Island, requiring Bell-A-Bike to manage the Authority's bike hire business.

12 The manager, namely the appellant company, is prohibited by the agreement from competing with the business by clauses 47 and 48, which read as follows:-

"47. The Manager may not be involved or concerned in any business that competes with the Business. If any person associated with the Manager (including Glen Parker and Sandra Parker) is involved or concerned in a business that competes with the Business, the Manager shall be deemed to be involved or concerned in a business that competes with the Business.

48. Without limiting the general meaning of the word "compete", a business competes with the Business if—

48.1 it hires bikes from a ferry terminal from which ferries take people to Rottnest Island; or

48.2 it hires bikes when the person in control of the business knows or ought to have known that the bike was to be used on Rottnest Island."

13 It was accepted that Bell-A-Bike was the employer for the purposes of the award. It seems to have been accepted, too, that the business conducted was the business of Bell-A-Bike for the purposes of the award, even though the extracts from their management agreement prescribe that Bell-A-Bike is the Authority's manager. As we say, that point was not argued either on appeal or at first instance, and is not an issue to be considered now.

14 Mr Christie gave evidence that he commenced working with the respondent, Bell-A-Bike, during the week ending 5 November 1999 continuing until 14 January 2002 when his employment was terminated.

15 Whilst there has been some attempt by the appellant to classify Mr Christie in some other role, His Worship accepted the evidence of Mr Christie which was supported by the respondent's other witnesses and documentary evidence, that Mr Christie's primary duties were those of a bicycle mechanic, and His Worship so found. That finding is not challenged.

16 It is quite clear, from the management agreement, that the business required to be conducted was the business of hiring bikes for use on the Island and ancillary retail and repair activities as the agreement prescribes.

17 His Worship found, and that finding is not challenged, that, although Bell-A-Bike sold water and soft drinks and other limited retail items, as well as spare parts and accessories for privately owned cycles, the "primary and substantial" business activity was the hire of bicycles. Bicycles generically included pedal cars, wheelchairs and tricycles. Bell-A-Bike also managed the hire of almost two thousand bicycles per annum and derived income from such hire in the amount of $1,667,603.00. Repairing bicycles was, on the evidence, a crucial part of the business. Further, the business provided a repair service for the public as was required as part of the business, but, as His Worship found, and this finding was not challenged, this was a minor part of the business. It is perhaps, as we will observe later, better described as a miniscule part of the business.

18 There were usually three of four bicycle mechanics employed by Bell-A-Bike, and they sometimes helped out "on the floor" assisting customers during busy periods. There is no doubt, on the evidence, that the workshop was an important, and, indeed, essential part of the business, as we think would be obvious.

19 The particulars of breach appear as alleged in paragraph 5 of the particulars of claim (see pages 4-5 of the appeal book) and allege breaches of clauses 31(1), 14(1)(b), (d) and (c)(i) and (ii) of the award.

20 There was, too, a claim for an order for alleged award underpayments totalling $10,554.34.

21 It was denied on behalf of Bell-A-Bike (the respondent at first instance) that the employee was employed as anything but a casual bicycle mechanic and floor person.

22 It was also alleged that there was an officially induced error of law in that Bell-A-Bike was bound by the award, but that was not an issue before the Full Bench on appeal.

23 An agreement referred to above was tendered and therein "business" is defined as meaning "the business of hiring bikes for use on the Island and ancillary retail sale and repair activities".

24 Clause 5. - Definitions and Classification Structure of the award prescribes the classifications of employees. It was not in issue on appeal that Mr Christie was employed in the classifications referred to in clause 5 and clause 31 of the award, indeed as His Worship found.

25 The only named parties to the award are the respondent organisation and another organisation of employees, the "Australian Electrical, Electronics, Foundry and Engineering Union (Western Australian Branch)".

26 In Appendix 2 of the award "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 received from the maker".

27 In the Second Schedule to the award, which is a list of respondents, one respondent is listed under the heading "Cycle Manufacturers and Repairers".

28 His Worship then went on to find that Mr Christie's primary duties being those of a bicycle repairer, there was no doubt that he would have been classified in the calling of a cycle mechanic based on the old definition in Appendix 2.

29 He also found that the calling of cycle mechanic now lines up with the wage group C12 as set out in Appendix 1, and classified as engineering/production employee level III in clause 5(3) of the award.

30 His Worship went on to refer to s.37(1) of the Act and considered the question whether Bell-A-Bike was in the cycle repair industry or the bike hire industry. It was the case for Bell-A-Bike that it was in the cycle hire industry and not in the cycle repair industry.

31 His Worship went on to consider *Eltin Open Pit Operations Pty Ltd v MEWU* 73 WAIG 1466 and *The King v Drake-Brockman and Others; ex parte National Oil Pty Ltd* 68 CLR 51, and found that the employees, including Mr Christie, who were engaged in the repair of bicycles were employed in the cycle repair industry, notwithstanding the evidence that they may have assisted in other areas during busy times. He therefore held that the award applied to Bell-A-Bike.

CONCLUSIONS

32 The Industrial Magistrate found that Bell-A-Bike was bound by the award and that the primary duties of Mr Christie were those of a bicycle repairer. He also found that the employer was engaged in two industries, the cycle hire industry and the cycle repair industry, and that Mr Christie was employed in the latter industry. It is that finding which is the real issue in this appeal along with the finding which it underpins, namely that the award applied at the material times and bound Bell-A-Bike, by common rule.

33 What was clearly the evidence and the correct finding open on appeal was that Mr Christie himself was engaged in and as a repairer of cycles.

34 What was also clear and what was also not challenged upon appeal was that the evidence was that the only activity carried on by Bell-A-Bike was the hiring of its cycles and their repair by it as an essential part of that activity. As a minor part of that activity cycles owned by members of the public were also repaired. Those findings were correctly made.

35 That the activities which we have described were also required to be conducted by the prescription of the management agreement, to which we have referred above, was also the case.

36 "Industry", for the purposes of s.37 of the Act, and, indeed, for the purposes of the whole of the Act, is defined in s.7 of the Act as follows:-

> "**"industry"** includes each of the following —
>
> (a) any business, trade, manufacture, undertaking, or calling of employers;
>
> (b) …
>
> (c) any calling, service, employment, handicraft, or occupation or vocation of employees,
>
> whether or not, apart from this Act, it is, or is considered to be, industry or of an industrial nature, and also includes —
>
> (d) a branch of an industry or a group of industries;"

37 Bell-A-Bike is not and was not a named respondent to the award, as we have already observed.

38 Clause 3 of the award (the Area and Scope clause) prescribes that the award relates to each industry mentioned in the award and the schedule to the award and applies to all employees employed in each such industry in any calling mentioned in clause 31.

39 It is quite clear, on the evidence, and it seems to have been accepted, that Mr Christie was employed as a cycle repairer, and it seems also to have been accepted that he was employed in a calling mentioned in clause 31.

40 It is trite to observe that, having regard to the prescription of clause 3, the scope and area clause, that does not determine the industry carried on or engaged in by Bell-A-Bike.

41 The question was whether Mr Christie was employed in an industry mentioned in the Second Schedule to the award. The appellant had to so establish that at first instance.

42 As was properly recognised in submissions upon this appeal, there were two tests which apply to determine the industry to which an award applies, to enable a finding as to the manner in which s.37 of the Act operates.

43 The first requires a finding of fact as to the industries or the industry carried on by the named appellant as at the date of the award, which finding is to be made in accordance with the common object test laid down in *Parker's Case* (1926) 29 WALR 90 per Burt J (as he then was) and in the well known case of *WA Carpenters and Joiners, Bricklayers and Stoneworkers' Industrial Union of Workers v Glover* (1970) 50 WAIG 704 ("Glover's Case")). The common object test is that "the common object which it is sought to attain by the combined efforts of the employer and the worker indicates the industry in which they are engaged".

44 The other test is to ascertain the industry by the words used to describe it (see *R J Donovan and Associates Pty Ltd v Federated Clerks Union of Australia, Industrial Union of Workers, WA* 57 WAIG 1317 ("Donovan's Case")). In this case, the industry concerned was identified in the award by the words used to describe it.

45 The test applied in Donovan's Case (op cit) was plainly applicable, and, indeed, it seems to have been accepted by the parties that this was the case. That meant, therefore, as Burt J (as he then was) said in Donovan's Case at page 1318:-

> "… in my opinion, the industry to which the award relates is to be ascertained by the words used to describe it and not by entering upon an inquiry as to the common object in the sense of Parker's Case …"

46 The words used in the award, Schedule 2, to describe the industry are unambiguous. The words used are "Cycle Manufacturers and Repairers" industry. That is the industry described by the award.

47 The appellant's business in the management agreement was clearly described as "hiring bikes for use on the Island and ancillary retail sale and repair activities". That description coincided with the evidence of what the activities of the business carried on by the respondent were (see page 24 of the appeal book). It is quite clear that that part of the activities of the appellant directed to repairing bicycles for the public was less than minor. A miniscule $7092.00 income was derived in the financial year 2000, compared to the income derived from hire, which we have already mentioned as being $1,667,603.00. There is no mention at all of income derived from any retail activities.

48 In our opinion, the words "Cycle Manufacturers and Repairers" ought properly to be read as "Cycle Manufacturers and/or Repairers", since, on a fair reading, either activity might be properly carried on as a separate industry. We think that that is quite clear.

49 In our opinion, whilst the test in Donovan's Case (op cit) prescribes an approach to determining the industry in which an employer is engaged by reference to the words of the award, it does not prescribe any test relating to fact finding which must inevitably take place to determine whether any given enterprise, industry or activity is an industry as described by the words of the award, in this case that of cycle repairer. We exclude any question of the appellant being a cycle manufacturer because there is simply no evidence that there was any cycle manufacturing carried on by it, and it was not so contended on appeal. We would also add that the finding was not attacked as being inapplicable to the date of the award.

50 As *Eltin Open Pit Operations Pty Ltd v MEWU* (op cit) recognised, and what we think is a trite proposition, is that, once the industry described by the award is ascertained, a finding of fact must be made as to whether the activity carried on by an employer is covered by the description of that industry and/or whether that has been so established as a matter of fact.

51 It was contended on behalf of the appellant that the fact finding should be conducted in accordance with the test in Parker's Case (op cit), "the common object test". We do not think that that is a tenable proposition because such an approach is entirely excluded by the ratio in Donovan's case (op cit).

52 In our opinion, it was not established, on the balance of probabilities, that, as a matter of fact, the industry carried on was that of cycle repairer. It was, as a matter of fact, not. The facts were that the appellant hired bicycles to the public, kept them in repair for that purpose, and to an absolutely negligible extent, provided some cycle repairs for the public and some liquid refreshment by way of water or soft drink.

53 It was therefore more probable than not that the respondent was not engaged in the industry as described in the award, on the evidence only. We would also add that it was erroneous, given the applicable test, to determine the industry being carried on by Bell-A-Bike at all, by reference to Mr Christie's occupation.

54 If, however, it is or was necessary to establish that the fact finding should be carried out by the application of a test, then one could say that the major and substantial activity of the business which characterised it unequivocally on the preponderance of the evidence was that the business was a cycle hire business not a cycle repair business, the cycle repairs being merely ancillary to or incidental to the carrying on of the business of cycle hire. That finding results from the application of the test used to establish whether an employee is engaged in a classification under an award, and, as we think, handy and simple (see *Litis v Pantelis* [1958] 60 WALR 17 and *Diggle v Brine and Others* [1939] 41 WALR 76). Further, and alternatively, it was not established to be otherwise. The industry could not be established by reference to the activities of the employees, it is trite to observe, nor by any reference for those reasons, to the minute amount of repair work done for members of the public. Further, it could not be properly found that Bell-A-Bike was engaged in two industries. The evidence was, for the reasons which we have advanced, that it was not so engaged. Of course, if the test in Parker's Case (op cit) were applicable and applied, which it is not and was not and could not be, it would achieve the exact same result because the common object to be carried out by employers and employees was to carry on the business of hiring bicycles. It was essential, as part of the achievement of that object, to have bicycles available for hire. Incidental to that object the respondent repaired and maintained its own bicycles and repaired an insubstantial number of bicycles owned by members of the public.

55 In any event, the circumstances of this case are not met by the application of *Eltin Open Pit Operations Pty Ltd v MEWU* (op cit) which dealt with the industry carried on by a contractor, saving and except to establish, if it were necessary to establish, that after one identifies the industry one has to embark on a fact finding exercise to establish that the industry alleged to be carried on by the respondent was the industry prescribed by the award.

56 It was not open to the Magistrate to find that the appellant was carrying on any industry as prescribed by and within the meaning of clause 3 of the award. The award did not apply to the industry carried on by the appellant. It was, in any event, not established that it was.

57 For those reasons, the Industrial Magistrate erred in finding otherwise. For those reasons, too, we would find the appeal made out. We would uphold the appeal. We would quash the order made at first instance.

Order accordingly

2002 WAIRC 06688

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	BELL-A-BIKE ROTTNEST PTY LTD, APPELLANT
	v.
	AUTOMOTIVE, FOOD, METALS, ENGINEERING, PRINTING AND KINDRED INDUSTRIES UNION OF WORKERS – WA BRANCH, RESPONDENT
CORAM	FULL BENCH
	HIS HONOUR THE PRESIDENT P J SHARKEY
	CHIEF COMMISSIONER W S COLEMAN
	COMMISSIONER J H SMITH
DELIVERED	FRIDAY, 27 SEPTEMBER 2002
FILE NO/S.	FBA 31 OF 2002
CITATION NO.	2002 WAIRC 06688

Decision	Appeal upheld and decision at first instance quashed
Appearances	
Appellant	Mr J H Brits (of Counsel), by leave
Respondent	Mr T R Kucera (of Counsel), by leave

Order

This matter having come on for hearing before the Full Bench on the 13th day of September 2002, and having heard Mr J H Brits (of Counsel), by leave, on behalf of the appellant and Mr T R Kucera (of Counsel), by leave, on behalf of the respondent, and the Full Bench having reserved its decision on the matter, and reasons for decision having been delivered on the 27th day of September 2002, it is this day, the 27th day of September 2002, ordered as follows:-

(1) THAT appeal No FBA 31 of 2002 be and is hereby upheld.

(2) THAT the decision at first instance made by the Industrial Magistrate in matter No M 269 of 2001 on the 21st day of June 2001 be and is hereby quashed.

By the Full Bench

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

FULL BENCH—Procedural Directions and Orders—

2002 WAIRC 06518

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	KWIK & SWIFT CO PTY LTD TRADING AS KWIK & SWIFT COURIERS, APPELLANT and KARAN CHOPRA, RESPONDENT
CORAM	FULL BENCH HIS HONOUR THE PRESIDENT P J SHARKEY CHIEF COMMISSIONER W S COLEMAN COMMISSIONER P E SCOTT
DELIVERED	TUESDAY, 17 SEPTEMBER 2002
FILE NO/S.	FBA 10 OF 2002
CITATION NO.	2002 WAIRC 06518

Decision	Appeal adjourned sine die
Appearances	
Appellant	Mr R O'Brien, as agent
Respondent	Mr B F Stokes, as agent

Order

This matter having come on for hearing before the Full Bench on the 17th day of September 2002, and having heard Mr R O'Brien, as agent, on behalf of the appellant, and Mr B F Stokes, as agent, on behalf of the respondent, and the parties herein having signed a minute of consent, and the parties herein having consented to waive their rights under s.35 of the *Industrial Relations Act* 1979 (as amended), it is this day, the 17th day of September 2002, ordered as follows:-

(1) THAT the hearing and determination of appeal No FBA 10 of 2002 be and is hereby adjourned sine die.

(2) THAT the appellant herein do file and serve a notice of discontinuance within 14 days of the date of this order.

(3) THAT upon the filing and service of such notice of discontinuance the Full Bench do refrain and will hereby refrain from hearing the said appeal further.

By the Full Bench

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

COMMISSION IN COURT SESSION—Matters dealt with—

2002 WAIRC 06656

TRANSPORT WORKERS' (GENERAL) AWARD NO. 10 OF 1961

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	TRANSPORT WORKERS' UNION OF AUSTRALIA, INDUSTRIAL UNION OF WORKERS, WESTERN AUSTRALIAN BRANCH, APPLICANT
	v.
	GORDON & GOTCH (AUSTRALASIAN) LTD & OTHERS, RESPONDENTS
CORAM	COMMISSION IN COURT SESSION
	COMMISSIONER J H SMITH
	COMMISSIONER S WOOD
	COMMISSIONER J L HARRISON
DELIVERED	TUESDAY, 1 OCTOBER 2002
FILE NO.	APPLICATION 83 OF 2002
CITATION NO.	2002 WAIRC 06656

Result	Respondents' application to vary Clause 15(1) of the Award dismissed.
Representation	
Applicant	Mr N Hodgson
Respondent	Mr J Uphill (as Agent)

Reasons for Decision

1 In a declaration delivered by Commissioner Smith on 6 June 2002, [2002] WAIRC 05690 the Commission declared that the amendment sought by the Respondents to Clause 15(1) of the Transport Workers' (General) Award No 10 of 1961 ("the Award") (if allowed) would be to reduce the Award Safety Net and she referred the Respondents' application to the Chief Commissioner under Principle 10 of the Statement of Principles [2001] WAIRC 03333; (2001) 81 WAIG 1721. The Commission file records that the Chief Commissioner allocated this matter to this Commission in Court Session on 7 June 2002.

2 Clause 15(1) of the Award provides—

> "(1) A worker required to work overtime for two hours or more shall be supplied with a reasonable meal by the employer or paid $6.80 for a meal."

3 The Respondents contend that Clause 15(1) of the Award should be amended to provide as follows—

> Proposal (A)
>
> "An employee required to work overtime for two hours or more 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 $6.80 for a meal."

4 Alternatively the Respondents contend that Clause 15(1) should be amended to provide—

> Proposal (B)
>
> "An employee required to work overtime for two hours or more after working ordinary hours, shall be supplied with a reasonable meal by the employer or paid $6.80 for a meal."

5 When the parties came before Commissioner Smith on 19 April 2002, the Respondents argued that prior to 19 February 1986 the requirement to pay the meal allowance only arose under Clause 15(1) when an employer had failed to notify the employee on the previous day or earlier that he or she would be required to work. It was contended on behalf of the Respondents in that hearing that an error had arisen in 1986 when the Award was varied and the requirement for notification was deleted. Commissioner Smith rejected the Respondents' contention in reasons for decision delivered on 30 May 2002 [2002] WAIRC 05704.

6 In support of the application before the Commission in Court Session the Respondents filed a book of exhibits and an outline of submissions on 7 August 2002. In those submissions the Respondents advised the Commission that Commissioner Smith's decision correctly determined it was not possible to positively conclude that a mistake had been made when the Award was varied in 1986. The Commission was also advised that the Respondents would not attempt to re-argue that issue but wished to include the submissions and evidence put before Commissioner Smith as part of the background to this special case application.

Respondents' Arguments as to Merit

7 The Respondents argue the following—

(a) Clause 15 of the Award is inconsistent with the rationale for the payment of meal money (see *Federal Clerks' Union of Australia, Industrial Union of Workers, WA Branch v Myer WA Stores Ltd* 70 WAIG 2555 and *The Transport Workers (Oil Stores) Award 1949 71 CAR 594*. Those decisions state the rationale of payment of meal money is to reimburse an employee who is unexpectedly detained at work and a meal at home is wasted.

(b) The current clause is inequitable as it unfairly advantages employees and significantly disadvantages employers. Consequently it is necessary to amend the Award to create a fair and reasonable safety net. It is contended from the bar table that many truck drivers are regularly rostered to work 10 hours per day, five or six days a week.

(c) Clause 15 of the Award is inconsistent with the basis of payment of meal money in other awards of the WA Industrial Relations Commission notably the Metal Trades (General) Award and Transport Industry Awards such as the Transport Workers' (North West Passenger Vehicles) Award and the Breadcarters' (Metropolitan) Award.

(d) The Labour Relations Reform Act 2002 by insertion of s.40B(1)(d) and (e) into the Industrial Relations Act 1979 ("the Act") supports the employer proposal. In particular Clause 15(1) is inefficient. Section 40B(1)(d) and (e) provide—

> "(1) The Commission, of its own motion, may by order at any time vary an award for any one or more of the following purposes—
>
> (d) to ensure that the award does not contain provisions that are obsolete or need updating;
>
> (e) to ensure that the award is consistent with the facilitation of the efficient organization and performance of work according to the needs of an industry and enterprises within it, balanced with fairness to the employees in the industry and enterprises."

(e) Clause 15 of the Award is inconsistent with the provisions of the parent award, namely the Transport Workers (Mixed Industries) Award which is an award made by the Australian Industrial Relations Commission.

Respondents' Submissions as to the Wage Principles – Principle 10

8 The Respondents contend—

(a) The application seeks to reduce the existing Award provisions below the Award Safety Net and therefore needs to address the following three areas—

- Why the matter has not been progressed and/or finalised pursuant to s.41 of the Act;
- Why the matter has not been pursued under any other Principle; and
- How in the discharge of its statutory function to consider varying above or below the safety net, the Commission should take into account, to the extent that it is relevant, each of the matters identified in s.26 of the Act.

(b) The matter has not been progressed via s.41 of the Act as the Transport Workers' Union of Australia, Industrial Union of Workers, Western Australian Branch ("the Union") has a fundamental objection to reducing award entitlements. The matter has been progressed via Workplace Agreements, Australian Workplace Agreements and s.170LK of the Workplace Relations Act 1996 - Certified Agreements.

(c) The matter has not been progressed under any other Principle because it is not possible to do so.

(d) Equity considerations contained in s.26 of the Act demand the amendment of the Award in the terms proposed by the Respondents as—

- It is inequitable on the parties directly affected that Clause 15 continue in its present format as it unfairly advantages employees and significantly disadvantages employers.
- Public interest considerations suggest that the transport industry (sic) should not be advantaged in comparison to other industries. In the Respondents' view, there should be consistency across industries with respect to the basis of payment of meal money. The current wording of the Award attacks the credibility of the award system.
- Employers have shown that they cannot bear the cost of the existing meal money provisions by fleeing the Award by the use of Workplace Agreements, Australian Workplace Agreements and s.170LK Certified Agreements. Employers do not have a problem paying something extra provided they get something of value in return but the Respondents have a strong view that the existing meal allowance clause is "money for nothing".

(e) Support for the Respondents' position can be found in the decision of the Chief Commission in Application No. 1396/1995, *Hon Minister for Police v WA Police Union of Workers, Western Australian.*

Effect of the Respondents' Proposed Variations to Clause 15(1) of the Award

9 Proposal (A) has the effect that workers will only receive a reasonable meal or a meal allowance if not notified of the requirement to work overtime the day before or at an earlier time. Proposal (B) has the effect that there will be no entitlement to a reasonable meal or a meal allowance if an employee works on the weekend. Pursuant to Clause 12 and Clause 9 of the Award all weekend work is time worked as overtime. Accordingly if proposal (B) is agreed to by the Commission in Court Session then an employee will be required to be given a reasonable meal or be paid the meal allowance on each day they work from Monday to Friday but not if they work on a Saturday or a Sunday, as currently applies.

The Union's Submissions

10 The Union contends—

(a) Clause 15(1) is not inconsistent with the rationale for the payment of meal money set out in 70 WAIG 2555 and 71 CAR 594. When a number of awards of the Australian Industrial Relations Commission and the Western Australian Industrial Relations Commission that cover the transport industry are examined it is clear there is no consistency from one award to another as to how meal allowances are to be paid. Further, the quantum of awards vary from $6.80 in the Award to $10.13 in the Transport Workers' (Refuse, Recycling and Waste Management) Award 2001 which is an award made by the Australian Industrial Relations Commission. Further, some State and Federal awards provide for notification of overtime work and some do not.

(b) The suggestion that the current Clause 15(1) is inequitable as it significantly disadvantages employers has no basis at all. No evidence has been provided by the Respondents that indicate hardship being experienced by the Respondents to the Award.

(c) The Respondents contend that the Labour Relations Reform Act supports their proposal. This may be the case but all the Act provides is a legislative framework and the legitimacy to lodge such a claim. The case must still be made out on its merits.

(d) The argument that Clause 15(1) is inconsistent with the Federal Parent Award (Transport Workers (Mixed Industries) Award 2002) has some validity. The Union says however that the only nexus is in the type of industries the Award seeks to cover but there is no nexus with the general conditions in the Award.

(e) There have been a number of agreements which have been reached in relation to the entitlement of the meal allowance which have been incorporated into industrial agreements which have been registered under s.41 of the Act.

(f) In relation to the equity considerations under s.26 of the Act the Commission must consider all parties involved. A reduction in the entitlement prescribed in Clause 15 would be inequitable to the workers involved. Further the argument that there should be consistency across the industry would apply if Clause 15(1) was radically different to the common standard. However there is no common standard for the payment of meal allowances or the provision of a meal.

11 The Union says this is the second occasion the Respondents to the Award have sought to have Clause 15(1) amended to provide for provision of a meal or payment of a meal allowance only in the absence of notification on the previous day or earlier. This issue was raised before a Commission in Court Session in March 1991 in *Transport Workers' Union of Australia, Industrial Union of Workers, Western Australian Branch v Australian Glass Manufacturers Company and Others* (1991) 71 WAIG 1418. In that matter the Commission had before it an application by the Union to give effect to the First State Wage adjustment under the Structural Efficiency Principle set out in the 1989 State Wage Decision and to implement a new classification structure. The Respondents to the Award as part of their Notice of Answer and Counter Proposal sought to have deleted the requirement to pay meal money where regularly rostered overtime is worked (i.e. overtime notified at least the day before it is rostered to be worked). It was submitted on behalf of the Respondents in 1991 that regular 10 hour shifts were a common feature of the industry and it was unlikely that where an employee finishes a shift at 4:30pm that a meal would be purchased. The Commission in Court Session did not make the amendment sought by the Respondents. They were not satisfied that there had been a draughting error in 1986. Chief Commissioner Coleman and Commissioner Parks held that the Respondents had not discharged its onus to show a revision of Clause 15(1) was warranted. Further the Chief Commissioner and Commissioner Parks held they were not prepared to accept that the circumstances under which a 10 hour shift is worked would, as a matter of course, result in the completion of work at 4:30pm and the consumption of a normal evening meal soon thereafter.

Respondents' Reply

12 Mr Uphill, on behalf of the Respondents in this matter, says that the issues of merit raised in this application are significantly different to the matters raised before the Commission in Court Session in 1991. He says the Respondents do not raise whether an error did or did not occur. Further it is contended the nature of the claim is that it is plain that the effect of Clause 15(1) as it currently stands is such that it simply effected a wage increase in 1989 and that such an argument can be made without any supporting evidence. Further it is said that it would be difficult to call evidence in support of the Respondents' case as the scope of the Award covers over 100 headings (industries) and it would take an inordinate period of time if the Respondents were required to call evidence in support of its case if they were required to call evidence on behalf of each of the 100 branches of the transport industry covered by the Award.

Conclusion

13 It is our view that, having regard to all the material put forth on behalf of the parties that the Respondents have not discharged their onus of proof. The reasons why we have reached this conclusion are as follows—

(a) In the absence of any evidence whatsoever that the current clause is inequitable or that it unfairly advantages employees and significantly disadvantages employers the Commission in Court Session is unable to accept the contentions made on behalf of the Respondents. Section 26(1) of the Act requires the Commission in Court Session to act according to equity, good conscience and the substantial merits of the case, whilst having regard for the interests of persons directly concerned. An award incorporates wages and conditions of employees who are unable to reach an industrial agreement. The award acts as a safety net and protects the basic entitlements due to an employee. Such conditions should not be disturbed lightly without a sound basis for doing so.

(b) Section 26(1)(d) of the Act requires the Commission in Court Session under Principle 10 to take into account where relevant—

"(i) the state of the national economy;

(ii) the state of the economy of Western Australia;

(iii) the capacity of employers as a whole or of an individual employer to pay wages, salaries, allowances or other remuneration and to bear the cost of improved or additional conditions of employment;

(iv) the likely effects of its decision on the economies referred to in subparagraphs (i) and (ii) and, in particular, on the level of employment and on inflation;

(v) any changes in productivity that have occurred or are likely to occur;

(vi) the need to facilitate the efficient organization and performance of work according to the needs of an industry and enterprises within it, balanced with fairness to the employees in the industry and enterprises;

(vii) the need to encourage employers, employees and organizations to reach agreements appropriate to the needs of enterprises and the employees in those enterprises."

It is our view that there is nothing in the Respondents' proposals (A) or (B) which addresses the efficient organization and performance of work according to the needs of the branches of the transport industry covered by the Award and the enterprises within it, that contains a balance of fairness to the employees in these branches of the industry and enterprises.

(c) There is no evidence before the Commission in Court Session that Clause 15(1) is an obsolete provision that needs to be updated. In our view, there is not a sufficient nexus between the Award and the Federal Transport Workers (Mixed Industries) Award. Further we accept the submissions made on behalf of the Union that there is no uniform basis of payment of provision of meals or meal allowances in other awards of this Commission which cover the transport industry and enterprises within the transport industry.

(d) Whilst *Federated Clerks' Union of Australia v Myer WA Stores Ltd* (op cit) sets out the rationale for payment of meal money, the provisions for meal allowances considered in that case did not provide for prior notification. Although *The Transport Workers (Oil Stores) Award 1949* (op cit) considered a claim for meal allowances should not be allowed where an employee has notice that he or she should work overtime, that case did not consider an application to vary a meal allowance clause below the safety net.

14 In light of these reasons an order will be made dismissing the Respondents' application to amend Clause 15(1) of the Award.

———

2002 WAIRC 06661

TRANSPORT WORKERS' (GENERAL) AWARD NO. 10 OF 1961

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	TRANSPORT WORKERS' UNION OF AUSTRALIA, INDUSTRIAL UNION OF WORKERS, WESTERN AUSTRALIAN BRANCH, APPLICANT
	v.
	GORDON & GOTCH (AUSTRALASIAN) LTD & OTHERS, RESPONDENTS
CORAM	COMMISSION IN COURT SESSION
	COMMISSIONER J H SMITH
	COMMISSIONER S WOOD
	COMMISSIONER J L HARRISON
DATE OF ORDER	TUESDAY, 1 OCTOBER 2002
FILE NO.	APPLICATION 83 OF 2002
CITATION NO.	2002 WAIRC 06661

Result	Respondents' application to vary Clause 15(1) of the Award dismissed.
Representation	
Applicant	Mr N Hodgson
Respondents	Mr J Uphill (as Agent)

Order

HAVING heard Mr Hodgson on behalf of the Applicant and Mr Uphill on behalf of the Respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act 1979, hereby orders—

THAT the Respondents' application to vary Clause 15(1) of the Transport Workers' (General) Award No. 10 of 1961 be, and is hereby dismissed.

(Sgd.) J. H. SMITH,
[L.S.] Commission in Court Session.

PUBLIC SERVICE ARBITRATOR—Awards/Agreements—Variation of—

2002 WAIRC 06682

GOVERNMENT OFFICERS SALARIES, ALLOWANCES AND CONDITIONS AWARD 1989

No. PSAA 3 of 1989

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED, APPLICANT
	v.
	ALBANY PORT AUTHORITY AND OTHERS, RESPONDENTS
CORAM	COMMISSIONER P E SCOTT
	PUBLIC SERVICE ARBITRATOR
DATE OF ORDER	WEDNESDAY, 2 OCTOBER 2002
FILE NO.	P 42 OF 2002
CITATION NO.	2002 WAIRC 06682

Result	Award varied

Order

HAVING heard Mr M Sims on behalf of the applicant and Mr A Harper on behalf of the respondents, and by consent, the Public Service Arbitrator, pursuant to the powers conferred under the Industrial Relations Act, 1979, hereby orders—

THAT the Government Officers Salaries, Allowances and Conditions Award 1989 (No. PSAA 21 of 1986) be varied in accordance with the following Schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after the 13th day of September 2002.

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

SCHEDULE

1. Schedule I – Clause 18. – Overtime: Delete this schedule and insert the following in lieu thereof—

PART I - OUT OF HOURS CONTACT

(Operative from the first pay period commencing on or from 13th September 2002)

Standby	$6.15 per hour
On Call	$3.07 per hour
Availability	$1.54 per hour

PART II - MEALS

(Operative from the first pay period commencing on or from 1 July 2002)

Breakfast	$7.75 per meal
Lunch	$9.55 per meal
Evening Meal	$11.50 per meal

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

A shift work allowance of $14.31 is payable for each afternoon or night shift of seven and one half (7.5) hours worked.

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

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

(1) Diving - (Clause 33)

$4.97 per hour or part thereof.

(2) Flying - (Clause 34)

(a) Observation and photographic duties in fixed wing aircraft - $9.18 per hour or part thereof.

(b) Cloud seeding and fire bombing duties, observation and photographic duties involving operations in which fixed wing aircraft are used at heights less than 304 metres or in unpressurised aircraft at heights more than 3048 metres - $12.58 per hour or part thereof.

(c) When required to fly in a helicopter on fire bombing duties, observation and photographic duties or stock surveillance - $17.38 per hour or part thereof.

(3) Sea Going Allowances (Clause 40)

(a) Victualling

(i) Government Vessel - meals on board not prepared by cook - $23.40 per day.

(ii) Government Vessel - meals on board are prepared by a cook - $17.61 per day.

(iii) Non Government Vessel - $21.36 each overnight period.

(b) Hard Living Allowance - 48 cents per hour or part thereof.

2002 WAIRC 06683

GOVERNMENT OFFICERS (SOCIAL TRAINERS) AWARD 1988
No. PSAA 20 of 1985

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED, APPLICANT
	v.
	DISABILITY SERVICES COMMISSION, RESPONDENT
CORAM	COMMISSIONER P E SCOTT
	PUBLIC SERVICE ARBITRATOR
DATE OF ORDER	WEDNESDAY, 2 OCTOBER 2002
FILE NO.	P 38 OF 2002
CITATION NO.	2002 WAIRC 06683

Result Award varied

Order

HAVING heard Mr M Sims on behalf of the applicant and Mr A Harper on behalf of the respondent, and by consent, the Public Service Arbitrator, pursuant to the powers conferred under the Industrial Relations Act, 1979, hereby orders—

THAT the Government Officers (Social Trainers) Award 1988 (No. PSAA 20 of 1985) be varied in accordance with the following Schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after the 13th day of September 2002.

[L.S.]

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

SCHEDULE

1. Schedule B – Clause 22. – Overtime: Delete this schedule and insert the following in lieu thereof—

PART I - OUT OF HOURS CONTACT

(Operative from the first pay period commencing on or from 13th September 2002)

Standby	$6.15 per hour
On Call	$3.07 per hour
Availability	$1.54 per hour

PART II - MEALS

(Operative from the first pay period commencing on or from 1st July 2002)

Breakfast	$7.75 per meal
Lunch	$9.55 per meal
Evening Meal	$11.50 per meal

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

For each afternoon or night shift worked - $14.31.

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

2002 WAIRC 06680

GRAYLANDS SELBY-LEMNOS AND SPECIAL CARE HEALTH SERVICES AWARD 1999, NO. PSAA 1 OF 1999

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED, APPLICANT
	v.
	DEPARTMENT OF HEALTH, RESPONDENT
CORAM	COMMISSIONER P E SCOTT
	PUBLIC SERVICE ARBITRATOR
DATE OF ORDER	WEDNESDAY, 2 OCTOBER 2002
FILE NO.	P 40 OF 2002
CITATION NO.	2002 WAIRC 06680

Result Award varied

Order

HAVING heard Mr M Sims on behalf of the applicant, Mr G Bucknall on behalf of the Hospital Salaried Officers Association of Western Australia (Union of Workers) and Mr A Harper on behalf of the respondent, and by consent, the Public Service Arbitrator, pursuant to the powers conferred under the Industrial Relations Act, 1979, hereby orders—

THAT the Graylands Selby-Lemnos and Special Care Health Services Award 1999 (No. PSAA 1 of 1999) be varied in accordance with the following Schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after the 13th day of September 2002.

[L.S.]

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

SCHEDULE

1. Schedule H – Overtime: Delete this schedule and insert the following in lieu thereof—

PART 1 - OUT OF HOURS CONTACT

(Operative from the first pay period commencing on or from 13th September 2002)

Standby	$6.15 per hour
On Call	$3.07 per hour
Availability	$1.54 per hour

PART II - MEALS

(Operative from the first pay period commencing on or from 1st July 2002)

Breakfast	$7.75	per meal
Lunch	$9.55	per meal
Evening Meal	$11.50	per meal
Supper	$7.75	per meal

The allowances prescribed in this schedule shall apply from the dates indicated and shall be varied in accordance with any movement in the equivalent allowances in the Public Service Award 1992.

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

(1) Diving - (Clause 33)

$4.97 per hour or part thereof.

(2) Flying - (Clause 34)

(a) Observation and photographic duties in fixed wing aircraft - $9.18 per hour or part thereof.

(b) Cloud seeding and fire bombing duties, observation and photographic duties involving operations in which fixed wing aircraft are used at heights less than 304 metres or in unpressurised aircraft at heights more than 3048 metres - $12.58 per hour or part thereof.

(c) When required to fly in a helicopter on fire bombing duties, observation and photographic duties or stock surveillance - $17.38 per hour or part thereof.

(3) Sea Going Allowances (Clause 40)

(a) Victualling

(i) Government Vessel - meals on board not prepared by a cook - $23.40 per day.

(ii) Government Vessel - meals on board are prepared by a cook - $17.61 per day.

(iii) Non Government Vessel - $21.36 each overnight period.

(b) Hard Living Allowance - 48 cents per hour or part thereof.

The allowances prescribed in this schedule shall apply from the first pay period commencing on or from 13th September 2002, and shall be varied in accordance with any movement in the equivalent allowances in the Public Service Award 1992.

2002 WAIRC 06488

HOSPITAL SALARIED OFFICERS' AWARD 1968
No. 39 of 1968

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	HOSPITAL SALARIED OFFICERS ASSOCIATION OF WESTERN AUSTRALIA (UNION OF WORKERS), APPLICANT
	v.
	HON MINISTER FOR HEALTH AND OTHERS, RESPONDENTS
CORAM	COMMISSIONER P E SCOTT PUBLIC SERVICE ARBITRATOR
DATE OF ORDER	FRIDAY, 13 SEPTEMBER 2002
FILE NO.	P 37 OF 2002
CITATION NO.	2002 WAIRC 06488

Result Award varied

Order

HAVING heard Ms C Thomas on behalf of the applicant and Ms R Proctor on behalf of the respondents, and by consent, the Public Service Arbitrator, pursuant to the powers conferred under the Industrial Relations Act, 1979, hereby orders—

THAT the Hospital Salaried Officers' Award 1968 (No. 39 of 1968) be varied in accordance with the following Schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after the 29th day of August 2002.

[L.S.]

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

SCHEDULE

1. Schedule A – Minimum Salaries: Delete subclause (2) of this clause and insert the following in lieu thereof—

(2) Minimum Salaries—

LEVELS	CURRENT	**ASNA**	NEW
Level 1 under 17 years of age	11363	1929.00	13292.00
17 years of age	13270	2253.00	15523.00
18 years of age	15490	2630.00	18120.00
19 years of age	17929	3044.00	20973.00
20 years of age	20135	3418.00	23553.00
21 years of age 1st year of service	22117	3755.00	25872.00
22 years of age 2nd year of service	22771	3755.00	26526.00
23 years of age 3rd year of service	23421	3755.00	27176.00
24 years of age 4th year of service	24069	3860.00	27929.00
Level 2	24720	3860.00	28580.00
	25371	3860.00	29231.00
	26120	3756.00	29876.00
	26638	3756.00	30394.00
	27403	3756.00	31159.00

LEVELS	CURRENT	ASNA	NEW
Level 3	28307	3756.00	32063.00
	29010	3756.00	32766.00
	29749	3756.00	33505.00
	30928	3756.00	34684.00
Level 4	31545	3756.00	35301.00
	32470	3756.00	36226.00
	33421	3756.00	37177.00
	34772	3756.00	38528.00
Level 5	35476	3756.00	39232.00
	36443	3756.00	40199.00
	37438	3652.00	41090.00
	38462	3652.00	42114.00
Level 6	40434	3652.00	44086.00
	41898	3652.00	45550.00
	43978	3652.00	47630.00
Level 7	45091	3652.00	48743.00
	46501	3652.00	50153.00
	47962	3652.00	51614.00
Level 8	50097	3652.00	53749.00
	51847	3652.00	55499.00
Level 9	54495	3652.00	58147.00
	56337	3652.00	59989.00
Level 10	58354	3652.00	62006.00
	61598	3652.00	65250.00
Level 11	64189	3652.00	67841.00
	66824	3652.00	70476.00
Level 12	70437	3652.00	74089.00
	72878	3652.00	76530.00
	75662	3652.00	79314.00

(a) An employee, who is 21 years of age or older on appointment to a classification equivalent to Level 1, may be appointed to the minimum rate of pay based on years of service, not on age.

(b) (i) For the purposes of this paragraph, 'Medical Typist' and "Medical Secretary' shall mean those employees classified on a classification equivalent to Level 1, 2, or 3 who spend at least 50% of their time typing from tapes, shorthand, and/or Doctor's notes of case history, summaries, reports or similar material involving a broad range of medical terminology.

(ii) A Medical Typist or Medical Secretary shall be paid a medical terminology allowance of an amount equivalent to 5.15% of Level 2 increment 3 per annum, which shall be converted to an hourly rate to enable payment—

(aa) on a fortnightly basis;

(bb) on a proportionate basis for a part time employee;

(iii) Notwithstanding any other provisions of this paragraph, where an employee, classified equivalent to Level 1, 2 or 3 (other than an employee for whom training or instruction is a formal requirement of their job) has been instructed to provide short-term training or instruction in medical terminology, the employee shall be paid the medical terminology allowance on an hourly basis for the hours so worked.

(c) Where State Wage Case decisions of the Western Australian Industrial Relations Commission result in an expressed money adjustment to adult (21 years and over) salaries under this clause, the rates for Level 1 employees under 21 years shall be calculated using the following formula—

Current junior rate ÷ Current Level 1 (21 years, 1st year of service) rate x ASNA rate for Level 1 (21 years, 1st year of service) = Junior ASNA rate.

The junior ASNA rate is added to the Current Junior Rate to obtain the applicable New Junior rate.

2002 WAIRC 06681

PUBLIC SERVICE AWARD 1992
NO. PSAA 4 OF 1989

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED, APPLICANT
	v.
	ABORIGINAL AFFAIRS (NOW KNOWN AS DEPARTMENT OF INDIGENOUS AFFAIRS) AND OTHERS, RESPONDENTS
CORAM	COMMISSIONER P E SCOTT
	PUBLIC SERVICE ARBITRATOR
DATE OF ORDER	WEDNESDAY, 2 OCTOBER 2002
FILE NO.	P 41 OF 2002
CITATION NO.	2002 WAIRC 06681

Result Award varied

Order

HAVING heard Mr M Sims on behalf of the applicant and Mr A Harper on behalf of the respondents, and by consent, the Public Service Arbitrator, pursuant to the powers conferred under the Industrial Relations Act, 1979, hereby orders—

THAT the Public Service Award 1992 (No. PSAA 4 of 1989) be varied in accordance with the following Schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after the 13th day of September 2002.

[L.S.]

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

SCHEDULE

1. Schedule H – Overtime: Delete this schedule and insert the following in lieu thereof—

PART I - OUT OF HOURS CONTACT

(Operative from the first pay period commencing on or from 13th September 2002)

Standby	$6.15 per hour
On Call	$3.07 per hour
Availability	$1.54 per hour

PART II - MEALS

(Operative from the first pay period commencing on or from 1st July 2002)

Breakfast	$7.75 per meal
Lunch	$9.55 per meal
Evening Meal	$11.50 per meal
Supper	$7.75 per meal

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

A shift work allowance of $14.31 is payable for each afternoon or night shift of seven and one half (7.5) hours worked.

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

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

(1) Diving - (Clause 33)

$4.97 per hour or part thereof.

(2) Flying - (Clause 34)

(a) Observation and photographic duties in fixed wing aircraft - $9.18 per hour or part thereof.

(b) Cloud seeding and fire bombing duties, observation and photographic duties involving operations in which fixed wing aircraft are used at heights less than 304 metres or in unpressurised aircraft at heights more than 3048 metres - $12.58 per hour or part thereof.

(c) When required to fly in a helicopter on fire bombing duties, observation and photographic duties or stock surveillance - $17.38 per hour or part thereof.

(3) Sea Going Allowances (Clause 40)

(a) Victualling

(i) Government Vessel - meals on board not prepared by cook - $23.40 per day.

(ii) Government Vessel - meals on board are prepared by a cook - $17.61 per day.

(iii) Non Government Vessel - $21.36 each overnight period.

(b) Hard Living Allowance - 48 cents per hour or part thereof.

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

2002 WAIRC 06404

ENGINE DRIVERS' (GOLD MINING) CONSOLIDATED AWARD 1979

No. 37 of 1947

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES CONSTRUCTION, MINING, ENERGY, TIMBERYARDS, SAWMILLS AND WOODWORKERS UNION OF AUSTRALIA - WESTERN AUSTRALIAN BRANCH, APPLICANT

v.

WESTERN MINING CORPORATION LIMITED AND OTHERS, RESPONDENTS

CORAM SENIOR COMMISSIONER A R BEECH

DATE WEDNESDAY, 4 SEPTEMBER 2002

FILE NO.	APPLICATION 595B OF 1996
CITATION NO.	2002 WAIRC 06404

Result	Application to vary an award discontinued.
Representation	
Applicant	Ms D. MacTiernan
Respondent	Ms G. Kristianopoulos

Order

WHEREAS an application was lodged in the Commission pursuant to section 40 of the *Industrial Relations Act 1979*;

AND WHEREAS a conference between the parties was convened;

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

AND HAVING HEARD Ms D. MacTiernan on behalf the applicant and Ms G. Kristianopoulos on behalf of the respondents;

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 06581

GOVERNMENT OFFICERS SALARIES, ALLOWANCES AND CONDITIONS AWARD 1989

No. PSA A3 of 1989

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED, APPLICANT
	v.
	ALBANY PORT AUTHORITY AND OTHERS, RESPONDENT
CORAM	COMMISSIONER P E SCOTT
	PUBLIC SERVICE ARBITRATOR
DATE OF ORDER	WEDNESDAY, 25 SEPTEMBER 2002
FILE NO/S.	P 25 OF 2000
CITATION NO.	2002 WAIRC 06581

Result	Application withdrawn by leave

Order

WHEREAS this is an application pursuant to Section 40 of the Industrial Relations Act 1979; and

WHEREAS by an email dated the 19th day of September 2002 the Applicant advised that the matter could be discontinued; and

WHEREAS on the 23rd day of September 2002 the Respondent consented to the matter being withdrawn;

NOW THEREFORE, the Public Service Arbitrator, pursuant to the powers conferred on it 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 06619

MEAT INDUSTRY (STATE) AWARD 1980, No. R 9 of 1979

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	WEST AUSTRALIAN BRANCH, AUSTRALASIAN MEAT INDUSTRY EMPLOYEES' UNION, INDUSTRIAL UNION OF WORKERS, PERTH, APPLICANT
	v.
	ACTION FOOD BARNS (WA) PTY LTD
	E.G. GREEN & SONS PTY LTD
	BENNETT CLUNING PTY LTD, RESPONDENTS
CORAM	SENIOR COMMISSIONER A R BEECH
DATE	WEDNESDAY, 25 SEPTEMBER 2002
FILE NO.	APPLICATION 23 OF 1996
CITATION NO.	2002 WAIRC 06619

Result	Application to vary the award discontinued.
Representation	
Applicant	Mr G. Haynes on behalf of the applicant
Respondents	No appearance

Order

WHEREAS an application was lodged in the Commission pursuant to section 40 of the *Industrial Relations Act 1979*;

AND WHEREAS the matter was listed for hearing for mention only on 24 September 2002;

AND WHEREAS Mr G Haynes on behalf of the applicant requested the application be discontinued.

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

THAT the application is hereby discontinued.

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

2002 WAIRC 06726

MOTOR VEHICLE (SERVICE STATION, SALES ESTABLISHMENTS, RUST PREVENTION AND PAINT PROTECTION) INDUSTRY AWARD
No. 29 of 1980, No. A 29 of 1980

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ASTERIAN PTY LTD T/A MICK'S CALTEX, DENWIN PTY LTD T/A AMPOL NAVAL BASE, COUNTRY ROAD TRAVEL STOPS PTY LTD T/A YULE DU AMGAS, APPLICANTS *v.* THE AUSTRALIAN WORKERS' UNION, WEST AUSTRALIAN BRANCH, INDUSTRIAL UNION OF WORKERS, ALLPIKE'S HONDA AND PEUGEOT, AMGAS FREMANTLE SERVICE STATION, RESPONDENTS
CORAM	SENIOR COMMISSIONER A R BEECH
DATE	TUESDAY, 8 OCTOBER 2002
FILE NOs	APPLICATION 964C OF 1997
CITATION NO.	2002 WAIRC 06726

Result	Application for variation of an award discontinued.
Representation	
Applicants	Ms C. Brown and Ms J. Moss (as agents) on behalf of the applicants
Respondents	Mr M. Lourey on behalf of the respondents

Order

WHEREAS an application was lodged in the Commission pursuant to section 40 of the *Industrial Relations Act 1979*;

AND WHEREAS a hearing was held on 26 June 1997;

AND WHEREAS an Order issued dividing the application into 964A and 964B of 1997;

AND WHEREAS application 964A of 1997 was finalised and application 964B of 1997 was adjourned sine die;

AND WHEREAS a hearing was held on 17 October 1997;

AND WHEREAS an Order issued on 15 December 1997 dividing application 964B of 1997 into 964B and 964C of 1997;

AND WHEREAS application 964B of 1997 was finalised and application 964C of 1997 was adjourned sine die;

AND WHEREAS nothing further has been heard from the applicants and the Commission listed the application to show cause why it should not now be discontinued;

AND WHEREAS the applicants now have advised the Commission that they have no objection to the matter being discontinued;

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

THAT application 946C of 1997 be hereby discontinued.

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

2002 WAIRC 06582

PUBLIC SERVICE AWARD 1992

No. PSA A4 of 1989

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED, APPLICANT
	v.
	THE AUDITOR GENERAL, OFFICE OF THE AUDITOR GENERAL AND OTHERS, RESPONDENT
CORAM	COMMISSIONER P E SCOTT
	PUBLIC SERVICE ARBITRATOR
DATE OF ORDER	WEDNESDAY, 25 SEPTEMBER 2002
FILE NO/S.	P 26 OF 2000
CITATION NO.	2002 WAIRC 06582

Result Application withdrawn by leave

Order

WHEREAS this is an application pursuant to Section 40 of the Industrial Relations Act 1979; and

WHEREAS by an email dated the 19th day of September 2002 the Applicant advised that the matter could be discontinued; and

WHEREAS on the 23rd day of September 2002 the Respondent consented to the matter being withdrawn;

NOW THEREFORE, the Public Service Arbitrator, pursuant to the powers conferred on it 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.

AWARDS/AGREEMENTS—Interpretation of—

2002 WAIRC 06697

WESTERN AUSTRALIAN POLICE SERVICE ENTERPRISE AGREEMENT FOR POLICE ACT EMPLOYEES

PSA AG 8 of 2001

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	WA POLICE UNION OF WORKERS, APPLICANT
	v.
	COMMISSIONER OF POLICE, RESPONDENT
CORAM	COMMISSIONER P E SCOTT
	PUBLIC SERVICE ARBITRATOR
DATE OF ORDER	THURSDAY, 3 OCTOBER 2002
FILE NO/S.	P 22 OF 2002
CITATION NO.	2002 WAIRC 06697

Result Application dismissed

Order

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

WHEREAS on the 1st day of August 2002 the Public Service Arbitrator convened a conference for the purpose of conciliating between the parties; and

WHEREAS at the conclusion of that conference the parties were requested to exchange relevant documentation and the Applicant's representative was to advise the Public Service Arbitrator of the Applicant's intentions; and

WHEREAS on the 2nd day of October 2002 the Applicant's representative advised that the matter was resolved;

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

THAT this application be, and is hereby dismissed.

[L.S.]

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

AGREEMENTS—Industrial—Retirements from—

CITY OF FREMANTLE ENTERPRISE AGREEMENT
No. 2 of 1995, No. AG 279 of 1995

IN THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

No. 1577 of 2002

IN THE MATTER of the Industrial Relations Act 1979

and

IN THE MATTER of the filing in the Office of the Registrar of a Notice of Retirement from Industrial Agreement in accordance with section 41(7) of the said Act

City of Fremantle will cease to be a party to the City of Fremantle Enterprise Agreement No. 2 of 1995, No. AG 279 of 1995 on and from the 17th day of October 2002.

DATED at Perth this 1st day of October 2002.

J. A. SPURLING,
Registrar.

P & P ITALIANO HOLDINGS INDUSTRIAL AGREEMENT
No. AG 340 of 1997

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

No. 1695 of 2002

IN THE MATTER of the Industrial Relations Act 1979

and

IN THE MATTER of the filing in the Office of the Registrar of a Notice of Retirement from Industrial Agreement in accordance with section 41(7) of the said Act

P & P Italiano Holdings Pty Ltd will cease to be a party to the P & P Italiano Holdings Industrial Agreement, No. AG 340 of 1997 on and from the 7th day of November 2002.

DATED at Perth this 9th day of October 2002.

(Sgd.) J. A. SPURLING,
[L.S.] Registrar.

NOTICES—Award/Agreement matters—

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

APPLICATION 1555 OF 2002

APPLICATION FOR VARIATION OF AWARD ENTITLED "CLOTHING TRADES AWARD 1973"

NOTICE is given that an application has been made to the Commission by The Western Australian Clothing and Allied Trades' Industrial Union of Workers under section 40 of the Industrial Relations Act 1979 to vary the above Award.

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

Schedule of Respondents

Delete the current list of respondents and insert in lieu the following list.

Cut It Out
870 Hay Street, PERTH WA 6000

Fullin Tailoring Company
567 Beaufort Street, HIGHGATE WA 6003

Regalia Craft Pty Ltd
116 Roe Street, NORTHBRIDGE WA 6003

Sinikka Furs
117 Barrack Street, PERTH WA 6000

Thompson's Frock Shop
1267 Hay Street, WEST PERTH WA 6005

Million Dollar Clothing Company
Unit 12, 1 Irwin Road, WANGARA WA 6065

Daneechi Swimwear Retailer
30 Rokeby Road
SUBIACO WA 6008

Barrymores Pty Ltd
86 Thompson Road
NORTH FREMANTLE WA 6159

Spectrum Sportswear
Unit 1/3 Natalie Way, BALCATTA WA 6021

Don Sinclair Agencies Pty Ltd
312 Murray Street, PERTH WA 6000

Jost Enterprises Pty Ltd T/A Logo Australia
Unit 39, 3 Park Avenue, CRAWLEY WA 6009

Rusty Surfboards Australia
13 Collingwood Street, OSBORNE PARK WA 6017

The Western Australian Clothing and Allied Trades' Industrial Union of Workers
25 Barrack Street, PERTH WA 6000

David T. Sport Wear
28 Collingwood Street, OSBORNE PARK WA 6017

Desam Fashion Design
Unit 5, 14-16 Sundercombe Street, OSBORNE PARK WA 6017

Cupids Bridal
Upper Level, 92-94 Barrack Street, PERTH WA 6000

Adelphi Tailoring Co
239 Main Street
OSBORNE PARK WA 6017

Obsessions Gym and Swimwear
Shop 37-38 Gosnells Railway Market, GOSNELLS WA 6110

Aussie Gold
1 Howlett Street, NORTH PERTH WA 6006

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

(Sgd) J. A. SPURLING,
Registrar.

24 September 2002.

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

APPLICATION 1554 OF 2002

APPLICATION FOR VARIATION OF AWARD ENTITLED
"FOOD INDUSTRY (FOOD MANUFACTURING OR PROCESSING) AWARD NO. A20 OF 1990"

NOTICE is given that an application has been made to the Commission by The Food Preservers' Union of Western Australia Union of Workers under section 40 of the Industrial Relations Act 1979 to vary the above Award.

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

Schedule of Respondents

Delete the current list of respondents and insert in lieu the following list.

Anchor Foods Pty Ltd
148 Carrington Street, O'CONNOR WA 6163

Azzura Gelati
7 Zeta Crescent, O'CONNOR WA 6163

Arnott's Biscuits Limited
90-94 Bannister Road, CANNING VALE WA 6155

Baldivis Poultry Processors
903 Mandurah Road, BALDIVIS WA 6171

The Smith's Snackfood Company Limited
38 Bannister Road, CANNING VALE WA 6155

Simplot Australia Pty Limited
232 Great Eastern Highway, BELMONT 6104

Inghams Enterprises Pty Ltd
9 Baden Street, OSBORNE PARK WA 6017

Kailis & France Foods Pty Ltd
14 Neil Street, OSBORNE PARK WA 6017

Goodman Fielder Consumer Foods
20 Coulson Way, CANNING VALE WA 6155

Mercer Mooney
Fruit and Vegetable Merchants
280 Bannister Road, CANNING VALE WA 6155

MG Kailis Gulf Fisheries Pty Ltd
Head Office
50 Mews Road, FREMANTLE WA 6160

Crestore Foods Pty Ltd
32 William Street, BECKENHAM WA 6107

PB Foods Ltd
22 Geddes Street, BALCATTA WA 6021

Prepact
1-7 Ilda Road, CANNING VALE WA 6155

Sumich
Fruit and Vegetable Wholesalers
386 Mandogalup Road, WATTLEUP WA 6166

Sunshine Pickle Co.
12 Denninup Way, MALAGA WA 6090

D'Orazio S N & A & Son
Poultry Farmers and Processors
39 Taylor Road, FORRESTDALE WA 6112

Mahogany Creek Distributors
8 Agett Road, MALAGA WA 6090

European Foods Wholesalers Pty Ltd
95 Aberdeen Street, NORTHBRIDGE WA 6003

Golden Ravioli
256 Fitzgerald Street, PERTH WA 6000

Homestyle Vegetable Processors Pty Ltd
15A Henderson Road, MUNSTER WA 6166

McCain Foods (Aust) Pty Ltd
2nd Floor, 77 Mill Point Road, SOUTH PERTH WA 6151

Worldwide Fine Foods Pty Ltd
1 Pritchard Street, O'CONNOR WA 6163

Benjamin & Co Pty Ltd
6 Montgomery Way
MALAGA WA 6090

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

(Sgd) J. A. SPURLING,
Registrar.

24 September 2002.

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

APPLICATION 1534 OF 2002

APPLICATION FOR VARIATION OF AWARD ENTITLED "LICENSED ESTABLISHMENTS (RETAIL AND WHOLESALE) AWARD 1979"

NOTICE is given that an application has been made to the Commission by The Shop Distributive and Allied Employees' Association of Western Australia under section 40 of the Industrial Relations Act 1979 to vary the above Award.

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

Schedule "A" Respondents

Delete the current list of respondents and their addresses and insert in lieu the following list.

Samson & Son, Lionel
31 Cliff Street, FREMANTLE WA 6160

Balcatta Liquor Supply
426 Main Street, BALCATTA WA 6021

Liquorland
State Office
Cnr. Bannister Road & Nicholson Road, CANNING VALE WA 6155

Wine Mine Wholesalers
28 Thompson Road, NORTH FREMANTLE WA 6159

Broadway Liquor Store
Broadway Fair Shopping Centre, NEDLANDS WA 6009

Cannington Liquor Store
60 Carrington Street, PALMYRA WA 6157

Kambalda Liquor Store
Town Square, KAMBALDA WA 6442

Seagram Australia Pty Ltd
5 Kingscote Street, KEWDALE WA 6105

Southcorp Wines Pty Ltd
307 Collier Road, BASSENDEAN WA 6054

Como Liquor Store
296 Canning Highway, COMO WA 6152

Wine Mine Pty Ltd
Wine Merchants
28 Thompson Road, NORTH FREMANTLE WA 6159

Houghton Wine Company
Dale Road, MIDDLE SWAN WA 6056

Asquith Cellars
31 Asquith Street, MOUNT CLAREMONT WA 6010

Carlisle Wine Bin
2 Wright Street, KEWDALE WA 6105

Cockburn Food and Liquor Store
333 Rockingham Road, SPEARWOOD WA 6163

Park Cellars
42 Park Road, KALGOORLIE WA 6430

Beaucott Liquor Store
654 Beaufort Street, MOUNT LAWLEY WA 6050

Smith S. & Son (WA) Pty Ltd
Yalumba Wine Cellars
114 Radium Street, WELSHPOOL WA 6106

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

(Sgd) J. A. SPURLING,
Registrar.

24 September 2002.

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

Application No. AG 190 of 2002

APPLICATION FOR REGISTRATION OF AN INDUSTRIAL AGREEMENT BETWEEN THERAPY FOCUS INCORPORATED AND THE HOSPITAL SALARIED OFFICERS ASSOCIATION OF WESTERN AUSTRALIA (UNION OF WORKERS) ENTITLED "THERAPY FOCUS ENTERPRISE BARGAINING AGREEMENT 2002"

NOTICE is given that an application has been made to the Commission by Therapy Focus Incorporated 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.

3 . - PARTIES

(1) The parties to this Agreement shall be Therapy Focus Incorporated, and the Hospital Salaried Officers Association of Western Australia (Union of Workers).

4. - AREA AND SCOPE

(1) This Agreement shall apply to all employees engaged by Therapy Focus Incorporated in the State of Western Australia in the gradings and classifications set out in Schedule C hereof.

(2) …

SCHEDULE C

CLASSIFICATION AND GRADING OF EMPLOYEES

Classification	
Administration Assistant	1
Administration Assistant	2
Administration Assistant	3
Secretarial Team Leader	
Personal Assistant to CEO	
Payroll / Finance Officer	
Administrator	
Receptionist	
Secretary	
IT / Network Administrator	
Marketing Coordinator	
Marketing Officer	
Therapy Assistant	
Therapy Assistant with qualification and experience	
Therapy Assistant Coordinator	
Therapy Assistant Team Leader	
Therapist / Project Officer	
Senior Supervisory Therapist	
Senior Project Officer	
Project Officer	
CAEP Project Coordinator	
Fee For Service Coordinator	
Team Leader Research and Evaluation	
Community Liaison Officer	

Classification

Clinical Specialist
Principal Advisor
Manager

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

J A SPURLING,
Registrar.

7 October 2002.

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

APPLICATION 1553 OF 2002

APPLICATION FOR VARIATION OF AWARD ENTITLED "WOOL, HIDE AND SKIN STORE EMPLOYEES' AWARD NO. 8 OF 1966"

NOTICE is given that an application has been made to the Commission by The Shop, Distributive and Allied Employees' Association of Western Australia under section 40 of the Industrial Relations Act 1979 to vary the above Award.

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

Schedule A – Employer Respondents

Delete the employers and addresses currently listed in Schedule A, and insert the following list.

Westralian Farmers Co-operative Limited
40 The Esplanade, PERTH WA 6000

Kreglinger (WA) Pty Ltd
Norfolk Street, FREMANTLE WA 6160

Elders Wool
Cnr Phoenix Road and Sudlow Road, SPEARWOOD WA 6163

Primaries of WA Pty Ltd
Wellard Street, SPEARWOOOD WA 6163

Wool Agency Co Pty Ltd
4 Clontarf Road, HAMILTON HILL WA 6163

Peter Scanlan Wools
4 Chamberlain Street, O'CONNOR WA 6163

Prevost Trading Pty Ltd
15 Cocos Drive, BIBRA LAKE WA 6163

Westcoast Wools Pty Ltd
Phoenix Road, SPEARWOOD WA 6163

Carbon Skin Services Pty Ltd
5 Aldgate Place, EAST FREMANTLE WA 6160

Perth Hide and Skin Exports
Lot 25 Cockburn Road, HAMILTON HILL WA 6163

Western Australian Skin & Hide Industries
34 Lionel Street, NAVAL BASE WA 6165

Standard Wool Australia Pty Ltd
Bracks Street, NORTH FREMANTLE WA 6160

United Quality Wool
34 Lionel Street, NAVAL BASE WA 6165

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

(Sgd) J. A. SPURLING,
Registrar.

24 September 2002.

PUBLIC SERVICE ARBITRATOR—Matters Dealt With—

2002 WAIRC 06567

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED, APPLICANT

v.

CHIEF EXECUTIVE OFFICER, ROTTNEST ISLAND AUTHORITY, RESPONDENT

CORAM COMMISSIONER P E SCOTT
PUBLIC SERVICE ARBITRATOR

DATE OF ORDER	TUESDAY, 24 SEPTEMBER 2002
FILE NO/S.	P 21 OF 2001
CITATION NO.	2002 WAIRC 06567

Result Application withdrawn by leave

Order

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

WHEREAS on the 19th day of September 2002 the Applicant filed a Notice of Discontinuance in relation to the application; and

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.

2002 WAIRC 06580

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED, APPLICANT
	v.
	CHIEF EXECUTIVE OFFICER, SOUTH WEST DEVELOPMENT COMMISSION, RESPONDENT
CORAM	COMMISSIONER P E SCOTT
	PUBLIC SERVICE ARBITRATOR
DATE OF ORDER	WEDNESDAY, 25 SEPTEMBER 2002
FILE NO/S.	P 22 OF 2001
CITATION NO.	2002 WAIRC 06580

Result Application withdrawn by leave

Order

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

WHEREAS on the 19th day of September 2002 the Applicant filed a Notice of Discontinuance in relation to the application; and

WHEREAS on the 24th day of September 2002 the Respondent consented to the matter being withdrawn;

NOW THEREFORE, the Public Service Arbitrator, pursuant to the powers conferred on it 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.

2002 WAIRC 06564

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED, APPLICANT
	v.
	CHIEF EXECUTIVE OFFICER, WESTERN AUSTRALIAN DEPARTMENT OF TRAINING, RESPONDENT
CORAM	COMMISSIONER P E SCOTT
	PUBLIC SERVICE ARBITRATOR
DATE OF ORDER	TUESDAY, 24 SEPTEMBER 2002
FILE NO/S.	P 52 OF 2000
CITATION NO.	2002 WAIRC 06564

Result Application withdrawn by leave

Order

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

WHEREAS on the 19th day of September 2002 the Applicant filed a Notice of Discontinuance in relation to the application; and

WHEREAS on the 19th day of September 2002 the Respondent consented to the matter being withdrawn;

NOW THEREFORE, the Public Service Arbitrator, pursuant to the powers conferred on it 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.

2002 WAIRC 06583

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED, APPLICANT
	v.
	COMMISSIONER OF POLICE, WESTERN AUSTRALIAN POLICE SERVICE, RESPONDENT
CORAM	COMMISSIONER P E SCOTT
	PUBLIC SERVICE ARBITRATOR
DATE OF ORDER	WEDNESDAY, 25 SEPTEMBER 2002
FILE NO/S.	P 53 OF 2001
CITATION NO.	2002 WAIRC 06583

Result Application withdrawn by leave

Order

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

WHEREAS by an email dated the 19th day of September 2002 the Applicant advised that the matter could be discontinued; and

WHEREAS on the 23rd day of September 2002 the Respondent consented to the matter being withdrawn;

NOW THEREFORE, the Public Service Arbitrator, pursuant to the powers conferred on it 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.

2002 WAIRC 06673

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA (INCORPORATED), APPLICANT
	v.
	THE DIRECTOR GENERAL, DEPARTMENT OF AGRICULTURE, RESPONDENT
CORAM	COMMISSIONER P E SCOTT
	PUBLIC SERVICE ARBITRATOR
DATE OF ORDER	WEDNESDAY, 2 OCTOBER 2002
FILE NO/S.	P 47 OF 2002
CITATION NO.	2002 WAIRC 06673

Result Application dismissed

Order

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

WHEREAS on the 27th day of September 200 the Commission convened a conference for the purpose of conciliating between the parties; and

WHEREAS at the conclusion of that conference the Applicant's representative advised the Commission that the matter had settled;

NOW THEREFORE, 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.

[L.S.]

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

2002 WAIRC 06496

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED, APPLICANT
	v.
	DIRECTOR GENERAL, DEPARTMENT OF JUSTICE, RESPONDENT
CORAM	SENIOR COMMISSIONER A R BEECH
DATE	TUESDAY, 17 SEPTEMBER 2002
FILE NO.	P 5 OF 2002
CITATION NO.	2002 WAIRC 06496

Result	Order dismissing application issued.
Representation	
Applicant	Mr M. Finnegan (by way of written submissions)
Respondent	Mr D. Matthews (of counsel) (by way of written submissions)

Reasons for Decision - Preliminary Point

1 In this matter the union seeks the following Declaration from the Public Service Arbitrator—

(1) That Prison Superintendents and Assistant Superintendents employed by the Department of Justice are required by their employer to be immediately contactable by telephone or paging system outside their normal hours of duty in case of a call out requiring an immediate return to duty; and

(2) That this requirement constitutes a written direction to be "on-call" in accordance with Clause 18(1)(k) of the *Public Service Award 1992*.

2 The respondent submits that the Commission should refrain from further hearing the application on the basis that further proceedings are not necessary or desirable in the public interest pursuant to s.27(1)(a)(ii) of the *Industrial Relations Act 1979*. The respondent submits that the issues to be canvassed have been previously canvassed in an application to the Public Service Arbitrator (P 47 of 1998), and further that one of the Superintendents has sworn a complaint in the Industrial Magistrate's Court alleging that the respondent has breached the *Public Service Award 1992* (hereinafter referred to as the award) by its failure to pay him in accordance with Clause 18(1)(k) of the award between 1 July 1994 and 22 June 2000.

3 At the request of the Commission both the respondent and the applicant union have put their respective positions in writing and what follows is the decision of the Commission based upon the respondent's outline of submissions of 2 August 2002 and the applicant's response of 8 August 2002 to that outline to which was attached a copy of the decision of the Public Service Arbitrator in P 47 of 1998 (reported at (1999) 79 WAIG 2228).

4 It is sufficient by way of brief background to note that all three matters, that is the present application, the complaint in the Industrial Magistrate's Court and P 47 of 1998, concern the same factual circumstances. The history of those circumstances commences in 1990 when the Department and the CSA entered into an agreement regarding an after hours contact allowance. The issue that was the subject of P 47 of 1998 was whether the agreement was validly made or was in breach of the award. The Public Service Arbitrator on that occasion held the 1990 agreement was valid and that it was not void.

5 Both the complaint in the Industrial Magistrate's Court and the present application concern Clause 18(1)(k) of the award. The present application seeks a declaration that Prison Superintendents and Assistant Superintendents are required by their employer to be immediately contactable and that this requirement constitutes a written direction to be on-call in accordance with Clause 18(1)(k) of the award. Complaint M202 of 2000 before the Industrial Magistrate is a complaint that the respondent failed to pay Philip John Coombes-Pearce in accordance with Clause 18(1)(k) of the award.

6 Clause 18(1)(k) of the award is as follows—

18. - OVERTIME ALLOWANCE

(1) For the purposes of this Clause, the following terms shall have the following meanings—

(a) …

(k) "Out of hours contact" shall include the following—

STANDBY - shall mean a written instruction to an officer to remain at the officer's place of employment during any period outside the officer's normal hours of duty, and to perform certain designated tasks periodically or on an ad hoc basis. Such officer shall be provided with appropriate facilities for sleeping if attendance is overnight, and other personal needs, where practicable.

Other than in extraordinary circumstances, officers shall not be required to perform more than two periods of standby in any rostered week.

This provision shall not replace normal overtime or shift work requirements.

ON CALL - shall mean a written instruction to an officer rostered to remain at the officer's residence or to otherwise be immediately contactable by telephone or paging system outside the officer's normal hours of duty in case of a call out requiring an immediate return to duty.

AVAILABILITY - shall mean a written instruction to an officer to remain contactable, but not necessarily in immediate proximity to a telephone or paging system, outside the officer's normal hours of duty and be available and in a fit state at all such times for recall to duty.

"Availability" will not include situations in which officers carry paging devices or make their telephone numbers available only in the event that they may be needed for casual contact or recall to work. Subject to subclause (3) of this Clause recall to work under such circumstances would constitute emergency duty in accordance with subclause (6) of this Clause.

7 It is apparent that for the Arbitrator to issue the declaration sought by the union will require the Arbitrator to assess whether Prison Superintendents and Assistant Superintendents are required to be immediately contactable and whether, if they are so required, that requirement constitutes a "written direction" to be "on-call" in accordance with Clause 18(1)(k) of the award. (The award requires a "written instruction" but I see no useful distinction between a "written direction" and a "written instruction".)

8 If the evidence before the Commission is that there is such a requirement, the Commission will then be required to interpret Clause 18(1)(k) of the award in order to determine whether that requirement constitutes a written instruction.

9 It is apparent that the relevance of making the declaration sought is that the written instruction to be immediately contactable by telephone or paging system outside the normal hours of duty is "out of hours contact" for the purposes of Clause 18(5) of the award. By virtue of Clause 18(5)(a) except as otherwise agreed between the Commissioner and the Association an officer who is required to be on "out of hours contact" shall be paid an allowance prescribed in the clause for each hour or part thereof the officer is on "out of hours contact".

10 For the declaration sought in these proceedings to have a practical consequence therefore, the provisions of Clause 18(5)(a) will need to come into play. The words "except as otherwise agreed between the Commissioner and the Association" calls into question whether the agreement entered into between the Department and the CSA in 1990 is "otherwise agreed between the Commissioner and Association". This question was directly considered by the Public Service Arbitrator in the 1999 proceedings to which the respondent draws attention. The Public Service Arbitrator in those proceedings held that the agreement between the parties is valid. That is, the agreement entered into between the Department and the CSA in 1990 is "otherwise agreed" for the purposes of Clause 18(5)(a).

11 Accordingly, even if I granted the claim in this matter and declared that the Prison Superintendents are required by their employer to be immediately contactable by telephone or paging system outside their normal hours of duty in case of a call-out requiring an immediate return to duty, and that the requirement constitutes a written instruction to be "on-call" in accordance with Clause 18(1)(k) of the award, the declaration would have no practical effect because the agreement entered into between the parties remains as valid today as it was declared to be in 1999. Therefore, on the material presently before the Commission, I have doubts whether it is necessary or desirable in the public interest for further proceedings to be held in this matter if ultimately, even if the declaration sought is made, the validity of the 1990 agreement renders the point moot.

12 I turn to consider the complaint made before the Industrial Magistrate.

13 Complaint M202 of 2000 is said to be a complaint that the respondent failed to pay the complainant, a Superintendent, in accordance with Clause 18(1)(k) of the Award between 1 July 1994 and 22 June 2000. The respondent, in its paragraph 6, says that the complaint alleges that as a Prison Superintendent, Mr Coombes-Pearce alleges that he is subject to a written instruction pursuant to Clause 18(1)(k) of the award and that the 1990 agreement is of no effect in relation to him. The complaint has not yet gone to hearing despite having been sworn in June 2000. Full particulars of what is said to constitute the written instruction under Clause 18(1)(k) have not yet been provided. The union says that the complaint traverses different grounds and seeks different outcomes to this application. The union states that the declaration sought in this application if granted may constitute evidence that assists the Industrial Magistrate in expeditiously hearing Complaint M202 of 2000 and/or in the alternative may encourage the parties to resolve outstanding industrial matters without further recourse to litigation.

14 From the above, it is apparent that for the Industrial Magistrate to be satisfied that the complaint alleging a breach of the award in Clause 18(1)(k) is proven, the complainant will need to show that he is subject to a written instruction pursuant to Clause 18(1)(k) of the award.

15 I see no effective difference in substance between the matter presently before me and the complaint before the Industrial Magistrate's Court. It is certainly true to say, as the union does say, that the two jurisdictions are different and that each matter is brought respectively in the correct jurisdiction. Nevertheless, they represent the same issue. That issue is whether a Superintendent (and therefore Superintendents and Assistant Superintendents) is subject to a written instruction pursuant to Clause 18(1)(k) of the award.

16 The immediate issue which arises is the potential for there to be two different decisions on the same subject in two different jurisdictions. That situation should be avoided. The issue provides an additional reservation for considering that it may not be necessary or desirable in the public interest for this present application to be heard. Indeed, it is apparent that the declaration sought in this application is merely a step in the process of the union attempting to address the issue between the parties regarding the payments made pursuant to the 1990 agreement. That is, even if the declaration sought is granted, thus disposing of this application, the dispute between the parties remains to be dealt with. Presently, it will be dealt with in the Industrial Magistrate's Court.

17 The resolution of the issue whether or not a Superintendent or an Assistant Superintendent has been underpaid according to the award, an issue referred to by the Public Service Arbitrator in 1999, is a matter for the enforcement of the award and that is the province of the Industrial Magistrate's Court. I see little point in proceeding with this application in these circumstances when it is not at all clear that, if a declaration issued from these proceedings, it would resolve the dispute between the parties. There is certainly nothing in the respondent's submissions which could permit the Commission to conclude that a declaration from these proceedings may encourage the parties to resolve outstanding industrial matters without further recourse to litigation. Indeed, the opposite seems likely.

18 The Public Service Arbitrator is given the power in s.27(1)(a) to refrain from further hearing or determining a matter if it is satisfied that further proceedings are not necessary or desirable in the public interest.

19 In the conclusion I have reached, I should refrain from further hearing this matter. The CSA should consider whether the resolution of the dispute it has with the Department lies in this application (which cannot finally resolve the dispute as it is presently worded), the present matter in the Industrial Magistrate's Court or in withdrawing from the 1990 agreement. The eventual fate of this application will depend upon the outcome of the CSA's considerations.

2002 WAIRC 06544

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED, APPLICANT
	v.
	DIRECTOR GENERAL, DEPARTMENT OF JUSTICE, RESPONDENT
CORAM	SENIOR COMMISSIONER A R BEECH
DATE	FRIDAY, 20 SEPTEMBER 2002
FILE NO.	P 5 OF 2002
CITATION NO.	2002 WAIRC 06544

Result	Order dismissing application issued.
Representation	
Applicant	Mr M. Finnegan (by way of written submissions)
Respondent	Mr D. Matthews (of counsel) (by way of written submissions)

Order

HAVING HEARD Mr M. Finnegan (by way of written submissions) on behalf of the applicant and Mr D. Matthews (of counsel) (by way of written submissions) 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 Public Service Arbitrator refrain from further hearing this matter.

(2) THAT either party may request that the application be listed for hearing, or dismissed as the case may be in the event of changed circumstances.

[L.S.]

(Sgd.) A. R. BEECH,
Senior Commissioner,
Public Service Arbitrator.

2002 WAIRC 06642

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA (INCORPORATED), APPLICANT
	v.
	MANAGING DIRECTOR, CENTRAL METROPOLITAN COLLEGE OF TAFE, RESPONDENT
CORAM	COMMISSIONER P E SCOTT
	PUBLIC SERVICE ARBITRATOR
DATE OF ORDER	FRIDAY, 27 SEPTEMBER 2002
FILE NO/S.	P 51 OF 2000
CITATION NO.	2002 WAIRC 06642

Result	Application withdrawn by leave

Order

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

WHEREAS on the 23rd day of September 2002 the Applicant filed a Notice of Discontinuance in relation to the application; and

WHEREAS on the 24th day of September 2002 the Respondent consented to the matter being withdrawn;

NOW THEREFORE, the Public Service Arbitrator, pursuant to the powers conferred on it 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.

2002 WAIRC 06643

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA (INCORPORATED), APPLICANT
	v.
	MANAGING DIRECTOR, CENTRAL WEST COLLEGE OF TAFE, RESPONDENT
CORAM	COMMISSIONER P E SCOTT
	PUBLIC SERVICE ARBITRATOR
DATE OF ORDER	FRIDAY, 27 SEPTEMBER 2002
FILE NO/S.	P 50 OF 2000
CITATION NO.	2002 WAIRC 06643

Result	Application withdrawn by leave

Order

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

WHEREAS on the 23rd day of September 2002 the Applicant filed a Notice of Discontinuance in relation to the application; and

WHEREAS on the 24th day of September 2002 the Respondent consented to the matter being withdrawn;

NOW THEREFORE, the Public Service Arbitrator, pursuant to the powers conferred on it 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.

2002 WAIRC 06572

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED, APPLICANT
	v.
	MANAGING DIRECTOR, EASTERN PILBARA COLLEGE OF TAFE, RESPONDENT
CORAM	COMMISSIONER P E SCOTT
	PUBLIC SERVICE ARBITRATOR
DATE OF ORDER	TUESDAY, 24 SEPTEMBER 2002
FILE NO/S.	P 48 OF 2000
CITATION NO.	2002 WAIRC 06572

Result Application withdrawn by leave

Order

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

WHEREAS on the 19th day of September 2002 the Applicant filed a Notice of Discontinuance in relation to the application; and

WHEREAS on the 19th day of September 2002 the Respondent consented to the matter being withdrawn;

NOW THEREFORE, the Public Service Arbitrator, pursuant to the powers conferred on it 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.

2002 WAIRC 06565

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED, APPLICANT
	v.
	MANAGING DIRECTOR, GREAT SOUTHERN REGIONAL COLLEGE OF TAFE, RESPONDENT
CORAM	COMMISSIONER P E SCOTT
	PUBLIC SERVICE ARBITRATOR
DATE OF ORDER	TUESDAY, 24 SEPTEMBER 2002
FILE NO/S.	P 49 OF 2000
CITATION NO.	2002 WAIRC 06565

Result Application withdrawn by leave

Order

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

WHEREAS on the 19th day of September 2002 the Applicant filed a Notice of Discontinuance in relation to the application; and

WHEREAS on the 19th day of September 2002 the Respondent consented to the matter being withdrawn;

NOW THEREFORE, the Public Service Arbitrator, pursuant to the powers conferred on it 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.

2002 WAIRC 06570

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED, APPLICANT
	v.
	MANAGING DIRECTOR, KARRATHA COLLEGE OF TAFE, RESPONDENT
CORAM	COMMISSIONER P E SCOTT
	PUBLIC SERVICE ARBITRATOR
DATE OF ORDER	TUESDAY, 24 SEPTEMBER 2002
FILE NO/S.	P 47 OF 2000
CITATION NO.	2002 WAIRC 06570

Result Application withdrawn by leave

Order

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

WHEREAS on the 19th day of September 2002 the Applicant filed a Notice of Discontinuance in relation to the application; and

WHEREAS on the 19th day of September 2002 the Respondent consented to the matter being withdrawn;

NOW THEREFORE, the Public Service Arbitrator, pursuant to the powers conferred on it 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.

2002 WAIRC 06566

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED, APPLICANT
	v.
	MANAGING DIRECTOR, KIMBERLEY REGIONAL COLLEGE, RESPONDENT
CORAM	COMMISSIONER P E SCOTT
	PUBLIC SERVICE ARBITRATOR
DATE OF ORDER	TUESDAY, 24 SEPTEMBER 2002
FILE NO/S.	P 54 OF 2000
CITATION NO.	2002 WAIRC 06566

Result Application withdrawn by leave

Order

WHEREAS this is an application for an order pursuant to Section 23 of the Industrial Relations Act 1979; and

WHEREAS on the 19th day of September 2002 the Applicant filed a Notice of Discontinuance in relation to the application; and

WHEREAS on the 19th day of September 2002 the Respondent consented to the matter being withdrawn;

NOW THEREFORE, the Public Service Arbitrator, pursuant to the powers conferred on it 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.

2002 WAIRC 06569

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED, APPLICANT
	v.
	MANAGING DIRECTOR, MIDLAND COLLEGE OF TAFE, RESPONDENT
CORAM	COMMISSIONER P E SCOTT
	PUBLIC SERVICE ARBITRATOR

DATE OF ORDER	TUESDAY, 24 SEPTEMBER 2002
FILE NO/S.	P 42 OF 2000
CITATION NO.	2002 WAIRC 06569

Result Application withdrawn by leave

Order

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

WHEREAS on the 19th day of September 2002 the Applicant filed a Notice of Discontinuance in relation to the application; and

WHEREAS on the 19th day of September 2002 the Respondent consented to the matter being withdrawn;

NOW THEREFORE, the Public Service Arbitrator, pursuant to the powers conferred on it 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.

2002 WAIRC 06641

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA (INCORPORATED), APPLICANT
	v.
	MANAGING DIRECTOR, SOUTH EAST METROPOLITAN COLLEGE OF TAFE, RESPONDENT
CORAM	COMMISSIONER P E SCOTT
	PUBLIC SERVICE ARBITRATOR
DATE OF ORDER	FRIDAY, 27 SEPTEMBER 2002
FILE NO/S.	P 43 OF 2000
CITATION NO.	2002 WAIRC 06641

Result Application withdrawn by leave

Order

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

WHEREAS on the 23rd day of September 2002 the Applicant filed a Notice of Discontinuance in relation to the application; and

WHEREAS on the 24th day of September 2002 the Respondent consented to the matter being withdrawn;

NOW THEREFORE, the Public Service Arbitrator, pursuant to the powers conferred on it 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.

2002 WAIRC 06568

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED, APPLICANT
	v.
	MANAGING DIRECTOR, SOUTH METROPOLITAN COLLEGE OF TAFE, RESPONDENT
CORAM	COMMISSIONER P E SCOTT
	PUBLIC SERVICE ARBITRATOR
DATE OF ORDER	TUESDAY, 24 SEPTEMBER 2002
FILE NO/S.	P 44 OF 2000
CITATION NO.	2002 WAIRC 06568

Result Application withdrawn by leave

Order

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

WHEREAS on the 19th day of September 2002 the Applicant filed a Notice of Discontinuance in relation to the application; and

WHEREAS on the 19th day of September 2002 the Respondent consented to the matter being withdrawn;

NOW THEREFORE, the Public Service Arbitrator, pursuant to the powers conferred on it 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.

2002 WAIRC 06571

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED, APPLICANT
	v.
	MANAGING DIRECTOR, SOUTH WEST REGIONAL COLLEGE OF TAFE, RESPONDENT
CORAM	COMMISSIONER P E SCOTT
	PUBLIC SERVICE ARBITRATOR
DATE OF ORDER	TUESDAY, 24 SEPTEMBER 2002
FILE NO/S.	P 45 OF 2000
CITATION NO.	2002 WAIRC 06571

Result Application withdrawn by leave

Order

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

WHEREAS on the 19th day of September 2002 the Applicant filed a Notice of Discontinuance in relation to the application; and

WHEREAS on the 19th day of September 2002 the Respondent consented to the matter being withdrawn;

NOW THEREFORE, the Public Service Arbitrator, pursuant to the powers conferred on it 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.

2002 WAIRC 06647

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA (INCORPORATED), APPLICANT
	v.
	MANAGING DIRECTOR, WEST COAST COLLEGE OF TAFE, RESPONDENT
CORAM	COMMISSIONER P E SCOTT
	PUBLIC SERVICE ARBITRATOR
DATE OF ORDER	FRIDAY, 27 SEPTEMBER 2002
FILE NO/S.	P 46 OF 2000
CITATION NO.	2002 WAIRC 06647

Result Application withdrawn by leave

Order

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

WHEREAS on the 23rd day of September 2002 the Applicant filed a Notice of Discontinuance in relation to the application; and

WHEREAS on the 24th day of September 2002 the Respondent consented to the matter being withdrawn;

NOW THEREFORE, the Public Service Arbitrator, pursuant to the powers conferred on it 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.

2002 WAIRC 06639

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	HOSPITAL SALARIED OFFICERS ASSOCIATION OF WESTERN AUSTRALIA (UNION OF WORKERS), APPLICANT
	v.
	METROPOLITAN HEALTH SERVICE BOARD, RESPONDENT
CORAM	COMMISSIONER P E SCOTT
	PUBLIC SERVICE ARBITRATOR
DATE OF ORDER	FRIDAY, 27 SEPTEMBER 2002
FILE NO/S.	PSAC 15 OF 2000
CITATION NO.	2002 WAIRC 06639

Result Order issued

Order

WHEREAS this is an application pursuant to Section 44 of the Industrial Relations Act 1979; and

WHEREAS on the 14th day of September, 7th day of November, 5th day of December 2000, 28th day of September 2001, 3rd day of April, 26th day of August, 13th day and the 24th day of September 2002 the Public Service Arbitrator convened conferences for the purpose of conciliation; and

WHEREAS at the conclusion of the conference on the 24th day of September 2002 the parties reached agreement in part settlement of the dispute and sought that the Public Service Arbitrator issue an Order to reflect their agreement; and

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

1. The parties shall adopt the following arrangements to settle the dispute that has arisen between them in relation to the use of the fixed term contract employment in the public health sector.
2. The arrangement applies to current public sector employees (not employed under Part 3 of the Public Sector Management Act 1994) on fixed term contracts and who are members, or eligible to be members of the Hospital Salaried Officers Association.
3. This arrangement does not include consultants or persons engaged through service companies or otherwise on contract for service.
4. The Public Health Sector agencies employing fixed term contact employees are to review the positions occupied by these employees and where the positions are not related to a finite project or task then the agencies shall take steps to fill the position in accordance with the requirements of the Modes of Employment policy issued by the Department of Consumer and Employment Protection in May 2001.
5. To determine which positions come within the scope of this arrangement, agencies will—

   Step 1

   a) review the position history of the fixed term contract employee prior to the expiry of a current fixed term contract; and

   b) where the position is clearly related to a finite project or task, exclude the employee from further consideration under the terms of this arrangement.

   Step 2

   Fixed term contract employees who are not excluded at step 1 shall have their employment history reviewed to ascertain if—

   (a) they have been continuously employed on a fixed term contract of service, or continuously rolled over on fixed term contracts, or employed on a series of fixed term contracts interspersed with periods of ongoing employment for which there is no formal documentation; at the same level performing substantially the same duties and by the same employing authority, for 12 months or more;

   (b) the position is a genuine ongoing position; and

   (c) the record of employment indicates that the position was filled by an open competition process at some stage for at least one of their fixed term contracts.
6. If all the criteria at step 2 are fulfilled the employment of fixed term contract employees shall be confirmed as permanent.
7. Permanency under step 2 will not be conferred on any fixed term contract employee whilst disciplinary or poor performance issues remain unresolved.
8. Where the records of employment of a fixed term contract employee indicate that the Public Sector Standards under Public Sector Management Act 1994 have not been followed and the position filled by open competition, then that employee's employment cannot be confirmed as permanent. The requirements of the Act and the Modes of Employment policy must be adhered to.
9. The parties have the liberty to seek further assistance from the Commission should any unforeseen issues arise as a consequence of this order.
10. So that the strategy is managed as consistently as possible the following definitions will apply—

    a) Continuously employed—

    means employees who have had ongoing unbroken employment with the same employing authority and a reasonable expectation of an ongoing relationship. Periods of absence corresponding to periods of accrued annual leave and sick leave entitlements would not be considered a break in service.

b) Employing authority—

Has the meaning given in S.5 of the Public Sector Management Act 1994, but includes the successor department or agency where an employing authority is amalgamated with or transferred to another department or agency. May also include any enabling legislation for public sector agencies

c) External funding—

Means where funding for a project is clearly outside the consolidated fund or an intra agency grant, eg. Federal or private sector grants. However, where external funding has been consistent on a historical basis and it can reasonably be expected to continue, the agency shall assess the percentage of fixed term employees that fulfil the criteria set out above that can be converted, subject to the agency's operational needs and the expectation of continued funding. Note: Schedule 1 entities, as defined in the Public Sector Management Act 1994, are, for the purposes of this definition considered external bodies.

d) Open competition—

Is met where the position was advertised as widely as appropriate and selection followed a merit-based assessment of skills, knowledge and abilities with the process being transparent and capable of review.

e) Project—

Covers all situations where work is of a finite nature including staff employed;

- for seasonal work;
- on work which is substantially externally funded including multiple external funding;
- where employment is purely to cover a defined fixed period of leave of an existing employee;
- workers compensation absence;
- on a contract basis for the period of a project or multiple projects.

[L.S.]

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

INDUSTRIAL MAGISTRATE—Complaints before—

2002 WAIRC 06675

BUILDING TRADES AWARD 1968

No. 31 of 1966

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CONSTRUCTION, MINING, ENERGY, TIMBERYARDS, SAWMILLS AND WOODWORKERS UNION OF AUSTRALIA - WESTERN AUSTRALIAN BRANCH, APPLICANT
	v.
	OVINGTON PTY LTD TRADING AS EZY VIEW WINDOWS, RESPONDENT
CORAM	WG TARR I.M.
DELIVERED	THURSDAY, 11 APRIL 2002
FILE NO/S.	M 155 OF 2001
CITATION NO.	2002 WAIRC 06675

Result	Claim dismissed
Representation	
Claimant	Ms E Peek (of Counsel)
Respondent	Mr O Moon as Agent

Reasons for Decision

The Claimant in these proceedings has made application on behalf of John Merrick, an employee of the Respondent Company.

The Claimant alleges that the employee was employed as a Joiner-Assembler A as set out in clause 10 of the Building Trades Award 1968, No 31 of 1966 (the Award) and as defined in clause 6 of the Award and that the Respondent employer was bound by the Award.

It is claimed that the Respondent has breached the Award on divers occasions by failing to pay the employee the correct rate for overtime work contrary to clause 19(1) of the Award and failing to pay a tool allowance contrary to clause 10(4) of the Award.

The Respondent's defence to these claims is simply that the employee was not engaged in a calling covered by the Award but was employed under the Metal Trades (General) Award 1966, No 13 of 1965 (the Metal Trades Award).

There is no doubt, on the evidence, that Mr Merrick was employed by the Respondent Company and that his primary duties were the construction or assembly of aluminium door and window frames. As he said, his full time job was the fabrication of aluminium frames.

Mr Merrick gave evidence that he measured, cut, marked out and assembled the frames, usually by drilling and screwing the pieces together using silicon, at times, to seal the joins.

All frames are made from aluminium extrusions with a variety of profiles depending on the type of frame being constructed.

There is no mystery in what the employee did and although occasionally he was required to do some glazing on site or fixing on rare occasions or to make up packing crates for the delivery of frames up North, his primary duties were as mentioned.

The calling the Claimant submits the employee falls within is that of a Joiner-Assembler A. Clause 6(4)(b) of the Award defines that calling as—

> "Joiner - Assembler A" means a worker who in the manufacturing of any article is—
>
> (i) wholly engaged in assembling prepared pieces of timber or other material (which is dressed, morticed, tenoned or otherwise prepared by machining) by cramping, nailing, screwing, gluing, or fastening in any way;
>
> (ii) not responsible for the dimensions of the article other than by checking with gauges or other measuring instruments, but may be required to trim, dress and/or sand such prepared articles (excluding the fitting of joints) in accordance with instructions given by a tradesman joiner.

Clause 6(4)(a) defines Carpenter and Joiner as follows—

> (a) "Carpenter and Joiner" means a worker engaged upon work ordinarily performed by a carpenter and joiner in any workshop establishment, yard or depot, or on site (including dams, bridges, jetties or wharves).
>
> Without limiting the generality of the foregoing, such work may include—
>
> (i) The erection and/or fixing work in metal.
>
> (ii) (aa) The marking out, lining, plumbing and levelling of prefabricated form work and supports thereto;
>
> (bb) the erection and dismantling of such form work but without preventing builders' labourers from being employed on such work.
>
> (iii) the fixing of asbestos products, dry fixing of fibre plaster materials and the fixing of building panels, wall board and plastic material;
>
> (iv) the erection of curtain walling;
>
> (v) the setting out and laying of wood blocks or parquetry or wooden mosaic flooring; and
>
> (vi) the erecting of pre-fabricated buildings or section of buildings constructed in wood, prepared in factories, yards or on site.

Although clause 6(4)(a) provides that "such work may include" working with other materials, Carpenter and Joiner means "a worker engaged upon work ordinarily performed by a carpenter and joiner". The definition does not go on to describe the work performed by a Carpenter and Joiner and the reason for that must be because it needs no further explanation.

The Shorter Oxford Dictionary describes a Carpenter as "an artificer in wood" and Carpentry as "the trade or art of cutting, working and joining timber into structures". In the same dictionary Joiner means "a craftsman who constructs things by joining pieces of wood; a worker in wood who does lighter and more ornamental work than that of a carpenter".

It is argued on behalf of the Claimant that "other material" in the definition of Joiner-Assembler A includes metal and therefore aluminium. The words dressed, morticed, tenoned or otherwise prepared by machining are words commonly used in relation to wood or wood substitutes. Cramping, nailing, screwing and glueing are all commonly used processes in joinery.

It was suggested that the aluminium used by the employee was machined. The process of producing the profiled aluminium was by extrusion. Machining, as used in the definition, is a process applied to timber. Aluminium may be polished or anodised (coloured) but in the form used is not machined.

The Scope clause of the Award provides that the Award applies to;

> (1) (a) Employers in "Schedule B – Common Rule"—
>
> To all employees (including apprentices) employed in a calling or callings set out in Clause 10. – Wages, of this award in the industries carried on by the respondents set out in the schedule attached to this award, and
>
> …

It is arguable that the Respondent is in the industry carried on by the Aluminium Pre-fabrication respondents set out in the schedule. Joiner-Assembler A, as defined in clause 6 of the Award, is a classification covered by the Award.

Subclause (2)(c)(i) of the Scope clause provides that the Award shall not apply—

> in respect to employers in "Schedule B – Common Rule":
>
> to an employee employed on work coming within the scope of any award or industrial agreement in force at the date of this award or to an employee whose conditions of employment are regulated by any such award or industrial agreement.

It is argued on behalf of the Respondent that the employee comes within the scope of the Metal Trades Award. Clause 3.-Area and Scope of the Metal Trades Award is in the following terms—

> 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.

The Second Schedule lists Aluminium Fabricators as one of the industries to which the Metal Trades Award relates and it is generally conceded that the Respondent Company falls within that industry.

Clause 31 classifies employees under a defined level specified in clause 5 of the Metal Trades Award and it is argued that Mr Merrick is employed in the calling Wage Group C12 Engineering/Production Employee Level III which provides—

> **WAGE GROUP: C 12**
>
> **ENGINEERING/PRODUCTION EMPLOYEE LEVEL III**
>
> **(Relativity to C 10 - 87.4%)**
>
> An Engineering/Production Employee Level III has completed eight modules towards an Engineering Production Certificate or equivalent training to enable the employee to perform work within the scope of this level.
>
> At this level an employee performs work above and beyond the skills of an employee at C 13 and to the level of the employee's training.

(1) Is responsible for the quality of the employee's own work, subject to routine supervision;

(2) Works under routine supervision either individually or in a team environment;

(3) Exercises discretion within the employee's level of skills and training.

Indicative of the tasks which an employee at this level may perform are the following—

- operates flexibly between assembly stations;
- operates machinery and equipment which requires exercising skills and knowledge beyond that of an employee at Level C 13;
- non-trade engineering skills;
- basic tracing and sketching skills;
- receiving, despatching, distributing, sorting, checking, packing (other than repetitive packing in a standard container or containers in which such goods are ordinarily sold), documenting and recording of goods, materials and components;
- basic inventory control in the context of a production process;
- basic keyboard skills;
- advanced soldering techniques;
- boiler attendant;
- operation of mobile equipment including forklifts, handtrolleys, pallet trucks, overhead cranes and winch operation;
- ability to measure accurately;
- assists one or more tradespersons;
- welding which requires the exercise of knowledge and skills above Level C 13;
- assists in the provision of on the job training in conjunction with tradespersons and supervisor/trainers.

It must follow that when considering the work done within that Wage Group, or in fact, any Wage Group in the Metal Trades Award, that work generally involves metal of some type.

Appendix 1 of the Metal Trades Award has a classification structure as a reference point for task and craft based work titles prior to award restructuring and places "Assembler window frame making" into Wage Group C12.

Although Appendix 4 applies only to the specified Respondent Companies as listed in clause 4 as follows—

4. - RESPONDENT COMPANIES

The following companies are respondent to this Appendix—

Avanti Glass
Stegbar Pty Ltd
Aluminium Products
Jason Anodising
Dowell Aluminium Windows
Lidco Aluminium Windows
ASA Windows Pty Ltd
W.A. Glass and Aluminium
Mawco Pty Ltd
Jason Windows
Supreme Windows

it does have a Wage Group C12 under the heading of Architectural Aluminium Fabrication Employee Level III which sets out the work performed as being—

1. Is responsible for the quality of their own work subject to routine supervision;
2. Works under routine supervision either individually or in a team environment;
3. Exercises discretion within their level of skills and training;
4. Performs work in the Fabrication, Glazing, Assembly and Material Handling areas of the workshop within the scope of the indicative tasks listed below.

It must follow from the heading and the list of respondents that the work performed is with aluminium and Mr Merrick would fit into that calling.

The Claimant, in response to the Respondent's submission that the Metal Trades Award applies, has asked the Court to consider the authorities that deal with the question of where two awards may apply. It is my view, however, that the evidence does not raise that issue.

There is no mention of timber or wood in the definition of the work of Carpenter and Joiner in clause 6(4)(a) of the Award. The definition merely reads "means a worker engaged upon work ordinarily performed by a carpenter and joiner". It does so, in my view, because that is so well known and accepted, it goes without saying that carpenters and joiners primarily work with timber and wood.

Mr Merrick did not work with timber or wood. The evidence before me is that he worked almost exclusively with aluminium.

In my view this is not a case where there is some doubt about which of two awards applies. Any objective assessment of the evidence must come to the conclusion that there is no merit in the argument that the work performed by Mr Merrick places him within the calling of Joiner-Assembler A in the Award. The evidence strongly supports a finding that the Metal Trades Award covers the work performed by Mr Merrick.

The claim will therefore be dismissed.

W. G. TARR,
Industrial Magistrate.

WORKPLACE AGREEMENTS—Matters pertaining to—

2002 WAIRC 06577

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	DEBRA STOKER, APPLICANT
	v.
	MARNI KRISHMAN BLUEJADE T/A MAYLANDS CHILDCARE CENTRE, RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE OF ORDER	WEDNESDAY, 25 SEPTEMBER 2002
FILE NO/S.	WAG 3 OF 2002
CITATION NO.	2002 WAIRC 06577

Result Application discontinued

Order

WHEREAS an application was lodged in the Commission pursuant to section 7F of the *Industrial Relations Act 1979*; and

WHEREAS on the 25th day of September 2002 the Commission convened a conference for the purpose of conciliating between the parties; and

WHEREAS on the 24th day of September 2002 the applicant filed a Notice of Discontinuance in relation to the application; and

WHEREAS on the 24th day of September 2002 the respondent consented to the matter being discontinued;

NOW THEREFORE pursuant to the powers vested in it by the *Industrial Relations Act, 1979*, the Commission hereby orders-

THAT the application be discontinued

(Sgd.) J. L. HARRISON,
Commissioner.

[L.S.]

UNFAIR DISMISSAL/CONTRACTUAL ENTITLEMENTS—

2002 WAIRC 06532

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	IHAAN ADRIANSZ, APPLICANT
	v.
	EPATH WA PTY LTD, RESPONDENT
CORAM	COMMISSIONER S WOOD
DELIVERED	WEDNESDAY, 18 SEPTEMBER 2002
FILE NO.	APPLICATION 537 OF 2002
CITATION NO.	2002 WAIRC 06532

Result	Applicant dismissed unfairly; Contractual benefit granted
Representation	
Applicant	Mr T Caspersz of Counsel
Respondent	Dr J Edelman of Counsel

Reasons for Decision

1 This is an application pursuant to section 29(1)(b)(i) and (ii) of the Western Australian *Industrial Relations Act, 1979* ("the Act"). The applicant, Mr Ihaan Adriansz, was employed by Mr Mabarrack, the General Manager for ePath Pty Ltd in September 1999. The business was sold to Clinipath Laboratories at the beginning of March 2002 and Mr Adriansz' services were made redundant with effect from 28 February 2002. For a short period of time Mr Adriansz then worked on contract for Clinipath Laboratories to assist in the changeover of the businesses. During his employment with ePath the applicant was progressively responsible for roles as a medical scientist, plant and equipment manager, technology manager and marketing support officer. Mr Adriansz was and continued to be a director and shareholder of ePath, and at various times gave personal loans and guarantees to or on behalf of the business. It is undisputed that Mr Adriansz' remuneration package is expressed in [Exhibit IA2]; this incorporated an annual salary of $55,000 plus 8% superannuation, sick leave, annual leave, unpaid overtime and on-call retainer and time and one half for a minimum of two hours for all callouts.

2 The applicant claims the following—

- The maximum compensation (ie six months) for loss and injury caused by the alleged unfair dismissal. This is approximately $30,000.
- Payment for unpaid callouts allegedly owed under his contract of employment, this is approximately $8000.

3 The applicant claims the following to be relevant in the unfairness of the dismissal—

(i) failure to give reasonable notice, which in all the circumstances was at least six months;

(ii) failure to pay reasonable severance payment;

(iii) the time that the Applicant would take to return to his previous remuneration level and the lost income during that period;

(iv) the hurt and humiliation caused by the dismissal;

(v) the damage to the applicant's reputation and the loss of the opportunity to develop his career prospects.

4 The agreed facts in the matter are—

1. The applicant was an employee of the respondent.
2. The applicant did not contact Mr John Kusinski
3. The applicant attended the Directors meetings of 29 November 2001 and 11 April 2002.
4. The applicant attended ePath shareholder meetings of 29 January 2002 and 12 February 2002.
5. At the ePath shareholder meeting of 29 January 2002, the applicant was aware of the resolution of the directors who decided to pursue the sale of the business.
6. At the ePath shareholder meeting of 12 February 2002 the applicant was aware that shareholders had confirmed approval of the sale of the business, with Sonic Healthcare Limited as the preferred option.

5 The applicant is currently employed as an Information Technology Officer with Perth Pathcentre at Queen Elizabeth II Medical Centre. He has been employed there since 4 June 2002. His salary is currently $44,613 plus 8% superannuation. It is uncontested that Mr Adriansz has properly sought to mitigate his loss since his time of dismissal [Exhibit IA6].

6 The only evidence given was that of Mr Adriansz. The respondent arranged for a number of witnesses but chose not to call any of them. Mr Adriansz' evidence was largely unchallenged and is as follows. In late December 1998 Mr Adriansz had discussions with Mr Mabarrack and others at Mr Mabarrack's house concerning the prospect of establishing a new pathology business in Perth. These discussions progressed to the point where in July/August 1999 ePath Pty Ltd was incorporated as a company. Mr Adriansz accepted the terms and conditions of an offer of employment on 4 August 1999. He commenced work at ePath in mid-September 1999. At the beginning of his employment he was not a director of the company. However, at a later date due to some difficulties with gaining loans for the business, the applicant agreed to become a director and provide personal guarantees for some loans for the business. In total the applicant gave personal guarantees of about $280,000 using his home as security.

7 Mr Adriansz says at the beginning of his contract the 3 scientists employed were advised by Mr Mabarrack that the business could not afford to pay overtime and on-call. A record of hours was to be kept with a view to being compensated at a later date. Initially each of the 3 scientists were to be paid the same package. This changed and each negotiated an individual package. Mr Adriansz says that callouts were outside normal operating hours where calls were diverted to his mobile and he would on occasion need to respond by taking blood, processing results and providing those to the relevant doctor. Each of the scientists was rostered for a week on a rotational basis to handle callouts. In his first year of employment the applicant worked a one in three week roster, in the second year a one in two week roster and in the third year a one in three week roster. At all times the number of callouts per week averaged approximately two. In addition to this the applicant worked an average of 10 hours per day and worked weekends. The laboratory being open on Saturdays. The applicant did not record his hours and does not recall any one else recording his hours. In mid-October 1999 the applicant became a director of the company. At times, as the company was struggling financially, the applicant did not draw a salary so as to assist the company. In about January 2001, the applicant loaned the company $22,000 in two instalments. The applicant says there were never any complaints about his performance.

8 In late December 2001, the directors of the company, Mr Mabarrack, Mr Tucker and the applicant, discussed how to keep the company going, given its financial position. They put to a shareholders meeting the various options they had considered, including two options for the sale of the company. At a meeting of shareholders on 12 February 2002 it was decided to pursue the sale option whereby the purchaser took across all staff. A heads of agreement for the sale was drafted. The applicant saw this agreement in late February 2002. Earlier in late December/early January the three directors met to recommend which staff should be transferred with the business if they were asked by the purchaser. Exhibit IA4 is the list which includes the staff to be transferred. The applicant was recommended as one of the staff to transfer. He was listed under 'marketing' with a question mark regarding an 'IT role'. It was decided that Mr Mabarrack would negotiate the sale with Clinipath. The applicant was not involved in negotiations. It is Mr Adriansz' evidence that he did not see an earlier letter from Mr Colin Goldschmidt, Managing Director of Sonic Healthcare Limited, dated 21 January 2002 with an attached indicative heads of agreement.

9 From mid-January 2002 the applicant understood that Clinipath would be the buyer of ePath. The applicant says he expected to be transferred to Clinipath given his skills and experience and the fact that he had worked previously for Clinipath and left on good terms. He had left Clinipath in early 1993 at the request of Mr Mabarrack to work with Perth Pathology. He says the two directors of Clinipath at that time had expressed regret that he was leaving. On 22 February 2002 staff were advised of the sale of ePath. The applicant had asked to be at the meeting when staff were advised, but was out on business and the meeting was conducted in his absence. He asked Mr Mabarrack later that day why they had not waited for him to return before informing staff. He also asked what had been decided regarding which staff were to transfer. Mr Mabarrack replied that he was having discussions with Clinipath on the following Sunday. The applicant also asked the other director Mr Tucker about the staff to transfer. Mr Adriansz says Mr Tucker's reply was that he did not know and it was best that he look after himself. Mr Adriansz said that earlier in the week he had a discussion with Ms Gray, who worked for ePath in marketing, and she advised that Mr Mabarrack had given her an assurance that she would have a job with Clinipath. Mr Adriansz was surprised at this. Mr Adriansz became concerned in light of these discussions with Ms Gray, Mr Mabarrack and Mr Turner. He rang Mr Mabarrack on the weekend to ask to attend the Sunday meeting with Clinipath. Mr Adriansz wanted to put his own case for employment to Clinipath. Mr Mabarrack denied his request and said that it would not be appropriate and would not be professional for Mr Adriansz to attend. The applicant did not attend that meeting. At approximately 10 – 10.30am on Monday, 25 February 2002 Mr Mabarrack asked to see the applicant and advised him that he would not be transferring his employment to Clinipath. Mr Mabarrack, on Mr Adriansz' recollection said, "They haven't offered you a position". He advised Mr Adriansz that he was to finish employment on 28 February 2002. Mr Mabarrack gave Mr Adriansz the name of Mr John Kusinski, an information technology professional, who Mr Mabarrack suggested would assist Mr Adriansz in finding a job. They discussed Mr Adriansz being paid two weeks notice and annual leave. Mr Adriansz did not take in the full discussion as he was shocked. Mr Adriansz worked until the Friday with ePath and negotiated with Clinipath to work with them on contract to assist with the technology changeover. The applicant earned $1000 performing this contract work.

10 The applicant did not contact Mr Kusinski as he had no formal qualifications in information technology. He did find out from another employee after his dismissal, a Miss Tracey Gallagher, about assistance having been arranged for those staff who had been made redundant. The company concerned was TMP Worldwide and the applicant contacted them and received assistance. He considers their service to be good, however, he was under the impression they would be offering a job placement service and this was not the case.

11 The applicant spoke to Mr John Cochran, who worked for Clinipath and with whom Mr Adriansz had worked previously. He wanted Mr Cochran to arrange an appointment for him with Mr Smith, the CEO of Clinipath. This never occurred even though Mr Adriansz followed up the matter with Mr Cochran.

12 Mr Adriansz says that his termination affected him in terms of loss of income and his social life given his lack of spending capacity. In their discussion of 25 February 2002 Mr Adriansz asked Mr Mabarrack about payment for the extra hours he had worked. Mr Mabarrack said he would talk to Clinipath about this. On 12 March 2002 Mr Mabarrack presented to Mr Adriansz a deed of release [Exhibit IA7] which incorporates some suggested payments in settlement. The final deed of release is [Exhibit IA8]. The applicant did not sign the deed of release.

13 The applicant called a Board meeting of ePath as he wanted to know what the company would do regarding his application for unfair dismissal. The application was lodged on 27 March 2002. The meeting was held on 18 April 2002. Exhibit IA9 are the applicant's notes for the meeting.

14 Under cross-examination the applicant confirmed that he did not sign the deed of release as he did not agree to the respondent's conditions. He says he worked callouts mostly at weekends but also mid week and he was rostered on for callouts. He says these callouts were separate to the unpaid overtime which he performed. In relation to the sale of the business he confirmed that from the 4 December 2001 directors meeting, he was aware of negotiations to sell the business. He was informed of how negotiations progressed. He did not use Mr Kusinski's services but he did use other on-line services for seeking employment.

15 Mr Adriansz was a clear, concise and straightforward witness who gave a good account, in my view, of the matters surrounding his employment and termination. His evidence was largely uncontested in cross-examination and there was no other evidence called. I have no difficulty accepting Mr Adriansz' evidence.

16 The claim has two parts. I will deal firstly with the claim for payment of on-call. The amount claimed is expressed in letter from Mr Caspersz, counsel for the applicant, to the respondent's solicitors of 15 July 2002. The claim reads as follows—

> "(ii) In addition to the matters referred to in point 24 of the claim, my client also claims the following by way of a contractual entitlement—
>
> - "$8,492 by way of accrued and unpaid moneys on account of call-outs worked by the Applicant from September 1999 to the day of termination, calculated as follows pursuant to the express term in the letter of offer – ie $28 (hourly rate of pay) x time and one half x 2 hours (see letter of offer) = $84 x —
>
> a) 2 call-outs/week, once every 3rd week for 1st year of employment = $2,911, plus;
>
> b) 2 call-outs/week, every 2nd week for 2nd year of employment = $4,368; plus
>
> c) 2 call-outs/week, every 3rd week for balance of employment in 3rd year = $1,213"

17 I note that the claims referred to in paragraph 24 of the application were not pursued other than in the context of the claim for unfair dismissal given the decision of the Industrial Appeal Court in *Dellys v Elderslie Finance Corporation Ltd* 82 WAIG 1193. The respondent did not challenge the amount calculated. The respondent, however, says the monies claimed must be construed as overtime as any callouts by their nature were unplanned and could happen anytime during the week. The respondent says that the contract must be read as such otherwise the agreement is hopelessly inconsistent. In that sense the applicant is only entitled to callouts that are unrostered. The applicant's evidence is that he was placed on roster to be available for callouts. The call outs were in addition to the extra hours or overtime which he worked. There is no evidence of the callouts other than the oral evidence of the applicant.

18 The applicant says that the Commission may order the payment of the on-call monies pursuant to s23A(1)(a) of the Act (ie prior to the recent amendments) or alternatively in accordance with s29(1)(b)(ii) of the Act. The applicant says the contract is clear, he refers separately to unpaid overtime and to payment for callouts. The applicant says that being rostered on call is different from going out and performing the work whilst on call. The contract must be interpreted on its face and no resort to extraneous material is required. The applicant's evidence must be accepted and the contract must be construed as working callouts and hence the gross amount claimed is payable.

19 The relevant provisions in the contract are as follows—

> "· Unpaid overtime and on-call retainer
>
> · Time and one half for a minimum of two hours for all callouts.
>
> As we have discussed over the past couple of months our initial workload will be an unknown factor despite our extensive pre-planning. Your hours will be dictated primarily by our service requirements, with rostered overtime on weekends recorded but unpaid within this agreement. Any other requirement to work additional hours above our standard hours from Monday to Friday will be recorded and closely monitored. This should ensure your workload over the year does not significantly exceed the estimated 200 hours on top of your 37.5 hours per week."

20 The applicant's evidence is that hours were not recorded. Nevertheless the agreement is clear that rostered overtime on weekends would be unpaid. It is equally clear that this unpaid overtime is separate from the time and one half for a minimum of two hours for callouts. The callouts are also separate from an on-call retainer. There is no submission regarding an on-call retainer being claimed, having been paid or being payable. In simple terms then "all callouts" are to be paid at the rate of time and a half for a minimum of two hours. Separate to rostered overtime on weekends the agreement envisages the working of additional hours above standard hours from Monday to Friday. These hours are also to be recorded and closely monitored. There was not a suggestion that these hours are unpaid. However, there is no suggestion they be paid and there is no claim for them. The contract simply says they will be monitored so as to ensure the workload does not significantly exceed the estimated 200 hours on top of the 37.5 hours per week. In simple terms I consider the contract must be read as providing for at least a minimum of an estimated 200 hours of overtime unpaid on top of the 37.5 hours per week worked, and monitoring of additional hours above this. The contract also provides for the payment of callouts. The respondent says that these callouts as they were rostered, as per the applicant's evidence, they must then form part of rostered overtime, and hence not be payable. I do not consider the contract can be read as such. Overtime is clearly expressed separately to callouts. The applicant's evidence is that overtime and callouts were different. The applicant's evidence is that he regularly worked additional hours during the week and on weekends at the laboratory on Saturdays. In addition to this he was rostered one in three weeks or one in two weeks to handle callouts. On average Mr Adriansz would be required twice a week to attend work to perform tests and provide results to doctors. These occasions then can easily be seen to fall within the contract for time and a half for a minimum of two hours for all callouts. These callouts would occur either during the week or on weekends. The respondent's argument rests on the applicant being "rostered". This is no more than the applicant being available to attend to the callouts should they arise, on a rotational basis with the other scientists. The contract only refers to "rostered overtime on weekends". I cannot accept the respondent's interpretation of the contract. There is no challenge that the applicant performed these callouts. There is also no challenge to the calculation of the amount claimed.

21 I do not need to refer to s23A(1)(a) of the Act (as it was). In my view what is being claimed is encompassed within s29(1)(b)(ii) of the Act that being "a benefit, not being a benefit under an award or order, to which he is entitled under his contract of service". On the evidence, the applicant has worked the on-call arrangements, he is entitled to the payment, and is entitled to the payment pursuant to his contract. The other issue is whether the applicant has been denied that benefit. Clearly the applicant has not been paid that benefit. The final deed of release [Exhibit IA8] which the applicant did not execute refers to a figure of $10,000 as a redundancy payment. It does not offer or envisage anything by way of payment for callout. I find that the applicant is entitled under his contract to payment of $8,492 gross for callouts worked during the term of his contract.

22 The second issue is the allegation of unfair dismissal. In relation to this the respondent says as follows. The applicant was made redundant on the sale of ePath. The applicant knew at all times of the proposed sale and took part in discussions and decisions leading to the sale. All employees were made redundant at the time of sale and given the circumstance there is nothing unfair regarding that. The applicant knew that he was to be made redundant. The discussion between Mr Mabarrack and the applicant on 25 February 2002 was simply a clarification that Mr Adriansz would not be employed by Clinipath. The employment with Clinipath was a separate issue and a decision entirely for Clinipath. The applicant was paid two weeks notice following 28 February 2002 and had received notice in the week of 25 February 2002. Under the Federal *Workplace Relations Act 1996* the applicant would have been entitled to two weeks notice and he has received that. Any decision to re-employ the applicant with Clinipath is a decision for Clinipath. Any complaint regarding that should be made against Clinipath, if it was able to be made. The applicant tried to contact Mr Smith, CEO of Clinipath and was unsuccessful. The termination cannot be otherwise deemed to be unfair due to the absence of redundancy payment. The applicant was offered $10,000 and did not accept it. The decision in *Dellys v Elderslie Finance Corporation Ltd [2002]* 82 WAIG 1193 is authority for the proposition that a redundancy payment cannot be implied into a contract of employment. In that sense as the applicant is not legally entitled to a redundancy payment, there being no express provision in the contract, it is hard to see how that could be an aspect of unfairness given the absence of a legal entitlement. In respect of outplace assistance, Mr Adriansz was offered the services of Mr Kusinski and contacted TMP Worldwide as did other employees and accessed their services. The suggestion that the applicant should have been able to attend the meeting of Sunday, 24 February 2002 and present his case for employment to Clinipath is not relevant as Mr Mabarrack was entitled to indicate that as Mr Adriansz was not invited it would not be professional for him to attend. Any suggestion that there was unfairness due to the lack of redundancy payment, as other employees may have received a payment, is not relevant in the respondent's submissions. What other employees received is a matter for them.

23 The applicant in turn says that he was made redundant. However, it was unfair given the fact that the applicant missed the opportunity to travel with the business and he had a reasonable expectation that he would do so. The applicant says Mr Mabarrack failed to properly advance his case with the purchaser (as is seen in paragraphs 11 to 15 of the applicant's outline of submissions). In particular paragraph 15 says:

> "In either event, Mabarrack, acting for and on behalf of the respondent failed to properly advance the best interest of the Applicant as an employee. He failed to use his best endeavours to facilitate employment of the Applicant by Clinipath. In fact, instead of representing to Clinipath the wide range of skills that the Applicant had as a medical scientist, marketing person and IT person, Mabarrack only represented to Clinipath the latter 2 areas of the Applicant's skills. Thus, the basis upon which the Applicant was made redundant, when the Respondent's business was transferred to Clinipath, was fundamentally unfair."

The applicant says this aspect of the claim is clearly seen in [Exhibit IA9], the minutes of the Directors meeting of 18 April 2002. These notes were taken by the applicant and say in part: "GM strongly recommended IA for both IT and marketing roles but was not accepted by Wayne Smit".

24 It is clear that the applicant had a reasonable expectation of gaining employment with Clinipath. His evidence is unchallenged in this regard and is bolstered by the list of recommended employees for employment with Clinipath compiled by the directors. It is equally clear from that list and from the Heads of Agreement [both Exhibit IA3 and Exhibit A1] that not all employees were to transfer to Clinipath. Exhibit A1 is something the applicant says he did not see until recently. The language of the Heads of Agreement includes "transferring employees" and "non-transferring employees" and deals with the liabilities described to each party in respect of these categories of employees. Similarly in [Exhibit A1], that is a letter of 21 January 2002 from Dr Smith to Mr Mabarrack and says in part—

> "Unfortunately, as you are aware, the financial side of the transaction can only work if the staff numbers are reduced in the merger process. This has been taken into account in structuring the attached offer. Some potential exists to slightly increase the purchase price if we can agree a further reduction in the number of staff to be offered positions. To do this, however, we would need to be satisfied that such reductions would not jeopardise the maintainability of revenues going forward."

25 Notwithstanding Mr Adriansz' expectation of continued employment, as at 22 February 2002 he was still concerned about whether he would gain a place with Clinipath. His evidence is that he asked Mr Mabarrack whether decisions had been taken and then asked Mr Tucker. Mr Tucker's response was that he needed to look after himself. Mr Adriansz was also concerned as Ms Gray had indicated that she had been given assurances of a job with Clinipath. Mr Adriansz complains that he was not allowed to put his case properly to Clinipath at the meeting of 24 February 2002 and that Mr Mabarrack did not fully represent the applicant's interest to Clinipath. Mr Adriansz writes in [Exhibit IA9] that Mr Mabarrack "strongly recommended" Mr Adriansz for IT and marketing roles. Mr Adriansz complains that his full range of skills, eg his medical scientist skills were not represented to the buyer. He says also that he was only one of two employees, the other being Mr John Bonar, on the recommended list of employees who were not offered employment by Clinipath.

26 The fact that the applicant was on the recommended list of staff to transfer to Clinipath is one of the reasons why Mr Adriansz expected to be given a job with Clinipath. He says also that he had worked there before and left on good terms. It is easy to infer from that that Clinipath knew of his abilities as a medical scientist. It is also easy to infer from [Exhibit IA4], a document in Mr Adriansz' handwriting and one drafted after discussion by all the directors including Mr Adriansz, that he was to be recommended to Clinipath in a marketing or "?IT role". Mr Adriansz says that they agreed that negotiations of the purchase of ePath would be left in Mr Mabarrack's hands. Counter to this the applicant asked that the Commission infer that Mr Mabarrack did not want the applicant to be at the meeting with Clinipath because he anticipated there would be difficulties persuading Clinipath to offer the applicant employment. Alternatively, to infer that Mr Mabarrack was simply uncaring of the applicant's prospects of being offered employment with Clinipath. Mr Adriansz already knew that Ms Gray was to be offered a job with Clinipath because she advised him that she had been told so by Mr Mabarrack. It should be said that on the applicant's evidence Ms Gray was the principal employee responsible for marketing and he also assisted in that role along with his other duties.

27 Counsel for the applicant says that in line with the decision in *Jones v Dunkel and Another* [1958-1959] 101 CLR 298 where it is within the reasonable control of a party in litigation to bring witnesses then it can be expected that they would be brought. Therefore, counsel for the applicant submits that Mr Adriansz' evidence and inferences should be accepted by the Commission

as they were not countered by the respondent bringing forth evidence. I accept the evidence of Mr Adriansz. As indicated it is credible and largely uncontested. However, weighing that evidence it is hard to get past the simple point that Clinipath considered Mr Adriansz for employment and decided not to employ him. In other words whatever Mr Mabarrack might have said to Clinipath or recommended to them it was obviously the decision of Clinipath not to employ Mr Adriansz. There is no suggestion that Mr Adriansz was not considered for employment or that Mr Mabarrack did not put him forward. The reverse is true, Mr Mabarrack strongly recommended him for a marketing/IT role [Exhibit IA4]. Clinipath knew of the applicant through past employment. In all the circumstances the decision not to transfer the applicant to employment with Clinipath was a decision taken by Clinipath for whatever reason. The applicant sought later to meet with Mr Smith and was denied that opportunity, again for whatever reason. There is no suggestion by Mr Adriansz that Mr Mabarrack misrepresented his interest to Clinipath. Rather the suggestion is that he obstructed or did not fully represent his interest to Clinipath. Even if this were so it is difficult to see how in the employment sense the decision not to transfer Mr Adriansz can be seen other than a decision taken by Clinipath. If the applicant's submission is to be adopted, namely that Mr Mabarrack prevented Mr Adriansz from attending the 24 February 2002 meeting as he anticipated it was going to be difficult to persuade Clinipath to offer the applicant employment, then that merely supports the view that Clinipath was not of the mind to offer employment to the applicant. Equally there is no evidence that Mr Adriansz at that time took any other step to put directly his case for employment with Clinipath other than to ask Mr Mabarrack if he could attend the meeting of 24 February 2002. This is not said as a criticism or to suggest that there was any obligation on Mr Adriansz to do so. However, in all the circumstances it is difficult to conclude that somehow Mr Mabarrack is solely at fault for Mr Adriansz not securing employment with Clinipath and hence that this makes the termination of Mr Adriansz' employment fundamentally unfair on this ground.

28 I would deal with the other grounds of unfairness summarised in paragraph 27 of the applicant's outline of submissions and covered in other paragraphs. The applicant says the termination was unfair due to the absence of reasonable notice. Counsel for the applicant maintains that given the applicant's responsibilities, his position in the respondent's business, length of service and prospect of finding a similar new position, Mr Adriansz was entitled to six months by way of reasonable notice. There is no provision in the contract for payment for notice or payment in lieu of notice. The applicant says he was paid 2 weeks notice. The respondent says the applicant was paid 3 weeks notice and as I understand it incorporates the final week of employment from 25 February to 28 February 2002. Counsel for the applicant refers to the decision of *Antonio Carlo Tarozzi v WA Italian Club (Inc)* 71 WAIG 2499 and the decision in *Peter Dellys* v *Elderslie Finance Corporation Ltd* 81 WAIG 1632 by the Commission as currently constituted. He says based on these decisions and given the findings of performance difficulties in the *Dellys case* then Mr Adriansz is entitled to at least 3 months and should be 6 months by way of reasonable notice. The *Tarozzi* case at page 2501 sets criteria for assessing reasonable notice. They are—

"(a) The high or low grade of the appointment.
(b) The importance of the position.
(c) The size of the salary.
(d) The nature of the employment.
(e) The length of service of the employee.
(f) The professional standing of the employee.
(g) His/her age.
(h) His/her qualifications and experience.
(i) His/her degree of job mobility.
(j) What the employee gave up to come to the present employer (eg a secure longstanding job).
(h) The employee's prospective pension or other rights."

29 The respondent says that the payment of 3 weeks notice was fair. In addition, the respondent says that Mr Adriansz knew for some time, and at least from mid-January 2002, that his position was to be made redundant on the sale of the business. To be fair it can be said alternatively that Mr Adriansz expected for some time to secure a job with Clinipath. In other words the only point at which Mr Adriansz was given notice was on 25 February 2002. Mr Adriansz was a senior figure in ePath. He was a co-founder of the company, a director and shareholder, and involved in many aspects of the business including the key aspect of supporting the technology network. He performed important roles in the business and was well qualified. The thrust of the business was geared towards electronically providing the pathology data and the results. Mr Adriansz was 33 years of age at the time, and had committed considerable monies or personal guarantees to the business, and has not been able to secure a job of equal stature. Albeit it is possible to infer from Mr Adriansz's evidence that his employment prospects are at least reasonable. In the circumstance I find the absence of a reasonable notice payment to be a factor in the unfairness of the dismissal. A greater consideration should have been given to Mr Adriansz in that regard. In assessing the reasonableness of the payment, and weighing the above factors, I would consider that 3 months notice was an appropriate period of reasonable notice. In the Industrial Appeal Court decision in *Dellys*, Anderson J states:

> "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".

He goes on to say:

> "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 ……. From this, they would have deducted the sum which was paid to the appellant as a payment in lieu of notice."

Hence Mr Adriansz is entitled to 3 months notice (incorporating salary and superannuation) less the payment already made which I take to be 2 weeks and 4 days. The 4 days being 25, 26, 27 and 28 February 2002.

30 The next two grounds of alleged unfairness I take together. They are the applicant was not paid out on termination his accrued and unpaid entitlements for callouts and that he was presented with a deed that purported to compromise any rights he had to the respondent in return for payment of amounts to which he was in any event entitled. It is not disputed that Mr Adriansz was paid out his entitlements excepting the claim for callouts which was disputed. It is not disputed that he worked the callouts. It is simply disputed that the applicant is entitled to take such payment under the contract. This goes to the interpretation of the contract which has already been dealt with. It seems strange then to deem in hindsight that the dismissal was somehow unfair as the respondent failed to pay the applicant a sum that they contested. It also seems strange that the dismissal could somehow be deemed to be unfair courtesy of negotiations in settlement past dismissal which the applicant participated in and which purported to be a final settlement of the matter. Clearly the applicant did not agree with the terms of the proposed settlement and hence the matter had to be heard. No unfairness can be found in the dismissal based on these grounds.

31 The applicant also complains that he did not receive proper outplacement assistance in the formal job search assistance. I do not consider this claim has been made out. On the applicant's own evidence he was directed to meet with Mr John Kusinski for assistance and did not, for his own reasons, take up that offer. Similarly, he received the assistance organised by the respondent with TMP Worldwide. Whilst he was made aware of this from another employee the fact is he did access that service. He was not present for an earlier presentation by TMP Worldwide as he was busy.

32 The applicant also complains that there was no proper consultation with him as required by section 41 of the *Minimum Conditions of Employment Act 1993* and that he did not receive a proper severance payment. The applicant submits that the Industrial Appeal Court decision in *Dellys* means that there can be no implied term of redundancy as a contractual entitlement where there is no expressed entitlement in the contract. However, the applicant refers to the Full Bench decision in *Frederick John Rogers v Leighton Contractors* (1999) 79 WAIG 3551 whereby the President states: "A termination for redundancy which is not accompanied by a reasonable redundancy payment is harsh, unjust and unreasonable" and relies on *Wynn's Wine Growers v Foster* 16 IR 381 as a principle to be applied.

33 The applicant says a reasonable redundancy payment would be 3 weeks for every year of service which he equates to about the $10,000 which was offered albeit the applicant says this was to cover callouts. The lack of consultation as required pursuant to section 41 of the *Minimum Conditions of Employment Act 1993* seems to relate to the fact that Mr Mabarrack did not discuss severance payments with Mr Adriansz when he gave him notice of his termination on 25 February 2002.

34 Once again this ground cannot be said to be made out. On the applicant's evidence the respondent knew on 24 February 2002 that Mr Adriansz would not be offered a position with Clinipath. He advised the applicant on Monday, 25 February 2002 of this. In other words he advised him soon thereafter of his impending redundancy. Arrangements were clearly made for non-transferring staff to access some job search services, albeit Mr Adriansz complains they were not designed to find him a job. In respect of the actual payment I accept the submission of the respondent that as the applicant was not legally entitled to a redundancy payment by virtue of the contract (eg *Dellys case*) then it could not be deemed to be an aspect of unfairness in the dismissal if the respondent failed to pay a redundancy payment that the applicant was not legally entitled to. On the applicant's submission the only remedy to correct the unfairness is to make a redundancy payment. In other words to make a payment that the applicant was otherwise not legally entitled to as part of his contract. There is some suggestion that another employee Mr John Bonar who was recommended for transfer but not transferred to Clinipath received a substantial termination payment on being retrenched from the respondent. The applicant claims that this is more favourable treatment in comparison to the applicant. There is also reference to the ePath redundancy kit [Exhibit A2]. There is no evidence as to what Mr Bonar received as a redundancy payment.

35 Within [Exhibit A2] at page 8 and 9 it references a sample letter to employees and says under heading of "Do I get paid a redundancy payment?" the following:

> "In Western Australia the law does not require that retrenched employees be paid a redundancy payment. Retrenched employees are entitled to the same payments as any employee whose employment ends, regardless of whether it is due to their position being made redundant. However, as a gesture of goodwill E-Path will pay all employees a redundancy payment. The redundancy payment is in addition to payment for unused annual leave, and the amount of notice set out in your employment contract."

It then goes on to give a table of redundancy payments and for a period of continuous employment with E-path of more than 1 year and not more than 3 years it includes a redundancy payment of 2 weeks. The exhibit also refers to notice payment as per the contract. This has already been addressed in my reasons. I would infer from this document unchallenged by the respondent that these payments were made to non transferring employees. Whilst I do not know what Mr Bonar was paid and whether that is relevant, it would seem that non transferring employees were paid a redundancy payment. These payments were "in addition to payment for unused annual leave, and the amount of notice set out in your employment contract". In other words they would appear to be in addition to any contractual entitlements. I consider that is an aspect of unfairness in that Mr Adriansz was not treated in a like fashion to other employees and paid a redundancy payment. The issue then is how much the redundancy payment should be. I consider the unfairness is that he was not paid at least what other employees were paid. Therefore I would award a redundancy payment of two weeks. This clearly does not apply the reasoning in *Rogers v Leighton*. However, in the circumstances of this matter the payment relates to the fact that Mr Adriansz at the time of dismissal was not granted a payment as per other staff when the respondent had advised staff of this payment. I would add also that the decision of the Full Bench in *Ramsay Bogunovich –v- Bayside Western Australia Pty Ltd* 79 WAIG 8 holds that the compensation must be causally linked to the termination.

36 The applicant also claims $5,000 to $10,000 by way of injury for the hurt and humiliation caused to Mr Adriansz by his termination. The applicant refers to the callous disregard of Mr Mabarrack for the applicant's position. It is trite to say that dismissals by their very nature may be hurtful and upsetting. In this case the disappointment is enhanced by the expectation Mr Adriansz had for employment with Clinipath and given his position as a founder of the company and a vital component of the company. However, the emphasis on Mr Mabarrack as having "callous disregard" for Mr Adriansz is not, in my view, sustained by the evidence. Without reiterating my reasons it is clear the decision was Clinipath's and it is clear from [Exhibit IA9] that Mr Mabarrack strongly recommended Mr Adriansz to Clinipath. It may be that he did not cover all of his qualities. That is something that might be inferred but I cannot be sure of.

37 In summary, I find that Mr Adriansz is entitled as a denied contractual benefit to be paid for the callout payments as claimed, that being $8,492. I find also that Mr Adriansz was dismissed unfairly by the respondent due to the absence of reasonable notice payment and the absence of a redundancy payment given the payment afforded to other staff. I would award Mr Adriansz a redundancy payment of 2 weeks, being $2,284.61 and a notice payment of 3 months less the payment already received of 2 weeks and 4 days, being $11,912.65. These amounts of compensation are calculated on the basis of his annual salary, that is $55,000 plus 8% superannuation (i.e. $4,400). This gives a total compensation payment of $14,197.26 and a denied contractual benefit payment of $8,492, less any taxation payable to the Commissioner of Taxation.

2002 WAIRC 06650

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	IHAAN ADRIANSZ, APPLICANT
	v.
	EPATH WA PTY LTD, RESPONDENT
CORAM	COMMISSIONER S WOOD
DELIVERED	FRIDAY, 27 SEPTEMBER 2002

FILE NO.	APPLICATION 537 OF 2002
CITATION NO.	2002 WAIRC 06650

Result	Applicant dismissed unfairly; Contractual benefit granted
Representation	
Applicant	Mr T Caspersz of Counsel
Respondent	Dr J Edelman of Counsel

Supplementary Reasons for Decision

1 The applicant has sought costs in this matter and amendments to the Minute of Proposed Order issued to parties on 18 September 2002. Submissions were received on behalf of the applicant on 19 September and 25 September 2002. A submission was received on behalf of the respondent on 23 September 2002. The respondent sought to convene a hearing to elaborate on that submission. Parties were heard in relation to the Speaking to the Minute and the applicant's application for costs on 27 September 2002.

2 Having considered those submissions I would say that in line with the decision in *Denise Brailey v Mendex Pty Ltd t/a Mair and Co. Maylands* 73 WAIG 26 there is nothing in either the conduct of this matter or more particularly the substance to suggest an exceptional circumstance. Costs are not lightly awarded in this jurisdiction. I would then dismiss the application for costs.

3 The applicant seeks the inclusion of a 14 day period for payment of the monies awarded in the order. The respondent seeks at least 21 days, being at least the period of appeal. I am willing to incorporate a period of 14 days as the applicant believes that provides greater clarity or certainty. I would not gear my Order to the appeal period. That is a completely separate consideration for either party.

4 Both the applicant and respondent submit that reference to 'less any taxation that may be payable to the Commissioner of Taxation' be removed. The applicant says this was not raised at hearing, is not within jurisdiction or power and produces uncertainty. I do not concur with this submission but I take the matter no further as I am willing to remove this reference from this order on the basis of the consent of the parties.

5 Finally, the applicant seeks to collapse orders (3) and (4) which refer separately to the payment of amounts in compensation for notice and redundancy. I am willing to condense the two orders to one and refer simply to the total amount in compensation being $14,197.26. I do so not on the basis of accepting the applicant's submission that the Order as originally proposed is neither within jurisdiction or power. I do so as it leads to the same path and may add certainty. I note that the amount awarded, as per my Reasons for Decision, is for compensation for notice and redundancy, the absence of those payments clearly being aspects of unfairness in the dismissal, for the reasons expressed.

2002 WAIRC 06653

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	IHAAN ADRIANSZ, APPLICANT
	v.
	EPATH WA PTY LTD, RESPONDENT
CORAM	COMMISSIONER S WOOD
DATE OF ORDER	FRIDAY, 27 SEPTEMBER 2002
FILE NO.	APPLICATION 537 OF 2002
CITATION NO.	2002 WAIRC 06653

Result	Applicant dismissed unfairly; Contractual benefit granted
Representation	
Applicant	Mr T Caspersz of Counsel
Respondent	Dr J Edelman of Counsel

Order

HAVING heard Mr T Caspersz of counsel on behalf of the applicant and Dr J Edelman of counsel for the respondent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby-

(1) DECLARES that the applicant, Ihaan Adriansz, was unfairly dismissed by the respondent on the 28th day of February 2002;

(2) DECLARES that reinstatement is impracticable;

(3) ORDERS that the respondent, within 14 days of the date of this order, do hereby pay, in compensation, the amount of $14,197.26 to Ihaan Adriansz.

(4) ORDERS that the respondent, within 14 days of the date of this order, do hereby pay, as and by way of a denied contractual entitlement, the amount of $8,492.00 to Ihaan Adriansz.

(5) ORDERS that the application for costs be dismissed.

[L.S.]

(Sgd.) S. WOOD,
Commissioner.

2002 WAIRC 06658

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	STEPHEN ALLAN COCKS, APPLICANT *v.* DUSKGALE T/A ENCORE AUTOMATION (IAN HAMILTON / MATT MAZZUCHELLI), RESPONDENT
CORAM	COMMISSIONER S WOOD
DELIVERED	FRIDAY, 27 SEPTEMBER 2002
FILE NO.	APPLICATION 520 OF 2002
CITATION NO.	2002 WAIRC 06658

Result	Applications dismissed
Representation	
Applicant	No appearance
Respondent	Mr N Irvine

Reasons for Decision

1 The substantive application for unfair dismissal and denied contractual benefits came on for show cause hearing on 25 September 2002. The parties were advised by letter that the Commission would also hear the respondent's application for costs. At hearing there was no attendance by the applicant and the matter was accordingly to be dismissed for want of prosecution.

2 The history of this matter in brief is that the applicant failed to respond to correspondence from the Commission of 14 August and 30 August 2002. This led to the Commission issuing on 17 September 2002 a notice of hearing to show cause why the matter should not be dismissed. The applicant was advised that failure to attend the proceeding would result in an order dismissing the matter. On the Friday preceding the hearing the applicant's wife contacted my Associate to advise that the applicant could not attend in person. My Associate was instructed to advise her to forward in writing any request the applicant may seek to make. She agreed to forward a request for teleconference the following Monday. No request was received.

3 On the morning of the hearing the Commission received a facsimile from the applicant which in part says—

> "Dear Sir,
>
> Due to work commitment I am unable to participate in todays phone conference. Please accept my apologies. Please see balance outstanding, $203.15, still owing to me."

4 My Associate, on instruction, spoke to the applicant's wife to advise that as the matter had been listed for show cause, any failure of the applicant to make himself available for teleconference would lead to the application being dismissed. He reminded her also that the respondent's application for costs may be heard. The Commission was advised that Mr Cocks would not be attending or make himself available for teleconference.

5 The respondent at hearing sought costs as per Exhibit R1. The costs were to cover the respondent's expenses or losses incurred in preparing for or responding to the claim. The costs included 41.3 hours of the respondent's time, and monies for photocopying, emails, travel, telephone calls and facsimiles. I say at the outset that the claim, in respect of the hours claimed appears to be excessive.

6 The respondent complains that the claim for $20,000 in contractual benefits was without foundation and there was never a contractual basis for such a claim. The amended claim by the applicant for $5,100 was found, after investigation to have been paid by the respondent. The respondent submits that at all times the claim was frivolous and vexatious and inadequately pursued by the applicant. The respondent submits that no 'reasonable person' could construe the claim as a bonafide claim.

7 The decision of the Full Bench in *Denise Brailey v Mendex Pty Ltd t/a Mair and Co. Maylands* 73 WAIG 26 is authority for the general policy that in industrial jurisdictions costs ought not be awarded, except in extreme cases. Clearly I accept by dismissing the application for want of prosecution that the applicant has not adequately pursued his application. The application was made pursuant to s.29 (1)(b)(i) and (ii) of the Industrial Relations Act, 1979 and alleged unfair dismissal and a denied benefit of $20,000 for commission not paid and for future commission. The applicant attended a conference on 17 May and documents were to be exchanged to clarify the commission. The applicant attended a conference by telephone on 25 July 2002 and amended his request for commission to $5,100 and denied that this had been paid. The respondent did not attend.

8 Following that conference the respondent submitted that the monies had been paid and provided the relevant documents to prove this in their view. The applicant then did not respond to correspondence from the Commission, effectively until the day of hearing, and advised that he would not make himself available for hearing and claimed that $203.15 was still outstanding.

9 I recite this history as a number of points are apparent. The applicant's claim for denied contractual benefit has changed substantially and it would seem was inflated in the application. The applicant attended twice for conference and after some clarification the contractual benefit claim diminished substantially. The applicant's allegation of unfair dismissal remained, although it was largely not progressed in discussion. Weighing those circumstances, as simply part of the conciliation process, it is hard to conclude that the application was frivolous and vexatious. The claim for $20,000 may have been misguided. The claim was progressed through discovery to attempt a resolution and in that sense is no different to many applications. I do not however have any evidence to suggest that the application in part could not have been made out, except to say that the contractual benefit claim was misguided.

10 For those reasons I do not consider the application to be extreme such as to warrant an order for costs and that application for costs will be dismissed along with the substantive application.

2002 WAIRC 06660

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	STEPHEN ALLAN COCKS, APPLICANT *v.* DUSKGALE T/A ENCORE AUTOMATION (IAN HAMILTON / MATT MAZZUCHELLI), RESPONDENT

CORAM	COMMISSIONER S WOOD
DATE OF ORDER	FRIDAY, 27 SEPTEMBER 2002
FILE NO.	APPLICATION 520 OF 2002
CITATION NO.	2002 WAIRC 06660

Result	Applications dismissed
Representation	
Applicant	no appearance
Respondent	Mr N Irvine

Order

THERE being no appearance on behalf of the applicant and having heard Mr N Irvine 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 application be and is hereby dismissed for want of prosecution; and.

(2) THAT the respondent's application for costs be and is hereby dismissed.

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

2002 WAIRC 06561

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	PETER DE FLORENCA, APPLICANT
	v.
	ALATACT PTY LTD AS TRUSTEE FOR THE PHILIP SHORT FAMILY TRUST TRADING AS LIVING STONE PAVING PRODUCTS, RESPONDENT
CORAM	COMMISSIONER J F GREGOR
DATE	TUESDAY, 24 SEPTEMBER 2002
FILE NO.	APPLICATION 453 OF 2002
CITATION NO.	2002 WAIRC 06561

Result	Dismissed
Representation	
Applicant	Mr P. De Florenca appeared on his own behalf
Respondent	Mr P. Nevin (of Counsel) appeared on behalf of the Respondent

Reasons for Decision

1 Peter De Florenca (the Applicant) has applied to the Commission under s.29 of the *Industrial Relations Act, 1979* (the Act) for orders pursuant to s.23A on the grounds that he was unfairly dismissed and at the completion of a contract of employment with Alatact Pty Ltd as Trustee for the Philip Short Family Trust t/as Living Stone Paving Products (the Respondent), he was owed a benefit not being a benefit under an order or award of the Commission. He claims those benefits arise from a contract entered into between him and the Respondent on 16th November 2001 to commence on 1st January 2002, the said contract being for a fixed term of 12 months. He claims the contract of employment was brought to a end prior to the completion of the 12 months fixed term in circumstances which would entitle him to claim that the Respondent pay him in full for the balance of the contract.

2 The Applicant told the Commission he was employed by the Respondent for 12 months prior to entering into the contract on 16th November 2001 (Exhibit D1). Throughout that time he had been promised better conditions and permanency. He was earning in the vicinity of $40,000.00 per annum but he was prepared to accept the diminished remuneration set out in the contract because he wanted the security. He described the lesser remuneration as a huge reduction in what he was earning.

3 The Applicant described to the Commission how he had instituted strategies to improve the Respondent's sales performance, followed up leads and wrote to potential clients. He organised for sales trends to be calculated and dedicated himself to improving sales.

4 He claimed he had worked hard for the Respondent and had shown loyalty. The positive attitude shown to him by Mr Philip Short, the principal and sole proprietor, changed when the Respondent employed an accountant, Ms Karen Klicker. The Applicant described Ms Klicker as confrontational and he had asked Mr Short on a number of occasions to do something about her attitude because he found his relationship with Mr Short becoming distorted.

5 The relationship came to an end after he had organised a trade show in which he claimed he canvassed over 18,000 people. He described the show as a successful event but when he returned back to the Respondent's premises he was given a letter which he took to be a notice of dismissal. He believes the dismissal was premeditated, he had been asked to train two new sales consultants who were being paid a lot less than him. It seemed to him to be more convenient for the Respondent to keep those people and move him on once he had trained them. He claimed that as a result of the dismissal, which came as a complete surprise, there was stress on his marriage and his family so much so that he suffered a marital breakdown.

6 The Applicant was subject to intensive and extensive cross examination by Mr Nevin (of Counsel) who appeared for the Respondent. During that cross examination the Applicant contradicted much of what he said in the examination in chief. There was internal contradiction in the cross examination itself. I will say more about these matters later in these Reasons for Decision. There is no need to further summarise the primary evidence given by the Applicant.

7 The Respondent has a different view of events. It says the proper construction of the history of the matter is that the Respondent is a manufacturer of paving products, it has two places of business, one in Naval Base the other, its sales office, in O'Connor. It agrees that the Applicant was employed in October in 2000.

8 The Respondent's business was not operating well in the years 2000 and 2001 it had a continuing and increasing debt (see Exhibits L8 and L9). It had a huge imbalance between its financial liabilities and the money owed to it by debtors. Mr Short decided it was imperative that the Respondent increase sales.

9 In November 2001 through Ms Klicker, who had been appointed as an accountant, it commenced some discussions with the Applicant to restructure his employment package with the aim of providing him more incentive to increase the volume of sales.

10 A copy of the contract accepted by the Applicant appears hereunder—

> "*Herewith we offer you the following employment contract with Living Stone paving Products in the position of Sales Consultant.*
>
> *This position commences on the 01/01/2002 and is for a period of 12 month. This contract will be revised in 12 Month time.*
>
> *We offer you a annual retainer of $30000 plus a car allowance of $5400. The Company will be paying the 8% Superannuation. The Company will provide you with a Mobile Phone but all costs are to be repaid via a monthly deduction by yourself.*
>
> *Your duties are outlined in the attached job description, these might vary from time to time but the day to day issues will be discussed on a daily basis.*
>
> *At the same time we offer a 2.5% commission on your O'Connor Sales. We require a monthly commission sheet showing the 2.5% commission on paid Sales.*
>
> *Your place of work will be at our O'Connor Display centre, or such other place the company may reasonably require.*
>
> *The consumption of alcohol from the start of work to the time of completion is prohibited.*
>
> *Your vehicle must be in good order and must be insured, we have included the Insurance costs in the vehicle allowance.*
>
> *The first two months of the employment contract will be a probationary period during which time either you or the company may terminate the employment at any time without giving any reason but subject to reasonable notice."*
>
> *Exhibit D1*

11 On behalf of the Respondent Mr Nevin says that it was an express term of the contract that it could be reviewed at any time, and in any event it was to be reviewed after two months. There was a specific ability to terminate the contract of employment within the probationary period by the giving of reasonable notice and it is argued that the contract should be read to imply that it could be brought to an end by reasonable notice at any time.

12 The Applicant's performance began to deteriorate. He was required to travel from the O'Connor sales centre to visit the Respondent's clients and trade partners and was provided with a vehicle allowance to assist him. This was because the Respondent felt in its best interests to provide the Applicant with a vehicle of a suitable standard in lieu of his own vehicle which was unreliable. It was disappointed on occasions to see him using his old vehicle when it had provided him with an allowance to operate one of a higher standard.

13 The Applicant was told that he needed to improve his sales performance, this had occurred in discussions between the Applicant and Ms Klicker and Mr Short. On 19th February and 28th February 2002 the Applicant's unsatisfactory performance became the subject of memorandums. The memorandums referred to a previous communication of 12th January 2002 in which the Respondent's requirements were set out in detail.

14 The Applicant responded on 24th February 2002 refuting many of the allegations (Exhibit L5).

15 The Respondent considered his response and advised him in a letter dated 28th February 2002 that it refused to accept his refutation. It considered the contents of the previous communications were valid and required the Applicant address the issues to the satisfaction of the Respondent. It also ordered him to place business arrangements and plans in writing because verbal communication was seen by it to be unreliable and subject to misinterpretation.

16 In the meantime the financial position of the Respondent did not improve, by March 2002 the Respondent owed its creditors three times as much as it was owed by its debtors (the details of these figures were revealed to the Commission but to remain in confidence). During that period the Respondent had gradually reduced its workforce from 10 employees to 6 through termination or attrition. The Applicant's sales performance was poor and his reluctance to chase work, had in the Respondent's view, contributed to the deteriorating financial position till it reached the point when the Respondent concluded it could no longer afford to keep the Applicant. It decided to deploy an employee, who would not be required to travel, to the O'Connor sales office to take orders. The Applicant was only made redundant after consideration of and as a result of the Respondent's financial position.

17 The Respondent contends that the termination came about because of a mix of its financial position and the Applicant's poor performance record. He was its only salesman and his continued poor performance was irreconcilable with the Respondent's need to win sales and overcome its perilous financial position. The Respondent had a duty to ensure that it traded in a financially responsible manner and it was forced to take the action it did in order to preserve its future.

18 The preceding is a sufficient scan of the facts in this matter. The Commission had the advantage of seeing the Applicant give his evidence. As mentioned previously that evidence was far from satisfactory. The Applicant did not produce a consistent story, he was evasive in cross examination and he repudiated evidence previously given. All in all the Commission is drawn to the conclusion that it should be cautious in accepting the Applicant as a credible witness. Apart from one document he called no evidence to support the contentions he advanced.

19 On behalf of the Respondent the Commission heard from Ms Karen Klicker. Ms Klicker impressed as an experienced accountant who had a good grasp of the financial and business principles involved in running a business of the nature of that operated by the Respondent. There is no reason to conclude she is anything other than a witness of truth. She was cross examined briefly by the Applicant but that cross examination did not disturb the impression the Commission has formed about the reliability of her evidence.

20 Evidence was also taken from Mr Philip Short. There is nothing in his evidence which would lead the Commission to conclude that he is anything other than an honest and truthful person and his evidence is therefore credible. It should be mentioned too that the cross examination of him by the Applicant did not disturb the impression of truthfulness which comes from his evidence in chief, there was no confusion about or repudiation of his evidence in chief during his cross examination. The evidence given by Mr Short corroborates the evidence given by Ms Klicker and the correlation of the corroboration is strong. Therefore I conclude that where the evidence of the Applicant differs from that advanced by the Respondent I favour the evidence of the Respondent.

21 The analysis of this matter should be approached from the point of view that the more likely sequence of events, on the balance of probabilities, was that the Applicant had presented himself to Mr Short at the office looking for work and Mr Short was impressed with what he saw and put the Applicant on. The Applicant's employment conditions were generous however the promise of the Applicant at the time of hire was not ultimately translated into success of the Respondent as Mr Short had contemplated. Soon after the Applicant was hired the Respondent's business at first boomed so much so that Mr Short had expanded the manufacturing side of the business. However that boom did not continue and it started to struggle such that its financial position deteriorated over 2001 until late in that year the Respondent engaged Ms Klicker to help out with the accounting side of the business.

22 According to Ms Klicker she found an accounting mess. There were no accounting systems, Ms Klicker had to reconstruct the financial operations of the Respondent from scratch. In doing so it became clear that unless there was quick and decisive action taken the trading capacity of the Respondent would continue to deteriorate until it would be forced to cease operations.

23 One of the corrections that Ms Klicker introduced was to renegotiate the contract of employment with the Applicant. This was done in November 2001 to operate from January 2002.

24 The nature of the contract is a matter of controversy between the parties. The Applicant says that the contract is a fixed term contract for a period of 12 months and because he has been dismissed before the completion of that 12 months he should be paid the balance.

25 A contract document of this nature is to be interpreted in the way described in the *Northwest Beef Industries v Australasian Meat Industry Employees Union (1984) 64 WAIG 2124,* the words are to be given their normal and natural meaning and unless there is ambiguity or an absurdity, extrinsic aids to interpretation are not to be used.

26 This is a contract which is ambiguous and confusing, it clearly has not been drafted by a person with legal training, it should be regarded as documents are in this jurisdiction as being prepared by lay people without legal advice. The document is to be read as a whole in that context. In doing so, although reading of the second paragraph might lead one to conclude that the contract was for a fixed period of 12 months, later paragraphs clearly create room for doubt, particularly the last, which provides for a probationary period and the ability to terminate on notice during that period.

27 Having read and considered the form and structure of the document, bearing in mind how it was created, it is my opinion that it is not the type of contract which could be regarded as fixed term contract as described in *Perth Finishing College v Watts (1989) 69 WAIG 2307* and *Welsh v Hills (1982) 62 WAIG 2708*. It is in fact a contract in which a term of notice can and should be implied. It is clear from the way the remuneration was to be paid that this contract was to be ongoing notwithstanding the reference to a period of 12 months. The best view is that the 12 month period was meant to be a period during which the Respondent would review whether the contract would continue or not. That makes sense given the Respondent's financial position at the time the contract was made and the imperatives of financial nature which led to the making of the contract. This was not a fixed term contract.

28 The question remains as to whether the Applicant was unfairly dismissed.

29 Mr Short says the dismissal came about in circumstances where Mr Short thought that the trust he had reposed in the Applicant for a long time had been breached. He described it as the straw that broke the camel's back and it arose when he visited the Respondent's display and found the water features, which were crucially important to the ambience of the feature, and for which the Applicant was responsible, were not working. He found that the filters were blocked with algae and had not been maintained. Mr Short spent some time making repairs. The next morning he spoke to Ms Klicker and discussed the dismissal of the Applicant. He was disappointed that the Applicant had not responded to the new offer which came into effect in January 2002 and which Mr Short thought was over generous. There had been no reciprocation from the Applicant who was just doing the bare necessity of his job and no more.

30 The financial position of the Respondent compounded the problem. Mr Short related that he had asked the Applicant to come and see him and the Applicant responded by asking was he going to be sacked, Mr Short found that to be a strange reaction. Mr Short described the time as frustrating, he had been told by his accountant that the business was in deep trouble but the Applicant was not doing his share to help out.

31 Mr Short gave evidence that the position occupied by the Applicant had not been filled by any other person and that he reached the decision to terminate the Applicant's employment and communicated it to him without delay.

32 I have carefully considered the evidence. In a matter such as this the Applicant bears the onus of proof, he is required to establish on balance the employer has abused its right to hire and fire and that in essence there has not been a fair go all round (*Undercliffe Nursing Home v Federated Miscellaneous Workers Union (1985)* 65 WAIG 385).

33 The Applicant called no evidence to support any of the contentions made by him and relies upon his own evidence in the witness box. I have previously found that where there is conflict in the evidence I favour the evidence produced on behalf of the Respondent. I should add too that many of the contentions by the Respondent as to the Applicant's failure to do his job properly and about his behaviour went unchallenged by him in cross examination. I accept the evidence from Ms Klicker and Mr Short as being evidence from credible witnesses and I must include that evidence in the mix of information to be considered in the determination of this matter.

34 Nothing that the Applicant has said detracts from the inclusion of any of that material and it adds further weight to the conclusion that here is a relationship which had run its course. The Respondent had tried to alter the attitude of the Applicant, that was unsuccessful, the failure of the Applicant to respond to the wishes of the Respondent took place against a background of severe financial stress on the Respondent which was at the time in a perilous trading position and continues to be according to the financial documents submitted to the Commission.

35 In such circumstances the Respondent was entitled to take action to ensure its financial viability and to dismiss the Applicant given his performance and given the surrounding circumstances was not unfair. This was not a redundancy. The Applicant's employment was most likely bound by the Clerks (Commercial Travellers and Sales Representatives) Award. He does not qualify for redundancy under that Award. As far as the Commission can see the Applicant appears to have been paid all of the entitlements set out in the Award. I have found there was no fixed term contract, even there were it would most likely be contrary to s.114 of the Act, however I need not rule on that in view of my previous findings.

36 This application will be dismissed.

2002 WAIRC 06562

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	PETER DE FLORENCA, APPLICANT
	v.
	ALATACT PTY LTD AS TRUSTEE FOR THE PHILIP SHORT FAMILY TRUST TRADING AS LIVING STONE PAVING PRODUCTS, RESPONDENT
CORAM	COMMISSIONER J F GREGOR
DATE	TUESDAY, 24 SEPTEMBER 2002
FILE NO.	APPLICATION 453 OF 2002
CITATION NO.	2002 WAIRC 06562

Result	Dismissed

Order

HAVING heard Mr P. De Florenca on his own behalf and Mr P. Nevin (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,
Commissioner.

[L.S.]

2002 WAIRC 06645

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	JOSEPHINE DICHIERA, APPLICANT
	v.
	ANGELINA NOMINEES PTY LTD, RESPONDENT
CORAM	SENIOR COMMISSIONER A R BEECH
DATE	THURSDAY, 26 SEPTEMBER 2002
FILE NO.	APPLICATION 1273 OF 2002
CITATION NO.	2002 WAIRC 06645

Result	Application alleging denied contractual entitlements dismissed.
Representation	
Applicant	Ms J. Dichiera
Respondent	Mr P. Burrows

Reasons for Decision

1 Ms Dichiera was employed by the respondent as a real estate representative between the dates of November 2001 and April 2002. She claims that she should be paid $1,500 being 50% of the commission payable for the sale of a property at 16 Reflection Gardens. The respondent denies that Ms Dichiera is entitled to the commission on the grounds the property settled after her employment terminated and the sale at that time was a conditional sale.

2 Ms Dichiera is entitled to be paid the commission if it was a term of her contract of employment that the commission is paid after the termination of her employment upon sales that were conditional. When Ms Dichiera was employed she discussed the terms of her employment with Ms Larussa. Both Ms Dichiera and Ms Larussa gave evidence. Ms Dichiera's evidence is that she was told she would be paid 50% of commissions that are due. Her evidence is that she was not told of any condition which would apply after her employment terminated. When she was cross-examined on her evidence by Mr Burrows, she prepared to accept that the commission to the sales representative was 45% including superannuation, although she maintains she was told 50%. When Ms Larussa gave evidence, she stated that she discussed a commission rate of 45% with superannuation and said that sales had to be followed through to the end. Commission was paid if sales were unconditional.

3 The kind of difficulty with which Ms Dichiera and the respondent are now faced would not have occurred if Ms Dichiera's conditions of employment had been agreed in writing. In the absence of any written contract of employment, I am left only with the evidence of both parties. It is not clear from the evidence whether Ms Dichiera's commission rate was 45% or 50%. However, I am quite satisfied that there was no discussion between Ms Larussa and Ms Dichiera regarding what commission would be paid if any sales were conditional at the time Ms Dichiera's employment terminated.

4 If there was no discussion between Ms Dichiera and Ms Larussa to cover the situation, it is possible for the Commission to imply a term in Ms Dichiera's contract of employment if there is evidence to show that there is a standard real estate industry practice regarding the payment of commissions on sales which are conditional at the time the selling representative's employment terminates. I have no such evidence before me. While Ms Dichiera stated that she had spoken to the Real Estate Institute of WA, she did not produce any evidence from that body of an industry practice. Neither did the respondent bring any evidence of a wider real estate practice. In order for me to hold that it was an implied term of Ms Dichiera's contract of employment that she would be paid a commission upon a sale which was conditional at the time her employment terminated, I would need to be satisfied at least that it was a term so common in the industry that "it goes without saying". I am unable to do so.

5 The result then is this. I am satisfied from the offer and acceptance of the property that Ms Dichiera was the selling agent. I am also satisfied that at the time the offer and acceptance was written up, it was conditional on finance, termite clearance, and that all electrical and gas goods were to be in working order including the outdoor spa. It was therefore a conditional sale. The settlement did not occur until after Ms Dichiera's employment terminated.

6 As a general principle, I am prepared to accept Ms Dichiera's statement that as the sales agent she is entitled to the commission by virtue of her having had the home open and that she was the effective cause of the sale. However, the commission is not fully earned unless the whole of the sale results from the whole of the work or efforts of the agent. In this case, not only is there no evidence that it was a term of Ms Dichiera's contract of employment that she would be paid commission on a sale that was conditional at the time her employment terminated, there is also much evidence of work the respondent was required to undertake in order to bring the settlement to a conclusion. That evidence arose from the failure of Ms Dichiera to write into the offer and acceptance form that the purchaser agreed that he was not concerned about shire approval of the spa at the property. The fact that the spa did not have shire approval was used by the purchaser as a reason for not proceeding unless the spa became shire approved. I accept the evidence of Mr Burrows that the respondent was required to organise the shire approval and it involved many hours of organisation "and many weeks of time on our part".

7 I find therefore that even though the property did sell after Ms Dichiera's employment terminated, it was not due wholly to her efforts. She is therefore not entitled to the commission which otherwise would be payable to her. In the absence of any term in her contract of employment prescribing the payment of commission, even on a reducing scale depending upon the work involved, after the termination of her employment or of any prevailing industry practice which both Ms Dichiera and the respondent could be taken to have automatically assumed applied to Ms Dichiera's employment, Ms Dichiera has not proven that she is entitled to the commission. Even if Ms Dichiera deserves some proportion of the commission, I cannot now retrospectivity re-write the terms of her contract of employment to create a right to payment if one did not exist before. Accordingly, her application is hereby dismissed.

2002 WAIRC 06646

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
PARTIES	JOSEPHINE DICHIERA, APPLICANT
	v.
	ANGELINA NOMINEES PTY LTD, RESPONDENT
CORAM	SENIOR COMMISSIONER A R BEECH
DATE	THURSDAY, 26 SEPTEMBER 2002
FILE NO.	APPLICATION 1273 OF 2002
CITATION NO.	2002 WAIRC 06646

Result	Application alleging denied contractual entitlements dismissed.
Representation	
Applicant	Ms J. Dichiera
Respondent	Mr P. Burrows

Order

HAVING HEARD Ms J. Dichiera on her own behalf as the applicant and Mr P. Burrows on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby by orders—

THAT the application is hereby dismissed.

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

2002 WAIRC 06576

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
PARTIES	BRENDA JEAN DUNCAN-SMITH, APPLICANT
	v.
	MARK DUNCAN-SMITH - SPA COSMETICA, RESPONDENT
CORAM	CHIEF COMMISSIONER W S COLEMAN
DATE OF ORDER	TUESDAY, 24 SEPTEMBER 2002
FILE NO.	APPLICATION 1667 OF 2001
CITATION NO.	2002 WAIRC 06576

Result	Application dismissed
Representation	
Applicant	Applicant appeared on her own behalf
Respondent	Ms D Peters (of counsel)

Reasons for Decision

1 The Applicant, Ms Duncan-Smith, claims to have been harshly and unfairly dismissed from her employment as a patient educator and para-medical beauty therapist with the Respondent company, Spa Cosmetica Pty Ltd., of which her former husband, Dr M A Duncan-Smith, is the sole director, company secretary and sole shareholder.

2 The Respondent company is the corporate structure through which Dr Duncan-Smith runs his plastic surgery practice. The company also provides para-medical beauty therapies. Ms Duncan-Smith was trained to undertake patient education

programmes about plastic surgery. These were designed by Dr Duncan-Smith so that he could reduce the time spent on patient consultations and spend more time operating. Through Ms Duncan-Smith the practice undertook endermology (treatment of cellulite), micro-dermabrasion and facial and chemical peels.

3 The termination of employment arose when on the 27th August 2001 the Applicant was informed that her position had been made redundant. She disputes that this was really the case. As I understand it in her view the circumstances were engineered by her former husband. She asserts that he cut back on advertising the range of beauty therapies available thereby reducing the number of clients attending the practice for treatments formerly provided by her. He then employed someone else to undertake the duties she had provided in the practice.

4 Furthermore it was submitted that her position had been "shut down" in a cruel and unnecessary manner, without warning or compromise.

5 The Applicant does not seek reinstatement but compensation to the extent of $10,000.00.

6 The Respondent, through Dr Duncan-Smith, objects to the application and rejects the claim that the dismissal was harsh or oppressive. He submitted that there was a genuine redundancy. The number of clients the Applicant was treating did not justify the weekly payment he was making to his former wife. The duties could easily be absorbed by the existing members of staff, including himself. In other words, he did not want the duties to be performed by someone else recruited to the practice to replace the Applicant. Indeed, he had not appointed anybody to a position within the practice until some six months later when he employed a nurse on a casual basis to remove bandages and sutures from patients who had undergone plastic surgery. The duties undertaken by his former wife, as a beauty therapist, are now performed by him and the receptionist.

7 The issue to be determined in the first instance in a narrow one. It is whether or not there was a genuine redundancy, albeit that this was effected in circumstances where there was a breakdown in the relationship and tension associated with the dissolution of the marriage and a property settlement. It was inferred that the termination of employment in these circumstances had been effected in a manner which was procedurally unfair.

8 Ms Duncan-Smith sought to show that although she and her husband had separated in May 2000 and that they continued work together in the Respondent's rooms. Her husband had, in February 2001 brought a nurse to the practice to be trained on the endermology equipment. At that time and now Ms Duncan-Smith does not accept that the nurse was being introduced to the practice to provide flexibility and multi-skilling. The nurse was not an employee but subsequently took up employment after Ms Duncan-Smith's services were terminated. Her suspicions were confirmed when a friend reported to her that she had phoned the practice to enquire about beauty treatment in response to the news magazine advertisement. The treatment was to be provided by a woman. Evidence was called from the friend who had made the phone call.

9 As to the matter of procedural unfairness, it was submitted that there had been no warning about the likelihood of redundancy and although some discussion took place with Dr Duncan-Smith on the 24th August 2001 about exploring possible alternatives at that time, the locks were being changed on the doors. As far as Ms Duncan-Smith was concerned the Respondent's position had been determined.

10 From the Respondent, considerable emphasis was placed on what was seen as the equity of his position in maintaining the income available for his wife and children after the couple had separated. Indeed, they operated a joint bank account until September 2000. It was only then that Ms Duncan-Smith took control of her own bank account.

11 Dr Duncan-Smith had maintained the Applicant's level of income as a full time employee up until the time of redundancy notwithstanding that on his estimates a very limited time had been spent by her working in the rooms. In the period from July until December 2000 Ms Duncan-Smith had seen 369 patients (Exhibit 4). This meant an average of 14 per week. Notwithstanding that Ms Duncan-Smith undertook some other duties associated with cleaning equipment, writing notes for clients receiving beauty therapy and re-ordering stock, Dr Duncan-Smith maintained that she would have spent approximately 15 hours per week in the practice. For the next six months, from January to June 2001 the number of patients dropped to 202 (Exhibit 4). The average number of patients seen each week was less than 8 and the time spent in the practice would have been 10 hours or less per week. The rate of pay remitted to Ms Duncan-Smith each week was based on a 38 hour week.

12 It was Dr Duncan-Smith's evidence that on several occasions, the first in January 2001, then again in February 2001, he had broached the subject of Ms Duncan-Smith's working hours and the number of patients she was seeing. These attempts to address the issue had been met with hostility. Indeed, he claimed, Ms Duncan-Smith had threatened him with legal action. Her position was that she occupied a salaried position and any reference to hours worked was irrelevant.

13 It was Dr Duncan-Smith's evidence that he had assessed the situation concerning the provision of beauty therapy within his practice and considered that he could absorb the duties performed by Ms Duncan-Smith within the existing staff structure *ie* by the receptionist and himself. On advice he followed the steps of alerting Ms Duncan-Smith to the likelihood of redundancy, he invited her to discuss how the impact could be overcome and of any possibility of an alternative. On each point, he stated, he failed to get a constructive response.

14 Following the discussion on the 24th August he determined that he would effect a redundancy. This was conveyed to Ms Duncan-Smith by letter on 27th August 2001. Provision was made for two weeks' pay in lieu of notice and a severance payment amounting to two weeks' pay also. Ms Duncan-Smith was advised that there was no need for her to attend work for the period of the notice.

15 On the matter of changing the locks. This had been done on the 24th August in anticipation of what Dr Duncan-Smith expected to be a violent outburst from the Applicant.

16 On the issue of advertising and the downturn of patients attending for beauty therapy treatment Dr Duncan-Smith stated that he had not cut back on advertising. He was able to tell on the basis of referrals; whether patients attending for beauty therapy had come to the practice as a result of information from other patients, from beauty salons or as a result of news magazine advertisements. The information showed that a fortnightly advertisement in the "Weekend Magazine" attracted just as many patients as a weekly advertisement.

17 The nurse who had been trained on the endermology equipment in February 2002 had been assisting him in the operating theatre in the Mount Hospital. Dr Duncan-Smith considered that in time it might be more efficient for him to retain her services in his private rooms to attend to dressings and sutures of the surgery patients rather than for him to spend the time providing this type of care. The opportunity presented for her to be trained on the endermology equipment when the company's representative visited for a once-only training course. Dr Duncan-Smith paid her as a casual employee for her attendance that day. He had not entered into any employment relationship with the nurse until many months later. It was Dr Duncan-Smith's evidence that she did not perform any beauty therapy duties and that included endermology. She had been retained for the role he had envisaged in February 2001. The beauty therapies were undertaken by him and the receptionist as and when the need arose.

18 I consider that the relationship between the parties from when the practice was established late in 1999 or early 2000 up until May 2000 was based on an arrangement to enable them to effectively split income. The Applicant's rate of remuneration bore little relationship to the hours she worked. It was convenient for them, as husband and wife, to have the Applicant remunerated

at the level of $40,000 per annum, to treat that money as joint income and for her to work about 15 hours per week so that she could be available to undertake the care of their children. The arrangement was inextricably linked to their marital relationship.

19 When the marital relationship deteriorated, however, and the family no longer resided together, the focus of the relationship slowly changed. The Applicant's level of remuneration became in part a means by which Dr Duncan-Smith maintained family support. Although the Applicant and her husband continued to operate a joint account as their estrangement became longer, that finally ended. It was then that the relationship took on a formal character of that between an employer and employee. I have little doubt that it was from this time, September 2000, that tensions arising from their personal relationship spilled over into the workplace. It can be appreciated how difficult it was for them, particularly as the prospect of divorce proceedings became inevitable.

20 It is clear, however, that the relationship and the basis upon which the Applicant was remunerated was that of an employer/employee. Dr Duncan-Smith was no longer content to have the Applicant work minimal hours while maintaining the same level of income. The position became more difficult with the reduction in the number of patients attending for beauty therapy. It appears that to some extent the number of patients attending for beauty therapy was dependent upon the Applicant's efforts. However, she expressed some reservation about undertaking endermology treatments until proper training was undertaken on the equipment provided by the supplier. This was done on the 22nd February, 2001.

21 I accept the Respondent's evidence that there was a programme for advertising the practice's beauty therapy treatments and that this was reflected in the cost effectiveness of a fortnightly notice in the "Weekend Magazine". I reject the inference that there was any attempt to undermine the provision of therapeutic services by restricting advertising.

22 I accept the evidence of Dr Duncan-Smith that the nurse employed as a casual to learn how to operate the endermology equipment, on the 22nd February 2001, was part of the strategy under consideration to assist with the plastic surgery generally and that she had not subsequently been employed to replace the Applicant.

23 Whilst the Applicant's friend, Ms Dickerson, made enquiries about the availability and cost of beauty therapy with the Respondent, that enquiry was many months after the Applicant had been made redundant. In any event, I accept the evidence that therapeutic services are now rendered by either Dr Duncan-Smith or the receptionist. I also accept that the nurse's employment is limited to areas of her professional training and that she was not appointed until late in 2001 or early in 2002.

24 I accept Dr Duncan-Smith's evidence that on at least two occasions early in 2001 he attempted to discuss with the Applicant his concerns about the limited number of hours she was working and the prospect of redundancy. In this respect there was no breach of procedure or fairness.

25 In all, there is nothing to conclude that there was anything other than a genuine redundancy and that it was effected in a manner which did not render the termination of employment harsh or oppressive. In order to conclude otherwise I would have to accept that the Respondent engaged in a scheme to rid itself of the Applicant's services by limiting patients' access to beauty therapy and by employing someone else in to perform the Applicant's duties. There is simply no evidence to support such a perception of events that took place.

26 Whilst this issue had to be determined within the constraints of the employer/employee relationship there can be little doubt that personal matters between the former married couple impacted on each of them in the workplace. Part of the Applicant's concern seemed to relate to an understanding of an agreement she had about arrangements for her to have control of the equipment necessary to provide beauty therapy in her own right. That was not a matter relevant to the determination of the issue of whether or not there was a genuine redundancy and whether or not the termination of employment, in all the circumstances, was harsh or oppressive.

27 Ms Duncan-Smith has been under considerable emotional strain for some time and to her credit she presented a cogent case in support of her claim. She has the worry of trying to establish herself in a career whilst sharing care of her children with their father. However, many of the matters which affected their relationship in the workplace will have to be finalised elsewhere.

28 The Application is dismissed.

2002 WAIRC 06575

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	BRENDA JEAN DUNCAN-SMITH, APPLICANT
	v.
	MARK DUNCAN-SMITH - SPA COSMETICA, RESPONDENT
CORAM	CHIEF COMMISSIONER W S COLEMAN
DATE OF ORDER	TUESDAY, 24 SEPTEMBER 2002
FILE NO.	APPLICATION 1667 OF 2001
CITATION NO.	2002 WAIRC 06575

Result	Application Dismissed
Representation	
Applicant	Applicant appeared on her own behalf
Respondent	Ms D Peters (of counsel)

Order

HAVING heard the applicant on her own behalf and Ms D Peters as 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 dismissed.

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

2002 WAIRC 06408

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	TRUDIE HARRIS, APPLICANT
	v.
	WORD BOOKSTORE, RESPONDENT
CORAM	COMMISSIONER S WOOD
DELIVERED	THURSDAY, 5 SEPTEMBER 2002
FILE NO.	APPLICATION 2203 OF 2001
CITATION NO.	2002 WAIRC 06408

Result	Applicant dismissed unfairly; compensation awarded
Representation	
Applicant	Mr P Mullally as agent
Respondent	Mr S Heathcote as agent

Reasons for Decision

1 This is an application made pursuant to section 29(1)(b)(i) of the *Industrial Relations Act, 1979* ("the Act"). The applicant, Ms Trudie Harris was employed by the respondent, Word Bookstore, as a casual and part time employee during two periods of employment. The applicant says the second period of employment was from May 2000 to 16 November 2001. The applicant was telephoned on 16 November 2001 by Mr Kite, the Manager of the store, who advised her that her services were no longer required as the respondent had decided to restructure their business. Ms Harris was given the option of working out her two weeks of notice or ceasing immediately and she chose the latter option. The applicant claims that the respondent also had concerns about her competence with the computer system and that this was a factor in the dismissal. This is denied by the respondent. The applicant claims that reinstatement is not practical as the trust between herself and Mr Kite has broken down. She claimed in compensation $2,000: incorporating $630.45 for injury. This claim was later amended to a claim for 6 months salary being $6,656 and a claim for compensation for stress in a sum of $5000. At hearing the claim for compensation was capped at the six months maximum at the average earnings of $169 per week, ie a total of $4,394.

2 Much of the evidence is common albeit the applicant has a different recollection of her conversation with Mr Kite of 16 November 2001 in which her services were terminated. Nevertheless Ms Harris does agree that Mr Kite indicated that the business was to be restructured and that there would be less part-time workers. She also does not challenge the respondent's position that a restructure has taken place. I do not for these reasons, and because I do not doubt the credibility of Ms Harris or Mr Kite, intend to recite all the evidence. I do have the impression that where there were differences in the evidence, which relate mainly to the telephone conversation of 16 November 2001, that Mr Kite's evidence is to be preferred. On both accounts it was a stressful discussion and my impression is that Mr Kite has a more certain recall of the discussion, which is not surprising given Ms Harris was studying for a university examination to be taken that day.

3 Ms Harris had previously been employed by the respondent as a part-time worker and dismissed as the respondent wished to take on another employee, be they a junior or full time worker. She was later employed by the respondent as a casual employee and then again became a part-time employee. She was studying full-time at university to be a teacher. Mr Kite had for some weeks leading to the dismissal discussed with his superior in Melbourne, Mr Norm Malton, the need to restructure the staffing in the business due, in his view, to the lack of flexibility of the part-time staff to take on additional hours. They decided on 15 November 2001 to change from a configuration of three full-time and three part-time staff to four full-time and one part-time staff. This restructure was to be implemented in February 2002. The part-time staff were Ms Gordon, Mr Gifford and Ms Harris. It is Mr Kite's evidence that Mr Gifford and Ms Harris were full-time university students and that in terms of rostering, Ms Gordon was the most flexible staff member, followed by Ms Harris and then Mr Gifford (who could only work on Saturdays).

4 On Wednesday 14 November 2001, in frustration with their perceived lack of knowledge about the operation of the computer system, Mr Kite issued a letter of warning to Ms Gordon and Ms Harris. The terms of that warning are common, were attached to Ms Harris' application and read as follows—

> "Dear Trudie
>
> It has been brought to my attention that you are still unsure of certain things relating to the computer system. It is high time that you know how each screen works now. I feel that there should only be need for extra training for new changes to the computer system. At the staff meeting you and the rest of the staff were told to bring back the form for extra training – but this has not been done – so I presume, as I said at the meeting, that you know how to do everything necessary to do your job well as the form wasn't returned to me.
>
> As I said in the meeting also that it is extremely frustrating hearing that staff still can't do certain things competently, especially being that they have been here for such a long time.
>
> DO NOT go to Peter and ask him to show you how to do something, I want to know about it from you directly. If I am not here then do so, but I will still want to know about it, either from him or yourself.
>
> The reason you may go to Peter is that you may feel that I get a little impatient, well that is true, but it is only due to the above. But, it is not that you have not been shown on the goodness knows how many times.
>
> So, take this as an official first written warning, that I must see an improvement or another written warning will be given. I need to know that whether I am in the store or not that you will do tasks correctly, and at the moment I don't feel that you do.
>
> Your job depends on you doing your work correctly, especially as we are in the very busy period now.
>
> Thank you"

5 Ms Harris and Ms Gordon, on Ms Harris' evidence, took immediate steps to improve their knowledge of the computing system. Mr Kite gave evidence that the reason for the termination of Ms Harris' employment was not connected to this warning. He says that Ms Harris was a competent worker. He had in fact offered her extra hours to cover an expanded coffee shop arrangement which was being considered. Ms Harris had agreed to do these extra hours and duties, albeit nothing was finalised prior to her dismissal.

6 Mr Kite says that Ms Harris was made redundant, along with Mr Gifford, due to the need for full-time staff to better cover the hours of the shop. I accept this evidence and find that Ms Harris' job was made redundant. Mr Gifford was kept in employment until just prior to Christmas. He had previously indicated his intention to depart at that time due to the completion of his studies. Ms Gordon was chosen to remain in part-time employment as she was the most flexible staff member in terms of rostering.

7 On Friday 16 November 2001 Mr Kite again became frustrated because another full-time employee, Ms Johnson telephoned to advise that she was ill and could not attend for work. She had been ill all week. Mr Kite was in a quandary as to how to staff the store that day. Friday is a busy day. Mr Gifford only worked Saturdays. Ms Harris was due in at 5:30 pm as she had university that day. His only option in his view was to ask Ms Gordon to extend her shift and cover the whole day (ie a 12 hour shift). Mr Kite telephoned Mr Malton, explained that he had trouble covering the shifts, and asked to implement the restructure immediately. Mr Malton agreed and they discussed how to go about it. They agreed to dismiss Ms Harris and keep Mr Gifford on Saturdays until the end of the year when Mr Kite knew he would be gone. Ms Gordon's services were to be retained as she was the most flexible part-time staff member.

8 They decided that Mr Kite should ring Ms Harris at home immediately as it would be stressful for her and that way she would not have to attend work and then go home again. Mr Kite telephoned Ms Harris and advised her of her dismissal, offered her the choice of working out her notice of two weeks or leaving that day. Ms Harris chose the latter. It was an unpleasant conversation; Ms Harris was studying for an examination later that day and she after some discussion hung up the telephone. Mr Kite says that he was not aware that Ms Harris had an examination that day albeit he does not deny that this information was written on the noticeboard at work. Ms Harris later attended the shop to hand back the respondent's possessions and appeared distressed according to reports from staff given to Mr Kite.

9 During the afternoon of 16 November 2001 Mr Kite contacted Ms Rachel Wiley. Ms Wiley had been earlier interviewed and was to commence employment in February 2002 as a full-time staff member. Mr Kite asked her to commence earlier; she agreed and commenced the following Tuesday.

10 Ms Harris has sought out part-time work and not been successful. She is continuing with her university studies. She says that she was financially and emotionally affected by the dismissal and needed to seek financial assistance and counselling. She was also prescribed Serepax to cope with the emotional impact on her.

11 At hearing, following the evidence of Mr Kite, I delivered my findings that the dismissal of Ms Harris had been both procedurally and substantively unfair. It was clear in my view that Mr Kite's evidence could be relied upon. My assessment at transcript pages 47-49 was that—

> "Mr Kite wanted to, through the lack of being able to cover his hours with his staffing arrangements, do a reorganisation. ……. he went about it all the wrong way without any consideration of Ms Harris' employment when a) she had advised him previously upon his request that she would do further hours, albeit for another aspect of the business; b) on her evidence, was coming up to the end of her examination period seemingly and would be otherwise available; c) that there were other staff who were also part-timers, one who was less flexible than her and hence there was other options for him to take. He did not take those. He launched into ringing her on the day of her exam, albeit he apologises for that in evidence, and told her she was dismissed and thought that would be the least stressful way of handling it for himself and for her and she wouldn't have to come in again….. My view is that it is substantively unfair in the sense that it breaches the requirements of section 41 of the *Minimum Conditions of Employment Act*, even though there was a redundancy. The reasons he (Mr Kite) provides for why it should have been Ms Harris compared to another staff (member) are not adequate and should have at least been discussed and could have led to an alternate view. ….. Now there were other options for him to take at that point in time and he did not do so; he did not engage in any consultation and it may well have been that there would have been a different mind. He acted out of frustration on the Wednesday, quite apparent from the letter and his own evidence; he acted out of frustration on the Friday, also on his own evidence. Now, a calmer and cooler head might have taken a different course and might have given a different result."

12 The respondent concedes that the dismissal was not handled correctly in a procedural sense. The respondent however maintains that there was nothing substantively unfair in the dismissal (see *Shire of Esperance -v- Peter Maxwell Mouritz* 71 WAIG 891) and that the applicant has not shown that another employee should have been made redundant (see *Amalgamated Metal Workers and Shipwrights Union of Western Australia & the Operative Painters and Decorators Union of Australia, West Australian Branch and Australian Shipbuilding Industries (WA) Pty Ltd* 67 WAIG 733). Let me first elaborate on the procedural unfairness. Mr Kite on his own evidence sacked Ms Harris one morning because he was frustrated that another employee had called in sick again and he had difficulty filling her roster. He overcame that problem by rostering Ms Gordon for an extended day. However, in frustration and in quick time he decided, in consultation with Mr Malton, to bring forward a restructure of the business of which only they were aware. There is no evidence that Ms Harris was aware of the restructure envisaged. In fact, to the contrary she was made aware of plans to extend part of the business and give her additional hours and she had agreed to this. Needless to say her expectations, given to her by Mr Kite, were in complete contrast to what actually happened to her. She was at home studying for a university examination, which she was to take that day prior to her shift at work, and Mr Kite rang her to advise her that she no longer had a job. She could work out two weeks notice or finish that day. He was ignorant of her examination, but did not need to be if he had paused to check his board. She was a good employee. She was sacked once before as Mr Kite wanted to employ a full-time or junior employee and she was dismissed again because he wanted to replace her with a full-time employee.

13 The intention was to introduce the restructure in February 2002. Mr Kite says that January is a quieter time in the business. The restructure was premised on the need for full-time staff to better cover the hours of the shop. Mr Kite experienced a staffing problem on that busy Friday, during a week when an employee had been ill and hence Mr Kite may have expected an absence. Mr Kite then acted immediately to implement the restructure and dismiss Ms Harris without warning, without consultation and without consideration of Ms Harris.

14 Section 41 of the Minimum Conditions of Employment Act 1993 states—

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

(b) measures that may be taken by the employee or the employer to avoid or minimize a significant effect,

as the case requires."

15 Mr Kite certainly told Ms Harris straight after the decision was taken to restructure and he certainly did not comply with the requirement to discuss any alternatives to lessen the impact on Ms Harris. The respondent maintains that the absence of this discussion led to merely a procedural unfairness. I disagree entirely. It is true that in many instances of redundancy there are no alternatives for an employer to take or to discuss. This can often occur in situations of acute financial stress on a business and quick action may need to be taken to ensure the continued viability of the business. This can be easily explained to an employee and even in those acute situations sensible options can be discussed such as the taking of leave or unpaid absences. I say that only in the sense that there may be alternatives that both parties may wish to consider.

16 In this matter there were alternatives to be considered and discussed. Mr Kite says that he required flexibility and hence decided to keep the most flexible part-time employee, ie Ms Gordon. I do not challenge that decision. Flexibility was the main criteria mentioned in his evidence. Mr Gifford was less flexible in terms of rostering than Ms Harris, albeit he had been there longer. The respondent mentioned his length of service but this was not expressed as a reason for his retention. Instead the reasoning was that he was to leave just before Christmas so he could remain until then. I should add that Ms Harris' evidence was that she did on occasion work on a Wednesday, Friday or Saturday. Mr Kite says also that he valued commitment to the business and that Ms Harris would not be there long term as she was studying to be a teacher and had foreshadowed going to Russia at the end of her course. Her course was not to finish for sometime. Mr Gifford was due to leave shortly. Ms Harris was however about to finish her university course for that year and had advised that she was willing to take on more hours. Yet Mr Kite dismissed her and later that day asked a new employee to start the following week instead of starting in February as agreed originally. Clearly there were options to at least discuss. The respondent then says that matters could have been discussed except that Ms Harris hung up on Mr Kite. The inference is that we cannot know what would have transpired if she had not acted so impulsively. This submission cannot be. The fact is that Mr Kite simply telephoned Ms Harris to terminate her services. His evidence does not suggest otherwise. To reverse the onus onto Ms Harris and blame her for Mr Kite's failure to fulfil his legal obligations is wrong. It is not for the Commission to interfere with the discretion of the employer unless the decision to dismiss is an abuse of that right and hence unfair. If flexibility and commitment to the business were factors in the respondent's decision then Ms Harris would seem to be better placed than Mr Gifford on both criteria. The dismissal was substantively and procedurally unfair.

17 The applicant suggests that she may have chosen to undertake full-time work. I find no substance in this submission. There has been a long period between the dismissal and the hearing and Ms Harris has not sought full-time work and has not been successful in her search for part-time work. She has returned to her studies and on her evidence has not sought clerical work as it may interfere with her studies. The relevance of this is that I am not convinced that Ms Harris would have accepted a full-time position at the bookstore if it had been offered. I am not convinced that she would have put on hold her studies towards being a teacher. I would add that I consider that Ms Harris was aware of the recruiting for a full-time staff member and she did not seek that position.

18 The respondent now says that Ms Harris could return to the position, even though a restructure has taken place. The respondent says that Ms Harris averaged about six hours per week and hence she could be given work. I have to wonder then why her dismissal was handled in such a poor and urgent fashion. Nevertheless, I am convinced that Ms Harris for good reason could not return to work for the respondent. I accept that there could be no trust of the employer in the circumstances. I find that reinstatement is impracticable.

19 Ms Harris has sought to obtain other work. Whilst I have some reservations about the extent of this search, she has shown her endeavours to seek other employment. The parties provided a schedule of earnings for Ms Harris for the last twelve months of her employment. This shows that Ms Harris earned on average $169 gross per week. The applicant has been approximately 37 weeks without work and seeks therefore the maximum allowable compensation of 26 weeks, being $4,394.

20 The method of calculating loss is expressed in the decision of the Full Bench in *Ramsay Bogunovich –v- Bayside Western Australia Pty Ltd* 79 WAIG 8 at pages 8-9. The loss must be linked to the dismissal and compensation, as much as possible, must put the person who suffered the loss, back in the position which, but for the loss, the person would have been.

21 As indicated previously I do not challenge the employer's decision to prefer Ms Gordon and I do not find that Ms Harris was seriously contemplating full-time employment. However, Mr Gifford was preferred to Ms Harris and continued in employment until about 22 December 2002. Ms Wiley was employed from 20 November 2002. In essence the full restructure was not implemented until Mr Gifford's departure. It is that period of time, a period of 5 weeks, which could have been worked by Ms Harris had she been given the opportunity. Put differently, but for the unfair termination, and given that the respondent chose to restructure the business, Ms Harris would have continued in employment for a further 5 weeks. Arguably there is a period up to February 2002 when Ms Wiley was originally due to commence which could have been offered to Ms Harris instead of Ms Wiley as Ms Harris would have been close to the end of her examination period. This would have been full-time work and as I have stated I am not convinced that Ms Harris would have wanted full-time work.

22 Whereas Ms Harris received a larger than normal final pay [Exhibit TMH 1] it does not appear from the evidence and submissions that this payment comprised at all a payment for notice. Instead the respondent submits that Ms Harris cannot complain of financial distress arising from her dismissal when she forewent the opportunity to earn money by working out her notice period. I therefore conclude that no notice was paid to her and the full five weeks in compensation should be awarded to her. The other matter is whether the award of the Commission should incorporate any component of injury for the distress caused by the dismissal. A certain amount of distress can be assumed to arise from any dismissal given the financial difficulty it may cause and particularly if the dismissal is sudden. In my view, there is nothing in the dismissal of Ms Harris which would normally lead to an award for injury, with the exception of her evidence that she needed to seek medical attention and was prescribed Serepax due to the stress which she suffered. This must be seen in the context of her evidence in that she admits that she was at the time experiencing a period of stress due to her examinations. On balance then I would not make an award for injury. In summary, I declare that Ms Harris was dismissed unfairly on 16 November 2002. I find that reinstatement is impracticable and I would award her compensation for the period she would, in my view, reasonably have expected to remain in employment. That figure is calculated on average earnings of $169 gross per week, thus giving a total of $845 gross less any taxation payable to the Commissioner of Taxation.

2002 WAIRC 06490

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	TRUDIE HARRIS, APPLICANT
	v.
	WORD BOOKSTORE, RESPONDENT
CORAM	COMMISSIONER S WOOD
DATE OF ORDER	MONDAY, 16 SEPTEMBER 2002
FILE NO.	APPLICATION 2203 OF 2001
CITATION NO.	2002 WAIRC 06490

Result	Applicant dismissed unfairly; compensation awarded
Representation	
Applicant	Mr P Mullally as agent
Respondent	Mr S Heathcote as agent

Order

HAVING heard Mr P Mullally on behalf of the applicant and Mr S Heathcote for the respondent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby-

(1) DECLARES that the applicant, Trudie Harris, was unfairly dismissed by the respondent on the 16th day of November 2001;

(2) DECLARES that reinstatement is impracticable;

(3) ORDERS that the respondent do hereby pay, as and by way of compensation, the amount of $845.00 to Trudie Harris, less any taxation that may be payable to the Commissioner of Taxation.

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

2002 WAIRC 06533

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ALFRED HORSTING, APPLICANT
	v.
	GBF UNDERGROUND MINING, RESPONDENT
CORAM	COMMISSIONER S WOOD
DELIVERED	WEDNESDAY, 18 SEPTEMBER 2002
FILE NO.	APPLICATION 609 OF 2002
CITATION NO.	2002 WAIRC 06533

Result	Applicant dismissed unfairly; compensation awarded
Representation	
Applicant	Mr A Horsting
Respondent	Mr R Gifford as agent

Reasons for Decision

1 This is an application made pursuant to section 29(1)(b)(i) of the *Industrial Relations Act, 1979* ("the Act"). The applicant, Mr Alfred Horsting worked as a Belt Runner for the respondent at T-junction underground mine near Kambalda. He was employed from 10 May 2001 to, he says, 11 March 2002. It is common ground that he was paid $18 per hour and worked on average 49 hours per week. The applicant says that during a telephone conversation on 11 March 2002 he was sacked by Mr Reggie Howell, the Project Manager. During that conversation Mr Horsting says that Mr Howell said to him, "you better call it quits". The respondent in turn denies that the applicant was dismissed. It is Mr Howell's evidence that that conversation occurred on 8 March 2002 and during the conversation Mr Horsting said, "I may as well snatch it". In other words the respondent says that Mr Horsting resigned his employment. The respondent also maintains that the application was made by Mr Horsting on 8 April 2002 and hence is out of time. For both these reasons the respondent says the Commission is without jurisdiction to deal with the matter. It is accepted by the respondent that if the Commission were to find that Mr Howell advised Mr Horsting to "call it quits" then this would mean that Mr Horsting had been dismissed. However, the respondent says in the event of this, the dismissal is not unfair in all the circumstances.

2 Mrs Ursula Horsting gave evidence that she was near her husband when he telephoned Mr Howell on Monday, 11 March 2002. Her initial evidence was that it was 11 April, however, this was clearly mistaken and corrected to be 11 March 2002. During that conversation she heard her husband say the following—

"Did you give me a pay rise"

"Okay, I want to have some days off"

"I'm taking it anyway"

"That's okay by me then"

She says this is the total of the conversation she heard her husband convey and he did not swear during this conversation. She remembers that the conversation occurred on 11 March as they were both due to go to Perth that afternoon.

3 According to Mrs Horsting, her husband had come off night shift on the Friday morning. Typically he arrived home at 6am and stayed up for approximately 2- 3 hours and then went to bed. He was to have the Friday, Saturday, Sunday and Monday off, as part of his roster. He was then to resume day shift on the Tuesday, Wednesday and Thursday. Mrs Horsting says that she was home on the Friday and Mr Horsting did not call the respondent on that day. Mrs Horsting listened to the conversation on 11 March as she wanted to know what was happening, she wanted to know whether Mr Horsting was to get a pay rise or whether he was to get the 3 or 4 days off that he desired. Mr Horsting wanted the leave as he was exhausted at the time. After Mr Horsting had hung up the telephone, Mrs Horsting says he advised her that Mr Howell had said, "Fred you had better call it quits". She understood this to mean that her husband had been sacked. She denies that her husband swore during the conversation or that he said words to the effect that he had better snatch it. She has heard him use those words previously but he did not say them on that day. She says that she was aware that Mr Horsting sought a separation certificate but that he did not get one.

4 Mr Horsting says that he asked the Industrial Relations Commission to fax him an application as it was getting close to the date for lodgement. This was faxed to a friend's house and he faxed the application back to the Commission. He later sent a letter to the Commission. [Exhibit AH1].

5 Mr Horsting says he spoke to Mr Howell between 11.30 and 12.30 on 11 March 2002. He says Mr Howell had promised him a pay rise since before Christmas and although Mr Horsting had raised the issue with him several times, Mr Howell had put him off. He telephoned Mr Howell on 11 March 2002 and said to him, "Reggie, I've had a look at my payslips and nothing is forthcoming". When Mr Howell responded unsatisfactorily, he said to him, "You don't seem to care". He then asked Mr Howell for some time off and advised him that he had about 20 days leave. Mr Howell complained that it was short notice and Mr Horsting said that he was taking the time off regardless. Mr Horsting says that Mr Howell then replied, "You better call it quits". Mr Horsting replied that that was fine by him. He then hung up the telephone. Mr Horsting denies that he ever said, "I might as well snatch it". He says he would not do that given his age and difficulty finding other employment.

6 Mr Horsting said he was fed up due to the lack of a pay rise. Other employees who had commenced working for the respondent at the same time as him were being paid $21 per hour. Mr Horsting says that 2 to 3 weeks after his termination he asked for a separation certificate. When this was produced by Ms Branwen Granville, the Human Resource Administrator, he rejected this certificate as it indicated that he had resigned. The Company refused to change the certificate. Mr Horsting later had a meeting with Mr Gary Martin, a manager at the site, who also refused to change the separation certificate. Mr Martin advised Mr Horsting that Mr Howell did not have the authority to sack him. He said that Mr Horsting had terminated his own employment.

7 Mr Howell gave evidence that he had experienced some performance difficulties with Mr Horsting. This was the background as to why Mr Horsting had not received a pay increase.

8 Mr Howell says that Mr Horsting rang him mid-morning on 8 March 2002 to ask for 3 days holidays. Mr Howell advised that it was short notice and that he already had other people off. Mr Horsting was not happy about this rejection and then raised the question of his pay increase. Mr Howell advised him that he did not fulfil the criteria to which Mr Horsting replied, "You don't give a fxxx". Mr Howell then replied, "Sorry to hear that Fred". Mr Horsting went on to say, "I may as well snatch it" and Mr Howell replied, "You would do what you think best at the end of the day Fred".

9 Mr Howell says that workers often ask for leave at short notice and he tries to accommodate them but he could not on this occasion as he had other people off. Likewise, he says, employees sometimes threaten to take leave anyway but their attitude changes and they normally come to work. Mr Howell says he took Mr Horsting's comments as a threat that he was going to resign. His job however was still open and Mr Howell did not have the authority to terminate his services. He rejects any notion that he said, "you better call it quits" and he says he does not use those words.

10 Mr Howell rang Mr Lindkvist, the Occupational Health and Safety Manager for the respondent, as he thought Mr Horsting may go to the office to complain. He thought that Mr Horsting may have been agitated. On Monday, 11 March 2002, he filled out the resignation form [Exhibit RJH1] advising Ms Granville for pay purposes that Mr Horsting had resigned. He says that if Mr Horsting had turned up to work on the Tuesday then he would have torn up the form.

11 He was later told by Ms Granville that Mr Horsting had asked for a separation certificate and had maintained that he was terminated. Mr Howell advised her that that was not the case. He made a report to Mr Gary Martin, Project Manager for GBF dated 3 April 2002 regarding the incident [Exhibit RJH2].

12 Under cross-examination Mr Howell says that Mr Horsting asked for 3 weeks leave, not 3 days leave.

13 Mr Dale Lindkvist, gave evidence that he received a call from Mr Howell about 9 am on 8 March 2002 concerning Mr Horsting. He is sure it was not the Monday, 11 March as he probably would not have been in the office at that time on a Monday. Mr Howell advised him that Mr Horsting had "snatched it". Mr Horsting had sought a pay rise and some leave and been denied it. Mr Howell advised Mr Lindkvist to be on the look out for Mr Horsting. Mr Lindkvist was later asked to file a report regarding the incident. This report is [Exhibit DAL1].

14 Ms Branwen Granville said that she received the resignation form from Mr Howell and that was the first she heard of Mr Horsting's departure. She receives these types of forms throughout the pay period and only actions them at the end of the pay period. Mr Horsting requested a separation certificate from her. She met with him on 2 April 2002 and filled out the separation certificate [Exhibit BG1] as a resignation as that was the advice she had received. Mr Horsting challenged this and said that he had not resigned. Ms Granville attempted to ring Mr Howell unsuccessfully. She later contacted Mr Howell and he confirmed that he had not terminated Mr Horsting. Mr Horsting explained to her what had happened in his view. She thought there had been a misunderstanding; namely Mr Horsting thought he had been sacked when he was not. She advised Mr Horsting that he would need to have a discussion with Mr Gary Martin. Following instructions she completed the letter which is Exhibit BG2 to Mr Horsting. The date of the letter would appear to be wrong.

15 Mr Nicholas Cernotta, the Chief Executive Officer for the respondent, says he was first aware of the incident on 2 April 2002 when Ms Granville advised him that Mr Horsting had alleged that he had not resigned. He was taken aback by this as he would have expected to be made aware of anyone who was to be dismissed. After exploring the issue with Ms Granville he suspected that Mr Horsting was attempting to change the separation certificate for Centrelink purposes. He also asked Mr Martin to talk to Mr Horsting. He later instructed Ms Granville to draft the letter to Mr Horsting explaining the situation from the respondent's point of view. He was made aware of the details of the letter prior to it being sent.

16 The first issue to consider is whether the application has been made out of time. Mr Horsting's evidence is that he was faxed the application form from the Industrial Relations Commission. The markings at the top of the form appear to indicate that this form was faxed to him on 5 April 2002. The Registrar on request from the Commission has confirmed this. The application form has two date stamps on it from the Commission. The earlier date stamp is 8 April 2002. I find the application was lodged on 8 April 2002. This being the case if the termination (resignation or dismissal) occurred on 8 March 2002, as opposed to 11 March 2002, the application would be outside the 28 day limit prescribed in the Act.

17 The evidence regarding the date of discussion between Mr Horsting and Mr Howell should it be a dismissal, is mixed. Mr and Mrs Horsting are emphatic that the conversation occurred on 11 March 2002. Mrs Horsting is sure of this as they were planning to go to Perth that afternoon. Their accounts of the conversation are slightly different but they both say that the conversation started with Mr Horsting asking about the pay rise. They then proceeded to discuss annual leave. This is consistent with [Exhibit AH1], prepared after the application had been submitted to the Commission. Mr Howell and Mr Lindkvist in turn are clear that the conversation occurred on 8 March 2002. Mr Lindkvist says that Mr Howell called him that morning about 9 am. He recalls it being a Friday because if it was Monday he probably would not have been in the office. His recollection as per [Exhibit DAL1] is that Mr Howell rang him approximately 3 weeks ago. There is no date on that note. Exhibit RJH2 which Mr Howell completed on 3 April 2002 refers to the date of the call as being 8 March 2002. In Exhibit BG2 which was completed by Ms Granville on advice from Mr Howell the day is referred to as Thursday, 7 March 2002. Mr Howell is said to have checked that letter. There is also a lack of consistency between Mr Howell and Mr Lindkvist in respect to the time of the day when the call is said to have occurred. Mr Lindkvist remembers it being around 9am. Mr Howell recalls it being somewhat later. They both say that Mr Horsting first raised the issue of annual leave followed by his pay rise, albeit Mr Lindkvist is going on Mr Howell's report of the conversation.

18 It is common ground that Mr Horsting finished night shift on Friday 8 March and was not due to work again until the following Tuesday, Wednesday and Thursday. Mrs Horsting says that Mr Horsting was exhausted and needed a break. However, on the common evidence he was about to commence a four day rostered break. It is not clear why the request for annual leave can be said to be on such short notice if it were in fact asked on the Friday rather than the Monday. It seems more probable that it was viewed as being on short notice because it was asked on the Monday for the Tuesday, Wednesday and Thursday which were the next days to be worked. Mrs Horsting says that they were set to go to Perth that afternoon and Mr Horsting insisted that he was taking the leave even though his request had been rejected. It may be inferred from this that Mr Horsting was committed to leaving Kalgoorlie and annoyed about the lack of pay rise and he did not want his immediate travel plans disrupted.

19 The other issue that concerns me is that Mr Howell says that employees sometimes say that they are going to take leave and when the time comes they turn up for work. This would suggest that he did not necessarily believe that Mr Horsting was going to take the leave in any event. The common evidence is that Mr Horsting said that he was going to take the leave regardless of Mr Howell's rejection. Mr Howell then says that he waited until the Monday, effectively to see whether Mr Horsting would contact him, before he filled out the resignation form and sent it to Ms Granville. He says he would have torn up the form on the Tuesday if Mr Horsting had arrived at work. Ms Granville, on her evidence, needed the form for processing the pay. She was not to process the form until the end of the pay period. On her evidence and Mr Howell's evidence the pay period finished on 19 March 2002. In other words there was seemingly no urgency to forward the resignation form to Ms Granville. It is therefore not clear why Mr Howell would not have waited until the Tuesday, that is the day which Mr Horsting was due to return to work, before forwarding the resignation form to Ms Granville. Similarly if Mr Howell believed that Mr Horsting had resigned on the Friday then why was the resignation form not forwarded on that day. Added to this is a lack of consistency between the reports of Mr Lindkvist, Mr Howell and then latterly Ms Granville in terms of time and date of discussion. This leads me to query the recollections on behalf of the respondent. Even though all these recollections were based on information provided by Mr Howell and the recollections as exhibited are only a matter of weeks after the initial conversation between Mr Howell and Mr Horsting.

20 Weighing this evidence I think it is more likely that the conversation between Mr Horsting and Mr Howell occurred on 11 March 2002. In addition Mr Horsting says that he asked for the application form to be faxed to him as he knew that he was close to the time limit for lodging the application. As the application form was faxed to him on 5 April 2002 and on Mr Horsting's evidence he was aware of the 28 day time limit, it would appear logical that he would have responded on that day if his date of termination had in fact been 8 March 2002; 5 April 2002 being the last day that the application could have been lodged if the date of termination had been 8 March 2002. I find that the date of termination was 11 March 2002 and hence the application is within time.

21 The next issue is what was said in the conversation of 11 March 2002 between Mr Horsting and Mr Howell. The only other evidence of relevance concerning this conversation was given by Mrs Horsting, who on her evidence was at home listening to the telephone call as she was anxious to know the result; seemingly she was waiting to depart for Perth. She could not hear what Mr Howell said, that was simply relayed to her by her husband after the call. The key issue is did Mr Horsting say "I may as well snatch it" or did Mr Howell say "you better call it quits".

22 There is no contention between the parties as to the meaning of the words. In their minds they clearly mean a resignation on one hand or a dismissal on the other. In my mind if it were a dismissal; that is if Mr Howell said "you better call it quits", then the dismissal was clearly unfair. It would be unfair because it was immediate, without sufficient basis in terms of performance concerns and simply in reaction to demands for pay and leave (which once rejected the applicant said he would take anyway).

23 Mr Howell says Mr Horsting's performance was not good, but was not so as to put his employment in jeopardy. Mr Howell says that this sort of comment has happened before and he still expects people to turn up for work and they do. He says he waited and considered that Mr Horsting's job was still open. Put differently, it is clear from Mr Howell's evidence that typically he would not, and cannot, dismiss someone for simply saying that he intends to take leave even though it has been rejected. It stands to reason then that if Mr Howell did dismiss Mr Horsting during that conversation then it would be unfair. Typically, according to Mr Howell, one would wait to see (and indeed expect to see) if the employee recommences work as scheduled.

24 Having witnessed Mr and Mrs Horsting and Mr Howell give evidence I would prefer the evidence of Mr and Mrs Horsting to that of Mr Howell. I do not consider that the evidence of Mr and Mrs Horsting was rehearsed in anyway. Mr Horsting was very straightforward in my view, in both his evidence and under cross-examination. I have covered in some detail the evidence concerning the date of discussion and clearly I have preferred Mr and Mrs Horsting's account for the reasons given. I similarly believe it is more probable that their account of the discussion of 11 March 2002 is correct. It is quite plausible that either gentleman could have said the words alleged. Either Mr Horsting in annoyance for having been refused a pay increase and leave could have said he would "snatch it". Alternatively, Mr Howell could have reacted to being challenged and told Mr Horsting to "call it quits". I should say that I have no difficulty with the credibility of the evidence of Ms Granville or Mr Cernotta. They were both very good witnesses. However, they have no direct evidence of the conversation.

25 Ms Granville who spoke face to face with Mr Horsting on 2 April 2002 formed the clear impression that there had been a misunderstanding and that Mr Horsting thought he had been dismissed when he had not been. She did not, however, form an impression that Mr Horsting was less than genuine. Mr Cernotta did form that suspicion in that he thought Mr Horsting wanted a change to the separation certificate for Centrelink purposes; Having reviewed all the evidence and seen the witnesses I do not share that impression. Clearly, I am forming my view at a time well past the events, however, I do not challenge the genuineness of Mr Horsting. Mr Martin also spoke with Mr Horsting, but I do not have the benefit of his direct evidence. I do not find Mr Howell's comment, that he was not authorised to dismiss anyone, convincing even though on Mr Cernotta's evidence it was clearly true at least in terms of company policy.

26 In summary, I find that Mr Howell advised Mr Horsing on 11 March 2002 that "you better call it quits". In doing so he dismissed Mr Horsting and having regard to the decision in *Undercliffe Nursing Home –v- Federated Miscellaneous Workers' Union of Australia, Hospital, Service and Miscellaneous, WA Branch* 65 WAIG 385, I find the dismissal to be unfair.

27 The respondent says that Mr Horsting's employment was due to end in any event. The job was to end in 8 weeks. Mr Howell knew this but it was not part of his consideration. Mr Horsting did not know this. This is not relevant to my finding that the dismissal was unfair.

28 Mr Horsting is not seeking reinstatement and I do not consider that it is practicable. He commenced another job on 15 April 2002 which he says is a better job. He has in my view sought to mitigate his loss and he has obtained another job.

29 The evidence of Mr Horsting is that he was paid what was due to him on 19 March 2002, that being accrued annual leave and for the work he had performed. Mr Gifford for the respondent says that if the question of compensation arises then it amounts to approximately a 5 week period. I calculate Mr Horsting's loss to be for the period between jobs, ie 12 March to 14 April inclusive. This is a period of 4.9 weeks at 49 hours per week and at a rate of $18 per hour. This makes a total of $4,321.80. I would award to the applicant this amount less any taxation payable to the Commissioner of Taxation.

2002 WAIRC 06628

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
PARTIES	ALFRED HORSTING, APPLICANT
	v.
	GBF UNDERGROUND MINING, RESPONDENT
CORAM	COMMISSIONER S WOOD
DATE OF ORDER	THURSDAY, 26 SEPTEMBER 2002
FILE NO.	APPLICATION 609 OF 2002
CITATION NO.	2002 WAIRC 06628

Result	Applicant dismissed unfairly; compensation awarded
Representation	
Applicant	Mr A Horsting
Respondent	Mr R Gifford as agent

Order

HAVING heard Mr A Horsting on his own behalf and Mr R Gifford for the respondent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby-

(1) DECLARES that the applicant, Alfred Horsting, was unfairly dismissed by the respondent on the 11th day of March 2002;

(2) DECLARES that reinstatement is impracticable;

(3) ORDERS that the respondent do hereby pay, as and by way of compensation, the amount of $4,321.80 to Alfred Horsting, less any taxation that may be payable to the Commissioner of Taxation.

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

2002 WAIRC 06657

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
PARTIES	JEANETTE KERSTING, APPLICANT
	v.
	ABORIGINAL GROUP TRAINING INC (WA), RESPONDENT
CORAM	COMMISSIONER S WOOD
DELIVERED	FRIDAY, 27 SEPTEMBER 2002
FILE NO.	APPLICATION 104 OF 2002
CITATION NO.	2002 WAIRC 06657

Result	Application dismissed
Representation	
Applicant	Ms J Kersting
Respondent	Mr L Pilgrim, as agent

Reasons for Decision

1 This is an application made pursuant to section 29(1)(b)(i) and (ii) of the *Industrial Relations Act, 1979* ("the Act"). The applicant, Ms Jeanette Kersting, alleges that she was unfairly dismissed by Aboriginal Group Training Incorporated (WA) (herein after referred to as AGT) on 18 December 2001. Ms Kersting has claimed the balance of what she says is a two year contract, and seeks to be placed in a similar position with the same remuneration level, and be paid until such a position is found.

2 Ms Kersting signed a contract with Dixon Road Accounting (herein after referred to as DRA) on 14 September 2001 [Exhibit JK8]. Her commencement date specified in the contract was 12 September 2001. She was employed as a Financial Administration Officer. Her salary was $26,000 per annum. The terms of the contract were, in part, as follows—

> "This contract of employment is for a probationary period of three months (3 months). The contract may be extended for a further period dependent upon the approval of the employer and employee. Neither the employer nor the employee will be obliged to renew the contract at the expiration of the three months. This contract may be terminated by either party after that party has given fourteen (14) days notice in writing to the other party, or as mutually agreed by both parties. Prior to the completion of six months of service a salary review is to be undertaken."

3 The applicant's duties are set out in Schedule Two of the contract and are as follows—

> "To work under the direction of the Dixon Road Accounting Directors and the Aboriginal Group Training Inc Administrator in the performance of the following:-
>
> 1. Monitor, record and file all income and expenditure transactions carried out by AGT.
> 2. Maintain systems that ensure an "audit trail" is evident for all financial transactions within AGT.
> 3. Undertake payroll on a fortnightly basis using MYOB PowerPay or equivalent.
> 4. Be responsible for the invoicing and collection of debts from all debtors within AGT.
> 5. Perform fortnightly control account reconciliation's in the general ledger on Debtors, Creditors and Payroll.
> 6. Arrange for completion of GST BAS and PAYG statements on behalf of AGT.
> 7. Prepare regular financial reports using the accounting package.
> 8. Inform the Directors of DRA about financial information relevant to any financial decisions and policies it intends to implement.
> 9. Any other duties as required by the Directors of DRA and Administrator of AGT."

4 Ms Kersting was dismissed by Mr Steve Williams, a partner at DRA by letter dated 17 December 2001 [Exhibit JK10]. The letter in part reads—

> "As you are aware, your original 3 month probationary contract entered into with Dixon Road Accounting Pty Ltd has expired.
>
> At this time we had hoped to be in a position to confirm your position as a full time employee with AGT, after successful completion of the probationary period.
>
> After careful assessment of the skills and professionalism exhibited over the past 3 months at AGT's offices, and the dissatisfaction expressed with the working conditions here, it is felt that the most appropriate course of action is to let your contract lapse.
>
> Accordingly, your employment with AGT is terminated with effect from 18th December 2001."

5 It is common ground that Ms Kersting was employed by Mr Greaves and Mr Williams of DRA to undertake support tasks at AGT. However, Ms Kersting says that following a telephone conversation with Mr Greaves on 5 November 2001 she changed from being an employee of DRA to being an employee of AGT. Her contract was improved at that time by the addition of $2000 per annum in salary, a salary sacrifice provision for housing, and the use of a motor vehicle. The respondent instead says that at all times Ms Kersting was employed by DRA. Ms Kersting's payment arrangements changed to assist her, so that she was paid directly by AGT and DRA changed their invoicing of AGT to accommodate this arrangement. In the respondent's mind the only contract under which Ms Kersting worked was Exhibit JK8. No new contract with AGT was made. It is contended that the contract with DRA was largely unaltered and Ms Kersting remained at all times an employee of DRA. The contract provided for a 3 month period of probation and as Ms Kersting was considered not satisfactory for the position her employment was terminated just after the end of the probationary period. The contract was said to have no life after the three month period unless extended by agreement and in that sense was different to normal probationary arrangements.

6 Ms Kersting's evidence is that she was told on 5 November 2001 at 1.30pm by Mr Andrew Greaves, a Director of DRA, that it would be in her best interests to change employment to AGT to gain better wages due to salary sacrifice arrangements. She indicated she had a contract with DRA until 4 December 2001 and was on probation. She says he indicated that she needed to have a new contract and would be paid $28,000 plus house payments as a salary sacrifice and the use of a motor vehicle. She says she indicated to Mr Greaves that that would mean the package was worth about $34,000 per annum gross and he agreed.

7 At the time of her next pay Ms Kersting noticed that she had not been paid the agreed amount and she approached Mr Greaves' wife, Ms Colleen Councillor, who at that time was the Administrator of AGT. Ms Kersting asked why she had not been paid the agreed amount and asked to sign her new contract. Ms Councillor indicated that she would speak to Mr Greaves that night. Ms Kersting says that she rang Mr Greaves and his partner Mr Steve Williams repeatedly to ask why she was not being paid the amount of $34,000 gross. Her telephone calls were ignored so she decided to put her questions in writing and asked for a meeting. On 24 November 2001 at 2pm she went for a meeting at DRA in Rockingham. Mr Williams and Mr Greaves were in attendance. Ms Kersting complained of lack of attention to her issues and that she was not being paid the correct amount. Mr Greaves indicated that she was being paid the agreed amount in his view. Ms Kersting then complained about her working environment whereby excessive heat was coming from the airconditioner. She says she complained to Ms Councillor about this and was advised to go home, get a fan and bring it to work. She asked who owned the building and was advised that PEEDAC owned the building. She therefore wrote a letter to PEEDAC requesting they inquire into fixing the airconditioning. Ms Kersting presented four payslips [Exhibit JK1] and says they show that she was employed by Aboriginal Group Training as the Administration Bookkeeping person. Ms Kersting said she last worked for the respondent on 12 December 2001. Ms Kersting was then on stress leave and was dismissed on 18 December 2001. Ms Kersting was paid notice over the 4 week period meaning she was paid up to 17 January 2002.

8 Ms Kersting exhibited bank statements to show the changeover of payment from DRA to AGT [Exhibit JK2].

9 Mr Williams gave evidence that Ms Kersting was employed by DRA to work at AGT on a three month trial basis. She performed bookkeeping and payroll duties initially and was to take on more duties once she had become established in the position. The contract was that after three months the parties were, if the arrangement worked well, to agree to extend the contract either with DRA or AGT. DRA contracted accounting services to AGT, but AGT was considering employing someone to do basic accounting work and it was agreed that DRA would employ Ms Kersting on trial to assess whether she should take up this role. It was more efficient for the gathering and collating of material that Ms Kersting work at AGT's offices.

10 Mr Williams says that Ms Kersting was instructed how to perform her duties but her work was consistently not correct. Mr Williams says that Ms Kersting advised Mr Greaves that she had financial difficulties and problems in getting to work. She

requested assistance and this was arranged by paying her through AGT as it was a not for profit organisation. A car was lent to Ms Kersting to make her life easier. In the original interview with Ms Kersting DRA wanted Ms Kersting to provide a commitment of at least two years to the position because they did not want to be constantly training someone.

11 Mr Williams complained that Ms Kersting's letter concerning the air conditioning placed DRA in a bad light. Ms Kersting had complained to an organisation for which DRA also worked. He considered Ms Kersting's work and her interactions within AGT to be inadequate. Therefore, on review of Ms Kersting's contract, which was done in conjunction with the management committee of AGT, it was decided not to continue her employment. That review was conducted on 14 December 2001. As the decision was taken close to Christmas Mr Williams decided to pay Ms Kersting an extra two weeks pay as notice.

12 Mr Robert Rooke, the Operations Manager for AGT gave evidence that DRA did the payroll and financial services for AGT and provided advice on administration support. Whereas the accounting work was outsourced to DRA, AGT was looking at the arrangement whereby somebody close to the operation would do the work. On this basis, Ms Kersting began working at AGT's premises. He says DRA still employed Ms Kersting and directed her duties. AGT did not have the technical expertise to do so. AGT was wanting at some stage to take on the payroll and financial services role in-house.

13 Mr Rooke also gave evidence that there was a difficulty with air conditioning in a couple of offices. The problem was a broken pump and that has since been replaced.

14 Mr Williams and Mr Rooke gave a very clear account of the working arrangements concerning Ms Kersting. I have full confidence in their evidence and would prefer it to the evidence of Ms Kersting.

15 It is clear from the evidence of Mr Williams and Mr Rooke that Ms Kersting was at all times under the direction of DRA, ie either Mr Greaves or Mr Williams. Ms Kersting's own evidence under cross-examination is as follows (Transcript p.45)—

> "I was there under the …. the guidance of Dixon Road Accounting", and again
>
> "He actually … I was taking orders from Andrew Greaves prior to that, then he actually said, "Once you are employed by AGT Steve will then be the assistant to come to me"

16 It is also clear from Mr Williams' evidence and Ms Kersting's evidence that the arrangement to have AGT pay Ms Kersting was designed to improve her remuneration through different taxation arrangements. Ms Kersting's evidence is as follows (Transcript p.45-46)—

> Mr Pilgrim: "The answer is "Yes". Yes, that he said to you, "The only way that we can give you all these things, these improvements in your terms and conditions of employment is if we put you on a payroll of AGT because otherwise we would have these FBT complications which Dixon Road Accounting are not equipped to … to accept"?
>
> Ms Kersting: "He explained that, yes, sir." (see also Transcript p.47)

17 It is clear that Ms Kersting considered the change of payroll to be a change of employer but that there was no change to the employment relationship other than a change of payroll. Ms Kersting continued to perform the same duties in the employment of DRA, under DRA's direction and at the premises of AGT. The change of payroll was the point of confusion for Ms Kersting in my view.

18 I find that Ms Kersting was employed at all relevant times by DRA and for this reason I would dismiss the application for want of jurisdiction. This is not a matter whereby the applicant is not aware of her employer (See *Parveen Kaur Rai v Dogrin Pty Ltd* 80 WAIG 1375). Ms Kersting may be confused about her employment arrangements but she argues fundamentally that she was granted an extended and improved contract with AGT and this is not so.

19 This deals with the question of who was the employer. I would add the following in relation to the allegation of unfair dismissal. There was a difficulty with airconditioning which caused discomfort and distress to Ms Kersting. After complaining without any satisfaction, Ms Kersting wrote a terse letter to PEEDAC, who she believed to be the owners of the building. This caused some embarrassment to DRA, her employer, and AGT, the client. This matter, whilst of legitimate concern to Ms Kersting and one which caused her to be absent from work for medical reasons, is not relevant to any findings in relation to unfair termination. The airconditioning problem undoubtedly should have been attended to sooner by the owners of the building. It would seem that Ms Councillor; who Ms Kersting worked with at AGT, should have assisted Ms Kersting in addressing the problem. However, on Mr Williams' evidence the problems experienced with Ms Kersting do not relate to the airconditioning or her absence. The problems incurred related to Ms Kersting's performance particularly on journal entries and her dissatisfaction expressed with the working conditions. What is of importance is that, on Mr Williams' evidence which I accept, DRA expected Ms Kersting to pick up the work progressively and this did not occur. Her work did not achieve an acceptable standard.

20 Ms Kersting's employment was terminated shortly after the end of her probationary period of employment. It was a matter of days. The probationary clause in Ms Kertsing's contract is poorly drafted, however, I accept that the contract was structured so as to mean that Ms Kersting's employment would not be ongoing unless agreed to. The contract does provide for parties to agree on ongoing employment if the initial trial period of employment is successful. In simple terms, for the reasons expressed by Mr Williams, it was not successful.

21 The Committee of Management for AGT met on 14 December 2001 and decided not to continue Ms Kersting's services. This may seem unusual given DRA was her employer. However, in the circumstances Ms Kersting was on trial to be taken on by AGT potentially. Arising from that meeting it was decided to terminate Ms Kersting's services. She was given a letter of termination on 17 December 2001. In all the circumstances and having regard to the principles in *Undercliffe Nursing Home – v- Federated Miscellaneous Workers' Union of Australia, Hospital, Service and Miscellaneous, WA Branch* 65 WAIG 385, I do not find Ms Kersting's termination of employment with DRA to be unfair. It undoubtedly would have been better if the employer had advised Ms Kersting that her continued employment was to be discussed and reviewed at the meeting on 14 December 2001. The fact that it did not does not of itself make Ms Kersting's termination unfair. Mr Williams says that Ms Kersting was paid up until 17 January 2002. She was paid additional monies due to the termination occurring just prior to Christmas. In other words extra monies were paid to tide her over.

2002 WAIRC 06655

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES JEANETTE KERSTING, APPLICANT

v.

ABORIGINAL GROUP TRAINING INC (WA), RESPONDENT

CORAM COMMISSIONER S WOOD

DATE OF ORDER	FRIDAY, 27 SEPTEMBER 2002
FILE NO.	APPLICATION 104 OF 2002
CITATION NO.	2002 WAIRC 06655

Result	Application dismissed
Representation	
Applicant	Ms J Kersting
Respondent	Mr L Pilgrim, as agent

Order

HAVING heard Ms J Kersting on her own behalf and Mr L Pilgrim on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders—

THAT the application be and is hereby dismissed for want of jurisdiction.

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

2002 WAIRC 06534

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CARMEN JANE KOVAL, APPLICANT
	v.
	P.R. HEPPLE & SONS PTY LTD, RESPONDENT
CORAM	COMMISSIONER S WOOD
DELIVERED	WEDNESDAY, 18 SEPTEMBER 2002
FILE NO.	APPLICATION 463 OF 2002
CITATION NO.	2002 WAIRC 06534

Result	Applicant dismissed harshly and unfairly; compensation awarded
Representation	
Applicant	Ms CJ Koval
Respondent	Mr WP Mahar

Reasons for Decision

1 This is an application made pursuant to section 29(1)(b)(i) of the Western Australian *Industrial Relations Act, 1979* ("the Act"). The applicant, Ms Carmen Jane Koval, was employed with the respondent as an Administration Officer from 4 September 2001 to 26 February 2002. Her duties included accounts payable, payroll, filing, reception, data entry and other duties as required. Ms Koval worked on a part time basis. Her hours averaged 25 to 28 hours per week and she was paid 437.50 gross per week. Ms Koval claims in her application compensation of 6 months for alleged unfair dismissal and a sum of $5000 due to the stress arising from the dismissal.

2 On 26 February 2002 Ms Koval was dismissed by Mr Warren Mahar, the Plant Manager, and handed a letter of termination [Exhibit CJK1]. The letter of termination reads—

"LETTER OF TERMINATION – MISCONDUCT

26th February 2002

Dear Carmen

This letter is to inform you that your employment with P R Hepple & Sons is to be terminated. You shall be paid two weeks pay in lieu of notice together with any entitlements to annual leave.

The reason for your termination is due to a serious case of misconduct and the inappropriate use of confidential information. Today you informed Colin Pearson (accountant) that Mr David Schumack was returning (accountant previously employed by P R Hepple & Sons). Whilst this information did form parts of a discussion for restructuring the company no decision was final and it was therefore inappropriate for you to have used this information in the manner that you did.

As this information directly affected Colin Pearson's position within the company, we view your use of this confidential information as serious misconduct and believe it would be in the best interests of the company to terminate your employment.

Yours Sincerely

Warren Mahar

Plant Manager

P R Hepple & Sons Pty Ltd"

3 It is the evidence of both Ms Koval and Mr Mahar that the reason given for the dismissal on that day was as per the letter of termination. Namely, Ms Koval was dismissed because she had informed Mr Colin Pearson, her supervisor, of a rumour that Mr David Schumack, a former employee, would be returning to the respondent's employment and that either Mr Pearson or herself would be laid off. In the respondent's view this inappropriate use of confidential information meant that Ms Koval's actions amounted to serious misconduct and warranted her dismissal.

4 It is common ground that Mr Schumack has since been employed by the company as the Accountant. Mr Pearson has retired. Ms Koval was not advised about Mr Schumack's potential return to the company by the manager for the respondent. Ms Koval

heard rumours that Mr Schumack was to return and says that there were locker room bets on who would be laid off, ie Mr Pearson or herself. Ms Koval had earlier been told on 18 February 2002 by Mr Mahar of a possible restructure of the company. There were no further details given at that time.

5 It is also common ground that Ms Koval received a written warning for poor work performance on 6 February 2002. The terms of the warning are as follows [Exhibit R2]—

"FIRST WRITTEN WARNING - POOR WORK PERFORMANCE

6th February 2002

Dear Carmen

I refer to a meeting held on Friday 1/2/02 between yourself and Peter Hepple and again today with myself. This letter is a first written warning resulting from concerns regarding your work performance raised during these meetings.

As you were informed at the meetings, there have been concerns over your recent performance in the workplace. In particular there have been occasions where your work performance has been inadequate, namely—

1. the general tidiness of workspace,
2. the frequency of smoke / coffee breaks,
3. lack of attention to duties resulting in errors, and
4. the general dedication by you towards your duties.

Improvement is required in your work performance and should the poor performance continue your employment may be terminated.

Your performance will be reviewed on the 6th March 2002 which allows one month to improve.

In the meantime if you require any assistance or if you are in doubt as to what is required, please do not hesitate to contact me.

Yours Faithfully

Warren Mahar

Plant Manager

P R Hepple & Sons Pty Ltd"

6 Mr Mahar says that this warning arose from the respondent having noticed a decline in Ms Koval's work performance during January whereby she did not appear focused on her job and was making an increased number of errors. Mr Mahar says that he was aware that Ms Koval had some personal problems at that time. Between the time of the warning and the time of dismissal Mr Mahar says he did not speak to Ms Koval about her performance, however, he noticed that her performance did not improve. On the day of dismissal Mr Mahar had a discussion with Mr Pearson and Mr Peter Hepple (presumably the owner) and they decided that given the warning regarding work performance, a possible restructure and because the applicant had breached the use of confidential information, Ms Koval was to be dismissed. Mr Mahar advised her at 2.50pm that day, handed Ms Koval a letter and arranged for the payment of two weeks notice in lieu. Ms Koval asked to be released immediately.

7 Ms Koval disputed the allegations of poor work performance. She replied to Mr Mahar regarding the first written warning. This response was only handed to him on the day of her dismissal [Exhibit R3]. Ms Koval also gave Mr Mahar a note [Exhibit R1] on 7 February 2002, ie the day after their discussion about work performance, the terms of this note are as follows:

"I would appreciate if this remain "off-the-record" - it is in writing as I feel that issues of the past few days have disappointed and upset me considerably and with lack of sleep I'm worried I will become quite teary.

I have decided that I will commence looking for another position. I feel that I am currently walking on eggshells, that I will have to justify everything I do, have someone witness my work as I complete it and "dob" when there is anything close to an error or problem which may be seen, as my fault (ie: Wesfarmers missing invoice on Thursday).

I intended on pointing out a few things yesterday with regards to my work/attention to detail and so on, but now feel that this would be a waste of everyone's time as minds have already been made up.

I am finding it difficult to decide whether there is an underlying message/ reason for certain things. I was concerned that the new key I have been given does not open any door other then to mine and Colin's office due to mistrust of me. There have been a couple of things that made me feel concerned (the leave memo's)

As I said in the interview I felt that the Alsiddig error was inexcusable and that my mind may not have been fully focused on the job at all times - however on reflection I really don't feel that other then the Alsiddig error I have done anything to justify being place on a months review and I honestly feel (having been on the other side) that I will not have a position in four weeks with PR Hepple & Sons regardless of what may occur between now and then. I also do not want to have to come to work worried and concerned every day and I don't want to have to report every error or problem that I encounter to yourself or Steve in order to "cover my butt" as that will only make for strained working relationships.

This has upset me greatly and I regret feeling the need to make this decision. I will trust your judgment if you feel that the contents of this letter need to be taken up with either Steve or Peter."

8 The respondent focuses on Ms Koval's comment that she would need to look for another position. Mr Mahar says on 18 February 2002, when he discussed restructuring with her, he suggested it might be better for her to find another position.

9 Ms Koval says that she has not been able to find work since her termination. She originally sought work as her husband was unemployed and was caring for their children. She applied to employment agencies and for positions in the paper and on the internet. Her search was unsuccessful and her husband sought work to meet the family's needs. Ms Koval says she was shocked by her dismissal. It was sudden albeit there was no unpleasantness in the manner of dismissal. Mr Mahar and Ms Koval otherwise would appear to have got on well at work. Ms Koval says arising from her dismissal she suffered severe depression, which was diagnosed, and she produced in her evidence a medical certificate [Exhibit CJK2] indicating her inability to work from 13 April 2002 to 13 July 2002. She says the severe depression affected her ability to seek work. She says also the reasons for her dismissal affected her ability to secure a position as she advised employers of the reason for her leaving her previous position.

10 In response to work performance issues, as can be seen from [Exhibit R3], Ms Koval disputed the seriousness of these but took responsibility for some issues and admitted that she was at that time feeling a great deal of stress with her personal life. This response was never discussed between Mr Mahar and Ms Koval. Mr Mahar's assessment is that on the day of discussion, that is 6 February 2002, Ms Koval did not in the main believe there was any difficulty with her work performance.

11 I have no difficulty with the credibility of evidence provided by Ms Koval or Mr Mahar. They were both very forthcoming in their evidence and in their replies to questions. The majority of evidence is in fact common, however, there is a difference between them in respect of the adequacy of the work performance.

12 It is clear from the evidence that the essential reason for Ms Koval's dismissal was because she advised Mr Pearson of a rumour that Mr Schumack would be returning to the respondent's employment and that would affect either Mr Pearson's position or hers. It is also clear that on that basis Mr Mahar, Mr Pearson and Mr Hepple met and decided to terminate Ms Koval's employment. Mr Mahar says the background to that was also Ms Koval's poor work performance and the possible restructure. He admits that no decision had been made regarding the restructure at the time of dismissal. He admits also in close that the prime reason is as expressed in the letter, namely misconduct for breach of confidential information. He argues that the dismissal was not a summary dismissal as two weeks notice was paid to Ms Koval which is in excess of what she would have been entitled to, namely one week's notice. Ms Koval in turn argues that the warning letter, which she disputes, was not connected to her dismissal. I accept this point as it is clear from the termination letter and also Mr Mahar's admission in closing submission. I find that Ms Koval was dismissed suddenly on 26 February 2002 for an alleged breach of use of confidential information.

13 It is difficult to see how the information could be said to be confidential and it is difficult to see how even if it were confidential Ms Koval's actions could amount to gross misconduct. The information on Ms Koval's unchallenged evidence was not provided to her by the respondent albeit the respondent advised her of a potential restructure. It is her unchallenged evidence that she gleaned the information from rumours at the workplace including locker room bets that either Mr Pearson or she would lose their job. Ms Koval says she declined to name who she heard the rumours from when asked by Mr Mahar as she considered he may dismiss the persons. Mr Mahar does not deny this. He says it would depend on the circumstance. Clearly however, Ms Koval was dismissed for advising Mr Pearson of these rumours. The respondent appears to take the view that it was not Ms Koval's job to advise Mr Pearson. It was the respondent's prerogative to advise Mr Pearson should that arise. However, Ms Koval has done no more than pass to her supervisor a rumour that potentially affected both of them. There is no evidence that she passed information around the company. Mr Pearson, on Ms Koval's unchallenged evidence then said he would take up the matter with Mr Peter Hepple. Resulting from these discussions, Ms Koval was dismissed.

14 There is nothing in Ms Koval's duties which suggests that she was responsible for confidential human resource matters. Once again there is nothing in the evidence to suggest the information was in fact confidential. All that was being dealt with at that time was a possible restructure. The dismissal itself, albeit notice of two weeks was paid, is much more in the nature of a summary dismissal. A single act by Ms Koval was thought to warrant her dismissal; albeit there was a backdrop of concern about Ms Koval's performance. That dismissal was carried out suddenly and without any warning by Mr Mahar. There was no need for an investigation as to whether the act occurred. Ms Koval admitted to telling Mr Pearson and it was agreed that Mr Pearson would talk to Mr Hepple about the matter. That is not the issue. The issue is that the action of Ms Koval could not be seen to be of such gravity or importance as to warrant her dismissal. Matters warranting such treatment are usually where the employee acts so as to reject or repudiate the contract. In *Blyth Chemicals Ltd v Bushnell* (1933) 49 CLR 66 @81-82 Dixon and McTiernan JJ stated :

> "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 (*Boston Deep Sea Fishing and Ice Co. v. Ansell (1); English and Australian Copper Co. v. Johnson (1); Shepherd v. Felt and Textiles of Australia Ltd (2)*). But the conduct of the employee must itself involve the incompatibility, conflict, or impediment, or be destructive of confidence. An actual repugnance between his acts and his relationship must be found. It is not enough that ground for uneasiness as to its future conduct arises."

It is hard to see how Ms Koval's discussion with Mr Pearson meets this test and in my view it does not. Her actions were not sufficient in nature to be fairly said to be destructive of the confidence in her (see also *Clifton Nominees Pty Ltd v Australian Liquor, Hospitality & Miscellaneous Workers Union, Western Australian Branch* 81 WAIG 3038).

15 In simple terms Ms Koval's actions are not sufficient to warrant dismissal. Mr Mahar also says that as part of the respondent's decision they considered Ms Koval's possible redundancy and her performance. He admits however that no decision at that time had been taken. In relation to Ms Koval's performance, at no time between 6 February and 26 February was Ms Koval spoken to about her performance.

16 In all the circumstances I do not consider that Ms Koval had been given a fair go all round as per *Undercliffe Nursing Home – v- Federated Miscellaneous Workers' Union of Australia, Hospital, Service and Miscellaneous, WA Branch* 65 WAIG 385. I find that she was harshly and unfairly dismissed on 26 February 2002. Ms Koval has sought work since her termination and during the period of time that she says that she was fit to do so. Mr Mahar does not challenge this. Ms Koval does not seek to be reinstated to the position. Mr Mahar says they have since restructured the operation. In the circumstances I consider reinstatement to be impracticable. I find that Ms Koval has sought to mitigate her loss and any loss suffered was derived from her dismissal. Ms Koval's remuneration was $437.50 gross per week. She has not been employed since the termination. In the circumstances she has been out of work for 28 weeks to the date of hearing. She was paid two weeks notice which should be deducted from the compensation as per *Dellys v Elderslie Finance Corporation Ltd* 82 WAIG 1193. Her loss therefore is 26 weeks pay which equates to the maximum compensation allowable. As per section 23A of the Act the maximum awardable compensation of six months remuneration incorporates compensation for loss or injury. The amount sought by Ms Koval in addition for injury is therefore incorporated within the maximum amount and does not need to be considered further. The total compensation to be awarded therefore is 26 weeks x 437.50, making a total of $11,375 gross less any taxation payable to the Commissioner for Taxation. If I were to separately award an injury component I would award in the circumstances a figure of $3500 due to the medical difficulties suffered by Ms Koval subsequent to the dismissal. It is true that she was experiencing personal difficulties prior to her dismissal, however, her dismissal clearly exacerbated her difficulties and she was diagnosed as suffering severe depression.

17 I should add that there is nothing in Mr Mahar's evidence that leads me to the view that Ms Koval would have lost her job in any event. Ms Koval was warned about her performance, but she did not have time to address this issue prior to her dismissal. I cannot conclude that in all the circumstances her performance would have continued to be so poor as to warrant dismissal. Additionally, although the company has restructured, Mr Pearson has left and I do not have sufficient evidence to suggest that Ms Koval in the circumstances was destined to be made redundant. The strongest evidence I have is that Ms Koval says she was going to seek another job.

2002 WAIRC 06627

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CARMEN JANE KOVAL, APPLICANT
	v.
	P.R. HEPPLE & SONS PTY LTD, RESPONDENT
CORAM	COMMISSIONER S WOOD
DATE OF ORDER	THURSDAY, 26 SEPTEMBER 2002
FILE NO.	APPLICATION 463 OF 2002
CITATION NO.	2002 WAIRC 06627

Result	Applicant dismissed harshly and unfairly; compensation awarded
Representation	
Applicant	Ms CJ Koval
Respondent	Mr WP Mahar

Order

HAVING heard Ms CJ Koval on her own behalf and Mr WP Mahar for the respondent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby-

(1) DECLARES that the applicant, Carmen Jane Koval, was harshly and unfairly dismissed by the respondent on the 26th day of February 2002;

(2) DECLARES that reinstatement is impracticable;

(3) ORDERS that the respondent do hereby pay, as and by way of compensation, the amount of $11,375.00 to Carmen Jane Koval, less any taxation that may be payable to the Commissioner of Taxation.

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

2002 WAIRC 06753

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	SHARON LEE PRITCHARD, APPLICANT
	v.
	PERTH ROAD EXPRESS ACN 079876323, RESPONDENT
	BEVERLEY ANNE CRUTE, APPLICANT
	v.
	PERTH ROAD EXPRESS ACN 079876323, RESPONDENT
CORAM	COMMISSIONER J H SMITH
DELIVERED	MONDAY, 16 SEPTEMBER 2002
FILE NOS.	APPLICATION 1942 OF 2001 & APPLICATION 1943 OF 2001
CITATION NO.	2002 WAIRC 06753

Result	Applicants harshly, oppressively and unfairly dismissed. Orders made that the Respondent pay each Applicant $5,200.
Representation	
Applicants	Mr T Crossley (as Agent)
Respondent	Mr G McCorry (as Agent)

Reasons for Decision

1 Sharon Lee Pritchard and Beverley Anne Crute ("the Applicants") made applications under s.29(1)(b)(i) of the *Industrial Relations Act 1979* ("the Act") for orders pursuant to s.23A of the Act. The Applicants claim that they were harshly, oppressively or unfairly dismissed by Perth Road Express ("the Respondent") on 12 October 2001. During the hearing Mr McCorry advised the Commission that the name of the Respondent is PRE Pty Ltd trading as Perth Road Express.

2 The Applicants carried out work as courier drivers for the Respondent under a job sharing arrangement. The Respondent says the Commission has no jurisdiction to deal with the Applicants' claims as it did not employ them. The Respondent says that at all material times the Applicants were engaged as sub-contractors. By consent it was agreed that the jurisdictional issue and the evidence whether the Applicants had been harshly, oppressively or unfairly dismissed would be heard together. The Respondent concedes that in the event that the Commission finds that the Applicants were at all material times employees of the Respondent that the termination by the Respondent of each of the Applicants was procedurally unfair. At the conclusion of the Applicants' case the Respondent elected not to call any evidence.

Factual Circumstances in Relation to the Nature of Engagement

3 The Respondent is a transport company. Among other services that the Respondent provides, it transports shipping containers. The Respondent at some time prior to the employment of the Applicants entered into an agreement with Danzas Pty Limited ("Danzas") who deals with exports and imports of goods. The Respondent agreed to provide a daily courier service whereby a courier, engaged by the Respondent, collected documents from Danzas' premises at the Perth International Airport, delivered

the documents to customs agents in Fremantle and to transport companies, to enable the movement of sea containers. This courier service was provided from Monday to Friday each week.

4 Ms Beverley Crute testified that she was engaged by the Respondent on 2 July 2000 after she was offered work as a courier by Mr John Hodges, the Respondent's manager. Ms Crute said that in May or June 2000 she was working part-time in a shop but the shop was closing and she was going to be out of work. She met with Mr Hodges whom she had known for many years and he said to her that he "had a job for her". She testified Mr Hodges explained that the job was for 52 weeks of the year. He said there would be no holidays and she would be required to work five days, Monday to Friday, each week. Ms Crute said she advised Mr Hodges she would think about the offer. Because she did not wish to work full-time she asked Mr Hodges whether she could job share with Ms Jane Gordon whereby over a two week period they could work an equal number of days. Ms Crute said that Mr Hodges agreed that she could job share with Ms Gordon.

5 Ms Crute commenced work with Ms Gordon. They worked two days one week and three days the next week. Ms Crute said that they reached this arrangement so that she and Ms Gordon would be paid equally each fortnight. Ms Crute tendered to the Commission time sheets which covered each week of her engagement. She says that Mr Hodges advised her that she was to fill out weekly time sheets showing each day that she worked. The weekly time sheets show that on each day Ms Crute worked, she always commenced at 9:30am but that her finishing times varied. Sometimes she finished work as early as 12:45pm, sometimes at 1:00pm, sometimes at 1:30pm or sometimes later. Ms Crute was instructed by Mr Hodges to commence work each day at 9:30am by attending the office of Danzas. On arrival at the office of Danzas, Ms Crute was given a mobile telephone for her use during the day. She picked up bundles of documents and was advised where the documents were to be delivered to. On many occasions she was required to take with her Danzas cheques to various transport companies, including the Respondent.

6 Ms Crute said that initially it was agreed by Mr Hodges that she and Ms Gordon be paid $80 each day they worked on the basis that they would use Mr Hodges' car for the work. After a short period of time Mr Hodges informed her they had to use their own vehicles. He agreed to pay them an extra $10 per day as a car allowance. They were then each paid $90 per day regardless of the hours worked or kilometres travelled on each day. Ms Crute was given a magnetic sign to attach to her vehicle. The sign stated "Perth Road Express Courier".

7 When cross-examined Ms Crute conceded that she approached Ms Gordon and asked her whether she (Ms Gordon) wished to job share and she then asked Mr Hodges whether they could enter into this arrangement. After a few months Ms Gordon did not wish to continue the courier work, so Ms Crute approached her daughter Ms Sharon Pritchard and asked her whether she wished to job share. Ms Crute says she approached Mr Hodges and Mr Hodges agreed. Ms Pritchard commenced work on 11 September 2000 and worked under the same terms and conditions as Ms Gordon and Ms Crute were engaged.

8 The Respondent deducted income tax from the Applicants' pay and provided them with group certificates for the years ending 30 June 2001 and 30 June 2002. Initially Ms Crute was paid by a company called JT Transport. She produced a copy of her tax return for the financial year ending 30 June 2001 and a letter from her accountant. Those documents record that the Applicant was provided with two group certificates in the year 2000/2001. One from JT Transport Services and the second from the Respondent. Ms Crute says that initially she was paid by JT Transport because they provided a payroll service to a number of transport companies, including the Respondent. After she had been working for a period of time Mr Hodges asked her to fill out a tax file declaration. She was then paid by the Respondent. Ms Crute produced a tax file declaration signed by her dated 29 September 2000 in which it she had ticked a box indicating the basis of her engagement was as a casual employee.

9 Ms Crute maintains she obtained her instructions as to how to carry out her work from Mr Hodges. She however, conceded that she also received instructions from persons employed by Danzas. Each day she went to the Danzas office at the airport and picked up the container documents. She then travelled to the Perth Road Express office and delivered some documents and collected others. She then travelled to Fremantle to deliver the shipping documents to enable the release of containers from the wharf. Once she finished the run for the day she would return to the Respondent's office. Ms Crute maintained that she could not delegate her work to anybody else other than the person she job shared with.

10 Ms Jane Gordon testified that she was a friend of Ms Crute and that Ms Crute approached her to work as a courier for the Respondent. Her evidence in relation to her daily run reflected the same pattern of work as described by Ms Crute. She said she reported to Mr Hodges. She said that Ms Crute did not give her any instructions, nor did she (Ms Crute) pay her (Ms Gordon).

11 Ms Sharon Pritchard testified that she commenced working as a courier for the Respondent in September 2000. She said her mother informed her that she (Ms Crute) had asked Mr Hodges whether she (Ms Pritchard) could speak to Mr Hodges about the job. Ms Pritchard said she spoke to Mr Hodges and he agreed that she could replace Ms Gordon. When cross-examined Ms Pritchard conceded that when she spoke to Mr Hodges about the position as a courier she did not have a long discussion with him about the nature of work. She said that prior to agreeing to speak to Mr Hodges she had been out on a "run" with her mother (Ms Crute). Ms Pritchard testified that she was required to report to Danzas at 9:30am on each day she worked, pick up the documents to be delivered and report to him (Mr Hodges) about the jobs that were to be done. She said that she was given a mobile telephone by Mr Hodges so that he could contact her during the day. At the end of the day she was required to report to the Respondent's office after she had finished the Danzas deliveries, then return to Danzas before going home.

12 Ms Pritchard testified that she was informed by Mr Hodges that she was employed as a casual. She said that her work varied in that the number of the hours she worked each day varied. She worked five days each fortnight and was paid $90 for each day that she worked. Ms Pritchard also testified that she filled out time sheets every day which recorded her start and finish times each day.

13 Ms Pritchard said that she did not receive any instructions from Ms Crute about her work. She strongly contends she received all instructions from Mr Hodges. As set out below she testified that prior to her termination an issue arose in relation to a possible lost cheque. When this was raised with her she was directed by Mr Hodges only to speak to Damien at Danzas. It was put to her and conceded by her she had disobeyed his instruction by speaking to Mr Chapman.

14 Both Applicants denied that it was open for either of them to arrange for someone else to do the courier work on the days that they were not available. Ms Pritchard said on occasions when she got sick with the flu that her mother would work for her. When her mother was ill she would do her mother's work. She said on the occasions that a public holiday arose that they did not carry out courier work on that day and they arranged with Mr Hodges to work two days each in that week.

15 Both Applicants testified that on some occasions Mr Hodges would pay them an extra $20 per day if an extra "side" trip was required.

Legal Principles

16 It is not for the Respondent to show that the Applicants were not employees but for the Applicants to show, on the balance of probabilities, that they were employees (*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).

17 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).

18 I observed in *Howe v Intercorp Services Pty Ltd trading as West Vision 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)."

19 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.' "

20 In *Hollis v Vabu Pty Ltd* (op cit) the Respondent conducted business in the Sydney area under the name "Crisis Couriers" a business of delivering parcels and documents. It engaged about 25 to 30 persons as bicycle couriers and a number of others as motorcycle and motor vehicle couriers. Mr Hollis was injured by a bicycle courier engaged by Vabu Pty Ltd. The couriers engaged by Vabu Pty Ltd were required to supply their own bicycles and bore the expenses of running the bicycles and supplied many of their own accessories. They were provided by Vabu Pty Ltd numerous items of equipment which remained Vabu Pty Ltd's property including a communication system. They were required to wear Vabu Pty Ltd's livery at all times. They were paid for each particular job they carried out. They were required to report for work each day and were allocated work. At [47] Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ observed—

> "In classifying the bicycle couriers as independent contractors, the Court of Appeal fell into error in making too much of the circumstances that the bicycle couriers owned their own bicycles, bore the expenses of running them and supplied many of their own accessories. Viewed as a practical matter, the bicycle couriers were not running their own business or enterprise, nor did they have independence in the conduct of their operations. A different conclusion might, for example, be appropriate where the investment in capital equipment was more significant, and greater skill and training were required to operate it."

In *Hollis v Vabu Pty Ltd* the couriers were found to be employees by the High Court. All members of the court found that they had little control of the manner of performing their work and were presented to the public and to those using the courier service as emanations of Vabu Pty Ltd. In relation to the provision of the bicycles Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ at [56] observed that bicycles are not tools but inherently capable of use not only for courier work but provide a means of transport or even a means of recreation out of work time.

21 It is clear from the evidence given in these proceedings that the Applicants used their vehicles not only for work as a courier but also for their own purposes. I am of the view that in itself the provision by the Applicants of their own vehicles does not indicate the existence of a relationship of independent contractor.

22 It was argued by Mr McCorry on behalf of the Respondent that Danzas had more control over the Applicants' work than the Respondent. I do not accept that. The Applicants and Ms Gordon gave uncontradicted evidence that they were directed by Mr Hodges to report to Danzas, pick up and deliver documents. It is apparent from their evidence that they were required by the Respondent to deliver the documents in accordance with the manner directed by employees or agents of Danzas. It is clear that the Applicants were treated for all material purposes as employees by the Respondent. Income tax was deducted from their daily payments. Further they were paid as if they were employees in that they did not invoice the Respondent and they

completed weekly time sheets. Whilst the deduction of income tax cannot be taken to be reflective of an employment relationship, when considered with all other relevant facts it is clear the Respondent regarded the Applicants as employees. However, 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 597).

23 The Respondent argues that it engaged Ms Crute to provide a courier service and it was a term of the agreement that she could engage another person to assist her. Further that in accordance with the terms of the agreement she chose to engage Ms Pritchard to carry out the requirements of the courier service in whatever manner she (Ms Crute) chose. It is also argued that Ms Crute engaged Ms Pritchard without consultation with the Respondent and it was up to each of them to decide what hours and on what days they would work. Consequently it is argued that the Applicants were not under the direct or indirect control of the Respondent. I do not accept these submissions, the uncontradicted evidence of the Applicants show that it was Mr Hodges who approved the work share arrangement. He gave directions to each of the Applicants and I am satisfied that they were subject to his direction and his control as the manager of the Respondent.

24 It is my view that neither of the Applicants could be described as conducting their own business. They could not delegate their work to anyone other than each other within their job sharing arrangement. Further, they did not have an ability to set or bargain their rate of remuneration.

25 When all the relevant factual circumstances are considered I am of the view that the Applicants were employed as part of the Respondent's business and their work was done as an integral part of that business. Accordingly I am satisfied that the Applicants were engaged at all material times as employees working under contracts of service.

Events that Lead to the Applicants' Employment Coming to an End

26 Ms Crute testified that she went to work on Tuesday, 9 October 2002. In accordance with her routine, she went to Danzas at 9:30am and picked up documents. She then went to the Respondent's office to pick up more documents. When she arrived at the Respondent's office she spoke to Mr Hodges who was very angry. Mr Hodges informed her that Mike Chapman, the Ocean Freight manager at Danzas, had complained that Ms Pritchard had lost a cheque for $5,000. She said Mr Hodges also told her he was "fed up with their work" and not happy with the performance of either her (Ms Crute) or Ms Pritchard. Mr Hodges told her he was going to speak to Mr Garry Lloyd, who was also employed by Danzas, about the courier work.

27 Ms Crute said that she had some contact with Mr Chapman at Danzas and she saw Mr Lloyd on a regular basis. She said at that time he (Mr Lloyd) was on holidays in Albany. She said that she had never received any complaints from Mr Chapman or Mr Lloyd or anyone else who worked for Danzas about the standard or quality of their work. Ms Crute said that she told Mr Hodges that she would ask Ms Pritchard about the cheque. That evening Ms Crute rang Ms Pritchard and spoke to her about her conversation with Mr Hodges. Ms Crute did not work for the next two days because it was Ms Pritchard's turn to work.

28 Ms Pritchard testified that when she was informed by Ms Crute that it was alleged she had lost the cheque, she was irate because she had not been asked about the lost cheque and the allegation was untrue. She said she telephoned Mr Hodges that night and he (Mr Hodges) told her to make a "quiet enquiry" of a person called Damien at Danzas. I gather from Ms Pritchard's evidence that Damien was a person who worked in the accounts department of Danzas. The next day Ms Pritchard went to the premises of Danzas and she spoke to Mr Chapman because Ms Crute had told her that Mr Hodges had intended to discuss the matter with Mr Chapman. Ms Pritchard said that Mr Chapman informed her that he knew nothing about a missing cheque, that he did not have any issues with her performance and he had not spoken to Mr Hodges about a cheque or anything else. Ms Pritchard testified that she apologised to Mr Chapman who indicated to her that he would make his own enquiries about the matter. Whilst she was speaking to Mr Chapman she was interrupted by another employee of Danzas who informed her that Mr Hodges was on the telephone. She was handed a mobile telephone and spoke to Mr Hodges. She said that Mr Hodges "blasted her" and told her not to speak to Mr Chapman.

29 The following day Ms Pritchard started work at 9:30am at Danzas. She spoke to Damien Swyny and another person, Hugh. She said they went through all the receipts and ascertained that the cheque was not missing. She said she was informed there had been an in-house error. She said she asked Hugh whether there was anything wrong with their work and was informed, "No, you're doing fabulous".

30 On the following day Ms Crute worked. She went to Danzas and asked Damien about the cheque and he told her the cheque "was an in-house accounting error". She spoke to Mr Hodges who informed her that he had spoken to Mr Lloyd who had telephoned him from Albany and as a consequence he (Mr Hodges) had decided that the Respondent was not going to do courier work for Danzas because it was costing too much money and not "worth it for him". She said he also informed her that Danzas would have to do the courier work themselves and that Danzas was very unhappy with their (the Applicants') work. Ms Crute said that she was stunned and cried because she loved the job. She said she could not understand why Mr Hodges had decided to cancel the work. He told her to inform Ms Pritchard that the work had finished. Ms Crute said that she was so upset that she did not take the paperwork or mobile telephone back to Danzas. Mr Hodges told her that he would return them. Over the weekend Ms Crute informed Ms Pritchard of what had occurred. She also spoke to Ms Gordon and advised her that she and Ms Pritchard had been terminated.

31 Ms Gordon testified that on Sunday, 14 October 2001 she received a telephone call from Mr Hodges. He advised her that he had sacked Ms Crute and Ms Pritchard. He asked her to train a new girl. Ms Gordon said she agreed to do so. She went to the Respondent's premises on 15 October 2001. She spent two days training the new person.

32 The Respondent filed Notices of Answer and Counter Proposal that were signed by Mr Hodges on behalf of Perth Road Express in these matters on 29 November 2001. Attached to the Notice of Answer and Counter Proposal in both applications were two letters dated 3 September 2001 and 18 September 2001 in which an allegation is made in relation to the performance of the Applicants in providing courier services to Danzas. Both Applicants gave uncontradicted evidence that they had not seen copies of these documents until they received copies of the Notices of Answer and Counter Proposal. The letters were not tendered as evidence in these proceedings.

33 At the conclusion of the Applicants' case, Mr McCorry on behalf of the Respondent advised the Commission that the Respondent elected not to call any evidence as Mr Hodges is no longer employed by the Respondent and the circumstances of his departure was such that his evidence was unlikely to be of assistance to the Commission.

Submissions

34 The Respondent concedes the Applicants were summarily dismissed and the terminations were procedurally unfair. The Respondent contends that the Applicants were engaged as casual employees. However, it is also conceded by the Respondent that irrespective of whether the Commission makes a finding that the Applicants were casual or part-time employees that they had an expectation of ongoing work. Accordingly the issues raised in relation to assessment of compensation remain the same. Further it is conceded that the Commission should make a finding that the Applicants were unfairly dismissed in that if the

allegations of poor performance were raised with the Applicants, the Respondent is unable to say whether those issues could have been cured or whether the allegations would have led in any event to the termination of the Applicants' employment.

35 Reinstatement is not sought by either Applicant. It is contended on behalf of each Applicant that they earnt an average of $450 per fortnight. It is contended that the maximum amount of compensation that can be awarded by the Commission in each case is $5,700.

36 The Respondent contends that Ms Pritchard has not satisfied her onus to take steps to mitigate her loss by seeking alternative employment. Further, that in any event the quantum of the Applicants' loss should not be assessed at $90 per day as the Applicants' operating costs of their vehicles should be deducted because the effect of the termination of the work is that they no longer have to bear the costs of the vehicle running expenses. In relation to Ms Crute it is contended that if regard is had to her 2000 income tax return that the maximum six month cap on her remuneration is an amount of $4,353. In relation to Ms Pritchard, Ms Pritchard testified her operating costs were $35 per day. If that is applied to her earnings the Respondent says the maximum amount of compensation the Commission can award her is $3,575.

Conclusion

37 The term "casual employee" has no fixed meaning. The true nature of any employment relationship will depend upon the facts and circumstances of each case (*Doyle v Sydney Steel Company Limited* (1936) 56 CLR 545 at 551, 565).

38 In the Australian Industrial Relations Commission it has been accepted that the status of "casual employment" is not necessarily inconsistent with the concept of an ongoing contract of employment (*Ryde–Eastwood Leagues Club v Taylor* (1994) 56 IR 385).

39 The nature of casual engagement has been set out in a number of decisions of this Commission. In *Serco (Australia) Pty Limited v Moreno* (1996) 76 WAIG 937 at 939, Sharkey P observed—

> " '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.'
>
> (See *Squirrell v Bibra Lakes Adventure World Pty Ltd t/a Adventure World* (op cit) at page 1835 per Fielding C and *Stewart v Port Noarlunga Hotel Ltd* (1980) 47 SAIR 406 at 420).
>
> The parties, of course, cannot by use of a label render the nature of a contractual relationship something different to what it is (see *Stewart v Port Noarlunga Hotel Ltd* (op cit) per Haese DPP at pages 5-6)."

40 It is argued on behalf of the Applicants that the terms of their employment were regulated by the Transport Workers' (General) Award No 10 of 1961 ("the Award"). The Respondent contends that the Award does not apply to couriers. That may be the case, however, the Commission is unable to form a view as Clause 3 of the Award provides—

> "This Award shall apply to all workers following the vocations referred to in the wages schedule who are eligible for membership in the applicant union and who are employed in the industries referred to in the Schedule of Respondents."

In the absence of any evidence about the industries carried on by the Respondents in the schedule, the Commission is unable to determine whether the terms of the Award apply to the Applicants' employment. In any event it would appear that the terms of the Award may not be of assistance as there is no definition of a casual employee or a casual worker in the Award.

41 In my view the concept of casual employment is usually work of an informal, irregular and uncertain nature. In most cases such engagement is not likely to continue for any length of time. However the duration of engagement may vary according to the circumstances of a particular case. It is also inherent in the concept of casual employment that an employer can elect to offer employment on a particular day or days and when offered, the employee can elect whether or not to accept work on that day.

42 In this case the nature of the engagement was "job sharing". It is clear from the circumstances of this case that the Applicants were effectively treated as one employee. It was up to each of them to determine what days of the week they worked. However they clearly understood and it was a term of their engagement that one of them would have to attend on any day between Monday and Friday of each week. The fact that the number of hours that they worked each day varied in my view does not mean that their employment can be said to be casual. They were paid the same rate of pay irrespective of how many hours they worked. It is apparent that they were engaged on a regular, continuous, ongoing basis. In the circumstances I am of the view that the engagement of the Applicants was not casual but part-time. Even if I am wrong in relation to this issue it is conceded on behalf of the Respondent this issue does not affect the Applicants' quantum of compensation, as it is conceded that they had an expectation of ongoing work.

43 The duty to mitigate loss in claims of unfair dismissal lies with the Applicants. The duty to mitigate requires a claimant to diligently seek suitable alternate employment and the onus of proof of failure to mitigate loss is on the Respondent (see *Brace v Calder and Others* [1895] 2 QB 253 applied by the Full Bench in *Growers Market Butchers v Backman* (1999) 79 WAIG 1313 at 1316). I am satisfied that the Applicants have both taken steps to mitigate their loss. Ms Crute testified that she has registered with a number of employment agencies seeking work and has made many attempts to find employment in retail, fashion and caring agencies. She said she recently had an interview with the Department of Disability Services and she has been accepted to be placed on a list as a carer seeking work. Ms Pritchard testified that she suffers from a condition which is called fibromyalgia. She said this affects her ability to do many jobs. She said that this was one of the few jobs that she has ever had where she was able to carry out the work on a long term basis. She said her condition causes her to require a lot of sleep, to be in a lot of pain and restricts movement in her arms and legs. She said despite that she has in the past worked in jobs such as retail work at Farmer Jacks for a short period of time. She testified that she has recently sought work from Farmer Jacks at Thornlie, she has also sought work at a nursery, has applied for baby sitting jobs in the local paper and has sought other jobs in the retail sector. In the circumstances I am of the view that Ms Pritchard has diligently sought suitable alternative employment and the Respondent has failed to prove that she has not mitigated her loss.

Quantum

44 I accept the Respondent's submission that in assessing the Applicants' loss, caused by the dismissal under s.23A(6) of the Act, should be assessed on the basis that part of the amount of $90 paid to the Applicants each day was to reimburse the Applicants for the running costs of their vehicles. I am not satisfied that an order for compensation should be based on a payment of $90 per day and I do not accept the Respondent's contention that there should be a deduction of $35 per day for running costs. As Ms Pritchard said in her evidence she estimated the costs of running her vehicle would be $35 per day. In assessing the cost to her she took into account the running costs of her vehicle for all purposes, that is for private and work use. I accept the uncontradicted evidence of Ms Crute that the Applicants were paid $10 per day as a car allowance. In light of that finding I have assessed the Applicants' loss at $400 per fortnight, or $5,200 average remuneration in six months.

45 I will make orders that the Applicants were harshly, oppressively and unfairly dismissed and make a further order that the Respondent pay to each Applicant the amount of $5,200 as compensation.

2002 WAIRC 06553

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	SHARON LEE PRITCHARD, APPLICANT
	v.
	PRE PTY LTD TRADING AS PERTH ROAD EXPRESS ACN 079876323, RESPONDENT
CORAM	COMMISSIONER J H SMITH
DATE OF ORDER	FRIDAY, 20 SEPTEMBER 2002
FILE NO.	APPLICATION 1942 OF 2001
CITATION NO.	2002 WAIRC 06553

Result	Applicant unfairly dismissed. Order made that the Respondent pay the Applicant $5,200 as compensation within seven days of the date of this order.
Representation	
Applicant	Mr T Crossley (as Agent)
Respondent	Mr G McCorry (as Agent)

Order

HAVING heard Mr Crossley on behalf of the Applicant and Mr McCorry 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; and

(2) ORDERS that the Respondent pay the Applicant $5,200 within seven days of the date of this Order.

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

2002 WAIRC 06555

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	BEVERLEY ANNE CRUTE, APPLICANT
	v.
	PRE PTY LTD TRADING AS PERTH ROAD EXPRESS ACN 079876323, RESPONDENT
CORAM	COMMISSIONER J H SMITH
DATE OF ORDER	FRIDAY, 20 SEPTEMBER 2002
FILE NO.	APPLICATION 1943 OF 2001
CITATION NO.	2002 WAIRC 06555

Result	Applicant harshly, oppressively and unfairly dismissed. Order made that the Respondent pay the Applicant $5,200 as compensation within seven days of the date of this order.
Representation	
Applicant	Mr T Crossley (as Agent)
Respondent	Mr G McCorry (as Agent)

Order

HAVING heard Mr Crossley on behalf of the Applicant and Mr McCorry on behalf of the Respondent the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act, 1979* hereby—

(3) DECLARES that the Applicant was harshly, oppressively and unfairly dismissed by the Respondent; and

(4) ORDERS that the Respondent pay the Applicant $5,200 within seven days of the date of this Order.

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

2002 WAIRC 06554

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	SHARON LEE PRITCHARD, APPLICANT
	v.
	PERTH ROAD EXPRESS ACN 079876323, RESPONDENT
CORAM	COMMISSIONER J H SMITH
DATE OF ORDER	FRIDAY, 20 SEPTEMBER 2002
FILE NO.	APPLICATION 1942 OF 2001
CITATION NO.	2002 WAIRC 06554

Result	Order made to amend the name of the Respondent.
Representation	
Applicant	Mr T Crossley (as Agent)
Respondent	Mr G McCorry (as Agent)

Order

Having heard Mr T Crossley on behalf of the Applicant and Mr G McCorry on behalf of the Respondent, the Commission by consent and pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders—

THAT the name of the Respondent be amended to PRE Pty Ltd trading as Perth Road Express ACN 079876323.

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

2002 WAIRC 06556

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	BEVERLEY ANNE CRUTE, APPLICANT
	v.
	PERTH ROAD EXPRESS ACN 079876323, RESPONDENT
CORAM	COMMISSIONER J H SMITH
DATE OF ORDER	FRIDAY, 20 SEPTEMBER 2002
FILE NO.	APPLICATION 1943 OF 2001
CITATION NO.	2002 WAIRC 06556

Result	Order made to amend the name of the Respondent.
Representation	
Applicant	Mr T Crossley (as Agent)
Respondent	Mr G McCorry (as Agent)

Order

Having heard Mr T Crossley on behalf of the Applicant and Mr G McCorry on behalf of the Respondent, the Commission by consent and pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders—

THAT the name of the Respondent be amended to PRE Pty Ltd trading as Perth Road Express ACN 079876323.

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

2002 WAIRC 06615

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	KAREN RILEY, APPLICANT
	v.
	BESTA INTERLOCKING BRICKS, RESPONDENT
CORAM	CHIEF COMMISSIONER W S COLEMAN
DATE OF ORDER	WEDNESDAY, 25 SEPTEMBER 2002
FILE NO.	APPLICATION 2116 OF 2001
CITATION NO.	2002 WAIRC 06615

Result	Application upheld and the Respondent to pay to the Applicant an amount of $3,736.40.
Representation	
Applicant	Ms K Riley on her own behalf
Respondent	No appearance by the Respondent

Reasons for Decision

1 This matter was first heard on the 20th August 2002 and proceeded without an appearance from the Respondent. The hearing was adjourned following the presentation of the Applicant's case. A copy of the transcript of that hearing was sent to the Respondent at what is understood to have been its business address. No mail has been returned to the Commission unclaimed. The hearing resumed on Thursday the 5th September 2002 and concluded on that day. Again there was no appearance by the Respondent.

2 Ms Riley, the Applicant, was terminated from her employment as office manager/personal assistant with the Respondent company on the 19th November 2001. Several weeks before the termination Ms Riley raised her concerns about the viability of the company with the Chairman, Mr Douglas Bestall and the Managing Director, Mr Kerry Roberts. She was privy to the

company's financial position and had been contacted by debt collectors. Ms Riley was worried about the stability of her employment.

3 When she attended for work on the 19th November, 2001 the Chairman of the company confronted her and demanded to know what she was doing there. He stated that she had resigned. She denied this and in the discussion that took place she feared for her safety. The Managing Director told her to go home and indicated that he would placate the Chairman and that he would ring her to tell her when to come back to work. No such contact was forthcoming.

4 Subsequently, Ms Riley was informed that the Respondent's premises had been broken into. She was told she would be contacted by the Police. Ms Riley was left with the distinct impression that she was under suspicion. She has not been contacted about the matter by anyone.

5 The Applicant claims that the dismissal was unfair and that her loss arising from the termination included a period of unemployment and work at a reduced level of income from part time employment. She also claims an outstanding contractual entitlement to accumulated leave, notice and a redundancy payment.

6 In the absence of any evidence to the contrary and based on my assessment of the Applicant, I accept that the termination of her employment was harsh and oppressive. The termination was accompanied by the perception of a threat and subsequently an inference of dishonesty, which she denies emphatically.

7 I am satisfied that the Applicant mitigated her losses to the fullest extent possible in seeking alternative employment. Clearly in the circumstances reinstatement is impractical.

8 The position Ms Riley worked in before securing permanent, full time employment again resulted in her income dropping to the extent of $1,714.00 over a seven week period. Given the state of the Respondent's business it is unlikely that the Applicant could have counted on her employment with the company extending beyond a seven week period. I am prepared to order compensation to the extent of this loss.

9 As to denied contractual entitlements the only claim which falls within the jurisdiction of the Commission is that of her accumulated annual leave entitlement pursuant to the *Minimum Conditions of Employment Act 1993*. This entitlement is in the implied term of her contract of employment (*RGC (Australia) Pty Ltd v Phippard* (2002) 82 WAIG 2013).

10 I also award a payment of her accrued entitlement to annual leave.

11 The Order now issues in these terms.

2002 WAIRC 06670

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	KAREN RILEY, APPLICANT
	v.
	BESTA INTERLOCKING BRICKS, RESPONDENT
CORAM	CHIEF COMMISSIONER W S COLEMAN
DATE OF ORDER	TUESDAY 1 OCTOBER 2002
FILE NO.	APPLICATION 2116 OF 2001
CITATION NO.	2002 WAIRC 06670

Result	Application upheld and the Respondent to pay to the Applicant an amount of $3,736.40.
Representation	
Applicant	Ms K Riley appeared on her own behalf
Respondent	There was no appearance by the Respondent

Order

HAVING heard the Applicant, Ms K Riley, on her own behalf and there being no appearance on behalf of the Respondent.

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

1. THAT the Applicant was harshly, oppressively and unfairly dismissed;
2. AND THAT the Respondent do pay to the Applicant the sum of $1,714.00 being compensation for her loss;
3. AND THAT the Respondent do pay to the Applicant her contractual entitlement to accumulated annual leave being the amount of $2,022.40;
4. AND THAT payment of the total amount of $3,736.40 pursuant to 2 and 3 above be made to the applicant within 21 days of the date of this order.

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

2002 WAIRC 06690

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CHRISTINE SCOTT, APPLICANT
	v.
	DYNO NOBEL ASIA PACIFIC LIMITED, RESPONDENT
CORAM	COMMISSIONER J H SMITH
DELIVERED	WEDNESDAY, 2 OCTOBER 2002

FILE NO.	APPLICATION 639 OF 2002
CITATION NO.	2002 WAIRC 06690

Result	Application dismissed.
Representation	
Applicant	Mr P Mullally (as Agent)
Respondent	Mr I Morison (of Counsel)

Reasons for Decision

1 Christine Scott ("the Applicant") made an application under s.29(1)(b)(i) of the *Industrial Relations Act 1979* ("the Act") on 17 April 2002 claiming that she was harshly, oppressively and unfairly dismissed by Dyno Nobel Asia Pacific Limited ("the Respondent") on 26 March 2002.

2 On 25 March 2002 the Applicant was informed that her position as an executive assistant had been made redundant. The Applicant claims that the decision to make her position redundant and the consequent termination of her employment was unfair. The Applicant contends that she should not have been selected for redundancy as there was work in the Respondent's office in Perth that she could have carried out until at least the end of September 2002 or the beginning of October 2002. In particular, it is contended on behalf of the Applicant that the termination process was unfair in that s.41 of the *Minimum Conditions of Employment Act 1993* was not complied with and that if s.41 had been complied with the Applicant would not have been denied an opportunity to continue to work in the Perth office until the end of September 2002 or the beginning of October 2002. Alternatively, the Applicant says that the termination was harsh, oppressive and unfair in that the redundancy was not genuine, that the real reason why the Respondent terminated the Applicant's employment was because of complaints that she had made about the conduct of her fellow workers. The Applicant says she was subjected to intimidating conduct, inappropriate conduct and sexual harassment by males and females employed by the Respondent. These complaints were investigated by the Respondent in November 2001 and were largely found to be unfounded. The Applicant maintains her allegations are true and that the Respondent dismissed her because she complained about the conduct.

3 The Respondent says that its decision to make the Applicant redundant was genuine, that the decision was made because there was no further work for the Applicant in the Respondent's Corporate Spinnaker Program and Marketing office in Perth. Further the Respondent says that its redundancy policy and the provisions of the *Minimum Conditions of Employment Act* were substantially complied with.

4 On 25 March 2002 the Applicant was paid $15,628.63 (net) as two months' pay in lieu of notice and one month's redundancy pay. She was also paid a bonus of $6,454.70 and accrued annual leave.

Particulars

5 On 14 August 2002 the Applicant's agent provided to the Respondent's solicitors particulars of the basis of which the Applicant challenged the decision to make her redundant. These grounds are as follows—

> "1. It was not part of our client's employment contract to be specifically allocated to the Spinnaker project;
>
> 2. Our client applied for the advertised position and was appointed Personal Assistant to Mr Jock Muir;
>
> 3. Mr Jock Muir is still employed in the Company;
>
> 4. In any event, the Spinnaker project continues;
>
> 5. The blatant breach of Section 41 of the Minimum Conditions of Employment Act under scores the ingenuineness (sic) of the asserted redundancy."

At the outset of the hearing the Applicant's agent advised the Commission that the Applicant also challenged her redundancy on the basis that the Respondent's termination guidelines for redundancy had not been complied with.

Background

6 The Respondent is a global company that manufactures, sells and distributes explosives. Mr John Muir is employed by the Respondent as a Senior Vice President. At the time the Applicant commenced employment with the Respondent, Mr Muir was the Senior Vice President of Marketing and the Spinnaker Project. As a Senior Vice President, Mr Muir is a member of the Respondent's global corporate executive team which is the Respondent's managing body. The only other Vice President located in Australia, is the Senior Vice President Asia Pacific, Mr Peter Richards who is located in Sydney. There are nine or perhaps ten Senior Vice Presidents employed globally.

7 Prior to the engagement of the Applicant, the Spinnaker Project had been created as a two year project. When the project commenced Mr Muir, Mr Mikael Von Hertzen and other project members were located in Oslo in Norway. The Spinnaker Project was a marketing initiative to develop a database over a two year period to enable the company to report globally. It was set up after the Respondent acquired an equity fund. The aim was to put initiatives in place to achieve a five year plan. At the time the Applicant was employed Mr Muir had relocated the Marketing and Spinnaker Project to Perth as his family were located in Perth.

8 When the Applicant commenced employment the Marketing and Spinnaker Project team in Western Australia comprised of Mr Muir, Mr Von Hertzen and Mr Greg Taylor. Both the Applicant and Mr Taylor were recruited locally. Mr Von Hertzen was employed as the project manager and Mr Taylor as a marketing analyst. During the currency of the Applicant's employment five other members of the Spinnaker Project were located in Olso, the United States and Sydney. The Spinnaker Project was attached to the Respondent's regional office in Perth. The regional office in Perth had a staff of 30 people when the Applicant first commenced work.

9 Prior to being employed by the Respondent, the Applicant had over 15 years' work experience as a senior professional assistant. The Applicant applied for a position with the Respondent through an executive placement agent, Beilby. Following an interview and a psychological assessment the Applicant was provided with an interim offer of a position as professional assistant/administrator by Beilby. In a letter dated 22 December 2001 Ms Trotter, the Account Manager of the Executive Selection Division of Beilby advised the Applicant that she was offered that position and that the general terms and conditions were—

> "• $47,000 per annum plus bonus (yet to be determined) upon reaching team goals and objectives;
>
> • Superannuation 8%"

The Applicant says she accepted the offer and commenced employment with the Respondent on 2 January 2001. She received a further letter setting out the terms of "the offer of employment" dated 4 January 2001. The terms of the offer describe her position as executive assistant responsible to Mr Jock Muir, Senior Vice President, Programme Office located at Perth. The Applicant signed that letter accepting the offer on 5 January 2000 (sic). The material terms and conditions set out in that letter that are relevant to this application are as follows—

> "Your employment will be subject to an initial probation period of three months. During this period your performance will be reviewed. Your employment may be terminated during the probation period by either you or ourselves giving one week's notice. We shall have the right to make a payment in lieu of notice. Your employment may be terminated without notice during the probationary period where you commit an act of serious misconduct.
>
> **...**
>
> Your employment may be terminated on one month's notice given by either yourself or ourselves. We reserve the right to make a payment in lieu of the notice period. If you fail to give the required notice you hereby expressly authorise us to withhold from any payment due to you the amount of your salary equal to the balance of the ungiven notice period. If you are involved in an act of serious misconduct your employment may be terminated without notice or payment in lieu."

Applicant's Duties

10 The Applicant testified that when she first commenced work she carried out a lot of work to set up the Spinnaker Project and Marketing office. She said it took over six weeks for the computers to be installed and to get the office up and running.

11 After the Spinnaker Project office was set up, she assisted Mr Von Hertzen and Mr Taylor. She wrote a help manual for the Spinnaker database which took long hours and several months to complete. This manual was completed three days prior to her termination. The target date for completion of that task was mid June 2002. The Applicant also wrote a glossary of terms for the Spinnaker database. As part of marketing work she was required to audit a new website every three months. Shortly before her employment was terminated she ceased to do this work and her web site duties were transferred to Mr Taylor.

12 Mr Muir was away from the Perth office for substantial periods. The Applicant says she acted as his personal assistant ("PA"). The Applicant testified that she made his travel arrangements and she did day to day work for him such as typing, checking his emails, arranging meetings, preparing minutes of meetings and presentations. Mr Muir however testified that the Applicant did little day to day routine work for him, that she mainly worked on projects associated with the Spinnaker Project or marketing.

The Applicant's Performance

13 It is clear that during the currency of her employment the Applicant performed all of her duties efficiently. Mr Muir testified that he was satisfied with the Applicant's work performance whilst she was engaged by the Respondent. The Applicant's only complaint was that she had conflict with her fellow employees. On one occasion she refused to provide assistance to Mr Von Hertzen to look up currency rates on the web site. The Applicant says she refused to carry out this task because in her view this work was for Mr Von Hertzen's personal banking as he came from Helsinki and had a personal interest in currency rates in Finland.

The Applicant's Version of Events that Occurred Prior to Her Termination

14 It is common ground that shortly after the Applicant's probationary period was completed in early 2001 that she had heard that the Spinnaker Project was to finish in the year 2002, so she spoke to Mr Muir about this. She testified that he assured her that although the Spinnaker Project was due to finish in August 2002, she would continue to be employed as his PA as global marketing would continue in its "fullest" and whatever role he undertook in the company there would still be a job for her unless he went overseas on secondment.

15 On 22 May 2001, the Applicant sent an email to Ms Sandra Ollington, who holds the position of Vice President, Organisation Development in Sydney. In that email the Applicant made a complaint that she had been the subject of rumour and innuendo which she regarded as defamatory of her. Her complaint was in general terms. She made a general allegation that she had been subjected to misbehaviour, including behaviour that had "sexual overtones". Ms Ollington responded to the email the same day and asked the Applicant to telephone her (Ms Ollington). The Applicant said she had an in-depth discussion about the matters with Ms Ollington on the telephone and it was agreed that no immediate action would be taken but that the Applicant would have further discussions with Ms Ollington in a month or two months' time.

16 The Applicant was asked in her evidence to state the events which caused her concern and resulted in her making a formal complaint to Ms Ollington. In response she testified her complaints were as follows—

(a) About six weeks after she (the Applicant) was employed she had difficulty getting the office set up which required her to use her initiative to push people to get things done quickly which seemed to be causing deterioration in her relationship with the staff members in the general Perth office and the Spinnaker Project office. She said that Mr Von Hertzen told her that it was "her role as the PA to this team that she should be disliked".

(b) The Applicant overheard a conversation between Mr Von Hertzen and Mr Muir in which Mr Von Hertzen said to Mr Muir, "Well she has got good references but they are not Russian references".

(c) The Applicant's desk faced Mr Muir's office. There were blinds between the Applicant's desk and Mr Muir's office. The Applicant said that Mr Muir left his blinds open and he often watched her when she was on the telephone because he was facing her. She said she closed the blinds on a number of occasions, but when she did that the blinds were later opened by Mr Muir.

(d) The Applicant made a complaint about Mr Taylor that he had "sent her on a wild goose chase". She said Mr Muir wanted to condemn Mr Taylor personally so she withdrew from the conversation because she did not want to get into any vendetta. She said when Mr Muir was out of the office, Mr Taylor "spat the dummy" and did not assist her with her Spinnaker Project tasks.

(e) On occasions the Applicant said she heard Mr Taylor call her a "stupid bitch" and a "stupid mole". She said if she ever took a personal telephone call he would start slamming doors and throwing a "bit of" a tantrum.

(f) On one occasion Mr Taylor put his foot on her desk to supposedly tie up a shoe lace. She turned her back to him and later asked him not to put his foot on her desk again.

(g) On one occasion the Applicant walked into Mr Von Hertzen's office and Mr Von Hertzen reclined in his chair, put his hands behind his head and lifted his pelvis briefly in the air, shifted in his seat and "appeared to" glare at the Applicant. He then left the office with a red face.

(h) At a meeting with Mr Von Hertzen and Mr Taylor, Mr Taylor disturbed the meeting by jangling coins and keys in his pocket. Mr Taylor and Mr Von Hertzen exchanged a glance in her presence "like there was a game being undertaken".

(i) On 20 March 2001, the Applicant's birthday, she did not bring in a cake. The Applicant overheard a conversation between Mr Muir and Mr Richards in Sydney. She said she heard, "She fucking didn't bring it ". The Applicant's view of this conversation was that the comment had been made about her not bringing in cake for morning tea. The Applicant said later that day Mr Muir bought flowers for her birthday and Mr Taylor and Mr Von Hertzen gave her a box of chocolates.

(j) A couple of months after the Applicant commenced employment the Applicant was standing near the fax machine and Mr Muir said to her, "I don't want you putting on any weight." On a number of occasions the Applicant says that Mr Muir used the expression "Jesus Christ". She said it was an expression he did not seem to use in the presence of others. She found this offensive because he was aware that she was a Christian.

(k) On a couple of occasions the Applicant says that Mr Muir stood very close behind her while she was sitting at her desk typing. She said in examination in chief that his body was touching her. When cross-examined about this issue she said that the top of his chest was touching the back of her head. She said she asked him to back off, to give her some space and, "You're trespassing my boundaries."

(l) On another occasion the Applicant says that Mr Muir also put his foot on the end of her desk.

(m) In late October 2001 Mr Muir returned to the Perth office after being on compassionate leave. She said they seemed to be getting on well that morning. She went into the meeting room and he extravagantly spread his legs across the chair and lowered a document down towards his groin area. She said she was very taken aback by this conduct. She said to him, "How dare you sit like that, especially in front of Michael." She said they then had a very heated discussion. Shortly thereafter she went into his office and she saw Mr Muir standing up in his chair with his legs across the seat. She said she would not look at him until he put his tail down on the seat. She said to him, "Look, Jock, I don't appreciate these postures that you adopt with me. They cause discomfort when you communicate with me." She said that he then blushed very deeply and as a result he contacted Ms Ollington to arrange for mediation.

(n) In cross-examination the Applicant was asked whether she complained about the women in the office flaunting themselves and the Applicant said "Yes". The Applicant testified that the young girls that worked in reception in the main part of the Perth office used to skip past her desk arm in arm, laughing and giggling. She said one of the girls came up to her desk wearing a very low cut top. She said that this girl went around and spoke to a male in the office and said something to him and he said "Oh, so she can look but she can't touch". She said another female made a comment to her that she was not gay that she was married. She also said there were incidents where a girl said something to her about her top and asked "Are you doing that to impress us". On another occasion when she was wearing a new perfume, two girls came skipping past her desk arm in arm and said "Well, that has to be the stink of the century". The Applicant said that when all these events occurred she believed that the women were spreading rumours of potential homosexuality about her which was untrue.

17 At the end of August 2001 the Applicant's performance bonus was due to be paid. Initially she was paid a bonus of 15%. She was later paid an additional 6.63% being a total of 21.63%. She said that prior to her bonus being paid she was checking Mr Muir's emails and she opened an email addressed to him. She said the email depicted a "PA at bonus time" kicking her naked boss in the crotch, with his arms in chains.

18 Ms Ollington made arrangements to conduct mediation on 19 and 20 November 2001. The Applicant met with Ms Ollington and a counsellor from Davidson Trahaire on 19 November 2001. The meeting took most of the morning. She understood that Ms Ollington and the counsellor later met with Mr Von Hertzen and Mr Taylor and later with Mr Muir. On the following day the Applicant was given a summary of Ms Ollington's findings and conclusions and she was given information in the event that she wanted to seek counselling to take the matter further. The Applicant did not give any evidence about what those findings were. However, it is apparent from her evidence that no action was taken by the Respondent in relation to the Applicant's complaints after that meeting.

19 Late in the afternoon on 20 November 2001 Mr Muir called the Applicant, Mr Von Hertzen and Mr Taylor to a meeting. The Applicant testified that Mr Muir opened the meeting by saying "I am a victim in this" and then said that due to a proposed merger of the Respondent with another large company that she (the Applicant) may be made redundant early in January 2002, but this was more likely to occur in April 2002. Mr Muir also advised to the Applicant and the others at that meeting that because of the merger it would be necessary for him to relocate overseas.

20 It is common ground that Mr Muir at that time and subsequently was intimately involved in the work required to be done to effect the merger. Yet the Applicant said that she did not believe that the Respondent should make her redundant. Although the Applicant said that she had known about the merger prior to that meeting. She said that she did not think she should be made redundant because Mr Muir had informed her that her role was not linked to the Spinnaker Project and that Mr Muir was building a house in Cottesloe. Consequently, she testified that she did not consider what he said seriously.

21 In January 2002 the Applicant was due for an annual salary increase. She said Mr Muir rang her from overseas and told her "I am going to give you a 3% increase, subject to redundancy". She said they had previously discussed 4%. She said "redundancy" was not discussed again until the day that her employment was terminated. The Applicant did not take any steps to look for any other work in the interim. It is apparent from her evidence that on 20 November 2001, she formed the view that if she was to be made redundant she would take action against the Respondent.

22 The Applicant said that on the day she was terminated she had just come back from three days annual leave. She said that the previous week she had left on Mr Muir's desk the revised help manual that had been finally completed. Mr Muir asked to see her in his office. She said he closed the door and informed her that as the "milestone" had been completed (meaning the manual) there was no further work for her to do. He then gave her a sheet of calculations which set out her redundancy pay. She said he suggested to her that she could accept the redundancy, leave that day and she would have a tax reduction, or she could work until 20 April 2002. She said she responded by informing him she wanted to seek legal counsel given their past history together. She told him she did not believe the reasons he was giving for the termination were valid. She left his office, made some enquiries and spoke again to Mr Muir in the presence of Mr Von Hertzen. She said Mr Muir asked her for her security key and asked her to leave immediately. She said she was taken aback. She informed him that she did not want to accept the payout until she had sought legal counsel. Mr Muir made it very plain that he wanted her to leave immediately and they had a very heated debate. She said she did not want to accept payment until she had some advice because she did not want to damage any future claims. She then left the premises. By the time she reached her home that morning the Respondent had had paid into her bank account the payments, for pay in lieu of notice, redundancy pay, accrued annual leave and a bonus payment.

Respondent's Evidence

23 Mr John Muir testified that he holds the position of Senior Vice President of Marketing, Spinnaker. Mr Muir testified that although he still holds the title in relation to the Spinnaker Project that he has not had any responsibilities in relation to that

project since June 2002. Mr Muir said that prior to taking up responsibilities for the Spinnaker Project he was the Senior Vice President of Asia Pacific and was based in Sydney. He said his boss wanted him to be based in Oslo but he reached a compromise for his family reasons to start the project in Oslo and then for him to be based in Perth. He moved to Oslo on 1 August 2000 to set up the Spinnaker Project. He relocated to Perth just before Christmas 2000.

24 Since late 2001 the Respondent has been involved in merger negotiations with an American company called Ensign Bickford and that required Mr Muir to travel overseas more regularly than he had been doing in the past. He said that when he first appointed the Applicant he anticipated she would have a long term position in marketing and she would continue to work for him beyond August 2002. It was apparent from his evidence that was what he intended prior to the proposed merger. Mr Muir said that at the time he gave evidence he was still located in Perth but he would be permanently moving to Connecticut in the United States to take up the position of Senior Vice President Initiation Systems. He will be running Initiation Systems after due diligence for the merger is complete. He said at the time of the hearing he was only spending one week out of six in Perth.

25 Mr Muir says he became aware that the Applicant had made complaints about matters concerning sexual harassment in May 2001. After the Applicant spoke to Ms Ollington he asked her (the Applicant) whether she wanted to take the matter any further and she said "No". He said when he returned to the Perth office from a holiday in August/September 2001 Mr Von Hertzen and Mr Taylor informed him that the Applicant had made allegations against them and he asked them to put those allegations in writing and send the document to Ms Ollington so everything was "on the record". He then went to Kuala Lumpur and then on to Boston for a merger meeting. Whilst he was in Boston his daughter-in-law died unexpectedly. He flew back to Perth and he saw the Applicant for the first time after a couple of months on about 12 October 2001. He said that he was in the conference room doing a monthly report and the Applicant came into the conference room and said something to him. She left the office and came back a few minutes later and upbraided him about the way he was sitting. He said she informed him it was disgusting. He said he lost his temper because he had no idea what she was talking about, had been totally engrossed in his computer screen and it was his first day back at work after a very traumatic family experience. He said he responded by telephoning Ms Ollington and requested her (Ms Ollington) to get to the bottom of the allegations of misconduct and to settle all the issues once and for all.

26 Ms Ollington was unable to arrange an investigation until late November 2001. At the conclusion of the investigation Mr Muir said he was informed by Ms Ollington that she (Ms Ollington) believed that the allegations were unfounded. He said that Ms Ollington informed him that there may have been some boisterous conduct in the office which could have been misconstrued but she felt that the Applicant was intimidating "us" and not getting on with her job. As a result he sat down with the Applicant, Mr Von Hertzen and Mr Taylor. At that meeting he told the Applicant that he too felt he had been victimised because unfounded allegations had been made against him. He said that he said "his piece" and that was that. At that meeting he told the Applicant and the others about the possibility of closing the Perth office due to the merger. He said the reason why he advised the Applicant and the others about the merger at that meeting was because there was a strong rumour going around the organisation that he had been chosen for the job of running the merger and he would be working in the United States.

27 Mr Muir gave evidence that overall the allegations the Applicant made against him were unfounded. He said he did not intend for his body postures to be offensive. He denied that he had ever said anything to the Applicant about her weight. He said he liked to keep the blinds open as when they were closed he felt "hemmed in". He said the Applicant never told him that keeping the blinds open was a problem for her and if he had known of her concern it was a matter that could have been easily resolved. He conceded he swore occasionally when he became a bit angry and may have used the words "Jesus Christ" a few times in the Applicant's presence. He agreed that such language would be hurtful to the Applicant. He said Ms Ollington asked him to watch his blasphemy and not to mention the Lord's name.

28 Mr Muir testified that in February 2002 he convened a Spinnaker Project meeting in Perth and all of the persons engaged globally in the Spinnaker Project came from overseas for the meeting. He said the team agreed to recommend that between February and August 2002 the Project members should concentrate on setting up a help desk and providing training. He took the Project team recommendation to a meeting of all the Senior Vice Presidents in Sydney and that recommendation was accepted. He then spoke to all the human resource managers about the various members of the Project team and asked if they could find people alternative positions. He then considered whether Mr Taylor could be used by Dyno Nobel Asia Pacific as it was likely that marketing would be transferred offshore and Mr Taylor would not be transferred offshore. He then looked at the Applicant's work and Mr Taylor's work. He said that the Applicant had done a very good job on the Project work, especially preparing the database manual but there was not going to be any further Project work for her to do because the rest of the team were concentrating on the help desk. In relation to her marketing work, she had two regular jobs, the web site audit and the glossary of terms. He said the glossary of terms work was being handed over to the internet manager in Sydney and the web site work to Mr Taylor. His assessment was that he could not justify retaining both the Applicant and Mr Taylor. As Mr Taylor was principally engaged in marketing his work could continue until his (Mr Muir's) marketing role was transferred to others overseas.

29 Mr Von Hertzen returned to Finland in June 2002. Mr Muir said a few weeks before the Applicant's employment was terminated he went to Sydney and whilst there he spoke to Ms Ollington about the possibility of making the Applicant's position redundant. He then came back to Perth for a week and went to Las Vegas in the United States. He said he spoke to Lance Tinney, the Western Australian Site Manager of the local Perth office, and asked whether there were any positions suitable for the Applicant in the near future. He was informed by Mr Tinney that there was not. A few weeks later a downsizing of the Perth office was announced which resulted in the staff at the Perth office being reduced from 30 to 19. Whilst he was in the United States he spoke to Ms Ollington again and asked whether there were any alternative positions for the Applicant. He asked Ms Ollington to prepare a retrenchment package. He returned to Perth and he spoke to the Applicant. He said he explained to her why she was being made redundant. He said that the Applicant became angry and informed him that she should not have been made redundant. She left the room to obtain legal advice. He saw her make a telephone call and assumed she was speaking to a lawyer. In light of her reaction he made a decision that it would be fruitless for her to work out her period of notice so he telephoned the Sydney office and asked a payroll officer to deposit the redundancy and notice pay into the Applicant's bank account. The Applicant returned to his office and he told her that he had put the money into her account and asked her to leave. He agreed that the Applicant informed him that she did not want the termination payments because she thought that it might compromise her ability to bring a claim against the Respondent.

30 Ms Sandra Ollington, the Respondent's Vice President of Organisational Development, testified that she received an email from the Applicant on 22 May 2001. Upon receipt of that email she discussed the matters raised in the email with the Applicant. She said the Applicant had been to a counsellor and she discussed with her (the Applicant) taking a more light-hearted approach to conduct in the office. She advised the Applicant that if she sensed anything sexual that she should say something and speak up about it. She said she can recall that she had a further conversation with the Applicant a couple of months later and the Applicant indicated to her that the conduct in the office was improving. Over the next couple of months Mr Muir indicated to her that "things were a little tense in the office". In September or October 2001 Ms Ollington said she received some notes from Mr Taylor and Mr Von Hertzen in which they stated that the Applicant had called them into a

meeting and had put various allegations to them. She later spoke to the Applicant to obtain her permission to conduct an investigation in Perth and she did that on 19 and 20 November 2001. At the conclusion of that investigation and mediation session she gave the Applicant, Mr Muir, Mr Taylor and Mr Von Hertzen feedback. She told the Applicant that if she was not happy with her (Ms Ollington's) investigation she could ask for another investigation and if she was not happy with another investigation the matter could be dealt with externally. She said she encouraged the Applicant to continue with her counselling and the Applicant agreed to contact her again if she wanted to speak again.

31 In February or March 2002 Ms Ollington had discussions with Mr Muir about redundancy of Spinnaker Project members. She said those conversations primarily related to the Applicant. She said that Mr Muir informed her that he did not have any additional work for the Applicant to do and he was looking at making her position redundant. She said he later telephoned her and asked her to prepare a redundancy calculation. She said that when the decision is made to make someone redundant it is common that redundancy calculations are prepared so that those payments can be discussed with the person in question. Ms Ollington said that Mr Muir consulted her as to whether there were any other positions in the company. She said that at that time she was not aware of any other positions being available.

The Respondent's Termination Guidelines for Redundancy

32 The Respondent's Guidelines provide—

"▪ Redundancy is a serious and frequently expensive option and thus all aspects of a potential redundancy must be discussed with Human Resources prior to any discussion with the employee. In all instances Human Resources will advise the SVP Asia Pacific of any actions that are proposed.

- A severance calculation will be organised through Human Resources, giving details of the components which comprise their redundancy package.
- The Manager/Supervisor will arrange an interview with the affected employee, advising them that they will be retrenched, providing counselling throughout the interview. It is important to explain the circumstances that brought about this situation and that their performance was not a factor in this decision. Hand to the employee their severance calculation, explaining each component. At this stage, final termination dates should also be discussed.
- The employee will be given a period of notice of the impending redundancy. In the majority of cases, the employee will be expected to continue to perform their duties up to the date of termination. The Company may request an alternative termination date and this may occur at any time during the notice period. The Company is then obliged to pay the appropriate salary in lieu of notice. The employee may also request a termination date within the notice period and in that instance, they forfeit pay in lieu of notice for the un-worked portion.
- The employee will have access to counselling through the EAP. Human Resources will be available for all employees by offering advice and assistance, as required.

Formula for Calculating the Severance Package

- Minimum of one (1) months pay in lieu of notice. This notice period may be shortened or lengthened by mutual agreement or the notice period may be worked;
- One (1) months additional pay in lieu of notice for employees over 45 years of age;
- One (1) calendar months pay for each completed year of service, to a maximum of six (6) months pay;
- Payout of all Annual Leave entitlements;
- Pro rata Long Service Leave after 5 years of continuous service with the Company."

Section 41 Minimum Conditions of Employment Act 1993

33 Section 41 provides—

" (1) Where an employer has decided to —

(a) take action that is likely to have a significant effect on an employee; or

(b) make an employee redundant,

the employee is entitled to be informed by the employer, as soon as reasonably practicable after the decision has been made, of the action or the redundancy, as the case may be, and discuss with the employer the matters mentioned in subsection (2).

(2) The matters to be discussed are —

(a) the likely effects of the action or the redundancy in respect of the employee; and

(b) measures that may be taken by the employee or the employer to avoid or minimize a significant effect,

as the case requires."

Legal Principles

34 The question to be determined by the Commission is whether the legal right of the Respondent to dismiss the Applicant has been exercised harshly or oppressively against the employee so as to amount to an abuse of that right (*Ronald David Miles, Norma Shirley Miles, Lee Gavin Miles and Rose & Crown Hiring Service trading as The Undercliffe Nursing Home v The Federated Miscellaneous Workers' Union of Australia, Hospital, Service and Miscellaneous, WA Branch* (1985) 65 WAIG 385 at 386).

35 Pursuant to the terms of the Applicant's contract of employment the employer was entitled to terminate the Applicant's employment by giving one month's notice or paying the Applicant one month's pay in lieu of notice. Accordingly it cannot be contended that any failure of the Respondent to allow her to work out her notice rendered the termination unlawful.

36 In order to establish that a termination of employment for redundancy is unfair on grounds that the selection of an employee was unfair, the employee in question must show that his or her selection was unfair in comparison to other workers (see *AMWSU and OPDU v Australian Shipbuilding Industries (WA) Pty Ltd* (1987) 67 WAIG 733 per Brinsden J at 734 and Olney J at 738). If the selection process was such as to deny procedural fairness, the selection process may also be unfair.

37 Further, a failure to comply with the mandatory requirements under s.41 of the *Minimum Conditions of Employment Act 1993* is a factor to be taken into account in deciding whether a dismissal is unfair (*Gilmore v Cecil Bros.* (1996) 76 WAIG 4434, per the President at 4445). See also *WA Access Pty v Vaughan* [2000] WAIRC 1179 at [66-69]; (2000) 81 WAIG 373 at 378 and cases cited therein). 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).

Conclusion

38 Having heard all of the evidence I am not satisfied that the Applicant has discharged her onus of proof that the decision to make her redundant was not genuine. Where her evidence departs from the evidence given by Mr Muir and Ms Ollington, I prefer the evidence given by Mr Muir and Ms Ollington to the evidence given by the Applicant. I did not find the Applicant to be a convincing witness. Mr Muir readily conceded a number of matters and Ms Ollington's evidence was not substantially challenged in cross-examination. In any event, having heard the Applicant's complaints of conduct which she says constitute harassment, I am of the view that many of her complaints were trivial. Mr Muir admits some of her complaints were justified. At the highest her complaints about body language appear to be based on her perception of conduct by others which may have been unintended. I accept the Respondent investigated her complaints and offered her a right to have a further internal and external investigation. Although the Applicant contends that the inappropriate conduct did not cease after November 2001, she did not given evidence about any other incidents, other than to say that several weeks before she (the Applicant) was terminated there was an occasion when she had put some perfume or cream on her hands and Mr Muir started sneezing in his office. She said he walked out in a "huff" and said to Mr Von Hertzen "stupid bitch".

39 Even if the conduct occurred in the manner she says, it is my view that it was not her complaints about the conduct of others in the office which led to the decision being made by the Respondent to terminate her employment. I accept the evidence given by Mr Muir that when the Applicant was initially employed it was anticipated that when the Spinnaker Project was completed, the Applicant would have continued to assist him with his marketing work. However, that was not to be the case as Mr Muir's work changed. He became heavily involved in the global merger of the company and it is apparent from his evidence that his marketing function will not be continued in Perth. Whilst it could be argued that the Applicant could have continued to assist Mr Muir with his marketing work, I accept that the Applicant's marketing functions were transferred to Mr Taylor. Although it was anticipated Mr Muir would remain working in part from Perth until the end of September 2002, it is clear that since the Applicant's employment was terminated, Mr Muir has only been in the Perth office for very short periods of time. Consequently I am not satisfied that the Applicant has proved that the decision made by the Respondent to make her redundant on the basis of insufficient work for her to carry out in Perth was not genuine.

40 I do not accept the Applicant's contention that there has been a blatant breach of s.41 of the *Minimum Conditions of Employment Act.* It is clear from the Applicant's own evidence that she knew from 20 November 2001 that she was going to be made redundant in the year 2002. It is not as if this decision was unexpected. The Applicant had made up her mind in November 2001 that if the Respondent terminated her on grounds of redundancy that she would institute legal action against the Respondent to challenge the decision. I accept the submission made on behalf of the Respondent that when an employee is informed that a decision has been made to make him or her redundant, that on that occasion there is an entitlement vested under s.41 of the *Minimum Conditions of Employment Act* to discuss the matters set out in s.41(2) of the *Minimum Conditions of Employment Act.* Although it is clear from the evidence that no such discussion took place, it is apparent from the evidence given by the Applicant and Mr Muir that the reaction of the Applicant when the decision was conveyed to her was such that the Applicant made it very difficult for such a conversation about the matters specified in s.41 to take place. In any event, even if I am wrong about the construction of s.41 of the *Minimum Conditions of Employment Act* I am of the view that even if the employer had complied with s.41 it would have made no difference as the Applicant had made a decision in November 2001 that if she was made redundant she would take action against the Respondent. In any event, I accept the evidence given by Mr Muir and Ms Ollington that there were no alternative positions available to her. Accordingly, it is my view that even if there was a breach of procedural fairness in that s.41 was not complied with, the circumstances of the final conversation that the Applicant had with Mr Muir on the day of her termination was unlikely to produce a different outcome.

41 In relation to the Respondent's redundancy policy, it is apparent from the evidence given by the Applicant and Mr Muir that no counselling was provided to the Applicant throughout the interview in which she was advised that she was to be made redundant. Although this constitutes a breach of the express terms of the policy, for the reasons set out above it is my view that this breach of the terms of the policy does not lead to a finding that the Applicant was harshly, oppressively or unfairly terminated. Even if counselling was intended to be given to her, her reaction was such that counselling would not have been possible or helpful.

42 For the reasons set out above I will make an order dismissing the Applicant's application.

2002 WAIRC 06689

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CHRISTINE SCOTT, APPLICANT
	v.
	DYNO NOBEL ASIA PACIFIC LIMITED, RESPONDENT
CORAM	COMMISSIONER J H SMITH
DATE OF ORDER	WEDNESDAY, 2 OCTOBER 2002
FILE NO.	APPLICATION 639 OF 2002
CITATION NO.	2002 WAIRC 06689

Result	Application dismissed.
Representation	
Applicant	Mr P Mullally (as Agent)
Respondent	Mr I Morison (of Counsel)

Order

HAVING heard Mr Mullally on behalf of the Applicant and Mr Morison on behalf of the Respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act 1979, hereby orders—

THAT this matter be, and is hereby dismissed.

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

2002 WAIRC 06579

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	JODIE ANN SMITH, APPLICANT
	v.
	GRAHAM GISHUBL PTY LTD T/AS RAY WHITE GREENWOOD, RESPONDENT
CORAM	CHIEF COMMISSIONER W S COLEMAN
DATE OF ORDER	TUESDAY, 24 SEPTEMBER 2002
FILE NO.	APPLICATION 479 OF 2002
CITATION NO.	2002 WAIRC 06579

Result	Application dismissed
Representation	
Applicant	Applicant appeared on her own behalf
Respondent	Respondent appeared on his own behalf

Reasons for Decision

1 The Applicant, Ms Jodie Ann Smith, was employed as a property manager in the Respondent company's real estate office. Her employment was terminated after three weeks' service. Ms Smith seeks the balance of one week's wages ($461.54) which she claims is outstanding as a result of only being paid one day's pay in lieu of notice. An amount for superannuation ($32.30) and interest is also claimed as an outstanding contractual entitlement.

2 The Respondent, through its Principal, Mr Graham Gishubl, objects to the claims and denies any outstanding liability with respect to the payment in lieu of notice. On advice received he also denies that any superannuation is due on a termination payment.

3 The Applicant's claim focused on an entitlement of one week's pay in lieu of notice which in the first instance, Ms Smith asserts, is based on the terms of an unregistered workplace agreement. She acknowledges that the Respondent also relies on the terms of that document in opposing her claim but nevertheless sees its provisions as being "obviously … the grounds that I am claiming for my week in lieu." In this respect I was referred to the provisions of Clause 6 (3) of the document (Exhibit 1 and Exhibit 4). It provides that—

> "Subject to Clause 5 – Probation, a full time or part time employee may be terminated on any day giving the other party notice as required below, or by payment by the agent, in which case the employment shall terminate at the time the payment is made, or forfeiture by the employee in lieu of the notice period, in accordance with paragraphs (b) and (c) below.
>
> **Employee's period of continuance service with the employer**
>
> | **Period of service** | **Notice Period** |
> |---|---|
> | Not more than 1 year | At least 1 week |
>
> … "

4 Although the workplace agreement was unregistered it was Ms Smith's submission that the above terms of notice applied. Ms Smith stated in evidence—

> "Well, obviously I was under a probationary period as well which in my understanding as well, and my probationary period expired in February because I was on a three month probationary period and that was my understanding."
>
> *(transcript page 6 and page 7)*

5 Ms Smith's services were terminated in December, before the expiry of the three month period. The Applicant also submitted that in the event that the terms of the unregistered workplace agreement with respect to notice, did not apply, then because she was paid on a weekly basis she was entitled to one week's notice in lieu. This entitlement would arise from the operation of the Federal Workplace Relations Act.

6 Mr Gishubl submits, for the Respondent, that the terms of the unregistered workplace agreement apply. These were agreed to verbally when the position to which Ms Smith was appointed was accepted. The Respondent claims that during the short period of her employment he requested her to sign the document on a number of occasions. However, she failed to complete this undertaking. Notwithstanding this, it is submitted, the terms under which termination of employment could be effected are those to which the Applicant has, in the first instance, referred. In this respect reference must be made to Clause 6 (1) of the unregistered workplace agreement. This states—

> "At any time during the probationary period, the employee or the Agent may terminate the contract of employment with 1 day's notice or payment by the Agent or forfeiture by the employee, in lieu of the notice period."

7 On the premise of that the terms of the workplace agreement apply and it is common ground that the Applicant's employment was subject to the probationary period, the contractual obligations of the Respondent had been discharged.

8 I accept that it was the Respondent's intention to employ the Applicant under the terms of the workplace agreement and that Mr Gishubl's intention had been conveyed to Ms Smith.

9 It is common ground that her appointment was for a three month probationary period. This was not the subject of the letter to Ms Smith confirming her appointment but was noted in the schedule attached to the copy of the workplace agreement submitted to her for signature. (See Schedule A Exhibit 1 and Exhibit 4).

10 I accept that the terms of contract entered into between the parties, verbally, in the first instance included the application of a probationary period and a provision for termination by the giving of one day's notice or payment or forfeiture in lieu by either party during that period.

11 On this basis it is clear that the provisions of Clause 6 – Termination of Employment, under the unregistered workplace agreement apply in the circumstances. In this respect the terms of sub-clause 6 (3)(a) must be subject to the operation of the probationary period and attracts the application of sub-clause 6 (1) to which the Respondent referred.

12 If I am wrong in concluding that the provision for notice in the unregistered workplace agreement do not form part of the contractual relationship, either as a direct result of arrangements entered into when the Applicant was employed, or by being implied to give efficacy to the contract, then the Applicant's claim must be considered under the Workplace Relations Act.

13 What has been established, however, and indeed is common ground, is that the Applicant was serving a period of probation.

14 The Commission's jurisdiction does not extend to the enforcement of entitlements under the Workplace Relations Act but in this respect the Applicant must confront the provisions of Section 170 CM(8) (Employer to give notice of termination – Exclusion of terminations), Section 177 CC (Regulations may exclude employees) and Regulation 30B(1)(c) (Employees excluded from requirement for termination of employment).

15 The Application for an additional payment in lieu of notice and superannuation is therefore dismissed.

2002 WAIRC 06578

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	JODIE ANN SMITH, APPLICANT
	v.
	GRAHAM GISHUBL PTY LTD T/AS RAY WHITE GREENWOOD, RESPONDENT
CORAM	CHIEF COMMISSIONER W S COLEMAN
DATE OF ORDER	TUESDAY, 24 SEPTEMBER 2002
FILE NO.	APPLICATION 479 OF 2002
CITATION NO.	2002 WAIRC 06578

Result	Application dismissed
Representation	
Applicant	Applicant appeared on her own behalf
Respondent	Respondent appeared on his own behalf

Order

HAVING heard the Applicant on her own behalf and the Respondent on his own behalf, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act 1979, hereby orders—

THAT the application be dismissed.

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

2002 WAIRC 06400

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	PAUL JULIAN THOMPSON, APPLICANT
	v.
	THE WINDSOR HOTEL SOUTH PERTH PTY LTD, RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	THURSDAY, 5 SEPTEMBER 2002
FILE NO.	APPLICATION 134 OF 2002
CITATION NO.	2002 WAIRC 06400

Result	Application alleging unfair dismissal upheld and an order issued for compensation in lieu of reinstatement
Representation	
Applicant	Mr R Clohessy (as agent)
Respondent	Ms M Saraceni (of counsel)

Reasons for Decision

1 This is an application pursuant to s.29(1)(b)(i) of the *Industrial Relations Act 1979* ("the Act"), whereby Mr Paul Thompson ("the applicant") claims he was unfairly dismissed from his employment with The Windsor Hotel South Perth Pty Ltd ("the respondent") on 6 January 2002.

2 The respondent claims there was no unfair dismissal. The respondent maintains that the applicant was on a probationary period of up to 3 months, and as he did not fulfil the requirements necessary to remain in employment, the respondent claims it was appropriate to terminate the applicant's employment.

3 Mr Paul Thompson gave evidence on his own behalf.

4 The applicant commenced employment with the respondent on 27 November 2001 as the Manager of Slugger's Bar at the Windsor Hotel.

5 His contract of employment was pursuant to a Workplace Agreement ("the Agreement") which was registered under the Workplace Agreements Act 1993 ("WP Act"). It was not disputed that the Agreement provides that if an employee is unfairly dismissed, the matter can be referred to the Commission for hearing and determination.

6 Under his contract of employment the applicant was paid a salary of $35,000 per annum. In addition, superannuation was to be paid. The position included a 5% bonus for each week that bar takings exceeded $25,000.

7 Mr Jim Pascov was the applicant's direct supervisor and General Manager of the Windsor Hotel at the time the applicant was employed. The applicant's duties included general running of Slugger's Bar, setting up staff rosters and undertaking promotions to increase the bar's client numbers.

8 It was the applicant's evidence that he had no warnings with respect to his performance whilst he was employed with the respondent, and there were no complaints made to him about his suitability for the position, or his capacity to undertake the work involved.

9 The applicant maintains that he was told to meet Mr Pascov at work on 6 January 2002 at approximately 2.00pm. At this meeting Mr Pascov told him that the respondent was going to have to let him go. The applicant was shocked by this and asked why he was being terminated. Mr Pascov apologised and stated that the decision did not come from him, but from upper management. The applicant was asked to hand back his keys. As the applicant was embarrassed about the termination he was asked if he wanted Mr Pascov to tell staff that he had resigned. The applicant agreed with this course of action. Approximately one week later the applicant was given 1 day's pay in lieu of notice. Some months later this was made up to 1 week's pay in lieu of notice.

10 The applicant maintains he wants reinstatement to his previous position, as he had done nothing wrong in relation to his employment with the respondent.

11 The applicant stated he has been able to obtain some casual bar work since termination, and he has earned approximately $4,764.00 in that time. The applicant has been unsuccessful in obtaining any work apart from the casual bar work even though he has made a number of approaches to various employers (Exhibit A4).

12 Under cross examination the applicant confirmed that he visited Slugger's Bar prior to commencing employment with the respondent. The applicant knew the previous Manager of Slugger's Bar, Mr Matt Baldock for approximately 1 year prior to commencing work at the Windsor Hotel. After Mr Baldock left Slugger's Bar to work in another of the respondent's hotels the applicant understood that a person called Bjorn managed the bar. However, he was unsuccessful and Mr Baldock approached the applicant to see if he was interested in taking up the position. Mr Baldock arranged for the applicant to meet with Mr Pascov and his boss Mr Collis, where the job was discussed and an agreement was reached that the applicant was to commence employment with the respondent on 27 November 2001

13 The applicant confirmed that he signed an Employment Application document which refers to the applicant being on a probationary period of 3 months (Exhibit R1). The applicant also confirmed that he was aware that the Agreement included a reference to the applicant being on 3 month's probation (Exhibit A1).

14 The applicant confirmed that his role was to supervise 6 or 7 staff, to keep the bar clean, put takings in the safe, and be responsible for organising entertainment and promotions.

15 The applicant decided how many bar supervisors were necessary and fixed rosters accordingly. He stated that there were 2 supervisors employed when he started and that from time to time, depending on the function, 2 supervisors were required to be rostered on at the same time. He utilised a computer in order to draw up the rosters, however as there was not a computer in his office when he commenced with the respondent, he used a shared computer. The applicant stated that Mr Pascov did not raise the issue of staff rostering with him.

16 It was put to the applicant that Mr Pascov and Mr Baldock raised an issue in relation to the poor advertising of a wakeboard surfing party which was held at Slugger's Bar in December 2001. The applicant maintained he did what he could in the time that he was given, in order to promote this particular party.

17 When asked whether or not turnover in the bar was decreasing, the applicant was unsure. The applicant maintained that he had no complaints from Mr Pascov about the cleanliness of the bar. The applicant was asked whether there was any complaints raised with him in respect to lighting screens. The applicant maintained that this issue was not raised with him.

18 The applicant confirmed that he was given a computer approximately 1 week prior to leaving the respondent. This was located in the applicant's office. The applicant conceded that during his last week of employment, Mr Pascov came into his office whilst the applicant was playing a card game on the computer, however Mr Pascov did not say anything to the applicant at that time and left the applicant's office.

19 On the day the applicant was dismissed, he conceded that Mr Pascov discussed an issue in relation to advertising. The applicant maintained that he did not agree to resign to obtain alternative employment. The applicant claimed he was shocked at being dismissed, because he did not see it coming. He stated that he was not given a warning in relation to playing a game on the computer, and he reiterated there was no criticism of him in relation to bar rosters. He stated that at no stage was any advice given about how he could improve his performance, or that if his performance did not improve, his employment was in jeopardy.

20 Mr Jim Pascov gave evidence for the respondent. Mr Pascov was employed for 2½ years as the respondent's General Manager but has since left the respondent. He has worked for approximately 21 years in the hotel industry. Mr Pascov was in charge of the operations of the Windsor Hotel when the applicant was employed with the respondent. He confirmed that Mr Collis was the Group Manager for the respondent.

21 Mr Pascov stated that Slugger's Bar seeks to attract clients between the ages of 18 to 29. Prior to the applicant becoming Bar Manager, a person by the name of Bjorn managed the bar for approximately 6 weeks, and prior to him Matthew Baldock was the Manager. The Manager of the bar was expected to ensure the cleanliness of the bar and the room in which it operated. Marketing involving promoting activities to attract customers was another role. The Manager put in place rosters for the operation of the bar, opened and closed the bar, counted the day's takings and undertook stock control. The hours worked were generally 1.00pm to 1.00am Thursday, Friday, Saturday and Sunday, with some additional work as required on Monday.

22 Mr Pascov gave evidence that it was his position to employ the staff who worked at Slugger's Bar. Mr Baldock had referred the applicant to him in late October 2001 and accordingly a meeting was held with the applicant at the hotel. Mr Collis was also in attendance. The applicant's past experience was discussed. The applicant maintained that he was experienced in marketing and he was a hands-on supervisor. The applicant stated that he had no problem signing a Workplace Agreement to cover his conditions of employment and there was discussion about a 3 month probationary period. On the day of the interview there was an offer to the applicant to be employed as Manager of Slugger's Bar and this was accepted by the respondent. The applicant commenced employment on 27 November 2001. On that day Mr Pascov took the applicant through the bar and explained in detail how the bar was to be operated.

23 Mr Pascov stated he frequently walked through Slugger's Bar, on his way to the Hotel's Bottle Shop, therefore he was aware of what was happening with Slugger's Bar. He gave evidence that there were 4 major issues which concerned him in relation to the applicant's performance. Mr Pascov maintained that the applicant did not establish appropriate rosters for the bar. The applicant was rostering 2 seniors on at the one time, which was inappropriate and costly. Mr Pascov stated he spoke to the applicant twice about this. The applicant said he would fix it however he did not do so, and it was left to Mr Pascov to deal with this issue.

24 The cleanliness of the bar was also an issue. Mr. Pascov gave evidence that he spoke to the applicant about the bar being messy and the applicant was reminded that it needed attending to. The applicant agreed to fix this problem.

25 There were also complaints about the way in which the applicant handled the promotion of wakeboarding parties in December and January. Mr Pascov maintained that the wakeboard party, held on the first Friday of each month which the applicant was responsible for organising, was not sufficiently promoted and substantial revenue was possibly lost as a result of the party not being widely advertised. Mr Pascov maintains he spoke to the applicant about this problem.

26 Another issue was inappropriate lighting and atmosphere of the bar. When Mr Pascov raised this with the applicant, he maintained that it was the job of someone else to undertake this work, however the applicant assured him the problem would be fixed.

27 On the Friday before the applicant was terminated, Mr Pascov visited the applicant in his office and saw him playing a card game on his computer. Mr Pascov did not say anything to the applicant but he had formed the view that at that stage it was inappropriate to have the applicant remain working with the respondent. Mr Pascov also had the view that the applicant was lazy, had a poor attitude, and he had started late on some shifts. Mr Pascov then approached Mr Collis and discussed terminating the applicant. Mr Collis agreed to the applicant being terminated.

28 On Sunday 6 January 2002, Mr Pascov requested the applicant attend Slugger's Bar. Mr Pascov informed the applicant that his management skills were not up to standard and he had a poor attitude. It was Mr Pascov's evidence that he put to the applicant that he be given the opportunity to resign, so as to assist him in obtaining alternative employment. The applicant was terminated on that day, on this basis.

29 Under cross examination Mr Pascov confirmed that at no stage during his employment was the applicant told that his job was in jeopardy, and that there was no written documentation in relation to any warnings given to the applicant. Mr Pascov confirmed however, that it was not usual in the hotel industry to issue written warnings when reviewing the performance of an employee.

30 Mr Matthew Baldock gave evidence that he became the Manager of Slugger's Bar approximately 2 years ago and had worked hard to make it a profitable operation. In September 2001 he left Slugger's Bar and went to work at another of the respondent's operations, the White Sands Hotel. Subsequent to him leaving Bjorn took over, but he only lasted 6 weeks. It was Mr Baldock who suggested that the applicant be interviewed in order to become the Manager of Slugger's Bar, as he was of the view that the applicant had been an effective Manager at the Curtin University Bar where he was working prior to commencing with the respondent. As a result of the applicant expressing interest in working with the respondent, Mr Baldock arranged for an interview.

31 Mr Baldock remained in contact with Mr Pascov about the operations of Slugger's Bar. It was Mr Baldock's understanding that the profits of the bar had declined during the time the applicant was managing the bar. He gave evidence that he understood the applicant had poorly organised the wakeboard party in January 2002. Mr Baldock was involved in organising the December 2001 party which he stated would have been successful because he was involved with its organisation.

32 Mr Baldock stated that on one visit to Slugger's Bar, whilst the applicant was Manager, he found the bar in a mess and his evidence was that he had some informal discussions with the applicant about some of the problems he had been told the applicant was experiencing. He advised the applicant he should do something about this, and effectively gave him a warning about his job.

Submissions

33 It was the applicant's submission that when an employee is on probation, there should be appropriate procedures for dealing with performance and disciplinary matters. In this case no proper procedures were followed. With respect to the applicant's termination there was unfairness to the applicant because no performance issues were raised with him and he was denied natural justice in relation to the way he was dismissed. He was given no opportunity to respond to the concerns the respondent had in relation to his employment either on the day he was terminated or during his probation. Further, no specific reasons were put to the applicant as to why his contract of employment was terminated.

34 The respondent maintained that there was no unfair dismissal, as the applicant had been counselled on several occasions even though formal warnings were not given. The applicant was aware that his performance was unsatisfactory and was given opportunities to improve. The applicant was an experienced manager who should have performed better than he did. As the applicant was on probation, he was able to be terminated on 1 week's notice. This notice was paid on 11 June 2002. On this basis there was no unfair dismissal

Credibility

35 I carefully observed the witnesses whilst giving evidence. I have some difficulty with the evidence given by both the applicant and the main witness for the respondent, Mr Pascov. In my view, when answering some questions under cross examination the applicant was not fully forthcoming in relation to aspects of his performance. However, on balance, his evidence taken as a whole is accepted with reservations in relation to some minor performance issues.

36 On the other hand, Mr Pascov's evidence was inconsistent and misleading in relation to some of the warnings he states he gave the applicant. Mr Pascov stated that one of the major issues he had with the applicant was his inability to properly promote and organise a wakeboard party held at Slugger's Bar. He was confused about which party the applicant had not organised properly, but finally gave evidence that it was the party held on 4 January 2002 that the applicant had not properly organised. However, he stated that he had made his decision to terminate the applicant on the afternoon of 4 January 2002, prior to the wakeboard party occurring that evening. Further, Mr Pascov was unable to demonstrate that the wakeboard party held on 4 January 2002 had been unsuccessful, because he conceded in his evidence that he couldn't recall whether that night was slower than any other wakeboard party.

37 Another major issue highlighted by Mr Pascov was the inability of the applicant to adequately roster senior staff, and the applicant never being able to get the staff roster right. In evidence in chief in relation to this matter, Mr Pascov claimed that the applicant inappropriately rostered 2 seniors on and was asked to fix the issue by not rostering 2 seniors on at once. However, under cross examination Mr Pascov claimed that the real problem in relation to this issue was that the applicant did not terminate one of the supervisors when instructed to do so (Transcript pages 68-68a).

38 In my view, another area of concern in relation to the evidence was that a number of propositions were put to the applicant under cross-examination in relation to the wakeboard party and the rostering of senior staff that were not supported by the evidence given on behalf of the respondent. In the absence of evidence being adduced to support the propositions upon which counsel for the respondent based a number of her questions, I have to conclude in those instances the evidence of the applicant has to be accepted.

39 On this basis, because of major inconsistencies in Mr Pascov's evidence in relation to the reasons for terminating the applicant, and because a number of propositions were put to the applicant which were not supported by evidence, I prefer the evidence of the applicant where the evidence differs, with some qualification which is elaborated on later.

Issues and Conclusions

40 The test for determining whether an employer acted harshly, unfairly or oppressively in dismissing an employee is well settled. (*Undercliffe Nursing Home v Federated Miscellaneous Workers' Union of Australia, Hospital, Service and Miscellaneous, WA Branch* (1985) 65 WAIG 385).

41 It was common ground that the applicant was employed on a period of up to 3 month's probation, which was able to be terminated by either party giving 1 week's notice within the probationary period (Exhibit A1).

42 The law relating to unfair dismissal in relation to employees on contracts for probationary employment was recently considered by the Full Bench of this Commission (*East v Picton Press Pty Ltd* (2001) 81 WAIG 1367 at 1369). The President set out the following principles from *East Kimberley Aboriginal Medical Service v The Australian Nursing Federation, Industrial Union of Workers Perth* (2000) 80 WAIG 3155 at 3158(FB)

> "Again, the following principles apply:-
>
> (a) The employer, throughout the period of probation, retains the right to see whether he/she wants the employee or not in his/her employment.
>
> (b) (i) The employer is entitled to consider the employee as if the employee was still at first interview with the following modifications in this case.
>
> (ii) There was an identifiable contract of employment for a period, indeed, a fixed term, including a period of probation of three months. This advances the matter beyond a notional first interview situation.
>
> (c) Probation is an extension of the selection process, a period of learning and a time for attention, assessment and adjustment to standards of performance and conduct. (Inherent in that is that it is a time for teaching, training and counselling.)
>
> (d) (i) However, a probationary employee knows that he/she is on trial and that he/she must establish his/her suitability for the post. The employer, on his side, must give the employee a proper opportunity to prove him/herself, but he/she reserves the right to determine the employment with appropriate notice provided he has reason for so doing (see *Sommerville v Brinzz Pty Ltd Clerk Vehicle Repair Industry* [1994] SAIRComm 8 (31 January 1994), citing *Re J M Hamblin v London Borough of Ealing* (1975) IRLR 354 and see *Hutchinson v Cable Sand (WA) Pty Ltd* (FB)(op cit)).
>
> (ii) Further, an employee on probation can expect to be counselled and informed that she/he is not meeting the required standards of performance, to be given reasonable training in this respect, and to be warned of the possible consequences of a failure to improve. Provided this is done, an employee who is on probation would have little cause to complain if a decision was taken during the course of or at the end of a probationary period to terminate the employment (see *Sommerville v Brinzz Clerk Vehicle Repair Industry* (op cit), citing *Hull v F F Seeley Nominees Pty Ltd* (1988) 55 SAIR 550 at 562).
>
> (e) (i) Consonant with those principles, a probationary employee is able to seek reinstatement, but an employer is entitled to terminate a probationary employee more easily, e.g length of service is not a factor generally, because probationary employment is for a finite period and, in that period, assessment, training and acquisition of skills and demonstration of ability can occur. In addition, any genuine question of compatibility between employer, employee and other employees can be assessed. (This is not a comprehensive inventory of such matters.)
>
> (ii) However, probation is not a licence for harsh, oppressive, capricious, arbitrary or unfair treatment of a probationer (see *Hutchinson v Cable Sands (WA) Pty Ltd* (FB)(op cit) and the cases cited therein)."

43 And also in *Rosanne Isidora Van Den Broeck v Highway Gynaecology* (2000) 81 WAIG 319 at 319.

> "A period of probation is a period at least where the employee is to be assessed as being suitable for the job. The employee knows that he or she is on trial and must establish his or her suitability for the post. The employer, for its part, must give the employee a proper opportunity to prove him or herself, and an employee on probation can expect to be counselled and informed that if that he or she is not meeting the required standards of performance dismissal may occur. An employee is also entitled to receive reasonable training as well as a warning of a possible failure to improve."

Findings

44 Given my findings in relation to witness credit I make the following findings.

45 I find that the applicant was employed by the respondent as the Manager of Slugger's Bar at the Windsor Hotel from 27 November 2001 to 6 January 2002, pursuant to the Agreement (Exhibit A1) on a 3 month probationary period.

46 I find that on the 6 January 2002, the applicant was terminated by the respondent and was paid 1 day's pay in lieu of notice one week later.

47 I find that the balance of the week's pay in lieu of notice due to the applicant pursuant to his contract of employment was not paid until some months after the applicant was terminated.

48 I accept the evidence of the applicant, and I so find, that the applicant was unaware at any stage whilst he was employed with the respondent that his contract of employment was in jeopardy.

49 I find that no formal warnings were given to the applicant, either verbally or in writing, and that the respondent did not advise the applicant of performance and/or behaviour problems which could lead to his contract of employment being terminated.

50 With respect to Mr Baldock's evidence that he gave a warning to the applicant, as it was not his role to discipline the applicant and he kept in contact with the applicant on an informal basis I do not find this to be a warning that the applicant's job was in jeopardy.

51 Given the evidence, and the view I have formed that some of the applicant's evidence was not as forthcoming as it could have been on some issues, I find that it is possible that from time to time Mr Pascov did raise issues with the applicant in relation to him undertaking his day to day duties. Mr Pascov gave evidence that he raised instances such as the cleanliness and lighting of the bar. However, I find that even though the applicant disputes that these issues were ever raised, it is possible that issues of this nature were raised with the applicant, given that he was a new employee of the respondent.

52 I find that the applicant was not advised that there were problems with his performance in relation to the wakeboard party and the rostering of senior staff.

53 In relation to problems arising from the wakeboard party, the applicant denied he had problems organising the December wakeboard party when he was asked about this in cross-examination. In the event Mr Pascov relied on the applicant

experiencing problems with the January wakeboard party, held after Mr Pascov made his decision to terminate the applicant. Problems with the January wakeboard party were never put to the applicant. The evidence of Mr Pascov was that he had concerns with the applicant in relation to the January wakeboard party, but he could not state if this party had been unsuccessful. Given these discrepancies in Mr Pascov's evidence and the applicant's denial of any problems, I accept the applicant's evidence and I do not find this issue relevant to the applicant's termination.

54 In relation to the rostering of senior staff and ongoing rostering problems, Mr Pascov maintained that the applicant was told to terminate one of the supervisors. It was never put to the applicant that he had refused to terminate one of the supervisors when instructed to do so by Mr Pascov. It was put to the applicant, which he denied, that he was inappropriately rostering 2 seniors on at once. Mr Pascov stated that the applicant at all times was unable to roster staff correctly, but this was never put to the applicant. No specific evidence was forthcoming by the respondent in relation to the applicant getting the rosters wrong on an ongoing basis. Also, Mr Pascov terminated one of the supervisors in early December, soon after the applicant had commenced with the respondent, thus dealing with the issue of rostering 2 supervisors on at the one time. Given these inconsistencies in the respondent's evidence and the denial by the applicant that rostering problems were raised with him, I accept the applicant's evidence and I find that this issue was not relevant to the applicant's termination.

55 Given my finding that it is possible some minor issues such as bar cleanliness and lighting may have been raised with the applicant, in my view these constitute the only issues the respondent had with the applicant's performance. Based on this conclusion, I do not believe there was a valid reason or reasons sufficient to warrant the termination of the applicant's contract of employment.

56 Further, it is clear from the relevant legal authorities that when an employee is on probation the employer must give the employee an opportunity to prove themselves, and if it is found that an employee is not meeting required standards of performance then opportunities must be given to improve. It must be made clear to an employee what the required standards are and what specifically is required of them by their employer. Appropriate procedures must be in place. I find that in this matter the applicant, who was only employed for a period of 6 weeks, was not given sufficient opportunity to establish that he was suitable for the position of bar manager even though some reminders may have been given to the applicant to undertake his job more effectively. I find that during this short period of employment the applicant was not given appropriate and sufficient feedback to demonstrate that his performance required improvement at any stage of his employment. It is clear from the evidence that no specific counselling sessions were held in order to warn the applicant that his job was in jeopardy if he did not improve in particular areas.

57 In my view, the applicant was denied natural justice with respect to his termination. He was presented with a fait accompli when he met with Mr Pascov on 6 January 2002. He was told that a decision had been made for him to be terminated and there was no opportunity for the applicant to put his side of the story or to negotiate alternatives to termination. On this basis, the applicant was not afforded procedural fairness.

58 I also find that the respondent breached its contract of employment with the applicant by not paying 1 week's pay in lieu of notice as required under the applicant's Agreement. Notwithstanding the fact that proper notice was paid some months after the applicant's termination, this does not absolve the employer from acting lawfully at the time of termination.

59 Given these findings, and applying the relevant legal authorities, in my view the applicant's termination was both procedurally and substantively unfair.

60 The applicant seeks reinstatement and the respondent opposes this course of action. On the basis I have found that it is possible that the respondent did have some concerns about the performance of the applicant, I find that in the circumstances reinstatement is impracticable. The applicant knew he was on trial and that he had to establish his suitability for the supervisory position of Bar Manager. On the basis that I have found that it is probable the applicant was experiencing some difficulties in his employment as Manager of Slugger's Bar, I find that these problems should not have occurred given that the applicant was employed as an experienced Bar Manager. On this basis, I form the view that it is unlikely that the applicant's employment would have continued with the respondent past his 3 month probationary period, that date being 27 February 2002.

61 Given that I find reinstatement impracticable and given my view that the applicant's employment would probably not have continued beyond 27 February 2002, it is appropriate to order compensation for the period between the date of termination and 27 February 2002 minus 1 week's pay in lieu of notice already paid. Any monies that the applicant received whilst working elsewhere during that period should also be deducted from this amount.

62 Prior to making an Order in relation to this application the parties are directed to confer and report to the Commission within 7 days as to an appropriate amount to be paid to the applicant, given these reasons for decision.

2002 WAIRC 06573

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	PAUL JULIAN THOMPSON, APPLICANT
	v.
	THE WINDSOR HOTEL SOUTH PERTH PTY LTD, RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE OF ORDER	TUESDAY, 24 SEPTEMBER 2002
FILE NO/S.	APPLICATION 134 OF 2002
CITATION NO.	2002 WAIRC 06573

Result	Application alleging unfair dismissal upheld and an order issued for compensation in lieu of reinstatement
Representation	
Applicant	Mr R Clohessy (as agent)
Respondent	Ms M Saraceni (of counsel)

Further Reasons for Decision

63 The Commission published its reasons for decision in relation to this matter on 5 September 2002. The parties were directed to confer and report to the Commission within seven days as to an appropriate amount to be paid to the applicant given the reasons for decision.

64 The parties were unable to reach agreement on the amount to be paid to the applicant and were requested to provide written submissions as to the appropriate amount to be paid to the applicant.

65 I have considered the submissions of both parties and calculate that a figure of $4,753.85 gross is an appropriate amount to be paid to the applicant. This is calculated as follows—

7 weeks and 3 days at $673.08 per week	=	$5,115.40
Superannuation at 8%	=	409.23
Annual leave, balance of 1 week due to the applicant	=	414.30
LESS 1 Week's Notice paid	=	$ 673.08
LESS income earned	=	512.00
TOTAL	=	$4,753.85

4 A Minute of Proposed Order will now issue.

2002 WAIRC 06696

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	PAUL JULIAN THOMPSON, APPLICANT *v.* THE WINDSOR HOTEL SOUTH PERTH PTY LTD, RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE OF ORDER	WEDNESDAY, 2 OCTOBER 2002
FILE NO/S.	APPLICATION 134 OF 2002
CITATION NO.	2002 WAIRC 06696

Result Application alleging unfair dismissal upheld and an order issued for compensation in lieu of reinstatement

Order

HAVING HEARD Mr R Clohessy (as agent) on behalf of the applicant and Ms M Saraceni (of counsel) on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act, 1979,* hereby—

1 DECLARES that the dismissal of Paul Julian Thompson by the respondent was unfair and that reinstatement is impracticable;

3 ORDERS the respondent to pay Paul Julian Thompson compensation in the sum of $4,525.38 gross within 14 days of the date of this order.

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

2002 WAIRC 06649

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	NICOLE ALBA VANDERBURG, APPLICANT *v.* HATTEN MARKETING PTY LTD, RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	TUESDAY, 1 OCTOBER 2002
FILE NO/S.	APPLICATION 2345 OF 2001
CITATION NO.	2002 WAIRC 06649

Result	Application alleging unfair dismissal upheld and order issued for compensation in lieu of reinstatement
Representation	
Applicant	Mr C Baker (of counsel)
Respondent	Mr A Marshall

Reasons for Decision

1 This is an application pursuant to s.29(1)(b)(i) of the *Industrial Relations Act, 1979* ("the Act") whereby Nicole Alba Vanderburg ("the applicant") claims she was unfairly dismissed from her employment with Hatten Marketing Pty Ltd ("the respondent") on 20 December 2001. The respondent claims there was no unfair dismissal.

2 The applicant gave evidence on her own behalf. Prior to commencing employment with the respondent on 18 December 2001, from September 2001 the applicant was employed by Australian Fast Foods Pty Ltd working in Fresh Express shops in Subiaco, Forrest Chase and at Carousel Shopping Centre. She was employed with Australian Fast Foods Pty Ltd as a trainee Assistant Manager for the first 8 weeks, and then became a qualified Assistant Store Manager. In this position the applicant received a wage of $530.75 per week gross, based on working a 45 hour week.

3 The applicant resigned from Australian Fast Foods Pty Ltd on 17 December 2001 as she was offered employment with the respondent from 18 December 2001. On resignation, Australian Fast Foods Pty Ltd paid the applicant all accrued entitlements, including annual leave.

4 The applicant was aware that the respondent was buying the Fresh Express Chicken Treat franchise in Subiaco approximately one month prior to her commencing work with the respondent. The applicant knew that Mr Alan Marshall, a Director of the respondent, was undertaking training in the Subiaco Fresh Express store in order to take over that business on 18 December 2001.

5 The applicant was formally interviewed by Mr Marshall at some time towards the end of November 2001 and subsequent to that interview was offered employment with the respondent. It was the applicant's understanding that she would be employed on essentially the same terms and conditions that she was receiving in her existing employment with Australian Fast Foods Pty Ltd. On the basis of this understanding the applicant accepted Mr Marshall's offer of employment.

6 The applicant commenced work with the respondent at the Subiaco Fresh Express store on Tuesday 18 December 2001. On the 19 December 2001, whilst at work, Mr Marshall presented the applicant with a contract of employment to read and if agreed, to sign. The applicant read the contract but declined to sign it because the rate of pay was approximately $60.00 per week less than what she was receiving at her previous employment and it was less than the applicant had expected to receive under her agreement with Mr Marshall. The applicant told Mr Marshall that she could not accept the contract on the basis of this lower rate of pay. Mr Marshall's response was that he would bring in a new contract the next morning for her to review, with the rate of pay restored to $530.75 per week.

7 It was the applicant's evidence that Mr Marshall was happy to agree to the change. However, upon reflection, in order to prevent any confusion arising as to the correct rate of pay and given the applicant had just purchased a house and land package and she could not afford to take a cut in her wages, the applicant rang Mr Marshall that evening and asked if he would fax a copy of the old contract to her so she could compare it with the new contract. Mr Marshall responded by saying that he did not want to fax the contract to her, that he would alter her contract to the correct amount as agreed and would bring it in the next day. They arranged to meet the next day in relation to the contract.

8 The applicant arrived at work on 20 December 2001 at approximately 11.00am. She had telephoned Ms Cheree Tavinor, the Store Manager, the previous evening and she had agreed to be in attendance at the meeting with Mr Marshall as the applicant was concerned about how the meeting would go. Ms Tavinor and Mr Marshall were involved in a discussion when the applicant arrived, and the applicant was then asked to join Mr Marshall and Ms Tavinor. At this meeting the applicant stated that Mr Marshall told her there was no room in the company for someone like her and he couldn't work with her. He then stated that the applicant's contract of employment was terminated because of those reasons.

9 Mr Marshall complained about the applicant interrupting a school function the previous evening when she contacted him about her contract of employment. He showed the applicant the new contract which the applicant claims she did not get a chance to read. He then wrote on the contract "Declined and Terminated", and asked the applicant to sign it (Exhibit A3). After the applicant signed it, she asked for payment for the two days she had worked for the respondent and Mr Marshall wrote out a cheque for that amount, at the revised rate of pay. The applicant did not receive any pay in lieu of notice.

10 The applicant was asked what the words "declined and terminated" meant. She stated "declined" meant that she had declined the contract and "terminated" meant that Mr Marshall had terminated her employment. However, the applicant qualified "declined" by stating that she had not actually declined the contract as she had not even been given the chance to read it.

11 The applicant was shocked about being terminated, because in her view she had done nothing to deserve being dismissed.

12 After the meeting the applicant understood that a work colleague, Ms Sally Testa, telephoned Mr Simon Kaye of Australian Fast Foods Pty Ltd to see whether the applicant could re-commence employment with her former employer. Mr Kaye stated to Ms Testa that he would contact a Mr Timothy Vagg who could assist the applicant with employment. As Australian Fast Food Pty Ltd runs both Chicken Treat and Fresh Express stores, the applicant knew she would have to be retrained if she was to be appointed to work in a Chicken Treat store. When Mr Vagg contacted her about a position in a Chicken Treat store she stated that she agreed to start work some time early in January 2002, given she was required to be retrained and that training would be difficult to undertake prior to Christmas.

13 Mr Vagg wrote a file note to Mr Kaye confirming that late in December 2001 he contacted the applicant to arrange for her to start in one of the ten Chicken Treat stores for which he was responsible (Exhibit A4). The file note stated that in his view, as the applicant required at least two weeks of retraining, and given it was Christmas and there was a necessity for the applicant to be retrained, it would not be beneficial for the applicant or Chicken Treat for her to commence employment straight away. On this basis, the applicant recommenced employment with Australian Fast Food Pty Ltd in one of their Chicken Treat stores on an agreed date of 8 January 2002.

14 During the two days she was employed by the respondent the applicant maintains that Mr Marshall did not give her any warnings in relation to her performance, nor were any complaints made about her performance. However, the applicant stated there was one matter in issue between her and Mr Marshall prior to her commencing employment with the respondent. It related to the Christmas Day roster. When the applicant was working alongside Mr Marshall in November 2001 in the Subiaco Fresh Express store whilst Mr Marshall was training to take over the franchise, the applicant raised concerns with him about the Christmas Day roster. The applicant asked if it was possible if she could have that day off. At the time Mr Marshall was not sure what would be happening on Christmas Day. The applicant raised this issue with some of the other staff members present in the store and they too expressed concerns about who would be working on Christmas Day. The applicant suggested to Mr Marshall that expressions of interest from staff wishing to work on Christmas Day could be sought. The applicant stated that Mr Marshall was not impressed with the applicant making this suggestion because he claimed these issues were confidential. The applicant was told by Mr Marshall that she should not speak to anyone further about this issue.

15 Since commencing with Australian Fast Foods Pty Ltd on 8 January 2002, the applicant has worked continuously and has been paid bonuses for two months.

16 The applicant maintains that in between being terminated by the respondent and taking up employment with Australian Fast Foods Pty Ltd, she missed out on 14 days of work which equates to $106.00 per day lost. As she was paid $106 per day, she had lost out on $1484 in wages, and $118 in outstanding superannuation entitlements.

17 Under cross-examination the applicant conceded that the wage specified in the contract of employment initially presented to her by Mr Marshall was an error and she agreed that Mr Marshall stated he would rectify it.

18 It was put to the applicant that she had breached the confidentiality clause of her contract of employment by raising the issue of the Christmas roster with other employees. The applicant disagreed that the Christmas Day roster was a confidential matter. It was also put to the applicant that the issue concerning the Christmas roster was raised after she commenced employment with the respondent. The applicant denied this was the case. It was put to the applicant that at the meeting held on 20 December 2001 between Mr Marshall, the applicant and Ms Tavinor, there was a mutual agreement between the applicant and the respondent to part company due to a personality conflict between the applicant and Mr Marshall. The applicant maintained that she did not agree to being terminated and that she did not have a chance to ask why she was being terminated.

19 On re-examination the applicant again confirmed that the discussions with Mr Marshall over the Christmas roster took place prior to her commencing employment with the respondent.

20 Mr Vagg was called by the applicant to give evidence. He has been an Area Manager with Australian Fast Foods Pty Ltd for approximately six years. Mr Vagg confirmed that the contents of the letter he wrote to Mr Kaye (Exhibit A4) reflected his understanding of how the applicant came to be re-employed with Australian Fast Foods Pty Ltd on 8 January 2002.

21 The respondent called Ms Tavinor. Ms Tavinor stated that she was initially employed on a three month probationary period with the respondent. Ms Tavinor was asked about what occurred at the meeting between the applicant, Mr Marshall and herself on 20 December 2001. Ms Tavinor stated that 20 December 2001 was her rostered day off, however she attended the workplace as the applicant was upset about her contract and asked Ms Tavinor to assist because of difficulties the applicant was experiencing communicating with Mr Marshall. Ms Tavinor stated that even though the applicant and Mr Marshall had only been working together for two days, in her view, there was a personality clash between them. Prior to meeting with the applicant on 20 December 2001 Ms Tavinor told Mr Marshall of the applicant's concerns, and at that point Mr Marshall told Ms Tavinor that the relationship between him and the applicant was not going to work out. The applicant then came into the meeting and Mr Marshall told the applicant that it was not going to work out between them, and asked whether she wanted to finish working her roster for the week, or whether she wanted to go then and there. The applicant stated she wanted to go straight away as she was upset. She asked for and was given a cheque for the hours she had worked that week.

22 Under cross-examination, Ms Tavinor confirmed that she commenced employment with the respondent on 18 December 2001, and she currently holds the position of Manager with the respondent. She confirmed that because of her roster she was not officially due to start work until 21 December 2001. Ms Tavinor stated that on 20 December 2001 when she spoke with Mr Marshall prior to them meeting with the applicant, Mr Marshall told her that he had decided that it was not going to work out with the applicant, and that he had decided to terminate the applicant.

23 It was put to Ms Tavinor that the applicant was told that she had the option of working that day, but was not given the opportunity to undertake any further work with the respondent that week. Ms Tavinor disputed this. Ms Tavinor confirmed that the applicant was upset and crying when she was told that she was no longer going to be working with the respondent. She confirmed that she understood this distress was particularly related to the applicant's concern about being able to pay for a house and land package to which she had recently committed.

24 Ms Tavinor stated that when referring to personality issues between the applicant and Mr Marshall she was commenting about their conduct in relation to a period prior to the applicant commencing employment with the respondent.

25 Ms Samantha Beatty was called by the respondent to give evidence. She commenced employment with the respondent at the end of April 2002. Subsequent to the applicant being terminated on 20 December 2001 the applicant visited Ms Beatty at the Fresh Express Forrest Chase store where she worked. The applicant was upset and stated that things had not worked out with Mr Marshall.

26 The respondent called Mr Simon Kaye, State Operations Manager for Australian Fast Foods Pty Ltd. It was Mr Kaye's role to oversee the transition and handover of the Subiaco Fresh Express store to Mr Marshall. Normally, existing staff are offered the opportunity to work with the new franchisee. Mr Kaye confirmed that when Mr Marshall took over the franchise at Subiaco, some existing employees were taken on by the respondent, others were paid out their entitlements, and others went to other Australian Fast Foods Pty Ltd stores. Mr Kaye confirmed that a computer payroll print out from Australian Fast Foods Pty Ltd indicated that on 17 December 2001 Australian Fast Foods Pty Ltd terminated the applicant (Exhibit R1). He also confirmed that the applicant was reinstated without loss of continuity of service when she was re-employed by Australian Fast Foods Pty Ltd on 8 January 2002 (Exhibits R2 and R3).

27 Mr Kaye confirmed the applicant commenced employment with Australian Fast Foods Pty Ltd on 4 September 2001 and resigned her employment with Australian Fast Foods Pty Ltd on 17 December 2001 (Exhibit R2). Mr Kaye stated that on 20 December 2001 he was asked if he could find a position for the applicant, because she was no longer working for the respondent. He then spoke to Mr Vagg and asked him to arrange for the applicant to be re-employed in one of the Australian Fast Foods Pty Ltd Chicken Treat stores. Mr Kaye spoke with the applicant and told her he would get Mr Vagg to contact her. Mr Kaye understood that the applicant would be put back into employment with Australian Fast Foods Pty Ltd straight away as all that was required was to find a shift for her. It was his evidence that positions were always available at Australian Fast Foods Pty Ltd as their stores were constantly looking for staff. Mr Kaye stated however, that the allocation of employees to individual stores was the responsibility of Mr Vagg. Accordingly when Mr Kaye contacted Mr Vagg on 20 December 2002 he delegated him the task of locating a position for the applicant.

28 Under cross-examination Mr Kaye confirmed that employees who left Australian Fast Foods Pty Ltd to take up work at the Subiaco Fresh Express store were paid out all of their entitlements on 17 December 2001. He also confirmed that his instruction to Mr Vagg on 20 December 2001 was to re-employ the applicant with Australian Fast Foods Pty Ltd. He conceded that whether work was available was something that Mr Vagg had to review.

29 Mr Marshall gave evidence for the respondent. He took over the operation of the Subiaco Fresh Express store on 18 December 2001 from Australian Fast Foods Pty Ltd. He negotiated a training period in order to take over the store and to learn the rules and requirements for Australian Fast Foods products. The training period was also to assist in choosing staff. Mr Marshall required experienced and trained employees, and on that basis he chose employees familiar with Fresh Express operations. On the basis of their experience, he was prepared to pay employees the same rate of pay that was paid by Australian Fast Foods Pty Ltd.

30 Mr Marshall was impressed with Ms Tavinor's management abilities and accordingly offered her a position as Manager. It was on her recommendation that Mr Marshall employed the applicant. Subsequent to this recommendation Mr Marshall had the opportunity to review the applicant's work when he was training to take over the Subiaco store. Mr Marshall formally interviewed the applicant approximately one week prior to her commencing on 18 December 2001, and at that meeting wages and employment conditions were discussed. On the basis of this discussion Mr Marshall undertook to draw up a contract of employment for the applicant. It was reinforced at this meeting that the applicant would be on a three month trial period. Mr Marshall stated the contract was drawn up on or about 19 December 2001 and presented to the applicant for her signature. Mr Marshall stated that as the contract had an incorrect rate of pay, the applicant would not accept it. He told the applicant he would change the contract and bring it in to work the next day.

31 Mr Marshall stated he felt there was a personality conflict between him and the applicant. He was unhappy about some of her actions, and that her behaviour was not subdued. Mr Marshall referred to an issue concerning the Christmas Day roster which he says occurred on 18 or 19 December 2001. Mr Marshall was concerned about the way the issue was raised by the applicant as she disrupted other staff members. He was in the kitchen when he claims the applicant came storming in complaining about working Christmas Day. Mr Marshall stated that the applicant approached other staff members and made an issue of it with them, as one of the other employees reported this to Mr Marshall. Mr Marshall then had discussions with the applicant about the roster, and agreed that the applicant could have the time off on Christmas Day because of prior personal commitments.

32 In regard to the meeting on the day the applicant finished employment with the respondent, Mr Marshall had made up his mind prior to the meeting that he could not work with the applicant and he stated there was a mutual agreement to part ways on 20 December 2001. He claims it was not a one sided affair, it was a mutual agreement between him and the applicant to end the contract of employment. The applicant was given the option of either working out her weekly roster, or finishing straight away. He made it clear it was his preference that she leave straight away. Mr Marshall confirmed that the applicant requested a cheque for two days' pay, which he wrote out and gave to her.

33 Mr Marshall claims he then undertook to organise for the applicant to be re-employed by Australian Fast Foods Pty Ltd. Mr Marshall asked Mr Kaye to find her a position. He understood that Australian Fast Foods Pty Ltd had been able to offer reinstatement to the applicant on the day after she finished employment with the respondent, therefore he understood the applicant had not suffered any financial disadvantage by not working with the respondent subsequent to 20 December 2001.

34 Under cross-examination Mr Marshall confirmed that he employed the applicant for 21 hours in total and that she was recommended by Ms Tavinor. He stated that even though he did not give the applicant a written warning whilst she was employed by the respondent, he claims he warned her verbally in regard to the Christmas Day issue. It was put to Mr Marshall that the Christmas Day roster incident arose prior to the applicant commencing employment with the respondent, however he denied this. When pressed and asked which date the incident occurred he could not recall whether it was 18 or 19 December 2001. In relation to this roster issue, Mr Marshall claimed the applicant had stepped outside of her lines of authority and was disruptive.

35 Mr Marshall confirmed that the applicant contacted him in the evening of 19 December 2001.

36 Mr Marshall confirmed that he had formed the view prior to meeting with the applicant on 20 December 2001 there was no point in continuing the employment relationship because in his view he and the applicant were incompatible. He reiterated that at the meeting on 20 December 2001 there was a mutual agreement that the employment contract would not be pursued. Mr Marshall claimed that as the contract had not been finalised and signed, there was no contractual relationship between the applicant and the respondent for the period 18 through to 20 December 2001.

37 Mr Marshall conceded the words declined and terminated were written by him on the written contract of employment between the applicant and the respondent (Exhibit A3). He stated that the words declined and terminated were written because the applicant declined the contract and on this basis there was to be a termination. Thus, there was an agreement between him and the applicant that there was no point in continuing the employment relationship. Mr Marshall confirmed that the incorrect rate of pay on the contract initially given to the applicant was a mistake and that he was happy to correct that when it was brought to his attention. Mr Marshall stated that even though there was a mutual agreement between him and the applicant to go their separate ways he went to some lengths to ensure that the applicant was able to be reinstated with her previous employer.

38 Mr Marshall maintained the respondent did not permanently employ the applicant as she was on probation. He stated that he interviewed the applicant in the week prior to 18 December 2001 and that the applicant was employed on the same terms and conditions of employment as her previous employer, until a new contract was agreed.

Submissions

39 The applicant maintains there was a contract of employment between the applicant and the respondent between 18 December and 20 December 2001. It was during the pre-employment period that the applicant was interviewed and offered the opportunity to work with the respondent. The applicant maintains that during pre-employment discussions between the applicant and Mr Marshall no issue was raised with the applicant with respect to a probationary period. The applicant maintains there was no valid reason for the termination. On 20 December 2001 the applicant's contract of employment was terminated without warning, without notice being given and with no opportunity for the applicant to discuss the termination. On this basis, the applicant maintains that the dismissal was substantively and procedurally unfair.

40 The applicant once terminated, sought alternative employment and commenced that employment on 8 January 2002. That was the earliest opportunity the applicant had to commence employment with a new employer on the basis that training was required in her new position. Reinstatement is not sought by the applicant, nor is it appropriate in the circumstances.

41 It was the respondent's position that the applicant had ceased employment as a result of a mutual agreement to terminate the employment relationship on 20 December 2001 thus, there was no unfair dismissal. Further, as Mr Kaye confirmed that the applicant had the opportunity to be re-employed immediately subsequent to 20 December 2001 by her previous employer, the applicant had not suffered any financial loss by not remaining employed by the respondent.

Issues and Conclusions

42 In this particular case there needs to be a determination as to whether or not a dismissal occurred.

43 In *Mohazab v Dick Smith Electronics Pty Ltd* (No 2) (1995) 62 IR 200 at 205, the Full Court of the Industrial Relations Court of Australia said—

> "termination at the initiative of the employer" involves a "termination in which the action of the employer is the principal contributing factor which leads to the termination of the employment relationship".
>
> "[A]n important feature is that the act of the employer results directly or consequentially in the termination of the employment and the employment relationship is not voluntarily left by the employee. That is, had the employer not taken the action it did, the employee would have remained in the employment relationship". (see Macken, McCarry and Sappideen's Law of Employment 4th Edition page 227-228).

44 I consider it is clear from the findings I make below in relation to this matter that the termination of the applicant's contract of employment was at the instigation of the employer, thus, a dismissal did take place.

45 Further, I have to determine whether the dismissal is unfair. The test for determining whether a dismissal is unfair or not is well settled. The question is whether the respondent acted harshly, unfairly or oppressively in dismissing the applicant. This is outlined by the Industrial Appeal Court in *Undercliff Nursing Home v. Federated Miscellaneous Workers Union of Australia Hospital, Service and Miscellaneous WA Branch (1985) 65 WAIG 385.* The onus is on the applicant to establish that the dismissal was, in all the circumstances, unfair. Whether the right of the employer to terminate the employment has been exercised so harshly or oppressively or unfairly against the applicant as to amount to an abuse of that right, needs to be determined. A dismissal for a valid reason within the meaning of the Act may still be unfair if, for example, it is effected in a manner which is unfair. However, terminating an employment contract in a manner which is procedurally irregular may not of

itself mean the dismissal is unfair (*see Shire of Esperance v Mouritz (1991) 71 WAIG 891* and *Byrne v Australian Airlines (1995) 65 IR 32)*. In *Shire of Esperance v Mourtiz (op cit)* Kennedy J observed that unfair procedures adopted by an employer when dismissing an employee are only one element that needs to be considered when determining whether the dismissal was harsh or unjust.

Credit

46 In relation to witness credit and after carefully observing the witnesses giving evidence, I am prepared to accept that events occurred substantially as detailed by the applicant.

47 The applicant gave evidence in a clear and considered manner, and in my view her evidence was given to the best of her recollection.

48 I do not have the same confidence in Mr Marshall's evidence. He was relying on semantics when he gave evidence regarding whether the applicant worked for him on 18 or 19 December 2001. On the one hand he stated she was not employed by him on those dates as she was on probation, yet he paid the applicant wages for working those two days. Further, his evidence relating to the Christmas roster incident was unconvincing. In my view the Christmas Day roster would have been in place prior to 18 or 19 December 2001, the days when Mr Marshall claims the applicant inappropriately raised this issue with other employees and with him. My view that a Christmas Day roster was in place prior to 18 December 2001 is reinforced by the fact that the applicant and Ms Tavinor knew which days they were working in advance for that week. Thus, it is highly likely that the Christmas Day roster was drawn up prior to 18 December 2001. On this basis, I do not accept Mr Marshall's evidence that the incident in relation to this matter occurred when he says it did.

49 Given this major inconsistency in the evidence of Mr Marshall, and given the lack of directness in relation to some of his evidence, where the evidence differs between the applicant and Mr Marshall, I prefer the evidence of the applicant. In relation to the evidence of the other witnesses, in my view, they gave their evidence honestly and to the best of their recollection.

Findings

50 Given my comments on witness credit I make the following findings.

51 I find that the applicant was employed by the respondent on 18 and 19 December 2001 and worked two shifts on those days at the respondent's Subiaco Fresh Express store.

52 I find that on the 19 December 2001 discussion occurred between the applicant and Mr Marshall in relation to the rate of pay that the applicant was to receive pursuant to her contract of employment. There was common ground that there was a mistake in relation to the applicant's rate of pay in the contract of employment that Mr Marshall initially drew up for the applicant and he agreed on 19 December 2001 to rectify that mistake and give the applicant a new contract on 20 December 2001.

53 I find that the applicant was keen to ensure that the correct rate of pay was on her contract of employment prior to her signing it the following day. This was particularly so given that she had recently entered into a commitment to purchase a house and land package. On this basis, I find the applicant contacted Mr Marshall on the evening of 19 December 2001 and requested that a copy of her contract of employment be faxed to her prior to meeting with Mr Marshall the following day. In my view, this was not an unreasonable request.

54 I find that Mr Marshall was annoyed by this out of hours contact and refused to fax a copy of the contract through to the applicant prior to meeting with her the next day.

55 I find that given this response from Mr Marshall the applicant became concerned about her relationship with Mr Marshall. She rang her supervisor and Ms Tavinor agreed to come into work the following day to attend a meeting between the applicant and Mr Marshall in order to assist discussions in relation to the applicant's new contract of employment.

56 I find that on 20 December 2001 a meeting took place between Mr Marshall and Ms Tavinor and at that meeting Mr Marshall expressed concerns to Ms Tavinor about his ability to work with the applicant, and I find that at that point he had made up his mind to terminate the contract of employment between the respondent and the applicant. Subsequent to meeting with Ms Tavinor, both Mr Marshall and Ms Tavinor met with the applicant and the applicant was informed by Mr Marshall that the employment relationship was not going to work between himself and the applicant. I find that Mr Marshall told the applicant that there were personality differences between the two of them and he then terminated the applicant's contract of employment because of that reason. I find that the applicant was terminated at the initiative of the respondent.

57 Mr Marshall then wrote declined and terminated on the revised contract of employment (Exhibit A3). In my view, the word 'declined' signified that the contract of employment between the applicant and respondent was not going to be pursued, and 'terminated' meant that Mr Marshall had terminated the applicant's employment.

58 I find the applicant was shocked and surprised at being terminated and was distressed during and after the meeting.

59 I find at no stage was the issue of the applicant's performance and behaviour brought to her attention to rectify, no warnings were given to the applicant, nor was the applicant given any opportunity to canvass alternatives to termination.

60 I find that the applicant was given the opportunity to finish her roster for that day but declined to do so because she was upset at being terminated. She requested two day's pay from Mr Marshall for the work she had undertaken that week and was paid that amount at the appropriate rate of pay.

61 I find that there was an incident in relation to a Christmas Day roster which Mr Marshall relied on as evidence in relation to the personality differences between him and the applicant and of the applicant's inappropriate behaviour. He also claimed that as a result of this incident the applicant breached the confidentiality clause of her contract of employment. I find that even though Mr Marshall may well have had issues about how this incident transpired, it was not unreasonable for the applicant to question whether or not the respondent would be open on Christmas Day and who would be working on that day. Having said this, however, I do not find this issue relevant because in my view as the incident occurred prior to the contract of employment commencing between the applicant and the respondent, and as the respondent would have been aware of this issue prior to the applicant commencing employment it could not now be relied on by the respondent as a reason to effect termination.

62 I find that efforts were made by Mr Marshall on 20 December 2001 to assist the applicant to obtain re-employment with her previous employer Australian Fast Foods Pty Ltd. As a result of these efforts both Mr Kaye and Mr Vagg from Australian Fast Foods Pty Ltd organised for the applicant to be re-employed with her previous employer.

63 I accept the evidence of Mr Vagg that it was inappropriate for the applicant to recommence with Australian Fast Foods Pty Ltd immediately, given that she was to be put into a Chicken Treat store as opposed to a Fresh Express store and that she required re-training. Thus, it was agreed between the applicant and Mr Vagg that it was appropriate that she not recommence work with Australian Fast Foods Pty Ltd until 8 January 2002. I find that this agreement was reasonable in the circumstances, particularly given that the period between termination and recommencement encompassed the Christmas and New Year break. I also find that the applicant has been employed successfully with Australian Fast Foods Pty Ltd since that date.

64 I find that there was no adequate reason for the respondent to terminate the applicant's contract of employment and given the summary nature of the termination, that the applicant was denied procedural fairness. Thus, I find that the applicant was unfairly terminated by the respondent as she was not afforded 'a fair go all round'.

65 The applicant does not seek reinstatement, nor do I believe on the evidence in relation to this matter, that reinstatement is appropriate.

Compensation

66 As I am satisfied on the evidence that the working relationship between the applicant and respondent has broken down such that an order for re-instatement would be impracticable, I therefore now turn to the question of compensation. I apply the principles set out in *Bogunovich v Bayside Western Australia Pty Ltd* (1998) 78 WAIG 3635 and *Tranchita v Wavemaster International Pty Ltd* (1999) 79 WAIG 1886.

67 I find that the applicant has satisfied the onus on her to mitigate her losses as a result of the termination.

68 The applicant gave evidence that if she had remained employed with the respondent she would have worked for 14 days in between the period 20 December 2001 and 8 January 2002. I accept that evidence and as the applicant's rate of pay was $106 per day, I calculate her loss to be $1484. I also accept that pursuant to her contract of employment the applicant is due $118 in superannuation entitlements for this period. On this basis, the applicant is owed $1617 as compensation for the unfair termination.

69 I find that pursuant to the applicant's contract of employment (Exhibit A3) she was entitled to 1 week's pay in lieu of notice on termination, which was not paid. However, as any payment for notice must be offset against the total compensation awarded to the applicant, no further payment is due to the applicant.

70 An Order for compensation will now issue.

2002 WAIRC 06707

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	NICOLE ALBA VANDERBURG, APPLICANT
	v.
	HATTEN MARKETING PTY LTD, RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE OF ORDER	FRIDAY, 4 OCTOBER 2002
FILE NO.	APPLICATION 2345 OF 2001
CITATION NO.	2002 WAIRC 06707

Result	Application alleging unfair dismissal upheld and order issued for compensation in lieu of reinstatement

Order

HAVING HEARD Mr C Baker (of counsel) on behalf of the applicant and Mr A Marshall 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 dismissal of Nicole Alba Vanderburg by the respondent was unfair and that reinstatement is impracticable;

3 ORDERS the respondent to pay Nicole Alba Vanderburg compensation in the sum of $1617.00 gross within 14 days of the date of this order.

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

2002 WAIRC 05412

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	LES JOHN VIDOVICH, APPLICANT
	v.
	THE SHIRE OF BROOME, RESPONDENT
CORAM	SENIOR COMMISSIONER A R BEECH
DELIVERED	MONDAY, 29 APRIL 2002
FILE NO.	APPLICATION 1164 OF 2001
CITATION NO.	2002 WAIRC 05412

Result	Application alleging denied contractual entitlements granted in part.
Representation	
Applicant	Mr S. Bibby
Respondent	Mr S. White

Reasons for Decision

1 The applicant in this matter, Mr Vidovich, was employed by the Shire of Broome in the position of engineering surveyor. He commenced employment on 9 January 1996. The letter of offer accepted by him which was dated 9 January 1996 included the following—

"Housing rental subsidy to apply as per Council policy, currently $100 per week (nett)."

2 During the course of his employment the $100 per week has not been increased. His claim in this Commission is brought under s.29(1)(b)(ii) of the *Industrial Relations Act 1979* which provides that a claim may be made by an employee 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. His claim is that the allowance has never been increased despite rental prices increasing in the Broome area. He has made enquiries with the Real Estate Institute of WA (REIWA) in Perth and local real estate agents and has determined the increases for each year. He seeks an Order from the Commission which requires the Shire of Broome to pay him the difference between the Perth and Broome average rentals as calculated by him from April 1996 to April 2002.

3 The Shire of Broome agrees that the extract from the letter of appointment quoted above is a benefit under Mr Vidovich's contract of service. However, the Council policy to which it refers was established in August 1995. The subsidy of $100 was reached after assessing Perth rentals based on typical dormitory Perth suburbs and not REIWA figures. These figures were taken from The West Australian newspaper. A Broome rental was then compared with the result and $100 was the difference between the two. Council policies are reviewed on an annual basis however the $100 was not seen as requiring amendment due to the lack of "significant" fluctuations in the calculated subsidy. The Council stresses that the policy requires the rental subsidy to be reviewed for "significant" fluctuations in market rentals and although the policy does not define what is "significant", the Council states that figures provided in March of 2001 indicated a difference of only $14.17 per week between the Broome and Perth rental markets from January 1996 to January 2000.

4 It was agreed that the Commission would determine Mr Vidovich's claim on the basis of written statements from the parties, together with any cross-examination taken by video-link from Broome, and upon final oral submissions made by the parties' respective advocates in Perth. This has been done.

Conclusion

5 It is not in dispute that Mr Vidovich is entitled to bring this claim. He is an employee for the purposes of the Act, he is entitled to a benefit under his contract of employment and that benefit is not a benefit under an award or an order. The only issue is whether the Shire of Broome has denied him that benefit to which he is entitled.

6 It is firstly necessary for the Commission to identify the benefit to which Mr Vidovich is entitled. As is agreed between the parties, Mr Vidovich is entitled to a housing rental subsidy. It is, however, the housing rental subsidy applied as per the Council policy of August 1995 which, at the time Mr Vidovich was employed, was "currently" $100 per week (nett).

7 The Council policy relevantly provides—

> "(b) Rental subsidy is calculated as follows:
>
> Broome Average Rental – Perth Average Rental
>
> = Nett Rental Subsidy
>
> (Note: this is a nett subsidy and Council will be required to meet the additional tax cost to ensure the employee netts the subsidy figure).
>
> (c) …
>
> (d) The calculation of the rental subsidy is reviewed annually to reflect any significant fluctuations in market rentals."

8 I therefore find that the benefit to which Mr Vidovich is entitled is the rental subsidy calculated in accordance with the Council policy. The amount of that subsidy in 1996 was $100 per week. Mr Vidovich accepted that amount when he accepted the terms of the letter of offer. If he had thought in 1996 that the level was too low then he could have attempted to negotiate an increase prior to accepting the offer. There is no suggestion that he did so. He may, as his evidence suggests, have believed that the level was to be subject to a review. Nevertheless, he accepted the rental subsidy offered which was calculated in accordance with the Council policy. His acceptance meant that it was that rental subsidy which became an express term of his contract of service.

9 It was also part of that rental subsidy pursuant to the Council policy that it would be reviewed on an annual basis. If there was a "significant" fluctuation in market rentals, the amount would be adjusted. I am not satisfied that Council has done so annually. The evidence of Mr Strugnell is clear that the annual review was not undertaken at least before December 1998 (exhibit 2, paragraph 10). He was the Deputy Chief Executive Officer for the Shire of Broome between July 1994 and December 1998. I do not place great weight upon the submission made on behalf of the Shire of Broome that Mr Strugnell may not have known of any review if one had taken place. I do so because this suggestion was not put to him in cross-examination and in any event it appears unlikely given that he was involved in the original formulation of the policy.

10 I am therefore cautious of accepting Mr Powell's statement at paragraph 13 that subsidy payments have been included by staff as part of the annual budget process such that if significant fluctuations in market rentals had been detected it would have been brought to the attention of Council. Even if the note of a senior management meeting of 13 May 1997 referred to by Mr Powell shows that a review was undertaken then, that alone seems to lead only to the conclusion that it was not done after that time. That is, the review was not done annually. What the Shire of Broome was obliged by its own policy to do, and what there is no evidence before me of it having done, is to have annually reviewed the method that it used in 1995 which resulted in a $100 rental subsidy and assessed whether the result constituted a "significant" fluctuation.

11 I turn now to consider Mr Vidovich's claim that he has been denied a benefit under his contract of service. Mr Vidovich's evidence shows that he has made enquiries regarding rental figures from local real estate agents and also from REIWA. According to his research, the difference between the rental figures of Perth and Broome in 1996 was $151.83. He states that therefore on the formula in the housing policy he believes he should have been paid $151.83, and not $100, in 1996. His further research has resulted in him being "shocked" by the figures the WA Municipal Association relied on in its calculations because he did not feel that it was a comparison of "like with like". His claim is that the Commission should now order the Shire of Broome to pay him the difference for each year according to the figures he has researched.

12 However, it is simply not open to Mr Vidovich now to retrospectively calculate a higher figure and say that he is entitled to that higher figure as a benefit under his contract of service. Neither he nor the Commission in this application can retrospectively rewrite the terms of his contract of service. I do not need to question the accuracy of the figures he produces in his evidence. I do, however, need to query their relevance to this claim. If in 1995 the Shire of Broome compared average rentals in selected Perth suburbs with a typical Broome rental figure based upon figures taken from The West Australian newspaper (and that is the evidence of Mr Powell who is the present Chief Executive Officer at the Shire of Broome and has been so since 3 February 1993) and decided that $100 nett was the rental subsidy to be offered, then that is the rental subsidy calculated in accordance with the Council policy.

13 I accept Mr Powell's evidence regarding the method used to calculate the rental subsidy. It is consistent with the evidence of Mr Strugnell. According to Mr Strugnell's evidence (exhibit 2) he was involved in formulating the staff housing policy. Although the subsidy was set initially at $100 nett per week, Mr Strugnell cannot recall the exact suburbs used to determine the Perth average rental. It is his belief that approximately 6 suburbs were referred to of which Willetton and Kardinya may have been included.

14 Therefore, even if it could be successfully argued that the figures now produced by Mr Vidovich may produce a fairer subsidy (about which I pass no comment) those figures would only be relevant if the issue before the Commission was whether the term in his contract of service should be changed to a rental subsidy calculated in a different manner. That is not the issue here.

15 Rather, the benefit under his contract of service to which Mr Vidovich is entitled was an annual review of the rental subsidy in accordance with Council policy and an adjustment if the result showed a "significant" fluctuation. He has shown to my satisfaction that those reviews have not been done annually. He has therefore established that he has been denied a benefit to which he is entitled under his contract of service.

16 A number of issues now arise. The first is that, as the evidence of Mr Powell and Mr Strugnell shows, the Council does not now know the precise method by which the $100 figure was arrived at in 1995. Either the appropriate records have not been preserved or they do not contain the necessary detail.

17 It is proper to observe that situation, while unfortunate, does not relieve the Shire of Broome from its obligation. It has employed Mr Vidovich on at least the condition that it will do so annually. The fact that the appropriate records have not been preserved or they do not contain the necessary detail does not alter that condition. Neither is it a reason why Mr Vidovich should receive less than he agreed to in 1996. It makes the Shire of Broome's obligation more difficult, but not impossible, to meet. It might provide grounds for the Shire of Broome to have sought to re-negotiate the subsidy so that their contract could be varied by any agreement reached but this has not occurred.

18 This situation has prompted the submission to be made by Mr Bibby, who appeared for Mr Vidovich, relying in particular upon the decision of the Full Bench of this Commission in *Hotcopper Australia Pty Ltd v David Saab* [2001 WAIRC 03827]; (2001) 81 WAIG 2704, that the Commission should now decide what is a fair rental subsidy is deciding Mr Vidovich's claim. In that matter the Full Bench decided that a claim for a sum of money equal to the value of shares and options to which Mr Saab was entitled under his contract of service was within the Commission's jurisdiction. The manner of the calculation of that sum is a matter that is yet to be decided. In this matter, I have little difficulty accepting the argument that I can, as a matter of jurisdiction, require the Shire of Broome to pay to Mr Vidovich a sum of money equal to the amount of any significant fluctuation in the rental subsidy calculated in accordance with the Council policy for each of the years since 1996.

19 I do not, however, see that decision as authority for the proposition that I have the jurisdiction in these proceedings to decide what is a fair sum of money to be paid to Mr Vidovich as a rental subsidy outside the benefit to which he is entitled under his contract of service.

20 For example, Mr Powell has supplied as part of his affidavit a table calculated according to figures supplied from the Valuer General's office of rentals in a number of suburbs compared to an average rental in Broome. It shows a difference of $78 in 1995 (exhibit A, paragraph 29). He refers to this table to say that the figure of $100 in 1996 was therefore generous.

21 I have already rejected the REIWA figures relied upon by Mr Vidovich because the rental subsidy was not calculated using those figures. The essential difficulty with the table of figures in Mr Powell's affidavit is the other side of that same coin. The figures supplied by the Valuer General's Office are not the figures upon which the rental subsidy was calculated. It is no more open to the Shire of Broome to rewrite the formula used to calculate the rental subsidy than it is for Mr Vidovich to do so. It is not lost upon me that in each case the figures used are widely different in their result. For that reason alone the logic, if not the law, of the situation calls out for the Shire of Broome to review the $100 using the same method as was originally used, or to reconstruct that method as accurately as possible, for each of the relevant years. It will by definition be more consistent with the 1995 method than either of the sets of figures supplied by the parties and in saying this I imply no criticism.

22 This point brings me to another issue. The Shire of Broome submits that the rental subsidy no longer applies because Council repealed the policy in November 2000 (exhibit A, paragraph 15). The reason why it was repealed, according to Mr Powell's statement, is that firstly the Council has the legal right pursuant to the relevant legislation to do so and its own policies and procedures allow it to change any policy. Further as part of an enterprise bargaining agreement in March 2000 a "Broome allowance" of $6,500 was increased to $7,141.94. Furthermore, there were equity issues with locally recruited staff who were not in receipt of any rental assistance.

23 Mr Powell is quite correct, with respect to him, to observe that Council has the right to rescind any of its policies. What it does not have the power to do, however, is to unilaterally vary a term of the contract of service between it and Mr Vidovich. It is agreed that it is a term of Mr Vidovich's contract of service that he is entitled to the rental subsidy as per the policy which was established in 1995. Council cannot by the repeal of that policy change the contract of service between it and Mr Vidovich. It is not entitled to do what it has purported to do: freeze Mr Vidovich's rental subsidy. While the contract of service remains, its terms remain those which were agreed between the parties unless there is a variation to those terms by agreement of the parties. Mr Vidovich's evidence (and for that matter, Mr Powell's) shows that there has not been any agreement to vary the terms of his contract.

24 Furthermore, the "Broome allowance" will only replace the rental subsidy if the terms of the enterprise bargaining agreement state that it has that effect. In other words, an enterprise bargaining agreement has force and effect pursuant to the *Workplace Relations Act 1996* and it may, by virtue of that Act, override a term of a contract of service if the enterprise bargaining agreement states that it does so. However, the "Broome allowance", by its express terms, is a payment to reimburse employees for "previous location allowance, airfare allowance and electricity subsidy" (clause 8 (7) of the enterprise bargaining agreement). It does not mention the rental subsidy. Therefore, the "Broome allowance" cannot replace the rental subsidy. Even if, as Mr Powell submits, there is some overlap in the components of the "Broome allowance" and the purpose of the rental subsidy, that is not the point at issue. The point is that the terms of the enterprise bargaining agreement do not override the rental subsidy and it remains a term of the contract of service between Mr Vidovich and the Shire of Broome.

25 Neither is it a question of whether Mr Vidovich is financially disadvantaged in his current position compared either to 1996 or compared with other staff. The question is whether Mr Vidovich has a benefit under his contract of employment to which he is entitled and which has not been allowed him by his employer.

26 In summary I am quite persuaded that this claim can only be resolved as follows—

(1) The Shire of Broome is to endeavour to recalculate the housing subsidy pursuant to the 1995 policy for each year since 1996 using a method of calculation that approximates as closely as possible the method which resulted in the $100 figure of 1995. This is likely to mean using rental figures from The West Australian newspaper again as that is the method the Shire itself used originally.

(2) The Shire of Broome is then to assess whether there has been a "significant fluctuation" in market rentals. It is correct that the word "significant" is not defined in the Policy. The Concise Oxford Dictionary definition defines "significant" as being "noteworthy, of considerable amount or effect … not … negligible". That will therefore be the test. It is an objective, and not a subjective, test.

(3) The Shire of Broome is to communicate the result, and the method by which it has been reached, to Mr Vidovich and his union.

(4) Mr Vidovich will only have further recourse to this Commission in the event that he contends that the method of calculation used does not approximate as closely as possible the method of calculation used in 1995 or that the result does constitute a "significant fluctuation" in market rental if the Shire of Broome decides that it does not do so.

27 Accordingly, this application will now be adjourned. The Commission will, unless either party objects in writing within the next 7 days, require the Shire of Broome to implement the first three points immediately above within six weeks from the date of publication of these Reasons. This application will be re-listed for mention only at the conclusion of that time for the parties to report back to the Commission.

2002 WAIRC 06586

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	LES JOHN VIDOVICH, APPLICANT
	v.
	THE SHIRE OF BROOME, RESPONDENT
CORAM	SENIOR COMMISSIONER A R BEECH
DATE	WEDNESDAY, 25 SEPTEMBER 2002
FILE NO.	APPLICATION 1164 OF 2001
CITATION NO.	2002 WAIRC 06586

Result	Application alleging denied contractual entitlements granted in part.
Representation	
Applicant	Mr S. Bibby (by way of written submissions)
Respondent	Mr S. White (by way of written submissions)

Further

Reasons for Decision

1 Following the Reasons for Decision which issued on 29 April 2002 the Commission was advised that the parties were unable to reach an agreement based upon the Commission's decision. The parties have now supplied the Commission with their respective positions in writing. I have considered those submissions. I accept that the circumstances are such that neither the Shire of Broome nor Mr Vidovich have been able to accurately recalculate the housing rental subsidy in accordance with the original basis of its calculation.

2 I note the common ground between both parties that the Valuer General's office provides the only reliable statistical data for the Broome area. On that basis and subject to what follows it is appropriate to refer to that data for the Broome Average Rental in the 1995 Council policy.

3 In relation to the Perth Average Rental, the Shire of Broome rejects Mr Vidovich's calculation on the basis that it includes 3 bedroom properties and excludes 4 bedroom properties. I have examined Appendix A attached to the Shire of Broome's submissions, and the column for the Perth rental average.

4 I have also noted the tables commencing at page 1 of Attachment 1 of the submission from the ASU and in particular page 5 of that submission.

5 The differences between the parties, in relation to the figures to be used as well as whether Cable Beach is to be included, arise because the original calculations which lead to the $100 subsidy in 1996 are not now known. Further, and despite best endeavours, it cannot be recalculated particularly because of the absence of the Broome rental figures. While I readily accept the position that the Valuer General's figures provide the only reliable data, that data was not used in 1995 by the Council. Therefore, the use of the Valuer General's figures cannot re-construct the original calculations. Their use is necessarily a departure from the original basis of the 1995 calculations. In that circumstance I regard it as crucial that the figures now to be used not be seen to produce a markedly different result from the original figures. I note that for 1996 the figures proposed by the Shire of Broome result in $83.50 whereas the figures proposed by Mr Vidovich result in $100.

6 I readily appreciate the issue regarding 3 and 4 bedroom houses, and the inclusion and exclusion of figures for Cable Beach. Mr Vidovich submits that including figures for Cable Beach will provide a true average of the Broome rentals. His submission points out that in doing so the starting figure for the subsidy is $100 which is the subsidy which resulted from the application of the Council policy in 1996.

7 The respondent, however, states that the Cable Beach suburb is an exclusive beachside resort separate from Broome and it is incorrect to include those rental values in establishing a true average of the Broome rentals. The respondent states that it is equivalent to including Perth suburbs such as City Beach.

8 I appreciate that Cable Beach may be regarded as a more exclusive suburb as the Shire suggests. However, I have found it significant that the method proposed by Mr Vidovich results in an average for 1996 that is precisely the sum of $100 which is the subsidy prescribed in 1996. Had the 1996 average proposed by the Shire of Broome been significantly closer to the 1996 subsidy which was actually paid then I would have reached a different conclusion. However, I conclude that on the best available data produced by both parties, the calculation of the rental subsidy in accordance with the Council policy will be more accurate if the method proposed by Mr Vidovich is used.

9 I appreciate that this may be seen as "altering the rationale originally applied". However, given the alternate figure suggested results in a 1996 subsidy of significantly less than $100, I am not at all confident that those figures apply the "rationale originally applied".

10 It seems to me to be likely that using consistently from 1996 to date a formula which produces a 1996 figure of $100 will "approximate as closely as possible the method which resulted in the $100 figure" (extract from original Reasons for Decision at [26]). That is likely to resolve the present dispute between the parties on as similar a basis as may have resulted if the original calculations were known and could be re-calculated for each year.

11 Significantly, if either the Shire of Broome or Mr Vidovich consider that it alters the rationale originally applied then they have an obligation to endeavour to reach an agreement on the proper basis of the calculation of the rental subsidy for the future. My conclusions in this matter are not to be taken as attempting to prescribe a new housing subsidy. They merely resolve the dispute about the past application of the Council policy.

12 It therefore follows that I find the calculation presented by Mr Vidovich in his Attachment 4 more closely reflects the application of the Council policy than the calculation supplied by the Shire of Broome. The figures in Attachment 4 show a variation of $1.90 per week as at 1 July 1996. As at 1 July 1997 it shows a variation of $2.70 from the previous year or $4.60 from the $100 subsidy. For 1 July 1998 the figure is $111.80 which represents a $7.20 difference from the previous year and $11.80 increase from the $100 subsidy.

13 For 1 July 1999 the figure is $126.40, which represents a $14.60 per week increase and which also represents a $26.40 per week increase on the subsidy from 1996. The figure for 1 July 2000 is also $126.40. For 1 July 2001 the figure is $137.20 which represents a $10.80 increase on the previous year and a $37.20 increase per week from $100 subsidy. For the succeeding year of 1 July 2002 the figure is $147.20, representing $10 per week increase on the previous year and $47.20 on the original subsidy.

14 The final figure supplied from 1 July 2002 to 6 September 2002 is a part year figure and I do not include that in this decision because the Council policy provides that the subsidy is reviewed annually.

15 There next has to be a finding whether the above figures reflect a "significant fluctuation" in market rentals. This is necessary because the Council policy provides that the calculation of the rental subsidy is reviewed annually to reflect any significant fluctuations in market rentals. If there is not a significant fluctuation then the subsidy would not be changed.

16 In the Reasons for Decision, I indicated that the test of a "significant fluctuation" would be whether the fluctuation is "noteworthy, of considerable amount or effect … not … negligible". I note that it is not suggested on behalf of Mr Vidovich that the increases to July 1997 are "significant fluctuations". They represent an increase on the $100 subsidy of 4.6%. It is arguable that such an increase is not "noteworthy or of considerable effect". If variations to the WA Minimum Wage are used by comparison, the increases being 3.7% and 3.11% for 1997, 1998 and 1999 respectively (82 WAIG Part 1, Appendix III), some point of relative comparison is seen.

17 The increase to July 1998 of $111.80 is arguably a significant increase upon $100.00. It represents an 11.8% increase and that is "noteworthy or of considerable effect" when it is expressed as a percentage for wages purposes. I conclude that it is a "significant fluctuation" by that test.

18 The figure from 1 July 1999 is an increase of $26.40 per week on the $100 subsidy and I would regard that also as a "noteworthy" and not a negligible increase. It follows, in my view, that had the Council policy been correctly applied, an increase would have resulted to the rental subsidy from 1 July 1998 such that the subsidy would have increased to $111.80 and then to $126.40.

19 There was no change to the figure in 1 July 2000. By 1 July 2001 the figure had increased to $137.20. That is an increase of 7.9% and, relatively, is "noteworthy or of considerable amount or effect" and I would not be surprised if the proper application of the Council policy had resulted in an adjustment to the subsidy on 1 July 2001.

20 The figure for 1 July 2002 of $147.20 is 7.2% and similarly is noteworthy or a considerable amount from the amount of $137.20 and a proper application of the Council policy is likely to have resulted in a variation at that time. At present, therefore, the rental subsidy paid to Mr Vidovich would be $147.20 until the next yearly review.

21 It follows therefore that Mr Vidovich has been denied the increase in the housing subsidy from 1 July 1998 of $111.80 per week and the yearly increases from that time. The Commission's calculation of that sum is $7748.00. The Minute of an Order now issues declaring that Mr Vidovich is entitled to a benefit under his contract and ordering the Shire of Broome to forthwith pay that sum to Mr Vidovich by way of that benefit.

22 The parties are requested to advise the Commission within 5 working days whether or not a Speaking to the Minutes is required. If not, an Order will issue in the terms of the Minute.

2002 WAIRC 06698

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	LES JOHN VIDOVICH, APPLICANT
	v.
	THE SHIRE OF BROOME, RESPONDENT
CORAM	SENIOR COMMISSIONER A R BEECH
DATE	THURSDAY, 3 OCTOBER 2002
FILE NO.	APPLICATION 1164 OF 2001
CITATION NO.	2002 WAIRC 06698

Result	Application alleging denied contractual entitlements granted in part.
Representation	
Applicant	Mr S. Bibby (by way of written submissions)
Respondent	Mr S. White (by way of written submissions)

Order

HAVING HEARD Mr S. Bibby 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—

DECLARES—

(1) THAT Les John Vidovich is entitled to a housing rental subsidy in accordance with the Council policy of August 1995 as a benefit under his contract of service with The Shire of Broome.

(2) THAT Les John Vidovich has not been allowed that benefit by The Shire of Broome; and

ORDERS THAT by 18 October 2002 The Shire of Broome pay Les John Vidovich the sum of $7748.00 being the benefit to which he is entitled.

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

2002 WAIRC 06528

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	DARRYL PAUL WEBB, APPLICANT
	v.
	CLASSIC FB HOLDINGS PTY LTD, RESPONDENT
CORAM	COMMISSIONER S WOOD
DELIVERED	WEDNESDAY, 18 SEPTEMBER 2002
FILE NO.	APPLICATION 2054 OF 2001
CITATION NO.	2002 WAIRC 06528

Result	Applicant dismissed harshly and unfairly; compensation awarded Contractual benefits claim dismissed
Representation	
Applicant	Mr P Wojtysiak
Respondent	No appearance

Reasons for Decision

1 This is an application pursuant to section 29(1)(b)(i) and (ii) of the *Industrial Relations Act, 1979* ("the Act"). The applicant, Darryl Paul Webb, alleges he was summarily dismissed without reason or notice from his employment with the respondent, Classic FB Holdings Pty Ltd, on 18 October 2001. He says he had received no warnings or prior reprimands and was given no explanation for the termination of his employment.

2 In his application he claims—

1. Payment in lieu of notice
2. Payment of accrued annual leave entitlement at the date of termination
3. Payment of overtime worked during the period of employment
4. Payment of meal times worked
5. Compensation for unfair dismissal.

3 The applicant signed the application on 15 November 2001. The application is stamped as having been received in the Commission on 19 November 2001. On the face of it the application lay outside the 28 day limit for applications pursuant to s.29. The respondent separately raised this issue with the Commission in correspondence on 3 December 2001. The matter came on for conference on 6 December 2001, both parties were present and conciliation was unsuccessful. The matter was then called on for preliminary hearing regarding jurisdiction as to whether the application was lodged outside the 28 days. This issue was heard on 24 January 2002. Mr Wojtysiak appeared for the applicant by warrant. There was no appearance by the respondent. At that time the applicant sought to correct the application, by altering the termination date to read 18 October 2001 rather than 18 November 2001. This was amended, it clearly being a mistake. Mr Wojtysiak presented a facsimile of the application with transmission sheet to indicate that the application had been faxed to the Commission at 2.37 pm on 15 November 2001. The transmission sheet confirms that the facsimile was sent. The original application was then mailed to the Commission. These documents were marked [Exhibit A1 and A2]. The Commission, based on these documents and Mr Wojtysiak's submission found that the application was made within time and proceeded to list the matter to hear the merits of the application.

4 The application from then on has an unusual history. At the substantive hearing on 12 March 2002, there was no appearance from the respondent and the matter was adjourned briefly in the event that the respondent was running late. The hearing then commenced later that day in the absence of the respondent. The notice of hearing was sent to the respondent at the address on record. The notice had also been faxed to the respondent on 24 January 2002. The applicant was advised at commencement of hearing that his evidence would be heard that day and the respondent would be sent a copy of the transcript giving them 7 days in which to make any response in writing. Mr Wojtysiak for the applicant maintained that the applicant's employment was covered either by the Printing Award or the Transport Workers (General) Award. In light of that he sought only to pursue the payment of notice in lieu and payment of annual leave, which had been withheld, and payment of compensation for unfair dismissal.

5 Mr Webb's evidence is as follows. He approached Mr Yovich, the Managing Director of Classic Print, on 15 October 2001 for a loan of $20 for fuel. The next day he ran out of petrol on the freeway and rang Mr Yovich's mobile and left a message. He then left a message on the answering machine for Ms Sascha Dry, Manager at Classic FB, to the effect that he would not attend work. On 17 October 2001 Mr Webb attended work and no one spoke to him about the previous day. On 18 October 2001 he worked until approximately 11:30 am. At that time he found his wages on his desk. He approached Ms Dry and Mr Yovich in Ms Dry's office to ask for the money owed to his wife for work carried out by her on contract for the respondent. When he asked for the $198, Mr Yovich got angry and said "I don't work for you. You work for me. My creditors give me 14 days or 30 days". Mr Webb complained about this and Mr Yovich said, "I'll fix you up and then we are finished". Mr Webb walked out of the office and then thought about what Mr Yovich had meant. He walked back in the office and asked Mr Yovich. Mr Yovich then said, "You're sacked". Mr Webb replied, "Fine", walked downstairs and left the building.

6 Mr Webb says the only time he was questioned about his work performance was approximately 3 weeks after he started when Ms Dry indicated to him that he was too friendly to the staff. Mr Webb since his dismissal has registered with Centrelink and Job Network but has not received employment. He says, "I am finding it very hard with this unfair dismissal over my head, which hasn't been finished yet." Mr Webb says that Mr Yovich prior to his dismissal knew that Mr Webb was stressed due to financial concerns and an impending court case. He says the dismissal has adversely affected him and his family life. He says he is still a mess and the bank is ready to take his house. He says his car is also to be repossessed and he has lost 10 kilograms in weight.

7 His duties with Classic Print were as a delivery driver and included deliveries, guillotining, binding, assisting with the printer and enveloping. When Mr Webb first started working he was given a list of duties. Mr Webb says he was the despatch manager and one of four managers. The duties presented by Mr Webb [Exhibit DW1] were agreed and distributed to all managers after a meeting on 5 June 2001.

8 Mr Webb says that he signed a contract dated 8 April 2001 [Exhibit DW2] which shows a salary of $30,000 per annum, but that was a mistake and he was paid $34,000 per annum. Mr Webb says he worked 7 to 7 ½ hrs a day just doing deliveries. He started at 5:45 am every morning and worked to between 3:30 and 5:30 pm. In the first 3 months he was there he worked every weekend. His gross weekly pay was $662 and was always the same amount.

9 No evidence was presented in respect of annual leave. It would appear that Mr Webb was not paid any notice on termination.

10 In mitigation Mr Webb says he has applied for work since 18 October 2001. He applied for driving jobs. He has been trying to get his taxi licence but has not had the money to do so. He has applied for labouring jobs and looked in the paper every day. He says he was unsuccessful because "no one wants to know me because I've got an unfair dismissal case hanging over my head at the moment". He says "I feel in myself that, like, I am not ready… you know, it just been dragging on for so long and we've been stressing out, you know, just so long, I can't get my mind into gear - - you know, I go to bed just thinking about what's going to happen, you know. I just - - it's just really hard". He says he has applied for a position at Bicton News, Bibra Lake Fibreglass which is owned by his brother, and Courier Australia. He says there have been hundreds of applications.

11 After he was dismissed Mr Webb says he was told not to speak to the staff. He asked for his final pay and was given two cheques by Mr Yovich, one for himself and one for the monies owed to his wife. He received a separation certificate [Exhibit DW3] which says he was dismissed for "refusing to attend, together with various other incidences over 4 months." He does not know what that means. He says all the statements in the respondent's Notice of Answer and Counterproposal ("the Answer") are fabricated. In the Answer there is an allegation of unsafe and hazardous driving which Mr Webb denies and says that it was the other driver's fault. He reported this to Mr Yovich and Ms Dry who shrugged it off as a joke. There was also an allegation that he advised his employer that he was ill when in fact he had legal appointments. Mr Webb says he advised Mr Yovich of these appointments before he commenced work. He simply advised Mr Yovich that he was sick because he did not want to hassle him about the court case. There is a third allegation that he operated machinery whilst consuming alcohol. He says this is a complete fabrication and if there was any alcohol then Mr Yovich or Ms Dry supplied it. Mr Webb attended a restaurant with Mr Yovich, Mr Bresnan and Ms Dry and they drank wine. On his way home he was picked up and charged for drunk driving and fined $150. He says they then asked him to sign a waiver that he was not allowed to drink. There is an allegation of drinking alcohol and smoking marijuana which he says is a complete fabrication. He was having a can of beer and playing pool after work and was asked to do an urgent delivery and did it as a favour. He says the only marijuana he smoked was with Ms Dry and Mr Yovich at their house. There is an allegation that he informed staff that he was resigning. He agrees with this as he says he was poorly treated when he sought to gain a sales representative position. He says Mr Yovich and Ms Dry's attitude changed toward him after he told the sales representative from another company about a weekend his family and he had had with them. Arising from this incident their attitude had changed toward him. He was not allowed to take the company van home and got in trouble for being too friendly to the staff. He says, "it was just a whole big turnaround because they couldn't trust me and that was one of the things they said they counselled me over is because I mouthed off about their affair." He says Mr Yovich did not counsel him at all and did not lend him $1500. Mr Webb says he had no idea he was to be dismissed prior to his dismissal. Mr Webb says he was initially on probation for 3 months.

12 The Commission wrote to the respondent on 26 March 2002 enclosing a copy of the proceedings from 12 March 2002 requesting that should the respondent wish to make any submission in reply to do so by close of business 9 April 2002. On 9 April 2002 the Commission received a reply from the respondent, on 11 April 2002 the respondent forwarded further documentation to the Commission.

13 In light of this material and Mr Webb's evidence on 12 April 2002, the Commission wrote to both parties advising that the matter would be relisted for further hearing on 10 May 2002. The Commission further advised the respondent that failure to attend may result in the applicant's evidence being adopted by the Commission.

14 On the day of the hearing the Commission received correspondence from the applicant's agent in the following terms—

> "Dear sir,
>
> In reply to your correspondence dated 12 April 2002, I advise as follows:
>
> Mr Webb has questioned that the matter has been relisted for hearing of further evidence, given the fact that he attended the first hearing and the respondent had the opportunity to attend, but failed to do so, or even advise the Commission by facsimile or telephone that they would not be attending. At the hearing on 12 March 2002 the respondent had every opportunity to submit evidence and to call witnesses in support of that evidence and also to cross-examine and rebut evidence and testimonies submitted by the applicant and the applicant's witnesses.
>
> It was the respondent's choice whether or not to attend the hearing.
>
> Accordingly, Mr Webb inquires what is the further evidence that is to be heard, and by what authority is the respondent permitted to submit further evidence, given their unexplained and unexcused failure to appear on 12 March 2002.
>
> Mr Webb has recently commenced employment with a transport company and is unable to attend the hearing scheduled for today. Mr Webb can ill afford the loss of income or to jeopardise his newly found employment at this time.
>
> Given the questions raised above, and Mr Webb's inability to attend the hearing scheduled for today, I request that the matter be adjourned to a later time.
>
> To minimise the potential effect on Mr Webb's employment, I would suggest that the matter be adjourned for at least 2 weeks and, if possible, 1 month.
>
> If you require any further information or have any questions, please contact me."

15 There was no appearance on behalf of the applicant. Mr Yovich and Ms Dry were present at the hearing and did not object to the matter being adjourned to a later date. The Commission adjourned the matter and advised the respondent that the matter would come on for hearing on another day so that a fair hearing could be conducted with all parties being present. The parties were advised on 14 May 2002 that the matter would be listed for hearing on 13 June 2002.

16 The Commission again wrote to the parties on 21 May 2002 advising that should the applicant not attend the hearing the application may be dismissed, and should the respondent not attend the applicant's evidence to date may be adopted by the Commission.

17 Ms Dry advised the Commission by e-mail on 12 June 2002 that Mr Yovich would not be attending the hearing but that she would be present.

18 On the day of the hearing Mr Wojtysiak appeared on behalf of the applicant. The applicant was not present and there was no appearance by the respondent. The Commission adjourned the hearing to allow the respondent time to arrive. My Associate also contacted the respondent. However, both Ms Dry and Mr Yovich were uncontactable and a person at their office did not know their whereabouts. The matter was adjourned with the decision being reserved. The respondent has made no contact with the Commission following this hearing.

19 I have sought to have all parties present to give their evidence. Notwithstanding convening the hearing three times this has not occurred. I am now left with the evidence of Mr Webb, submissions from Mr Wojtysiak and correspondence submitted by the respondent to determine whether or not there has been an unfair dismissal and whether the alleged unpaid contractual benefits are due. Albeit the applicant presented no evidence in relation to the contractual benefits and submitted that his employment was covered by an award. I adopted this approach to effect a fair hearing particularly as I was in great doubt about the credibility of Mr Webb's evidence following the hearing on 12 March 2002, at which time I questioned Mr Webb. My strong impression was that his evidence was exaggerated, inconsistent and unlikely to be a proper account of what transpired. His explanation of the allegations made against him in the Answer were less than convincing, to say the least. However, mindful of my obligations under section 26 of the Act I chose to provide the respondent with a further opportunity for hearing as, in simple terms, I have little faith in Mr Webb's evidence.

20 The Answer lodged in the Commission by the respondent on 27 November 2001 states that Mr Webb was employed full-time on a salary of $34,424 per annum. He was employed for the period 5 April to 18 October 2001 as the Delivery and Warehouse Supervisor. The respondent says that Mr Webb was never confirmed in his employment at the end of his probationary period. The respondent says that Mr Webb was dismissed for gross misconduct for a number of incidences, which together with feedback from their customers, led them to the view that Mr Webb was an extremely untrustworthy employee with both management and fellow co-workers.

21 I do not recite all the complaints mentioned by the respondent but they relate to unsafe driving, consuming alcohol and marijuana whilst at work, unauthorised absences and abusive and rude behaviour toward his managers. It would appear from the answer that Mr Webb was dismissed on 18 October 2001 as a result of "Mr Webb's manner and abusive language towards Mr Yovich" after he demanded to be paid immediately for work performed by Mrs Webb. Attached to the Answer were what appears to be a record of an oral warning to Mr Webb on 10 September 2001 for consumption of alcohol and marijuana whilst driving a company vehicle. There are also what appears to be two statements from fellow employees concerning events leading to 18 October 2001. The respondent submitted other written material to the Commission on 4 April in response to the Commission's letter arising from the hearing of 12 March 2001. The material submitted is largely consistent with the Answer, albeit the correspondence seeks to refute evidence given by Mr Webb. The material also contains a separation certificate [which is the same as Exhibit DW3] which confirms that Mr Webb was dismissed for misconduct and states, that the reason for dismissal was "refusing to attend work, together with various other incidences over four months". I do not intend to have regard for that material in more depth as the respondent, on the second occasion, failed to attend to give evidence and their statements could not be tested. This was after being advised by the Commission that their non-attendance may lead to the applicant's evidence being accepted and after Ms Dry advised the Commission the day prior to the second hearing, by email, that Mr Yovich would not be in attendance but she would be.

22 This has been a protracted matter due to the non-appearance of the respondent or the applicant. The difficulty I have is the strong impression formed at hearing that I cannot rely on the applicant's evidence, and the lack of evidence from the respondent. Mr Webb in response to questioning from the Commission did not deny many of the episodes or complaints mentioned by the respondent in the Answer. He simply sought to make something different of them and in some instances to lay blame with Mr Yovich or Ms Dry. He drank alcohol and drove a vehicle, but they gave him the alcohol. He smoked marijuana, but it was with them. He had a complaint about his driving, but it was the other driver's fault and Mr Yovich and Ms Dry shrugged it off as a joke. He was absent from work, but Mr Yovich knew of the reason, even though he said he was ill but was not. He does deny having borrowed money regularly from Mr Yovich albeit he sought $20 from Mr Yovich for petrol just prior to his dismissal. He also says that he was experiencing some financial problems. He denies that he was in anyway aggressive or rude in the discussions which he had with Mr Yovich on 18 October 2001. That discussion on both accounts was about monies owed to Mrs Webb by the respondent. The discussion on both accounts drew an adverse response from Mr Yovich. Mr Webb would have it that Mr Yovich became hostile when asked about the money. He then dismissed Mr Webb. Mr Yovich in turn says that Mr Webb was abusive and his actions were intolerable. He says that this behaviour coupled with Mr Webb's behaviour over the previous four months led to his instant dismissal for misconduct. It would seem also that Mr Webb's absence from work just prior to dismissal were also factored into his dismissal.

23 It would appear from Mr Webb's evidence and the Answer that an aspect of personal friendship had existed between Mr Webb and Mr Yovich. Mr Webb and his family were invited on a weekend away with Mr Yovich and Ms Dry. He says that their attitude changed towards him from very early on in the employment relationship. He says that in his first week of employment he was hauled over the coals for talking about, he says, an affair between Mr Yovich and Ms Dry. This occurred after they took Mr Webb and his family away for a weekend. Then in the third week of employment Mr Webb says that he was cautioned by Ms Dry for being too friendly with staff. Later in the employment relationship Mr Webb dined with Ms Dry and Mr Yovich and attended a social occasion at their house. This evidence appears inconsistent, but more importantly if Mr Yovich and Ms Dry were so against Mr Webb then why did they not terminate his employment whilst he was on probation. Mr Webb maintains that it was because he was good at his job.

24 On both accounts, Mr Webb's employment was terminated on 18 October 2001 without notice and without a reason being given. The complaint from the respondent is that Mr Webb was not a very good employee. There is a suggestion that Mr Webb's employment was in jeopardy in the apparent warning given on 10 September 2001. This refers to counselling over alcohol and marijuana consumption by Mr Webb whilst in control of a company vehicle. It also refers cryptically to gross misconduct and instant dismissal. The respondent does not however submit that Mr Webb knew his employment was in jeopardy.

25 I have weighed carefully the evidence of Mr Webb, which was tested only by the Commission, the Answer lodged initially by the respondent, and the material supplied by the respondent by letters dated 9 and 11 April 2002. I have taken account of the later material only to the extent of its consistency with the Answer and the separation certificate which was already exhibited. On this basis, and given my strong doubts about the credibility of Mr Webb's evidence, I would make the following findings—

1. Mr Yovich summarily dismissed Mr Webb on 18 October 2001. The dismissal on both accounts arose from their discussion and was instant. Mr Webb left his employment that day and was not paid notice, on his account and there is no evidence to the contrary.

2. The dismissal generated from a demand Mr Webb made for payment for work performed by his wife, as a contractor, for the respondent. I use the word "demand" as on both accounts Mr Yovich objected to the request. He had paid Mr Webb his normal wages and later that day paid Mr Webb the payment for Mrs Webb. I consider that it can be inferred that Mr Webb's request was made in an insistent manner or tone. His request certainly caused a less than favourable reaction by Mr Yovich. Mr Webb also gave evidence of continuing financial difficulty whilst employed by the respondent.

3. There was no reason provided for the dismissal at the time of dismissal and Mr Webb was not expecting such treatment at that time. The dismissal was more in the nature of Mr Yovich being fed up with the behaviour of Mr Webb.
4. Mr Webb was absent from work on 16 October 2001 without good reason. Mr Webb says simply that he ran out of fuel and hence did not attend work. He says that his employer did not speak to him about his absence the next day. I do not consider his absence due to lack of fuel to be reasonable, particularly given his evidence that he sought $20.00 from Mr Yovich the day before for fuel. Put differently he knew the day before that he needed fuel and one can infer that he did not attend to this need and then simply did not attend work because of it. It was Mr Webb's responsibility to present himself for work as normal.
5. Mr Webb was not on probation at the time of dismissal. The contract [Exhibit DW2] refers to a three month probation period. Mr Webb says he was not on probation and there is no tested evidence to the contrary. There is certainly no documentation extending the probationary period and Mr Webb, at the time of dismissal, had worked for the respondent for approximately six months.
6. Mr Webb was counselled and warned on 10 September 2001 concerning consumption of alcohol and marijuana whilst in control of a company vehicle. This is evidenced in the warning note attached to the Answer and I do not accept in anyway Mr Webb's explanation of this. This warning it would seem was treated seriously by the respondent given the notation on the warning of "gross misconduct and instant dismissal". One would expect that such actions by an employee need to be treated seriously when his prime duty involved delivering goods.
7. Mr Yovich and Ms Dry at times had other difficulties with Mr Webb's work performance in respect of unsafe driving, absence from work and consumption of alcohol. These difficulties were apparent in the Answer and in Mr Webb's responses to questioning by the Commission. Mr Webb does not say the incidences did not happen, he provided instead reasons to diminish their importance or divert responsibility from himself. I am not at all convinced by his answers and I consider it more probable that these were real concerns held by the employer and made plain to Mr Webb.
8. I do not make a finding as to whether Mr Webb or Mr Yovich was rude or aggressive in their discussions on 18 October 2001. I am confident that Mr Webb has embellished events to his seeming advantage. I do not however have any tested evidence upon which to decide or infer that either party acted in a rude or aggressive manner.

26 Given Mr Webb was summarily dismissed on 18 October 2001 the issue is whether his conduct was sufficient to warrant such treatment. The principles guiding such an assessment are clear and have been expressed frequently in decisions of the Commission. In *Clifton Nominees Pty Ltd v Australian Liquor, Hospitality & Miscellaneous Workers Union, Western Australian Branch* 81 WAIG 3038, the President states:

> "We would also observe that this was an act of misconduct, as Ms Bowen admitted in evidence. She made dirty but did not damage a customer's truck and made dirty a small portion of it at that. That act was an isolated one and arose out of frustration. It was not a calculated act intended to harm her employer or the customer. It was admitted and reparation and apology offered, at least when under threat. The nature of the act and the circumstances surrounding it were not such as to warrant a finding that Ms Bowen committed a breach of such gravity or importance as to indicate a rejection or repudiation of the contract warranting summary dismissal (see *North v Television Corporation Ltd* 11 ALR 599 at 609 per Smithers and Evatt JJ, and see also the well known statement in *Blyth Chemicals Ltd v Bushnell* (1933) 49 CLR 66 at 81-82 per Dixon and McTiernan JJ. These tests have been applied by the Full Bench in a large number of cases, including *Sargant v Lowndes Lambert Australia Pty Ltd* 81 WAIG 1149 (FB) and *BGC (Australia) Pty Ltd v Phippard* (unreported) (2001 WAIRC 03987) Delivered 22 October 2001 (FB))." (underlining added)

27 The actions leading to Mr Webb's dismissal were his absence from work without good reason on 16 October 2001 and his demand for payment for his wife's work on 18 October 2001. The first issue was not raised with him by the respondent prior to his dismissal. The second issue was part of the discussion which led to Mr Webb's sudden termination. There is no evidence that Mr Webb acted toward Mr Yovich and Ms Dry in a manner that could be said to be a repudiation of his contract. It can be inferred that the discussion was hostile and Mr Webb as I have found was insistent, but nothing greater than this can be said to have occurred on the evidence. Therefore, Mr Webb's dismissal on that day must be seen as harsh and unfair, and I so find.

28 The decision in *Undercliffe Nursing Home –v- Federated Miscellaneous Workers' Union of Australia, Hospital, Service and Miscellaneous*, *WA Branch* 65 WAIG 385 requires the Commission to consider whether a fair go all round was afforded. Brinsden J at page 386 states—

> "The jurisdiction has been variously stated: in *re* Loty and Holloway v. Australian Workers' Union (1971) A.R. 95 at 99 Sheldon J. said that even though in the dismissal be it summary or on notice, the employer has not exceeded his common law and/or award rights, the Court was entitled to enquire as to whether the employee had received "less than a fair deal". He also approved what had been said in an earlier case whether there had been "a fair go all round"."

And further he states—

> "As His Honour points out the question to be investigated is not a question as to the respective legal rights of the employer and the employee but a question whether the legal right of the employer has been exercised so harshly or oppressively against the employee as to amount to an abuse of that right."

29 Mr Webb had been employed for approximately six months and seemingly at one stage had a friendship with Mr Yovich. On Mr Webb's evidence he got offside with Mr Yovich and Ms Dry from the first week of his employment. I doubt the veracity of this evidence, particularly as events during his employment include some socialising with Mr Yovich and Ms Dry. Mr Webb was on probation at this time and was kept on past his end of probationary period. He committed, in my view a serious breach in September 2001 for which he was warned but not terminated. If he was offside with the employer from the start then why did he remain in employment. He says that it was because he was a good worker. However, his own evidence to a degree speaks against this in that he admits absence without authority, consumption of alcohol (but it was someone else's fault), and I would say careless driving, even though Mr Webb denied this and again said it was someone else's fault. Put simply I am not convinced that Mr Webb was a good employee who would have remained in employment. The respondent complains in the separation certificate of incidences over the last four months as part of the reason for dismissal. I am confident that Mr Webb, on a number of occasions during his employment, acted so as to raise the legitimate concern of his employer and was counselled. He was formally warned at least in respect of alcohol and marijuana consumption. I am confident that Mr Webb would not have lasted much longer in his employment. Though Mr Webb was not counselled regarding his absence on 16 October 2001, that too would have been a legitimate concern of his employer.

30 I consider that it was open to the employer to give Mr Webb a second formal warning on 18 October 2001 and that Mr Webb by his attitude and actions evinced a disrespect for his employer and the concerns of his employer. For these reasons I do not

consider that Mr Webb would have remained in employment beyond a further month. In *Ramsay Bogunovich –v- Bayside Western Australia Pty Ltd* 79 WAIG 8 Kenner C at page 13 states:

> "As to loss and injury, it is not the case that an applicant who has been found by the Commission to have been unfairly dismissed, and who is to be awarded compensation, is automatically entitled to an award of compensation for loss representing the loss of wages or salary from the date of dismissal to the date of the hearing. That may be the ultimate outcome after findings are made and an assessment by the Commission, as to the quantum of compensation having regard to s 26 of the Act and factors such as the employee's duty to mitigate his or her loss. All the circumstances of the case need to be considered. For example, it well may be that despite the Commission's finding that the dismissal was harsh, oppressive and unfair, it was characterised as such by reason of the manner or process leading to the dismissal rather than the substantive reasons for the dismissal itself, in the sense in which that principle is referred to in Shire of Esperance v Mouritz (1991) 71 WAIG 891. In such a case, it may be open to find as a fact on the evidence, that the unfairly dismissed employee could have been fairly dismissed by the employer shortly after the actual dismissal in any event. In a case such as this, it would be open for the Commission to find that the unfairly dismissed employee's loss is limited to that period between the date of the employee's actual dismissal, and when he or she could have been fairly dismissed in any event."

These comments are appropriate to the circumstances of this matter.

31 If I am wrong on this then Mr Webb is entitled to either reinstatement or the determination of his loss. Mr Webb has not sought reinstatement and I am sure that reinstatement is impracticable. The employment relationship has broken down irretrievably and the time elapsed since dismissal is too great. In terms of Mr Webb's loss, Mr Webb's evidence is that his gross weekly pay was $662.00. At the time of the hearing on 12 March 2002 he had not been employed. The letter from his agent of 10 May 2002 says that Mr Webb 'recently commenced employment with a transport company'. I do not have the date of commencement of this job or the remuneration package. I will assume that his period without income continued to the end of April 2002. This means that Mr Webb was without income for greater than six months, which is the statutory limit for compensation.

32 If I am wrong that Mr Webb would later have been fairly dismissed from his employment, then I also have to consider whether Mr Webb has sought to mitigate his loss. The onus is on the respondent to prove this and they have not done so. However, in response to my questioning Mr Webb's own evidence leads me to conclude that he has not sought to adequately mitigate his loss. There was no documentary evidence at the various hearings of Mr Webb's attempts at mitigation, I have only his limited evidence, which I doubt greatly, that he had applied for hundreds of jobs. He says—

> "There's been hundreds. I honestly can't remember their business names at the moment. I can't remember. Oh, Courier Australia was one. I actually went in there in person.
>
> What did you apply for a job as?---As courier driver, but they paid monthly and because Mr Yovich didn't give me my holiday pay, I couldn't take that job because I couldn't put fuel in the car for a month without any pay."

Of particular concern is Mr Webb's evidence that:

> "no one wants to know me because I've got an unfair dismissal case hanging over my head at the moment"……."I feel in myself that, like, I am not ready… you know, it just been dragging on for so long and we've been stressing out, you know, just so long, I can't get my mind into gear - - you know, I go to bed just thinking about what's going to happen, you know. I just - - it's just really hard"

He claims to be a mess but my impression of him at hearing does not marry with this statement. I do not believe Mr Webb has been serious in his endeavours to find employment, and I find that Mr Webb has not mitigated his loss.

33 In summary, I would find that Mr Webb was harshly and unfairly dismissed by his employer on 18 October 2001. I find that he would not have remained in employment beyond a month and I would award him the sum of $662.00 by 4 weeks. This is a total of $2,648.00 gross less any taxation payable to the Commissioner of Taxation. Mr Webb's contractual benefits claim for annual leave has not been proven and must be dismissed. The claim for notice is subsumed by my finding as to his continued employment.

2002 WAIRC 06629

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	DARRYL PAUL WEBB, APPLICANT
	v.
	CLASSIC FB HOLDINGS PTY LTD, RESPONDENT
CORAM	COMMISSIONER S WOOD
DATE OF ORDER	THURSDAY, 26 SEPTEMBER 2002
FILE NO.	APPLICATION 2054 OF 2001
CITATION NO.	2002 WAIRC 06629

Result	Applicant dismissed harshly and unfairly; compensation awarded Contractual benefits claim dismissed
Representation	
Applicant	Mr P Wojtysiak
Respondent	No appearance

Order

HAVING heard Mr P Wojtysiak 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-

(1) DECLARES that the applicant, Darryl Paul Webb, was harshly and unfairly dismissed by the respondent on the 18th day of October 2001;

(2) DECLARES that reinstatement is impracticable;

(3) ORDERS that the respondent do hereby pay, as and by way of compensation, the amount of $2,648.00 to Darryl Paul Webb, less any taxation that may be payable to the Commissioner of Taxation.

(4) ORDERS that the claim for denied contractual benefits be dismissed.

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

2002 WAIRC 06548

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ANDREW JAMES WISBEY, APPLICANT *v.* CARON GROUP OF COMPANIES TRADING AS SECURALL PROTECTION PLUS, RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	FRIDAY, 20 SEPTEMBER 2002
FILE NO/S.	APPLICATION 117 OF 2002
CITATION NO.	2002 WAIRC 06548

Result	Application dismissed
Representation	
Applicant	Mr A Wisbey on his own behalf
Respondent	No appearance on behalf of the respondent

Reasons for Decision

1 The applicant brings these proceedings pursuant to s 29(1)(b)(ii) of the Industrial Relations Act 1979 ("the Act") claiming he has been denied certain contractual entitlements on termination of his employment. Those alleged entitlements include one week's salary in the sum of $600; holiday pay in the sum of $900; $180 for telesales commissions; and the sum of $3000 in relation to commission on gross company turnover.

2 The respondent declined to appear in the proceedings allegedly on the basis that it was not the employer of the applicant, rather the applicant was a contractor to "Troubleshooters Available", a labour hire agency. The Commission proceeded to hear the matter in the absence of the respondent, it being satisfied that the respondent had been duly notified of the proceedings by notice of hearing.

3 The applicant represented himself. He testified that in early August 2001 he attended an interview with representatives of what he understood to be a group of companies, for a position with a company trading as Securall Protection Plus, which provided residential security systems. The position the applicant applied for was marketing manager in Western Australia. As a result of two interviews, the applicant was offered and accepted a position. He testified that he was to be paid, as a full time employee, a salary of $30,000 per annum and in addition, superannuation, holiday pay and sick leave. In addition, as a manager, the applicant testified he was also to receive a payment in respect of 1% of the businesses gross turnover to be paid monthly. The applicant's evidence was this was a payment made to all managers at his level.

4 There were no written terms of engagement according to the applicant. He commenced employment under an oral contract of employment. On 18 August 2001 he commenced work and received a business card, tendered as exhibit A1, describing him as marketing manager. A duty statement was tendered as exhibit A13, outlining his duties. The applicant testified that initially he was paid by cash cheque by the "Caron Group of Companies ". However, I note that also tendered by the applicant as exhibit A2, were two PAYG payment summary forms, identifying Strata Security Pty Ltd & West ? Security as the payers. These documents covered the period 2 to 7 September and 2 September to 5 October 2001 respectively.

5 The applicant testified that he always understood himself to be a full time employee.

6 After about two and a half months of employment, the applicant said he had a meeting with other managers, and suggested an alternative way to structure the staffing arrangements in the business. He suggested that casual staff be engaged through a labour hire agency, Troubleshooters Available. It was proposed that this arrangement be effected in October 2001. The applicant gave evidence that he also changed the basis of his arrangements and entered into a contract with Troubleshooters Available dated and signed 18 October 2001, a copy of which was tendered as A7. A copy of the Troubleshooters Available standard hiring agreement, but not the particular agreement with the respondent, was tendered as exhibit A11. Also tendered as a bundle as exhibit A6, were remittance advises from Apocalypse Holdings Pty Ltd trading as Troubleshooters Available. These remittance advices commence for the period ending 9 October 2001 through to and including 11 December 2001. These remittance advices refer to the applicant's base salary rate of $600 per week. It was the applicant's evidence that the change of arrangements to Troubleshooters Available was for the purposes of administrative convenience only. The applicant said the only difference after moving to Troubleshooters Available, was who paid him.

7 The applicant said that during the whole time whilst at the respondent, he received no commissions as he considered he was due, except for a small payment of $80 or there abouts, from his own telemarketing efforts, which appeared in one of the remittance advices for the period ending 23 October 2001.

8 As to gross commission, the applicant testified that he requested financials from the respondent, but these were declined. The applicant tendered no other evidence as to the respondent's gross turnover, apart from estimating in his view, gross turnover of approximately $300,000 from his general impression as to sales activity. This is despite the applicant's ability under the Industrial Relations Commission Regulation's 1985, to seek the production of relevant documents.

9 However, the applicant tendered his diary for 2001 as exhibit A8. He testified that telesales staff under his supervision, had their monthly sales figures recorded on a white board in the sales managers office. The applicant had a diary entry for 17 September 2001 recording some 51 effective sales calls by five sales representatives over a period that is not indicated in the diary entry. Reference was made to another diary entry on 16 October alleging some 160 leads lead to sales. In my view, the diary note is not consistent with the applicant's evidence on this point. It refers to a target of appointments, not sales.

10 There was no other evidence lead from the applicant as to sales, apart from a document tendered as exhibit A12, for the week ending 1 December 2001. This hand written document, prepared by and author unknown, seemed to suggest some 13 sales for that period, by sales consultants.

11 Subsequently, in December 2001, the respondent's general manager told the applicant that he was "pulling the pin" and also advised the applicant that employees were not going to be paid, under the direction of a Mr Stevens, the managing director. In light of this, and the fact that he was not paid for the last week of his engagement, the applicant decided that he no longer wished to be associated with the respondent's business.

Consideration

12 It is for the applicant to establish on balance, that he was at all material times an employee of the respondent; what the terms of the contract of employment were; and whether any benefits to which the applicant was entitled under that contract, have been denied by the applicant. *? v. AFTPI* (1999) 79 WAIG 1867; *Hot Copper Australia Ltd v. Saab* (2001) 81 WAIG 2704.

13 At the outset, in my opinion, on and from the entry into the arrangement with Troubleshooters Available, on his own instigation, the applicant can have no valid claim against his previous employer, whoever that may have been. The terms of exhibit A7 are clear and conclusive. Whatever the relationship between the applicant and Troubleshooters Available after October 2001, I am satisfied there was no longer any employment relationship between the applicant and the respondent: *The BWIU & Ors v. Odco Pty Ltd* 1991 AILR 129. This is all the more so, given that the arrangement was put in place by the applicant himself.

14 In respect of the period from the commencement of the applicant's employment up until October 2001, I am not persuaded, despite substantial reservations as to the applicant's treatment by the respondent, to make any conclusive findings as to entitlements of the applicant. Firstly, in relation to holiday pay allegedly owed, there was no evidence before the Commission as to the entitlement, if any, by the applicant to pro rata annual leave. There is no automatic entitlement to such payment at common law. It must be an agreed term of contract or otherwise reliance placed on the terms of the Minimum Conditions of Employment Act 1993, the enforcement of which, is not within the Commissions jurisdiction: *Oate v. Sanders Executive Pty Ltd trading as LJ Hooker* (1998) 79 WAIG 1198.

15 As to the claim for the sum of $3000 in respect of commission on gross company turnover, I am not satisfied on the evidence the applicant has made out this claim. On his own evidence to his credit, the applicant, who I found to be an impressive witness, was simply unable to adduce any evidence as to the actual turnover of the relevant business over the relevant period. This being so, the applicant has not established this benefit. Likewise in relation to commission due for telesales, in my opinion, the evidence in the applicant's diary, as to what he understood were sales for a particular period, is inconclusive. There was no evidence before the Commission by way of confirmation that those alleged sales lead to revenue being received by the business, and the periods over which that revenue was received. In the absence of evidence of that kind, it is simply unsafe to attempt to make any findings of fact, in proceedings of this kind.

16 As I have said, whilst I have substantial reservations as to the conduct of the applicant's employer on the evidence of the applicant, which evidence, in the absence of any evidence from the respondent, I accept, I am simply unable to make findings of fact, in terms of the applicant's contractual arrangements with the business by which he was initially employed, to uphold any element of the applicant's claims. The application is therefore dismissed.

2002 WAIRC 06549

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ANDREW JAMES WISBEY, APPLICANT
	v.
	CARON GROUP OF COMPANIES TRADING AS SECURALL PROTECTION PLUS, RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	FRIDAY, 20 SEPTEMBER 2002
FILE NO/S.	APPLICATION 117 OF 2002
CITATION NO.	2002 WAIRC 06549

Result	Application dismissed
Representation	
Applicant	Mr A Wisbey on his own behalf
Respondent	No appearance on behalf of the respondent

Order

HAVING heard Mr A Wisbey on his own behalf and 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.

[L.S.]

(Sgd.) S. J. KENNER,
Commissioner.

2002 WAIRC 06662

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	GORDON BRETT WORKMAN, APPLICANT
	v.
	WESTDAY INVESTMENTS PTY LTD T/A METRO FILTERS, RESPONDENT
CORAM	COMMISSIONER J L HARRISON

DATE	FRIDAY 27 SEPTEMBER 2002
FILE NO.	APPLICATION 710 OF 2002
CITATION NO.	2002 WAIRC 06662

Result	Application alleging unfair dismissal upheld and order issued for compensation in lieu of reinstatement and application alleging contractual benefits allowed
Representation	
Applicant	Mr G Workman on his own behalf
Respondent	No appearance

Reasons for Decision

1 This is an application by Mr Gordon Workman ("the applicant") pursuant to s.29(1)(b)(i)and(ii) of the *Industrial Relations Act, 1979* ("the Act"). The applicant alleges he was unfairly dismissed from his employment as a filter installer/delivery driver with Westday Investments Pty Ltd t/as Metro Filters ("the respondent") on 28 March 2002. The applicant is also claiming benefits pursuant to his contract of employment with the respondent. The respondent did not appear at the hearing.

2 This matter was filed in the Registry of the Commission on 26 April 2002 and a declaration of service in relation to the application was lodged on 6 May 2002. Registry sent the respondent a Notice of Answer and Counter Proposal to be filled in if the respondent wished to oppose any part of the claim. A file note from Registry states that it was contacted on 21 May 2002 and informed that a representative of the respondent would contact Registry in relation to lodging a Notice of Answer and Counter Proposal however, no documentation was filed on behalf of the respondent. Thus the provisions of the Industrial Relations Commission Regulations 1985 requiring the respondent to file a Notice of Answer and Counter Proposal have not been complied with. On 11 June 2002 the Commission received a letter from Lyons Waddell Pty Ltd stating that the respondent had ceased trading as of 29 March 2002 due to insolvency.

3 On 10 June 2002 a notice was sent to the parties listing a conference for 24 June 2002. On the 20 June 2002 the Commission contacted Mr David Collins, a Director of the respondent, who stated that the respondent's Accountant would attend the conference on that date. When the conference was convened the respondent did not appear. The Commission then referred the matter for hearing and determination and a hearing date of 23 August 2002 was set down.

4 On the day prior to the hearing the Commission received a facsimile from Mr P Phang stating that in relation to this application Mr Collins was unavailable to attend the hearing set down for 23 August 2002 as he was overseas attending to his elderly mother who was unwell.

5 At the commencement of the hearing on 23 August 2002 the Commission raised the issue of the status of the respondent. The applicant was unaware if the respondent was in liquidation. The Commission made enquiries to the Western Australian Supreme Court and was informed that as at 23 August 2002 the respondent had not gone into liquidation. As there was no evidence that the respondent was in liquidation the Commission formed the view that it was appropriate for the hearing to continue. The name of the respondent was called outside the court and there was no appearance.

6 Given the notice of hearing had been sent to the parties on 8 July 2002 and the respondent had adequate opportunity to be represented at the hearing, I formed the view that it was appropriate to proceed with the hearing. There had been no appearance by the respondent at any stage in proceedings in relation to this application before the Commission. I formed this view as the respondent had made no attempt to participate in any of the proceedings to date thus it was unlikely that the respondent would attend a hearing if a new date was to be set. On this basis, and pursuant to s.27(1)(d) of the Act, the hearing went ahead on 23 August 2002.

7 The applicant gave evidence that he commenced employment with the respondent on 31 October 2001 and was terminated in a summary manner on 28 March 2002 when he was handed a letter of termination by the respondent's office manager on that day (Exhibit A6). The letter confirms that as of 29 March 2002 the respondent's business had been sold to another entity and that all employees would be advised in due course whether they would be employed by the new proprietor. The letter specified that any leave entitlement enquiries should be directed to Mr Patrick Lyons of Lyons Waddell Pty Ltd.

8 28 March 2002 was the first indication the applicant had that the respondent's operations were going to be taken over by another entity, and that he was to be terminated.

9 The applicant maintains that on the day he was terminated he was told that he had to work on the following Saturday of the Easter weekend. As the applicant had already made arrangements for the Easter break he stated that he was unavailable to work on this Saturday. At 1.30pm on 28 March 2002 he was told to finish up straight away with the respondent. The applicant waited until 4.30pm on that day to collect outstanding annual leave entitlements, wages in lieu of notice and a separation certificate, however Mr Collins did not appear in the office that afternoon, so the applicant was not paid these entitlements nor did he receive a separation certificate.

10 The applicant gave evidence that he was a full-time employee of the respondent. He commenced on a three month probationary period when he started with the respondent on 31 October 2001 (Exhibit A1). He worked on average 43 hours per week and was paid $500 gross per week irrespective of the number of hours he worked. He was supplied with a van in which he travelled to and from home. The respondent also supplied a uniform to the applicant.

11 On 18 February 2002 the applicant sustained a work related injury and filled out relevant workers' compensation documents. However, as the respondent does not appear to have workers' compensation insurance, the applicant's claim in relation to this matter has been delayed. The applicant's workers' compensation claim is currently before Workcover and is subject to a preliminary review on 13 September 2002.

12 The applicant tendered a number of exhibits which were outstanding medical and physiotherapy bills which had not be paid due to a delay in his workers' compensation claim being accepted. The applicant seeks payment of these accounts as part of his claim before the Commission.

13 On commencement with the respondent the applicant stated that there were discussions about his weekly pay and, he understood that his contract of employment included annual leave and annual leave loading entitlements because that was the standard that was paid to employees and these payments were referred to in the applicant's letter of termination (Exhibit A6).

14 On Tuesday 2 April 2002 the applicant rang Mr Lyons of Lyons Waddell Pty Ltd to enquire about his leave and other entitlements. Mr Lyons appeared to be unaware of what was happening in relation to any of the respondent's employees but he undertook to assist with the payment of the applicant's entitlements. It was agreed that he would enquire into entitlements

owing to the applicant and would assist with obtaining a separation certificate for the applicant. On the following Friday the applicant stated that it was arranged that he visit Mr Phang and Mr Collins in order to collect monies owing to him as Mr Lyons had agreed to pay the applicant annual leave and annual leave loading, one week's pay in lieu of notice, plus he was to be issued a separation certificate. At this meeting Mr Collins refused to pay the applicant any monies but offered the applicant $600 in full and final settlement of all outstanding monies owing. The applicant refused the $600 as he was owed more than that amount.

15 Since termination the applicant was not able to return to work until approximately four weeks prior to the date of hearing due to his work related injury. He has applied for approximately 22 jobs but he has been unsuccessful in obtaining employment and he believes this is because he has an outstanding workers' compensation claim. There is a possibility of him commencing a job in a restaurant on 2 September 2002.

Issues and Conclusions

16 The applicant is seeking compensation for medical and physiotherapy costs as well as payment of wages since termination, and notice and annual leave entitlements pursuant to his contract of employment with the respondent.

Credibility

17 I accept the evidence of the applicant. He gave his evidence in a clear, straight forward and honest manner and it was corroborated by documentation. On this basis I accept his evidence in its entirety.

Findings

18 With respect to the claim for medical and physiotherapy accounts, the Commission does not have jurisdiction to order payments of these costs and wage entitlements incurred by employees arising out of workers' compensation claims. These amounts come within the jurisdiction of the Workers' Compensation and Rehabilitation Act 1981 and on that basis it is not appropriate for the Commission to issue any orders in relation to those matters. Thus I reject the applicant's claim for payment of these accounts and for wages whilst on workers' compensation.

19 I find that the applicant was terminated without notice on 28 March 2002. I find the applicant was made redundant by the respondent when he was informed that the respondent no longer wanted the applicant to continue to undertake his normal work.

20 Redundancy is itself a sufficient reason for dismissal (*Amalgamated Metal Workers and Shipwrights Union of Western Australia and the Operative Painters and Decorators Union of Australia, West Australian Branch, Union of Workers v Australian Shipbuilding Industries (WA) Pty Ltd* (1987) 67 WAIG 733).

21 If a decision is made to make an employee redundant based on the operational requirements of the company that can be a valid reason for the dismissal. In this case I am of the view that the applicant was terminated for a valid reason, as the respondent's business was sold to another entity (Exhibit A6).

22 Having said that it is appropriate to consider any unfairness in relation to the process used in effecting redundancy, as well as all of the circumstances surrounding the termination of the employment having regard to s.26 of the Act.

23 The provisions of Part 5 of the Minimum Conditions of Employment Act 1993 ("MCEA") are implied into the contract of employment of the applicant. This section provides that where an employer has decided to make an employee redundant the employee is entitled to be informed by the employer as soon as is reasonably practicable after the decision has been made of the redundancy and discuss with the employee the likely effects of the redundancy and measures that may be taken to avoid or minimise its effect. This was not done. It is clear on the evidence and I so find that there was no discussion of this nature with the applicant once the decision was made by the respondent to make him redundant. Furthermore, the applicant was deprived of any ability to avail himself of paid leave to attend for job interviews, which is prescribed in Part 5 of the MCEA. For this reason, in my view, I consider that to the extent the applicant was not consulted in relation to his dismissal, his termination was unfair. There was in my view, a clear breach of the requirements of Part 5 of the MCEA and on this basis alone, the dismissal was harsh, oppressive and unfair: *Miles and Others trading as The Undercliffe Nursing Home v Federated Miscellaneous Workers' Union of Australia, Hospital, Service and Miscellaneous, Western Australian Branch* (1985) 65 WAIG 385.

24 Having said that I now turn to the question of relief in this case. The applicant seeks compensation for loss.

25 The applicant does not claim reinstatement and it is clear, given the particulars of this case reinstatement is impracticable.

26 In this instance there is no basis to conclude that the applicant has suffered the loss of a reasonable severance payment, given his short length of service with the respondent and there being no evidence that a redundancy payment formed part of the applicant's contract of employment with the respondent.

27 The applicant has, as I have noted above, been deprived of the ability to avail himself of the statutory right prescribed in Part 5 of the MCEA to paid leave of absence for the purposes of attending job interviews, given the summary manner of his dismissal. I consider that the applicant's loss in this case is represented by a period to enable the matters in Part 5 of the MCEA to be attended to, which I find to be in this case, one week's pay. I will issue an Order for this amount to be paid to the applicant.

28 The law in relation to contractual benefits claims in this jurisdiction is well settled (*Ahern v The Australian Federation of Totally and Permanently Incapacitated Ex-Service Men and Women (WA Branch Inc)* (1999) 79 WAIG 1867 at 1869). The Commission must determine whether the claim is one for a benefit to which the applicant is entitled under his contract of employment.

29 I find on the evidence and taking into account entitlements specified in the MCEA in relation to annual leave, that the applicant's contract of employment included an entitlement to a notice period of one week on termination, and entitlements to annual leave and annual leave loading. This is corroborated by the agreement made between the applicant and the respondent subsequent to the applicant's termination whereby the respondent agreed to pay the applicant one week's pay in lieu of notice, annual leave entitlements and annual leave loading. I find these amounts to be $500 for one week's pay in lieu of notice and $940 in annual leave entitlements. It is appropriate to issue an Order for those amounts to be paid to the applicant.

30 A Minute of Proposed Order will now issue.

2002 WAIRC 06668

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	GORDON BRETT WORKMAN, APPLICANT
	v.
	WESTDAY INVESTMENTS PTY LTD ACN 068 100 658 T/A METRO FILTERS, RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE OF ORDER	TUESDAY, 1 OCTOBER 2002
FILE NO/S.	APPLICATION 710 OF 2002
CITATION NO.	2002 WAIRC 06668

Result Application alleging unfair dismissal upheld and order issued for compensation in lieu of reinstatement and application alleging contractual benefits allowed

Order

HAVING HEARD Mr G Workman, the applicant, 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—

1 DECLARES THAT the dismissal of Gordon Brett Workman by the respondent was unfair and that reinstatement is impracticable;

2 ORDERS the respondent to pay Gordon Brett Workman compensation in the sum of $500.00 gross within 14 days of the date of this order.

3 DECLARES that the respondent denied the applicant benefits under his contract of employment

4 ORDERS that the respondent pay Gordon Brett Workman $1440.00 gross within 14 days of the date of this order.

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

SECTION 29 (1)(b)—Notation of—

Parties		Number	Commissioner	Result
Adams C	Ventura Homes Pty Ltd	1285/2002	HARRISON C	Discontinued
Allen GR	Superline Plastic Products (1979)	643/2002	GREGOR C	Discontinued
Allen GR	Superline Plastic Products (1979)	807/2002	GREGOR C	Discontinued
Augustyn JE	Vistadale Pty Ltd As Trustee For The Ranger Family Trust Trading As Ranger Contracting	679/2001	SMITH C	Discontinued
Bailey PA	Peel Automotive Group	10/2002	WOOD C	Discontinued
Barlow MJ	Hills Community Support Group	1278/2002	SCOTT C	Discontinued
Bell SL	Ashburton Minerals Ltd	1852/2001	GREGOR C	Discontinued
Boulton RJ	Eagle Fishing Company	441/2002	HARRISON C	Order Issued
Brinkworth PA	Labour Force (WA) Pty Ltd	1421/2002	KENNER C	Discontinued
Broad PJ	Elders Limited acn 004 045 121	830/2002	SMITH C	Discontinued
Buchanan M.R.	Subi Sensations	1987/2001	BEECH SC	Discontinued
Cardoso J	Stirling Harbour Services Pty Ltd	2179/2001	KENNER C	Discontinued
Cardy C	Craig Armstrong	1108/2002	GREGOR C	Discontinued
Cats T	Sunny Sign Company	872/2001	SCOTT C	Discontinued
Cave S	The Western Australian Turf Club (ACN 82 227 231 356)	538/2002	KENNER C	Order Issued
Chapman BA	Giacci Contracting Pty Ltd	827/2002	SCOTT C	Dismissed
Cook CE	Hydro Engineering Pty Ltd (ABN 800 094 399 18)	1209/2002	SMITH C	Discontinued
Crainie STR	Accord Technologies Pty Ltd	1362/2002	GREGOR C	Discontinued
Crookey T	Minninup Pastoral Company	1094/2002	SCOTT C	Dismissed
Curtis DG	M/M Marchioli t/a Skypark Valet Parking	862/2001	SMITH C	Discontinued
Darling CM	Genisis Holdings WA Pty Ltd	891/2002	SMITH C	Discontinued
Donnelly G	Barnco Pty Ltd Tradins As Ramada Furnishings	1213/2002	GREGOR C	Order Issued
Dougall CN	Croucher K	2217/2001	KENNER C	Discontinued
Edwards CJ	Civil & Earthmoving Contractors of Kwinana Pty. Ltd.	1626/2001	SCOTT C	Dismissed

Parties		Number	Commissioner	Result
Elstone CP	Brumbys Claremont (Pepperton Delaware)	1172/2002	GREGOR C	Discontinued
Fallo MA	Damascus Nominees Pty Ltd	49/2002	SMITH C	Order Issued
Fancote KF	Selsea Investments Pty Ltd t/a Redfurn Commercial Furniture acn 008 930 381	1089/2002	SMITH C	Discontinued
Gillane AG	R.J. Renting & Co Pty Ltd	1225/2002	KENNER C	Discontinued
Goh A	National Steel Group	1303/2002	HARRISON C	Order Issued
Griffin CM	Rockingham Early Learing & Child Care Incorporated	930/2002	KENNER C	Discontinued
Hamilton JJ	Contract Marine Coatings & S/Ship Marine	2238/2001	GREGOR C	Discontinued
Hamilton JL	Contract Marine Coatings & S/Shape Marine	2239/2001	GREGOR C	Discontinued
Hardinge L	Alvaton Holdings Pty Ltd t/a Cut Price Imports	1331/2002	BEECH SC	Dismissed
Harris AL	Rob Martin	1163/2002	KENNER C	Discontinued
Harvey TM	Minninup Pastoral Company	1095/2002	SCOTT C	Dismissed
Hick KR	Quality Wholesale Productions t/a Boatland	829/2002	SMITH C	Discontinued
Hopkins PW	The City of Canning	13/2002	HARRISON C	Discontinued
Hoskin AP	Ellendale Estate P/L Ellendale Tuna	2134/2001	WOOD C	Dismissed
Iannarelli E	Emerald Colonial Lodge	809/2002	SCOTT C	Discontinued
Jackson SK	API Leisure & Lifestyle - API WA Inc.	545/2002	HARRISON C	Order Issued
James AK	Mindarie Liquor Partnership	1517/2002	GREGOR C	Discontinued
Kanik V	Cafe Del Mar business name of Flea-Stoppers (Australia) P/L (070 569 318) & Others	2191/2001	SMITH C	Discontinued
Kemenade R	Choice Landscapers	1193/2002	BEECH SC	Discontinued
Kirk A	Quality Bakers Australia Limited T/A Buttercup Bakeries WA	1334/2002	BEECH SC	Dismissed
Koia R	Hills Community Support Group	1279/2002	SCOTT C	Discontinued
Kovalevitch E	Fabcon Construction Pty Ltd	1845/2001	KENNER C	Discontinued
Lambert JBR	Go-Crete Pty Ltd	614/2002	HARRISON C	Order Issued
Le Grove B	Glory Business Ltd t/a Ridges Perth	389/2002	SMITH C	Discontinued
Lewis TG	B & J.L. Woodcock	1215/2002	SCOTT C	Dismissed
Lloyd SL	Port Stationary Office Choice	1442/2002	HARRISON C	Discontinued
Lowry M	Darrell Crouch & Associates Pty Ltd	798/2002	GREGOR C	Discontinued
Luck SK	Western Homecare (Ascotvale Investments)	734/2002	SMITH C	Discontinued
Mackenzie PA	Westgroup Pty Ltd	2231/2001	SCOTT C	Dismissed
Malone PA	Misa 2000 Pty Ltd	1142/2002	SMITH C	Discontinued
Mehew SR	The Outdoor Furniture Specialist	2144/2001	SMITH C	Order Issued
Van Der Merwe J	Drake Australia Pty Ltd	1795/2001	SMITH C	Discontinued
Meyers JC	Andrew & Louise Kerse - Muntadgin Farming Co	1260/2002	KENNER C	Order Issued
Morgan PR	Warin Engineering Services Pty Ltd	768/2002	WOOD C	Dismissed
Moroney WP	Monkey Mia Yacht Charters Pty Ltd	1139/2002	GREGOR C	Discontinued
Ognenovski S	Gaynors Retravision	1157/2002	HARRISON C	Discontinued
O'Neill K	Protective Services (Australia) Pty Ltd	1119/2002	SMITH C	Discontinued
Papakonstaninou V	Supa Valu Stirling	894/2002	GREGOR C	Order Issued
Pascov JM	Ogden Corporation Pty Ltd Windsor Hotel	1245/2002	COLEMAN CC	Dismissed
Pech M	Mach Valves Pty Ltd	472/2002	KENNER C	Discontinued
Pellicciotti W	Liquid Engineering International Pty Ltd	1822/2001	SMITH C	Discontinued
Plant D	Peter Swain of Roy Weston Carousel	1112/2002	SCOTT C	Discontinued
Rawlins JL	Zipform	1109/2002	SCOTT C	Discontinued
Reid CL	Mr Neil Hirt Courier Australia	1262/2002	GREGOR C	Order Issued
Reynolds KG	Integrated Workforce Limited	1212/2002	GREGOR C	Discontinued
Rickwood LLA	Peter Mizen Tradelink Balcatta	905/2002	GREGOR C	Dismissed
Roberts A	Terry Roberts (Glazing Solutions ABN 44394161910)	1381/2002	SCOTT C	Dismissed
Roberts CJ	Air World	1886/2001	SMITH C	Dismissed
Rose LA	Myer Perth City	1/2002	HARRISON C	Discontinued
Rutherford JR	Hills Community Support Group	1277/2002	SCOTT C	Discontinued
Ryder DA	Jett Pty Ltd T/as MSC Security	437/2001	BEECH SC	Discontinued
Sampson BJ	South Guildford Cafe	1063/2002	HARRISON C	Discontinued
Sarracini MJ	Geoff Macauly Macauly Family Trust Tading as Games world	1347/2002	BEECH SC	Discontinued
Shrives IM	Hawke Measurements Systems Pty Ltd	943/2002	GREGOR C	Discontinued
Simons JG	Gary Rosich WA Advanced Hire	833/2002	GREGOR C	Discontinued

Parties		Number	Commissioner	Result
Skinner AJ	Camellia Holdings Pty Ltd Trading as Esplanade Hotel Fremantle (ABN 1384 753 9690)	1106/2002	KENNER C	Discontinued
Smith DE	AG Direct Pty Ltd	119/2002	SCOTT C	Discontinued
Smith DE	Colin Firth - Summit Fertilizers	31/2002	SCOTT C	Discontinued
Sommerville A	Caron House Pty Ltd t/as Secural Protection Plus	346/2002	HARRISON C	Order Issued
Stoyles GJ	Wembley Cycles	1126/2002	GREGOR C	Order Issued
Tan A	Intelecom Australia Pty Ltd	115/2002	HARRISON C	Discontinued
Thomson K	Plantation Development Pty Ltd	588/2002	SMITH C	Dismissed
Thompson SC	John Allen Insurance Broker	152/2002	HARRISON C	Discontinued
Thorpe AJ	Goldy Motors Pty Ltd	936/2002	HARRISON C	Discontinued
Vaughan A	Walkers Pty Limited	1156/2002	SMITH C	Discontinued
Victor/Irvine CM	Rentokil Initial Pty. Ltd	477/2002	SMITH C	Discontinued
Wainwright C	Jeanswest Corporation Pty Ltd	1214/2002	GREGOR C	Order Issued
Ward JDJ	Alinta Gas Limited	1698/2001	GREGOR C	Discontinued
Wauchope SB	Chapmans Barristers & Solictors	767/2002	GREGOR C	Order Issued
Weinbrecht O	Laserline Australia Pty Ltd	1545/2001	BEECH SC	Discontinued
Wilson ML	Leisure and Allied Industries Pty Ltd	1305/2002	GREGOR C	Discontinued
Woodhall JD	Out of Bounds, Design Marketing and Multimedia	711/2002	KENNER C	Discontinued
Wormley P	Maxxium Australia Pty Ltd	1058/2002	HARRISON C	Discontinued
Zappala R	Carousel Glass Pty Ltd T/As Modern Glass	1270/2002	SMITH C	Dismissed

CONFERENCES—Matters arising out of—

2002 WAIRC 06557

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION (COMMISSION'S OWN MOTION) WESTERN AUSTRALIAN PRISON OFFICERS' UNION OF WORKERS AND HON ATTORNEY GENERAL
CORAM	SENIOR COMMISSIONER A R BEECH
DATE	MONDAY, 23 SEPTEMBER 2002
FILE NO.	C 186 (1) OF 2002
CITATION NO.	2002 WAIRC 06557

Result	Order issued
Representation	
Hon Attorney General:	Mr A. Leech
WA Prison Officers' Union of Workers:	Mr P. Giblett

Order

WHEREAS an Order issued in this matter on 7 September 2002 prescribing in Order 4. that from the making of the Order the Hon Attorney General ensure that for the 14 days from the date of the Order each unit within Hakea Prison be fully staffed;

AND WHEREAS on 20 September 2002, in consideration of the ongoing negotiations between the parties, the parties agreed that Order 4. be varied to provide that up to and including 1 October 2002 the Hon Attorney General ensure that each unit within Hakea Prison be fully staffed;

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

THAT Order 4. of the Order in this matter dated 7 September 2002 be deleted and the following substituted—

4. That up to and including 1 October 2002 the Hon. Attorney General ensure that each unit within Hakea Prison be fully staffed.

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

CONFERENCES—Matters referred—

2002 WAIRC 06684

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE WESTERN AUSTRALIAN BUILDERS' LABOURERS, PAINTERS & PLASTERERS UNION OF WORKERS, APPLICANT
	v.
	CITY OF STIRLING, RESPONDENT
CORAM	COMMISSIONER J F GREGOR
DATE	WEDNESDAY, 2 OCTOBER 2002
FILE NO.	CR 173 OF 2001
CITATION NO.	2002 WAIRC 06684

Result	Compensation awarded
Representation	
Applicant	Mr M. Cox (of Counsel) appeared for the Applicant
Respondent	Mr D.M. Jones appeared for the City

Reasons for Decision

1 The matters the subject of this application have been before the Commission in various forms from early in 2001. There have been a number of proceedings before the Commission involving The Western Australian Builders' Labourers, Painters & Plasterers Union of Workers (the Union) representing its member, Mr Robert Jack, who was a Job Steward of the Union, and the City of Stirling (the City) who was Mr Jack's employer.

2 In particular the ongoing dispute between Mr Jack and the City came to a head when the Union applied to the Commission for a compulsory conference pursuant to s.44 of the *Industrial Relations Act, 1979* (the Act) on 17th July 2001. That conference was unsuccessful in resolving the matter and eventually it was referred for hearing and determination. The Memorandum of Matters for Hearing and Determination under s.44 which was prepared on 23rd July 2001 describes the dispute between the parties in the following terms—

> *"The Western Australian Builders' Labourers, Painters and Plasterers Union of Workers ("Union") contends—*
>
> *1. The dismissal of one of their members, Mr Robert Jack ("Jack") on 10th August 2001 by the City of Stirling was harsh, oppressive and unfair in all of the circumstances.*
>
> *2. The removal of Jack's entitlement to be "on call", have access to overtime, payment, have use of a vehicle and have use of a mobile by the City of Stirling on 9th July 2001 is a denial of benefit in Jack's employment contract.*
>
> *3. That to (sic) the failure of the City of Stirling to record and grant Jack accrued rostered days off while on sick leave is a denial of a benefit in Jack's employment contract.*
>
> *The City of Stirling denies these contentions.*
>
> *The Union seeks the following orders—*
>
> *1. Reinstatement of Jack;*
>
> *2. If reinstatement is not practicable, compensation for the dismissal;*
>
> *3. Payment of an amount (to be advised after discovery is provided by the City of Stirling) equal to the denied contractual benefit outlined in 2. above;*
>
> *4. That Jack continued to accrue rostered days off while on sick leave and that the equivalent salary should be paid to him or the days should be accrued in the City of Stirling records for Jack."*

3 The dispute between the Union and the City at least in so far as contemporary issues are concerned involved the removal of some employment conditions from Mr Jack and alleged discrimination against him by supervisors.

4 The Union claim that since 1995 Mr Jack was "on call", this created a set of circumstances of privilege to him in that he had the use of a vehicle to commute to and from the City's work depot and a mobile phone to take calls if he had to do work out of hours. When he received calls he went on to overtime and it was estimated that he received between $3000.00 to $9000.00 per year as a result of being "on call".

5 In 2001-2002 there was a dispute between the Union and the City over an interpretation of the City of Stirling's Building (Maintenance Section) Enterprise Agreement. In various guises that dispute came before the Commission and was the subject of a determination issued on 12 April 2001 *Western Australian Builders Labourers, Painters and Plasterers Union v City of Stirling (2001 WAIRC 02552)*. That Decision provides some of the relevant background to the relationship between Mr Jack and the City and need not be repeated here. Nevertheless the series of events which started to develop in 2000 and 2001, had an influence upon the relationship and continued to have. In addition there were other problems between Mr Jack and the City over its clothing policy. There were also arguments about whether Mr Jack was able to wear T-shirts which announced his union affiliations contrary to the City clothing policy.

6 There had been arguments in July 2001 (Exhibit J7) between a supervisor, Mr Plunkett, and Mr Jack which involved allegations of shouting and inappropriate behaviour by him contrary to the City's interests. There were also altercations in public which led the Manager of the City's Building Services to conclude the conduct of Mr Jack was unacceptable.

7 The City developed the view that Mr Jack spent so much time on his union activities that he became an ineffective worker. This led to a series of what are described as formal reprimands to be issued to him. One received on 21st March 2000 dealt with failure to wear the uniform of the City. Mr Jack was warned that his employment would be terminated by any further breech. He was required to meet with his supervisors to explain his conduct. The City made it clear, in writing, that any repeat of the behaviour referred to in the letter of 27th March 2001 (Exhibit S9) would result in Mr Jack's services being terminated.

8 All of these events preceded the arguments which occurred during 2001. Mr Jack took 12 weeks sick leave in July 2001. The evidence before the Commission shows treatment over a long period by the attending physician Dr Nicholas Cooke who issued medical certificates to support sick leave taken by Mr Jack for stress resulting from disputes in the workplace. There are a series of medical certificates through July to August from Dr Cooke on the same issue. Dr Cooke gave extensive evidence about the treatment regime he prescribed for Mr Jack.

9 Dr Cooke is general practitioner who specialises in mental health aspects of work. Dr Cooke has practiced in psychiatric settings and clearly has an informed professional interest in the area. He had indicated to Mr Jack that during the time of his leave he should as a distractor try and occupy himself, his diagnosis of Mr Jack though was against the background of other personal difficulties that Mr Jack was having which need not be summarised here.

10 While Mr Jack was still on leave in July 2001, and prior to the proposed date for his return on 16th July 2001, he was advised he would not accrue rostered days off while on sick leave. Mr Jack protested because this was contrary to past practice adopted by the City in that rostered days off had been accrued while employees were on sick leave. Mr Jack was then told not to commence duties as usual on 16th July 2001 but instead to attend a meeting at the Human Resources Office prior to reporting to his workplace. On 12th July 2001 he was advised he would no longer be "on call" and would lose his commuting rights when he returned back to duty.

11 On 16th July 2001 in company with a Union representative Mr Jack met with his employer. Mr Jack understood his supervisor to say that he could not return to work unless he ceased rumour mongering and placing undue stress and duress on his supervisors. According to the Union the City would not elaborate on the conditions and why those conditions were attached to the employment of Mr Jack as opposed to any other employee. The Union tried in accordance with the dispute procedure set out in the City of Stirling (Building Maintenance Section) Enterprise Agreement No AG118 of 2000 (EBA AG118) to resolve the matter and were unsuccessful in doing so. This led it to make the notification under s.44 of the Act filed in the Registry 17th July 2001.

12 The Commission convened a conference on 10th August 2001. It is common ground that prior to that conference commencing an advocate appearing for the City dismissed Mr Jack in the precincts of the Commission. The Commission was told when the conference started that Mr Jack had been summarily dismissed. The Union immediately complained that the termination was harsh, oppressive and unfair because of the nature and place of the termination and due to the fact that Mr Jack had a medical certificate and was eligible for sick leave.

13 At the time the Commission was told that the action took place because there were further breeches of policy by Mr Jack in that he was absent from work and contrary to his obligation to do so had not advised the City of his intention not to attend for duty.

14 The preceding recitation is a short but sufficient summary of the relationship between Mr Jack and the City in order that what happened later can be put into some perspective.

15 As has been mentioned previously the dispute was referred for hearing and determination pursuant to s44 of the Act. It was heard on 3rd and 4th April 2002, the hearing was not completed on 4th April 2002 and was further listed for hearing on 4th July 2002.

16 At the conclusion of the proceedings on that day the Commission told the parties that it was clear on the facts and that being the case was in a position to publish a finding. This was done verbally on the basis that the parties may, on application of the appropriate principles for compensation, be able to agree on compensation to be paid to Mr Jack in the light of the findings to be made by the Commission. The Commission published the following finding—

> "*First, the dismissal of Robert Jack on 10th August was summary and was therefore unfair. Secondly that the relationship had deteriorated to a stage where the termination of it in the near future was more likely than not. In those circumstances the termination would have been justified and therefore not unfair."*

17 The Commission then advised that in the absence of an agreement that the advocates address, by way of written submissions, the quantum of compensation to be awarded given that it was jointly held that there should be no reinstatement.

18 In due course the parties were unable to reach agreement about the quantum of compensation and the Commission listed the matter for hearing on 25th September 2002.

19 The submission of Mr Cox, of Counsel, on behalf of the Union in summary is as follows. In order for the dismissal to be fair there must be reasons to justify it relating to poor performance or disciplinary breaches or general redundancy. The reason for dismissal must be put to the employee in a particularised way and provide him with the opportunity to deny or respond to the allegations. If there is a denial the employer is obliged to make sufficient enquiry into it and give proper consideration to the employee's version of events. Finally that if poor performance is proven it must be sufficient gravity to justify the termination.

20 Mr Cox says these requirements do not fit the factual matrix of the current case. Mr Jack was not provided with sufficient opportunity to reply to the allegations he would have been dismissed in any event according to the evidence of his supervisor. The City should have taken into account that Mr Jack had been employed for 18 years and had a reasonably satisfactory performance record. Mr Jack was targeted because of his involvement with the Union. He was singled out because of his representation role in the uniform disputes and he had been unfairly reprimanded when he had returned late from lunch.

21 Through the intervention of the Union or the Commission the City would have been presented or dissuaded from discriminating against the Applicant. In any event Mr Jack was sick, the City knew he had a stress related illness and should have taken that into account.

22 If those submissions do not persuade the Commission, Mr Cox argued that if the complaints were properly and fairly identified or made the subject of intervention by the Commission by way of a s.44 referral, those complaints would have been withdrawn as having been found to be unfair. The issues relating to the uniform dispute would have been the subject of ongoing discussion and in all of those circumstances any future dismissal could not have occurred within the next six months.

23 In response Mr Jones, who appeared for the City, says that the aggregation of the evidence makes it crystal clear that the relationship between Mr Jack and the City had deteriorated to a stage where the City had decided that it had no alternative but to bring the employment to an end. It was therefore entitled to dismiss Mr Jack by giving him appropriate notice.

24 The City not only paid Mr Jack his statutory entitlements to normal hours, annual leave, sick leave and long service leave but it also paid him 190 hours as the equivalent of five weeks pay in lieu of notice in the sum of $3,005.46 to which it added what Mr Jones described as a gratuity payment of $2,428.00.

25 Mr Jones argues that the payments more than adequately recognise the service that had been rendered by Mr Jack to the City. In the circumstances the City was entitled to the conclusion that if it had not dismissed Mr Jack on 10th August 2001 it would have dismissed him within two weeks or one month at the most.

26 The parties have requested the Commission to fix compensation. This is a question referred under s.44 of the Act. The jurisdiction of the Commission to deal with the matter arises from s.23(3)(h) which provides that when the Commission exercises the jurisdiction conferred, it shall not on a claim of harsh, oppressive or unfair dismissal in the case of an application made under s.44, make any order except an order that is authorised under s.23A [or 44]. The Commission in assessing compensation to be paid in this matter is to apply the powers that are set out in s.23A.

27 This is a situation where reinstatement is not an option, the parties agree that reinstatement or reemployment would be impracticable. The Commission, subject, to the six month cap and consideration of mitigation of loss, can order the employer to pay the employee an amount of compensation for a loss or injury.

28 In applying s.23A the Commission is required to have regard to decisions relating to the assessment of compensation particularly that of the Full Bench in *Boganovich v Bayside Western Australia Pty Ltd (1999)* (79 WAIG 8) and the Industrial Appeal Court in *Peter Dellys v Elderslie Finance Corporation Limited* (2002 WASCA 161).

29 In my view, bearing in mind that the dispute between the Union and the City over Mr Jack was before the Commission and would have been subject to further conciliation and negotiation it is likely that, given those procedures if they had been unsuccessful, more likely than not the relationship between Mr Jack and the City would have lasted for a period of 10 weeks, including the period of notice which had been necessary to bring the relationship to an end. In that time the Applicant would have earned an amount of $6,328.00 based on earnings of $15.82 per hour. In accordance with the authority of *Dellys* (ibid) the Commission should deduct from that amount the sum of $3,005.46 being the five weeks pay in lieu of notice and the gratuity payment of $2,428.00 gross in total the sum of $5,433.00. This means that Mr Jack should be paid the further sum of $895.00 for loss.

30 The Commission is also to consider compensation under the head of injury. There is evidence from Dr Cooke concerning Mr Jack's medical condition. Dr Cooke had treated Mr Jack for a considerable period, it is a fair summation of his evidence to say that Dr Cooke had concluded that he was suffering from medical conditions as a result of stress occurring at the workplace and the doctor had recommended him take extended leave which he did. It is clear too that the problems from his work were not the only factors influencing his medical condition. It is on Dr Cooke's analysis likely that Mr Jack suffered further hurt and distress because of his perceptions of the unfairness of his dismissal. At the time of the hearing Mr Jack was being treated by Dr Cooke and was still ill.

31 There is no set rule for the assessment of the amount of compensation for injury but given the circumstances the Commission concludes that there was added injury caused to the Applicant from his dismissal. The sum of money to be awarded is affected by the fact that although the illness had been ongoing for some time it was within Mr Jack's hands to do something about it however he had not done so other than take sick leave. He nevertheless still suffered some additional injury to that which was being suffered by him and was perhaps in his control and the Commission has decided that a fair compensation for injury in those circumstances would be the sum of $1,000.00.

32 The Commission will order that the Applicant be paid the sum of $1,895.00 as compensation. This will mean that the total paid on the termination of employment is $19,262.95.

33 Orders will issue that Robert Jack was unfairly dismissed by the City of Stirling on 10th August 2001 and that he be paid compensation in the sum of $1,895.00.

2002 WAIRC 06705

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE WESTERN AUSTRALIAN BUILDERS' LABOURERS, PAINTERS & PLASTERERS UNION OF WORKERS, APPLICANT
	v.
	CITY OF STIRLING, RESPONDENT
CORAM	COMMISSIONER J F GREGOR
DATE	FRIDAY, 4 OCTOBER 2002
FILE NO.	CR 173 OF 2001
CITATION NO.	2002 WAIRC 06705

Result	Compensation awarded

Order

HAVING heard Mr M. Cox (of Counsel) and Mr D.M. Jones on behalf of the Respondent, the Commission pursuant to the powers conferred on it under the *Industrial Relations Act, 1979,* hereby orders:

1. THAT Mr Robert Jack was unfairly dismissed by the City of Stirling on 10th August 2001.
2. THAT the City of Stirling pay Mr Jack compensation in the sum of $1,895.00.

[L.S.]

(Sgd.) J. F. GREGOR,
Commissioner.

2002 WAIRC 06716

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	AUSTRALIAN LIQUOR, HOSPITALITY AND MISCELLANEOUS WORKERS UNION, WESTERN AUSTRALIAN BRANCH, APPLICANT
	v.
	CUDDLES GROUP PTY LTD, RESPONDENT
CORAM	COMMISSION J L HARRISON
DATE	TUESDAY, 8 OCTOBER 2002
FILE NO.	CR 100 OF 2002
CITATION NO.	2002 WAIRC 06716

Result	Application alleging unfair dismissal dismissed.
Representation	
Applicant	Ms S Northcott
Respondent	Mr G Carver

Reasons for Decision

1 Ms Kirsty Brighton was employed by Cuddles Group Pty Ltd ("the respondent") until she was terminated on 24 April 2002. As a result of this termination the Australian Liquor, Hospitality and Miscellaneous Workers Union, Western Australian Branch ("the applicant") commenced proceedings under s.44 of the *Industrial Relations Act, 1979* ("the Act") alleging that Ms Brighton's dismissal was harsh, oppressive and unfair. Conciliation proceedings did not resolve the claim and the matter was referred for arbitration under s.44 (9) of the Act. The respondent denies that it harshly, oppressively and unfairly dismissed Ms Brighton.

2 Ms Brighton is 24 years old and commenced part-time employment with the respondent in July 2001. She became a full-time employee of the respondent in October 2001. She was engaged as a senior staff member at Cuddles Child Care Centre ("the centre") because of her age, qualifications and experience. She completed a Certificate III in Children's Services in 1996 and since that time has worked with children, including special needs children in either child care centres or with the Western Australian Education Department

3 Whilst employed with the respondent Ms Brighton initially worked in the Babies Room. In January 2002 she was given responsibility for her own room of children. Prior to this she was working under the supervision of a qualified childcare worker.

4 The incident in relation to this application took place on 19 April 2002. Part of Ms Brighton's duties was to collect children from school and return them to the centre. On 19 April 2002 Ms Brighton commenced work at her normal time of 7.00am and was due to finish work at 3.30pm. At approximately 2.55pm Ms Kelly Stevenson, her supervisor at the centre, requested that Ms Brighton drive her car to collect two children from the nearby school. Normally she would walk, however as one staff member was absent from the centre that day and other staff were very busy, it was quicker for her to drive her car to pick up the children.

5 Ms Brighton drove to the school and collected the children, however when she started her car to drive back to the centre she discovered it was bogged. A woman accompanied by children from the school approached Ms Brighton and asked if she required help. This person was a stranger to Ms Brighton, however Ms Brighton recognised her as a mother of children at the school. Given this offer of assistance and as she was in a hurry Ms Brighton requested the mother take the two children back to the centre on her behalf, which she did. Meanwhile, Ms Brighton received assistance from another parent to remove her bogged car and returned to the centre at 3.30pm, not long after the two children arrived. Ms Brighton maintained that she was anxious that the children return to the centre as quickly as possible as one of the parents would be arriving early to collect her child. On this basis she allowed the children to return to the centre with the person who had offered assistance.

6 Initially, Ms Brighton felt comfortable allowing the mother to take the children to the centre because she had seen her around the school before and recognised her face, and her children attended the school. However, subsequent to the mother leaving with the children to take them back to the centre, Ms Brighton immediately realised that she had made a mistake. On reflection she realised that she should have left her car bogged and walked back to the centre with the children, which would have only taken about 10 to 15 minutes.

7 When Ms Brighton arrived back at the centre she was upset about the incident and immediately apologised to her supervisor, Ms Stevenson. Ms Stevenson gave Ms Brighton a warning in the form of a green card, which is part of the respondent's disciplinary procedure. Ms Stevenson informed her she would discuss the matter further with her the following Monday. The warning stated that her behaviour would be reviewed two weeks after the incident.

8 Ms Brighton attended work on Monday 22 April 2002 and was told that subsequent to a call between Ms Stevenson and Mr Carver, a director of the respondent, she had been directed to tell Ms Brighton to work as normal until he could arrange to meet with her at the centre. Ms Brighton was also directed not to take children out of the centre, nor to go on excursions with the children.

9 Ms Brighton gave evidence that from Monday through to Wednesday of the following week she conducted normal activities with the children. She avoided contact with the parents of the children who had been involved in the incident until she had met with Mr Carver. In retrospect Ms Brighton stated that she would have liked to speak to and apologise to these parents straight after the incident.

10 On Wednesday 24 April 2002 at approximately 1.00pm a meeting was held between Mr Carver, Ms Stevenson and Ms Brighton. Mr Carver asked Ms Brighton what had happened on 19 April 2002 and she gave a full and honest account. Mr Carver indicated that the parents of one of the children involved in the incident required him to take action, and that if Ms Brighton was to remain at the centre she would have to be placed under supervision because of the incident. In relation to this Mr Carver indicated that this was not an option that he could entertain because this would require him having to employ an additional person at the centre. Given these comments, Ms Brighton understood that she was about to lose her job.

11 Ms Brighton stated to Mr Carver that as she had undertaken normal duties from Monday up until the meeting on Wednesday and had already received a warning, it was unfair that she was now being told that she could lose her job because of the incident. At the end of the meeting Mr Carver asked Ms Brighton to leave the room and return to her normal duties.

12 Mr Carver then met with Ms Stevenson and Ms Yates, who was acting as the centre's Co-ordinator. They discussed the issue for approximately 40 minutes. Subsequently Ms Stevenson asked Ms Brighton to return to the room, where Mr Carver told her he had to terminate her for misconduct and a breach of regulations. Ms Brighton asked if she could leave the premises and once Ms Stevenson confirmed that her shift could be covered, she went home.

13 Ms Brighton received $1131.00 from the respondent on 6 May 2002, which included wages up to 24 April 2002 and accrued annual leave entitlements.

14 Since termination Ms Brighton has sought alternative employment but has only managed to work 11 ½ days as a casual employee. She is registered with Centrelink and has completed a job diary of positions for which she has applied.

15 Ms Brighton has a good rapport with children, she has an excellent work record in the child care industry and she wants to continue working in this field. Three references (Exhibit A1) were tendered in support of her exemplary work record since 1996. Ms Brighton believed that as the respondent had the confidence in her to continue working subsequent to the incident, and as she believed she had made only one mistake, she felt it was unfair for the respondent to terminate her on 24 April 2002.

16 Under cross-examination Ms Brighton agreed that in relation to the incident on 19 April 2002 she was irresponsible in allowing the children to leave her care and go off with a stranger. She confirmed that Ms Stevenson had warned the applicant that there could be a chance of her losing her job prior to the meeting on 24 April 2002. She conceded that she would have found it easier to accept her dismissal if she was terminated straight away, immediately after the incident on the 19 April 2002. However, under re-examination she reiterated that she still believed that in all of the circumstances her termination was unfair.

17 Ms Susan Deveraux gave evidence. She is currently a Children's Services Organiser with the applicant and has been working with the Union since February 1992. Her background is in early childhood education. She has been a director of a day care centre, and employed at day care centres. She has also undertaken practice supervision of child care workers at Curtin University and lectured in the area of teachers' assistants.

18 Ms Deveraux confirmed that when an incident occurs in a child care centre where there is a serious breach of an employee's contract of employment, an employer is required to respond immediately in order to review the nature of the breach and decide whether or not dismissal is appropriate or whether alternatives to dismissal can be canvassed. If there was a complaint from a parent, mediation would be arranged if appropriate. If the relationship between the employee and a parent broke down completely, an employee would normally be moved to another part of the centre or to another centre.

19 Mr Gerard Carver, a director of the respondent, gave evidence. Mr Carver stated that the incident that Ms Brighton was involved in on 19 April 2002 was not dealt with prior to 24 April 2002 because that was the first day that he could get to the centre to deal directly with the issue, as the respondent operates 11 child care centres.

20 Mr Carver stated Ms Stevenson contacted him on 19 April 2002 with respect to the incident involving Ms Brighton and he asked her to seek feedback from the children's parents in relation to the incident. Ms Stevenson told him the parents were upset about what had happened and they were very concerned about the way in which things had unfolded. Mr Carver confirmed that on 24 April 2002 he went to the centre and met with Ms Brighton and Ms Stevenson and after considering what Ms Brighton had to say about the incident and discussing what had occurred with Ms Stevenson and Ms Yates, he decided to summarily terminate the applicant on that day.

21 Mr Carver stated that he did not speak to the parents of the two children involved in the incident, however he confirmed they had written to the respondent outlining their concerns in relation to the incident (Exhibit R1). He understood they were told of the incident on the day it occurred. He conceded that alternatives to termination were not explored by him as he saw that as an issue for his supervisor Ms Stevenson to manage. However, as a director of the respondent, it was ultimately his decision to terminate Ms Brighton after discussing the matter with Ms Stevenson and Ms Yates. He stated that he did not take the parents' complaints into account when deciding to terminate the applicant. He believed that Ms Brighton had committed a breach of her contract of employment serious enough to warrant summary termination.

22 Ms Stevenson, the senior person at the centre, gave evidence. She stated that on 19 April 2002 when the two children arrived in an unfamiliar car with an unfamiliar adult, she was horrified and quickly took the children into the centre. Ms Stevenson spoke to the children's parents that afternoon and told them what had happened. She confirmed that both parents were upset about what had occurred. She stated that in her view Ms Brighton had behaved inappropriately and the incident should never have occurred. In cross-examination Ms Stevenson confirmed that she had directed Ms Brighton to use her own vehicle on the afternoon of 19 April 2002 to pick up the children. Subsequent to the incident she issued a green card written warning to Ms Brighton which stated that her position would be reviewed in two weeks. Notwithstanding the applicant being issued a green card in relation to this incident, Ms Stevenson still believes the actions and behaviour of Ms Brighton were sufficient to warrant summary termination. Ms Stevenson stated that she was not in a position to terminate Ms Brighton on 19 April 2002 because she did not have the authority from the respondent to do so. Accordingly Ms Stevenson passed on the details of the incident to Ms Yates, the centre's acting Co-ordinator.

23 Ms Yates gave evidence for the respondent. Ms Yates stated that Ms Stevenson rang her at approximately 4.00pm on 19 April 2002 and told her what had happened in relation to Ms Brighton. She too was horrified at the incident. Ms Yates contacted Mr Carver and then went to the centre to speak further with Ms Stevenson about the incident. On 22 April 2002, Ms Yates had a telephone conversation with Mr Carver where a number of alternatives in relation to Ms Brighton's employment options were canvassed. Ms Yates wanted to terminate Ms Brighton at that point however Mr Carver stated that he wanted to have a think about options prior to taking any action. On 24 April 2002 when Ms Yates met with Mr Carver and Ms Stevenson prior to meeting with Ms Brighton, the possibility of terminating Ms Brighton was canvassed. Ms Brighton was then brought into the meeting and told that she was terminated. Ms Yates confirmed that she had not spoken directly to Ms Brighton about the incident on 19 April 2002 prior to the meeting on 24 April 2002, and at that stage she had only spoken to one parent. This parent was very unhappy about what had happened. However she had reviewed Ms Brighton's written statement of the incident and had discussed it directly with Ms Stevenson. Ms Yates stated that there were regulations governing the behaviour of child care workers set down by the Children's Services Board and those regulations are very clear with respect to the duty of care of child care workers. Ms Yates maintains that Ms Brighton had breached these regulations by leaving children to be supervised by someone other than an employee of a child care centre. This meant that the children were supervised by someone who did not have a police clearance, medical check and a TB clearance – all matters required to be complied with under the Children's Services Board regulations.

Submissions

24 The applicant claims that Ms Brighton had committed a single error of judgement in relation to the incident on 19 April 2002 and that this was the first time this had happened in a six year period of working with children. The applicant maintained there were alternatives open to the employer apart from summarily terminating Ms Brighton. The applicant seeks a declaration that Ms Brighton was unfairly terminated, and that she be reinstated. In addition, the applicant argues that an order for compensation should issue in relation to the period between Ms Brighton's termination and reinstatement.

25 In relation to the incident, the applicant argues that 19 April 2002 was a busy day for all employees at the centre and it occurred towards the end of Ms Brighton's shift. Ms Brighton had admitted the error she made, she immediately knew that her actions were wrong, she apologised to Ms Stevenson and was very distressed by the incident. Ms Brighton accepted the written warning given to her on 19 April 2002, however when nothing else eventuated on Monday and Tuesday of the following week, and as she has continued her normal duties on those days, the applicant claims it was unfair to terminate Ms Brighton days after the incident.

26 The respondent states that the facts are clear with respect to the incident that occurred on 19 April 2002 and that Ms Brighton knew it was a serious incident and that a dismissal could possibly result from the incident. The respondent maintained that it needed time to properly canvass the ramifications of the incident and have discussions with people involved, and that there was not an unreasonable length of time between the incident and Ms Brighton's dismissal. The respondent believed that it had followed a proper process in investigating the incident and effecting the termination and, as the issue was a serious breach of Ms Brighton's contract of employment warranting summary termination, there was no unfair termination.

Credibility

27 In my view each witness gave their evidence honestly and to the best of their recollection and on that basis I accept their evidence. There was no dispute about what had occurred in relation to the incident on 19 April 2002, nor was there any dispute about events subsequent to the incident except in relation to the work Ms Brighton undertook in the week subsequent to the incident. However, in my view nothing substantial turns on that issue.

Findings and Conclusions

28 This dismissal was summary in nature.

29 The question whether a person is guilty of misconduct justifying summary dismissal is essentially a question of fact and degree. (see: *Robe River Iron Associates v Construction, Mining, Energy, Timberyards, Sawmills and Woodworkers Union of Australia – Western Australian Branch & Ors* (1995) 75 WAIG 813 at 819), and the onus is on the employer to justify the dismissal. In most cases the employee should be given an opportunity to defend allegations made against them. In *Bi-Lo Pty Ltd v Hooper* (1992) 53 IR 224 at page 229 the Full Bench of the South Australian Commission observed—

> "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."

30 In relation to the evidence I make the following findings.

31 I find that Ms Brighton was employed as a senior child care worker with the respondent from July 2001 until 24 April 2002.

32 I find that on 19 April 2002 Ms Brighton was required to collect two children from a nearby school and return them to the centre at approximately 3.00pm on that day. She collected the children but when she went to return to the centre she discovered her car was bogged. As she was anxious for the children to return to the centre as quickly as possible as one of the parents was picking her child up early Ms Brighton allowed the children to return to the centre with a person whom she did not know. Even though the person was, it appears, a parent of other children attending the school I find it was inappropriate for Ms Brighton to allow the children to leave her care and for the children to be taken away by a stranger.

33 I find that Ms Brighton was genuinely distressed subsequent to the incident when she realised that she had made a grave error of misjudgement. Correctly she reported the incident immediately to her supervisor, Ms Stevenson who then informed the parents about the incident.

34 I accept that Ms Stevenson was horrified by the incident as she realised that this was a major error of judgement on the part of Ms Brighton. As Ms Brighton's supervisor, Ms Stevenson issued a warning to Ms Brighton, but no termination occurred at that point as Ms Stevenson did not have the power to terminate staff. I accept Ms Stevenson's evidence to that effect.

35 I find that Ms Stevenson contacted Mr Carver, a director of the respondent, in relation to the incident. Arising from that conversation I find that Ms Brighton was directed to work as normal, except that Ms Brighton was directed not to undertake any outings with the children until a meeting could be arranged in relation to the incident the following week.

36 I find that Ms Brighton attended the centre the following week and that on the Monday and Tuesday of that week she undertook work as normal, except that no external outings were undertaken.

37 I find that there was a telephone discussion between Ms Stevenson and Mr Carver on the Monday morning of that week and I find Mr Carver was not in a position to make a decision about Ms Brighton's employment at that stage as he required a further opportunity to consider the matter and undertake appropriate investigations.

38 I find that on Wednesday 24 April 2002 two meetings were held by the respondent in relation to the incident on 19 April 2002 and Ms Brighton was given the opportunity to explain her position to Mr Carver and Ms Yates.

39 I find that Mr Carver canvassed alternatives to termination, one of which was to employ an additional supervisor in order to allow Ms Brighton to remain at the centre. However, given the nature of the incident and given that an additional supervisor would need to be employed at the centre to supervise Ms Brighton if she was to remain working with the respondent, he formed the view that it was not appropriate to continue employing Ms Brighton.

40 The respondent operates a number of child care centres. Given the nature of the behaviour of Ms Brighton in relation to this incident, I find that it was not unreasonable for the respondent to refuse to transfer Ms Brighton to one of those other centres subsequent to the incident on 19 April 2002.

41 I accept the evidence of Ms Yates that in addition to obligations under her contract of employment Ms Brighton had responsibilities under regulations covering the behaviour of child care workers set down by the Children's Services Board. I accept Ms Yates's view, and I find that some regulations in relation to Ms Brighton's duty of care had been breached, based on the examples Ms Yates gave in her evidence.

42 I find that the respondent could have acted in more haste than it did in resolving this matter, however in my view this omission does not outweigh the fact that in all of the circumstances I find that it was appropriate to summarily terminate Ms Brighton's contract of employment.

43 I find that the respondent afforded Ms Brighton a reasonable opportunity to put her case in relation to the incident and that she was afforded procedural fairness notwithstanding the delay caused by the respondent.

44 I accept that Ms Brighton is a dedicated and hard working child care worker, who made a single error of judgement. However in relation to this incident Ms Brighton made a serious error of judgement in allowing two children in her care to be taken away, in a vehicle, by a stranger. I find that in the circumstances this action and misjudgement by Ms Brighton was conduct sufficient to warrant summary termination. I find it was appropriate for the respondent to summarily terminate the contract of employment of Ms Brighton as she behaved in a manner that breached a fundamental obligation under her contract of employment.

45 On the facts as I find them I am satisfied, at least on balance, the respondent has demonstrated that Ms Brighton was guilty of gross misconduct justifying summary dismissal. Further, I am satisfied that the applicant was treated fairly because she was given an opportunity to defend herself against the allegations relied upon to effect the termination. She was afforded "a fair go all round" (see *Undercliffe Nursing Home v Federated Miscellaneous Workers' Union of Australia, Hospital, Service and Miscellaneous, WA Branch* (1985) 65 WAIG 385).

46 An Order dismissing the application now follows.

2002 WAIRC 06715

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	AUSTRALIAN LIQUOR, HOSPITALITY AND MISCELLANEOUS WORKERS UNION, WESTERN AUSTRALIAN BRANCH, APPLICANT
	v.
	CUDDLES GROUP PTY LTD, RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE OF ORDER	TUESDAY, 8 OCTOBER 2002
FILE NO/S.	CR 100 OF 2002
CITATION NO.	2002 WAIRC 06715

Result Application alleging unfair dismissal dismissed.

Order

HAVING HEARD Ms S Northcott on behalf of the applicant and Mr G Carver 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. L. HARRISON,
Commissioner.

[L.S.]

CONFERENCES—Notation of—

PARTIES		COMMISSIONER/ CONFERENCE NUMBER	DATES	MATTER	RESULT
Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union	Electrolux Home Products Pty Ltd	GREGOR C C177/2002	4/09/2002	Termination	Concluded
Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union	Midland Brick Company Pty Ltd	GREGOR C C130/2002	24/06/2002 4/07/2002	Right of entry	Concluded
Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union	P & H Minepro Services Australia	GREGOR C C138/2002	8/08/2002	Dismissal	Concluded
Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union	Sandvik Material Handling (Beltreco Ltd)	GREGOR C C187/2002	N/A		Concluded
Civil Service Association	Director General, Department of Justice (Formerly known as Ministry Of Justice)	BEECH SC PSAC19/2002	21/05/2002 13/06/2002	Conversion of contract worker to permanency	Referred
Civil Service Association	Director General, Education Department Of WA	KENNER C PSAC22/2001	7/02/2002 26/07/2002	Dispute over reclassification of applicant union member	Concluded
Civil Service Association	The Director General, Department of Consumer and Employment Protection	SCOTT C PSAC26/2002	29/07/2002	Level of position	Concluded

PARTIES		COMMISSIONER/ CONFERENCE NUMBER	DATES	MATTER	RESULT
Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing, and Allied Workers Union	Bentley Health Service	SCOTT C C220/2001	N/A	Alleged unfair dismissal	Referred
Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing, and Allied Workers Union	Bentley Health Service	SCOTT C CR220/2001	N/A	Alleged unfair dismissal	Dismissed
Hospital Salaried Officers Association	The Australian Red Cross Blood Service	SCOTT C C163/2001	21/11/2001	Dispute over reclassification of union member	Concluded
Liquor, Hospitality and Miscellaneous Workers Union	Department of Culture and the Arts	SCOTT C C198/2002	N/A	Proposal to use contract cleaning	Concluded
Liquor, Hospitality and Miscellaneous Workers Union	Activ Foundation (Inc)	HARRISON C C108/2002	7/06/2002	Redeployment of an employee	Concluded
Liquor, Hospitality and Miscellaneous Workers Union	Cuddles Group Pty Ltd	HARRISON C CR100/2002	15/08/2002 8/10/2002	Dispute in relation to the alleged unfair dismissal of applicant union member	Dismissed
Liquor, Hospitality and Miscellaneous Workers Union	Education Department of WA	HARRISON C C194/2002	19/09/2002	Award and agreement coverage of canteen employees	Concluded
Liquor, Hospitality and Miscellaneous Workers Union	Mastercare Property Services (WA) Pty Ltd	WOOD C C31/2002	22/02/2002 19/06/2002 24/09/2002	Alleged termination without reasonable compensation for severance	Concluded
Liquor, Hospitality and Miscellaneous Workers Union	Perth Linen Service	HARRISON C C172/2002	21/08/2002	Alleged failure to offer redundancy	Concluded
Liquor, Hospitality and Miscellaneous Workers Union	WA Blue Sky Inc	BEECH SC C86/2002	21/05/2002	Constructive unfair dismissal	Concluded
Police Union	Commissioner of Police	SCOTT C PSAC8/2002	17/07/2002	Alleged dispute regarding the contract of employment of applicant union member	Concluded

CORRECTIONS—

2002 WAIRC 06130

WESTERN AUSTRALIAN INDUSTRIAL APPEAL COURT

PARTIES HOT COPPER AUSTRALIA LTD, APPELLANT
v.
DAVID SAAB, RESPONDENT

CORAM ANDERSON J (Presiding Judge)
PARKER J
HASLUCK J

DATE OF ORDER THURSDAY, 18 JULY 2002

FILE NO. IAC 6 OF 2001

CITATION NO. 2002 WAIRC 06130

Result Appeal allowed.

Representation

Appellant Mr M H Zilko (of Senior Counsel) and Mr P Redding (of Counsel)

Respondent Mr M W Odes (of Queen's Counsel)

Amended Order

HAVING heard Mr M H Zilko (of Senior Counsel) and M P Redding (of Counsel) for the Appellant and Mr M W Odes (of Queen's Counsel) on behalf of the Respondent, THE COURT HEREBY ORDERS THAT—

1. The Appeal be allowed.
2. The order of the Full Bench in Appeal No FBA15 of 2001 made on 21 September 2001 be set aside.
3. The order of Commissioner Gregor in Application no 774A of 1999 made on 14 March 2001 be varied such that paragraph 1 be set aside.
4. It is hereby declared that the Commission does not have jurisdiction or power to deal with the Respondent's claim for a sum of money equal to the value of shares and options the Appellant was required to issue to him under the terms of his contract.

(Sgd.) JOHN SPURLING,
[L.S.] Clerk of the Court.

PROCEDURAL DIRECTIONS AND ORDERS—

2002 WAIRC 06545

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ALAN WILLIAM PROSSER, APPLICANT
	v.
	NARAYA PTY. LTD. T/A DEE SEED REAL ESTATE, RESPONDENT
CORAM	COMMISSIONER J H SMITH
DATE OF ORDER	FRIDAY, 20 SEPTEMBER 2002
FILE NO.	APPLICATION 190 OF 2002
CITATION NO.	2002 WAIRC 06545

Result	Interlocutory orders made.
Representation	
Applicant	Mr R Clohessy (as Agent)
Respondent	Ms F Stanton (of Counsel)

Order

HAVING heard Mr Clohessy on behalf of the Applicant and Ms F Stanton on behalf of the Respondent the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby—

(1) DECLARES that if the Applicant has not complied with order (2) and (3) of these orders by 15 October 2002, the Commission will list the application for the Applicant to show cause why the application should not be dismissed;

(2) ORDERS that the Applicant comply with orders (1), (3) and (4) of the order made by the Commission on 1 August 2002; [2002] WAIRC 06126 by 15 October 2002; and

(3) WITHOUT limiting the generality of order (2) of this order, orders that the Applicant provide further and better particulars by 15 October 2002 of—

(a) how the amounts in paragraph A under the heading "Commission" in the document titled "Terms and Conditions of Employment" ("the document") are calculated in relation to the claim in paragraph 3(A) of the document that the Applicant was to be paid 50% commission;

(b) the date or dates on which the rental fees claimed in paragraph B under the heading "Rental Fees" arose and the name of each tenant allegedly introduced;

(c) how the "List of Listings" referred to in paragraph 4 of the document and set out in Schedule A of the document is relevant, together with the basis of the claim and the quantum of pay in lieu of notice; and

(d) how the claim for superannuation arises as a contractual benefit and how the quantum claimed is assessed.

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

2002 WAIRC 06547

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	LORRAINE FLORENCE PROSSER, APPLICANT
	v.
	NARAYA PTY. LTD. T/A DEE SEED REAL ESTATE, RESPONDENT
CORAM	COMMISSIONER J H SMITH
DATE OF ORDER	FRIDAY, 20 SEPTEMBER 2002
FILE NO.	APPLICATION 191 OF 2002
CITATION NO.	2002 WAIRC 06547

Result	Interlocutory orders made.
Representation	
Applicant	Mr R Clohessy (as Agent)
Respondent	Ms F Stanton (of Counsel)

Order

HAVING heard Mr Clohessy on behalf of the Applicant and Ms F Stanton on behalf of the Respondent the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby—

(1) DECLARES that if the Applicant has not complied with order (2) and (3) of these orders, by 15 October 2002, the Commission will list the application for the Applicant to show cause why the application should not be dismissed;

(2) ORDERS that the Applicant comply with orders (1), (3) and (4) of the order made by the Commission on 1 August 2002; [2002] WAIRC 06126 by 15 October 2002; and

(3) WITHOUT limiting the generality of order (2) of this order, orders that the Applicant provide further and better particulars by 15 October 2002 of—

(a) how the amounts in paragraph A under the heading "Commission" in the document titled "Terms and Conditions of Employment" ("the document") are calculated in relation to the claim in paragraph 3(A) of the document that the Applicant was to be paid 50% commission;

(b) the date on which the rental fee claimed in paragraph B under the heading "Rental Fee" in the document arose and the name of the tenant allegedly introduced;

(c) how the "list of listings" referred to in paragraph 4 and set out in Schedule A of the document is relevant, together with the basis of the claim and the quantum of pay in lieu of notice; and

(d) how the claim for superannuation arises as a contractual benefit and how the quantum claimed is assessed.

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

2002 WAIRC 06489

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ANTHONY RICHARD ROSS, APPLICANT
	v.
	CHEVRON AUSTRALIA PTY LTD, RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	MONDAY, 16 SEPTEMBER 2002
FILE NO/S.	APPLICATION 226 OF 2002
CITATION NO.	2002 WAIRC 06489

Result	Order issued
Representation	
Applicant	Mr N Friedman of counsel
Respondent	Mr S Shepherd of counsel

Reasons for Decision

1 The substantive claim by the applicant in these proceedings is that the respondent dismissed him unfairly and denied him contractual benefits, both claims being brought pursuant to s 29(1)(b)(i) and (ii) of the Industrial Relations Act 1979 ("the Act").

2 In short, the applicant, a former senior executive of the respondent, complains that he was unfairly dismissed as a result of a redundancy effected by the respondent on or about 17 January 2002. The applicant also claims that he has been denied contractual benefits, under various heads of claim, in the sum of $1,357,624.89. I should observe that this sum appears to include compensation for loss arising from the unfair dismissal, in the sum of $271,524.98.

3 By direction of the Commission dated 15 April 2002, both parties were directed to provide discovery on affidavit by 28 May 2002, with inspection of documents to be completed by 4 June 2002. As a consequence of issues arising concerning discovery and production of documents, the matter was listed for further directions on 21 June and 18 July 2002. A particular matter raised by counsel for the respondent, was the issue of location and access to documents in the possession, custody or power, of overseas entities associated with the respondent. By correspondence dated 7 August 2002 from the respondent's solicitors, an

undertaking was given to provide a list of the documents in issue to the applicant and to the Commission, and make them available for inspection by the applicant and his solicitors. It was anticipated that those documents would be received shortly thereafter.

4 By letter dated 26 August 2002 from the applicant's solicitors to the respondent's solicitors, it was noted that no contact had been received by the applicant's solicitors, since the respondent's solicitors' letter of 7 August, referred to above. That letter foreshadowed an application by the applicant for a supplementary affidavit of discovery to be filed by the respondent, in the event that the documents were not received by 30 August 2002. By letter dated 29 August 2002 from the respondent's solicitors, an issue of jurisdiction was raised, arising from the decision of the Industrial Appeal Court in *Hot Copper Australia Ltd v Saab* (2002) 82 WAIG 2020.

5 The matter was listed for mention on 11 September 2002. Counsel for the respondent raised the decision in *Hot Copper* as going to the jurisdiction of the Commission to entertain the applicant's contractual benefits claim or parts thereof. After hearing counsel on this matter, given the nature of the claims made, and the necessity for there to be findings of fact before, in the Commission's view, the proper character and setting of the claims could be determined, the Commission declined to rule on the issue of jurisdiction at this stage of these proceedings. The parties were invited to put whatever submissions they wished to, at the substantive hearing of the matter. By way of an observation however, and without in any way expressing a concluded view on the matter, it would seem arguable that *Hot Copper* is of limited application. The decision seems to turn on its own facts in relation to a very specific type of claim, brought in the exercise of one aspect only, of the Commission's jurisdiction.

6 Counsel for the applicant submitted that the respondent had failed to discover documents in its possession, custody or power, relating to the matters in question in these proceedings. In that regard, counsel for the applicant tendered a schedule described as "List of Respondent's Required Documents", which in large part, related to documents referred to in earlier directions hearings.

7 The relevant principles regarding discovery and inspection in this jurisdiction are well settled. I refer to and adopt what I said in relation to these matters in *Ellis v The Grand Lodge of WA of Antient Free and Accepted Masons Incorporated and Others* (1998) 79 WAIG 1736 in this regard. I do not propose to repeat what I said in that matter, save to say that the Commission must be persuaded that the circumstances are such that an order of discovery is just.

8 I have carefully considered the applicant's particulars of claim and the respondent's particulars of answer. I am of the opinion that documents particularised by the applicant, in the context of the breath of the particulars of claim and of answer, save for those referred to at paras 4 and 16, prima facie, are documents which may fairly lead to a train of inquiry, which may, either directly or indirectly, enable the applicant to either advance his own case or to negative that of the respondent. The categories of documents sought to be discovered are, in my view, necessary to fairly disposing of these proceedings; are in the interests of a fair hearing; and access to them, if they exist, is necessary in order for the proper preparation of the respective cases of the parties: *Percy v General Motors Holden Pty Ltd* (1975) 1 NSWLR 289; *ALHMWU v Burswood Resort (Management) Ltd* (1995) 75 WAIG 1801.

9 Accordingly, I order that a supplementary affidavit of discovery in respect of these documents, be filed and served by the respondent within seven days and inspection take place within seven days thereafter.

10 Furthermore, the Commission foreshadows that it intends to give consideration to exercising powers pursuant to s 27(1)(ha) and (hb) of the Act, in relation to the expeditious hearing of this matter. If so, the matter will be re-listed for further directions, at which the parties will be given an opportunity to be heard.

11 I order accordingly.

2002 WAIRC 06621

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
PARTIES	ANTHONY RICHARD ROSS, APPLICANT
	v.
	CHEVRON AUSTRALIA PTY LTD, RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	THURSDAY, 26 SEPTEMBER 2002
FILE NO/S.	APPLICATION 226 OF 2002
CITATION NO.	2002 WAIRC 06621

Result	Order issued
Representation	
Applicant	Mr N Friedman of counsel
Respondent	Mr S Shepherd of counsel

Further Reasons for Decision

1 By reasons for decision dated 16 September 2002, the Commission determined that an order should issue in relation to supplementary discovery by the respondent. A speaking to the minutes in relation to the minute of proposed order, took place on 20 September 2002. Notwithstanding that that proceeding was a speaking to the minutes, counsel for the respondent referred to the question of jurisdiction, raised in the earlier proceedings leading to the issuance of the minute of proposed order, and referred to in my reasons of 16 September 2002.

2 To the extent that the documents the subject of the order for supplementary discovery go to that aspect of the applicant's claim in relation to which a jurisdictional point has been foreshadowed, and it is by no means clear that they do, I refer to s 24 of the Industrial Relations Act 1979 ("the Act") by which the Commission has jurisdiction to determine in any proceedings before it, whether it has jurisdiction, including the exercise of powers pursuant to s 27(1) of the Act. I am also mindful of the principles discussed in *Springdale Comfort Pty Ltd v Building Trades Association of Unions of WA* (1986) 67 WAIG 325 and in *State School Teachers Union of WA (Inc) v The Hon Minister for Education* (1995) 76 WAIG 27 in this regard.

3 An order now issues.

2002 WAIRC 06558

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ANTHONY RICHARD ROSS, APPLICANT
	v.
	CHEVRON AUSTRALIA PTY LTD, RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	FRIDAY, 20 SEPTEMBER 2002
FILE NO/S.	APPLICATION 226 OF 2002
CITATION NO.	2002 WAIRC 06558

Result	Order issued
Representation	
Applicant	Mr N Friedman of counsel
Respondent	Mr S Shepherd of counsel

Order

HAVING heard Mr N Friedman of counsel on behalf of the applicant and Mr S Shepherd of counsel on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders—

1. THAT a supplementary discovery on affidavit shall be given by the respondent by 23 September 2002 of the following documents or classes of documents that exist and which are or have been in the respondent's possession, custody or power, they being those particularised in the "List of Respondent's Required Documents" dated 11 September 2002, excluding those referred to at paras 4 and 16 thereof.
2. THAT inspection of those documents shall be completed by 30 September 2002.

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

2002 WAIRC 06648

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE AUSTRALIAN WORKERS' UNION, WEST AUSTRALIAN BRANCH, INDUSTRIAL UNION OF WORKERS, APPLICANT
	v.
	KALGOORLIE CONSOLIDATED GOLD MINES PTY LTD & OTHERS, RESPONDENTS
CORAM	COMMISSIONER S J KENNER
DATE	TUESDAY, 17 SEPTEMBER 2002
FILE NO/S.	APPLICATION 899 OF 2002
CITATION NO.	2002 WAIRC 06648

Result	Order issued
Representation	
Applicant	Mr C Young as agent
Respondents	Mr R Gifford as agent and Mr K Dwyer as agent

Order

HAVING heard Mr C Young as agent on behalf of the applicant and Mr R Gifford as agent and Mr K Dwyer as agent on behalf of the respondents, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, and by consent hereby orders—

(1) THAT the herein proceedings be and are hereby divided such that the applicant's claims in relation to superannuation and parental leave and the counterproposals of the respondents be heard and determined as application 899B of 2002 on a date to be fixed by the Commission.

(2) THAT the remainder of the applicant's claims be and are hereby renumbered application 899A of 2002.

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

NOTICES—Appointments—

The Industrial Relations Act 1979

I, the undersigned, the HONOURABLE DAVID KINGSLEY MALCOLM AC CitWA, Chief Justice of Western Australia, in exercise of the powers conferred on me by section 85(6) of the *Industrial Relations Act 1979* (WA), DO HEREBY NOMINATE THE HONOURABLE ERIC MICHAEL HEENAN, a Judge of the Supreme Court of Western Australia, to be an Acting Ordinary Member of the Western Australian Industrial Appeal Court from 1 October 2002 to 31 October 2002 or until the completion of the hearing and determination of any proceedings his Honour may be participating in at the expiration of that period.

As witness my hand this 27th day of September 2002.

DAVID K. MALCOLM,
Chief Justice of Western Australia.

The Industrial Relations Act 1979

I, the undersigned, the HONOURABLE DAVID KINGSLEY MALCOLM AC CitWA, Chief Justice of Western Australia, in exercise of the powers conferred on me by section 85(6) of the *Industrial Relations Act 1979* (WA), DO HEREBY NOMINATE THE HONOURABLE KEVIN HORACE PARKER AO, a Judge of the Supreme Court of Western Australia, to be the Acting Presiding Judge of the Western Australian Industrial Appeal Court on 1 October 2002.

As witness my hand this 27th day of September 2002.

DAVID K. MALCOLM,
Chief Justice of Western Australia.

SITE ALLOWANCES—

2002 WAIRC 06520

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE AUTOMOTIVE, FOOD, METALS, ENGINEERING, PRINTING AND KINDRED INDUSTRIES UNION OF WORKERS - WESTERN AUSTRALIAN BRANCH AND OTHERS, APPLICANTS
	v.
	UNITED CONSTRUCTION PTY LTD AND OTHERS, RESPONDENTS
CORAM	SENIOR COMMISSIONER A R BEECH
DATE	TUESDAY, 17 SEPTEMBER 2002
FILE NO.	APPLICATION 299 OF 1996
CITATION NO.	2002 WAIRC 06520

Result	Application for a site allowance discontinued.
Representation	
Applicants	Mr L McLaughlin and Ms F Bennett for the applicants
Respondents	No appearance

Order

WHEREAS an application was lodged in the Commission pursuant to section 40 of the *Industrial Relations Act 1979*;

AND WHEREAS proceedings in the application were adjourned to await the advice of the applicants;

AND WHEREAS the Commission listed this application For Mention Only for the applicants to show cause why the application should not be discontinued;

AND WHEREAS the applicants sought to discontinue the 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,
Senior Commissioner.

[L.S.]

PUBLIC SERVICE APPEAL BOARD—

2002 WAIRC 06701

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
PARTIES	LISA DELLA POSTA, APPLICANT
	v.
	WESTERN AUSTRALIAN TOURISM COMMISSION, RESPONDENT
CORAM	PUBLIC SERVICE APPEAL BOARD
	COMMISSIONER P E SCOTT - CHAIRMAN
	MS D ROBERTSON - BOARD MEMBER
	MR R THOMAS - BOARD MEMBER
DATE OF ORDER	FRIDAY, 4 OCTOBER 2002
FILE NO/S.	PSAB 4 OF 2002
CITATION NO.	2002 WAIRC 06701

Result Appeal dismissed

Order

WHEREAS on the 14th day of March 2002 the Appellant appealed to the Public Service Appeal Board ("the PSAB") pursuant to Section 80I of the Industrial Relations Act 1979; and

WHEREAS on the 5th day of September 2002 the PSAB wrote to the Appellant directing her to respond to issues regarding the appeal by the 19th day of September 2002; and

WHEREAS on the 19th day of September the Appellant's representative sought an extension of time in which to reply to the PSAB's letter until 4.00pm on the 23rd day of September 2002, which was granted; and

WHEREAS the Appellant failed to respond to the issues raised in the PSAB's letter of 5th September 2002, and further, on the 26th day of September 2002 the Appellant's representative advised the PSAB that the Appellant would not be proceeding with the appeal;

NOW THEREFORE, the Public Service Appeal Board, pursuant to the powers conferred on it under the Industrial Relations Act 1979, hereby orders—

THAT this appeal be, and is hereby dismissed.

[L.S.]

(Sgd.) P. E. SCOTT,
Commissioner,
Public Service Appeal Board.

2002 WAIRC 06563

AGAINST THE DECISION TO SUSPEND MADE ON 16/7/2002

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
PARTIES	STEPHEN KELLY, APPLICANT
	v.
	DIRECTOR GENERAL, DEPARTMENT OF JUSTICE, RESPONDENT
CORAM	PUBLIC SERVICE APPEAL BOARD
	COMMISSIONER P E SCOTT – CHAIRMAN
	MS D ROBERTSON – BOARD MEMBER
	MS G HUSK – BOARD MEMBER
DATE OF ORDER	MONDAY, 23 SEPTEMBER 2002
FILE NO.	PSAB 12 OF 2002
CITATION NO.	2002 WAIRC 06563

Result	Application for discovery granted
Representation	
Appellant	Ms M in de Braekt
Respondent	Ms V Zupanovich and with her Mr B Hogan

Reasons for Decision

1 This is an appeal said to be pursuant to section 78(1) of the Public Sector Management Act 1994 ("the PSM Act") and/or section 80I(1)(d) and 80J of the Industrial Relations Act 1979 ("the IR Act").

2 On 17 September 2002 the appellant sought an order for discovery, production and inspection of documents in relation to this matter. The respondent opposes the bulk of the application for a number of reasons.

3 In considering whether to order discovery, production and inspection, it is necessary for the Public Service Appeal Board ("the Board") to consider what is sought, and what is relevant to the claim. The appeal filed on 22 August 2002 says that it is

"against the respondent's decision on 16 July 2002, to suspend Mr Kelly without explanation from his duties at Casuarina Prison, and the ongoing approach towards Mr Kelly by the Respondent (including but not limited to the unlawful/unfair investigation into unexplained alleged misconduct and unlawful transfer …". The Schedule to the Notice of Appeal sets out 16 Grounds, 15 Particulars, Request for extension of time, 3 Urgent Interim Orders Sought, and 11 Final Orders Sought. The appellant made application to have the matter proceed urgently, and by letter dated 13 September 2002, the Board notified the parties of its intention to do so.

4 It is noteworthy that following the Board agreeing to the appellant's request that the appeal be dealt with urgently, and setting the hearing date as Thursday, 19 September 2002, by facsimile transmission received on 17 September 2002, the appellant advised the Board that without discovery, the appellant was unable to properly argue his case. Accordingly, he requested that the hearing scheduled for 19 September 2002 not proceed, and that discovery be dealt with. The appellant advised that even if discovery were ordered at that point, he would be unable to proceed on 19 September 2002 and indicated that it would be some weeks before the matter could be dealt with, notwithstanding the urgency of the matter.

5 In the letter of 13 September 2002 to the parties, the Board sought to clarify the claim bearing in mind the detail contained within the Notice of Appeal and its schedule, and the appellant's letter to the Board dated 2 September 2002 in respect of the urgency of the matter, and the respondent's position noting—

"The Board seeks confirmation from the parties as to the issues to be dealt with. The Board has considered the appellant's claim as set out in the Notice of Appeal and in Ms in de Braekt's letter of 2 September 2002 and the correspondence from the respondent. The Board seeks the parties' confirmation that the essential issues are—

1. The appellant claims—

(a) that the respondent is engaged in ongoing unlawful action in that it has failed to adhere to the disciplinary procedures in the Public Sector Management Act 1994; and

(b) that the direction to Mr Kelly to not attend work constitutes a suspension, and that this suspension does not comply with the requirements of the Public Sector Management Act 1994.

The other matters raised appear to be consequential upon those issues. The appellant seeks the orders set out in the Notice of Appeal.

2. The respondent says:

(a) that there has been no unlawful action in that the process being undertaken is preliminary to any disciplinary action pursuant to the Public Sector Management Act 1994, for the purpose of the employer deciding whether it has a suspicion upon which to enter into the disciplinary process; and

(b) that the direction to Mr Kelly to not attend work does not constitute a suspension in accordance with the Public Sector Management Act 1994.

The respondent also raises issues of the jurisdiction of the Public Service Appeal Board to deal with the matter and also says that the appeal is out of time."

6 At the hearing of the application for discovery on Thursday, 19 September 2002, the appellant confirmed that the letter of 13 September 2002 set out the essence of his appeal.

7 The terms of the order sought in the application for discovery, production and inspection are as follows—

"Orders sought

The applicant/appellant therefore seeks the following Orders—

1. Within 7 calendar days of the date of this Order, the parties shall supply to each other, complete written lists of all discoverable documents within their power, possession, custody or control, which may be relevant to the issues in question, in accordance with the substantive applications. The lists are to be verified by the parties by Affidavit, as being true, correct, accurate and complete.

2. The documents to be contained in the lists shall contain all documents which *may* be relevant to any of the issues in question in the matters. Documents include any information stored in any of the following forms: hard copy, soft copy, electronic, handwritten or otherwise.

3. The documents to be discovered shall include, but not be limited to the following—

- all documents produced and/or considered by the respondent in connection with the allegations made against Mr Kelly which related to his removal from duties at Casaurina (sic) Prison on 16 July 2002 ("the allegations");

- all documents produced and/or considered in relation to any inquiry or investigation, (whether preliminary or otherwise), into the allegations made against Mr Kelly, including any investigation reports;

- all documents which reveal information about the allegations and/or complaints made against Mr Kelly;

- all documents which reveal why Mr Kelly was removed from his duties at Casaurina(sic) Prison on 16 July 2002;

- all documents which reveal whether Mr Kelly will be returned to his duties at Casaurina(sic) Prison;

- all documents which reveal what, if any action the Department has taken against public service officers in the last 2 years, in connections with allegations/complaints made against them, the precise nature of the allegations/complaints, the relevant employee identity numbers, what disciplinary action ensured (if any), what (if any) penalty was applied, and whether the officers were removed from their duties before the precise nature of the allegations were put to them;

- all documents which reveal complaints made against the respondent for the manner in which it progressed disciplinary proceedings or responded to complaints against staff, communicated to the respondent within the last 2 years, and all documents produced by the respondent in response to such complaints;

- any policies, procedures, guidelines, circulars etc referred to in relation tot eh(sic) allegations against Mr Kelly; and

- any correspondence, briefings, memorandums etc produced or considered in relation to the allegations against Mr Kelly.

4. The lists are to precisely specify the creation date, author/s, type and purpose of each document. If privilege is claimed on any documents, the precise form of privilege must be indicated for each such document. Each documents(sic) is to numbered(sic), and the lists are to chronologically orders (sic), from the most recently produced documents to the oldest.

5. Within 4 calendar days of the provision of the discovery lists, in accordance with Order 1, the parties, shall communicate to each other, precisely which documents each seeks for production and inspection. Within 3 calendar days of this communication date, the parties shall provide each other with complete and unedited copies of all documents so requested, and this shall form production and inspection."

8 At the conclusion of the hearing on 19 September 2002, the Board indicated that certain orders for discovery, production and inspection would issue, and that reasons would follow. These are those reasons.

9 The Board has considered the arguments of the parties and in particular, with reference to the relevance and appropriateness of the documents sought to be discovered and produced; the issue of public interest privilege due to the appellant's employment in a high security prison and the involvement of the respondent's Internal Investigations Unit ("IIU") in the inquiry and/or investigation of the complaints or allegations against Mr Kelly. These matters have been weighed in the context of the appellant's claim, and the need for justice to be done between the parties in the matter of discovery, production and inspection (*ALHWMU v WA Hotels and Hospitality Association Incorporated and Burswood Resort Hotel* (1995) 85 WAIG 1801).

10 We note that discovery is not a matter of right in this jurisdiction, but, in accordance with s.27(1)(o) and (v) of the IR Act it may be appropriate and just in particular cases.

11 We conclude that the issues identified as being the essence of the claim require that Mr Kelly, in order to properly argue his case, needs to have discovery, production and inspection of those documents which deal with the establishment of the inquiry or investigation of the allegations or complaints made against him. Those documents will assist in examining the question of whether or not the inquiry or investigation entered into by the respondent is, as Mr Kelly alleges, an investigation which ought be conducted within the terms of the PSM Act, but which he says is not being applied; or whether the investigation is, as the respondent asserts, a preliminary one for the purpose of deciding whether it has a suspicion upon which to enter into the disciplinary process set out in the PSM Act. We do not believe that it is necessary for the report of the IIU to be made available to the appellant, as that report will not answer that issue. The Documents dealing with the establishment of the inquiry or investigation should assist in identifying the basis for and of the inquiry, the purpose to be achieved, how and by whom it is to be conducted and the nature of the complaints against Mr Kelly.

12 Further, even if the IIU report were to assist in the identification of those matters, we believe that the issue of public interest privilege may arise in respect of the report, as the nature and location of Mr Kelly's employment involves issues of security and offender management functions within the respondent's operation. We also note that, if the appellant's claim is correct, then the disciplinary process is at a relatively early stage. No action, apart from the alleged suspension of Mr Kelly for, according to the respondent, the purpose of enabling inquiries to be made in respect of the complaints, has occurred. At this point, there is no finding against him. It may be that, should the appellant be unsuccessful in his claim and the respondent undertake further inquiries or investigations as part of a disciplinary process, whether or not it has to date, Mr Kelly may seek discovery of the IIU report for the purposes of an appeal against any subsequent decision of the employer where that report is relevant. Such application would then be considered in light of the prevailing circumstances.

13 We distinguish Mr Kelly's current situation in this appeal from that which applied in *Pauline Jane Bingham v Director General, Department of Justice*, PSAB 4 of 2002 (82 WAIG 2293) where the IIU report was the subject of an order for discovery, production and inspection and where Ms Bingham's employment was not related to security and offender management functions of the respondent's operation and in Ms Bingham's case, the disciplinary process had concluded, and was not at an early stage.

14 We are also of the view that any documents which relate to the decision that Mr Kelly not attend for work are necessary to enable him to argue whether or not that decision constituted a suspension, and accordingly, whether the suspension, if any, is in accordance with, or contrary to the PSM Act. Their discovery, production and inspection is appropriate.

15 The respondent says that there are no documents which reveal whether Mr Kelly will be returned to his duties at Casuarina Prison and we accept that advice.

16 As to those documents relating to any action taken by the respondent against public service officers in the last two years, we are of the view that these documents are not necessary or appropriate for discovery and production as they do not relate to the essential issues before us, but are related to more peripheral considerations, which may or may not become an issue at a later stage.

17 The respondent has indicated no objection to providing those documents which are "policies, procedures, guidelines, circulars etc. referred to in relation (tot he) allegation against Mr Kelly", as they are a public documents, and we expect that they will be provided.

18 We also note the requirement which is a usual requirement of discovery, production and inspection, that documents dealt with in that process will be used only for the purpose of the hearing and that the contents will not otherwise be divulged. We have not limited the inspection of those documents to Mr Kelly's representative, and not Mr Kelly, on the basis that Mr Kelly's representative says that she will be unable to take proper instructions in respect of the allegations and the process applied to date if Mr Kelly is unable to be aware of the content of those documents. We accept that this is so in this case. We also note that the nature of the documents the subject of the orders are to be treated appropriately by Mr Kelly and his representative and further, those documents do not include the IIU report which was the subject of particular concern by the respondent.

19 We note at this point that the respondent's argument regarding jurisdiction, and issue of the appeal being out of time have not been resolved. However, because those matters are intricately interwoven with the subject matter of the appeal and the matters we have identified, we are of the view that discovery, production and inspection in the terms of the order issued will be necessary to enable those issues to be heard and determined.

20 For all of these reasons, we considered it appropriate and just for the hearing of this appeal that an order issue in the terms outlined above.

2002 WAIRC 06546

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	STEPHEN KELLY, APPELLANT
	v.
	DIRECTOR GENERAL, DEPARTMENT OF JUSTICE, RESPONDENT
CORAM	PUBLIC SERVICE APPEAL BOARD
	CHAIRMAN - COMMISSIONER P E SCOTT
	BOARD MEMBER – MS D ROBERTSON
	BOARD MEMBER – MS G HUSK
DATE OF ORDER	FRIDAY, 20 SEPTEMBER 2002

FILE NO/S.	PSAB 12 OF 2002
CITATION NO.	2002 WAIRC 06546

Result	Order for discovery issued
Representation	
Appellant	Ms M In de Braekt
Respondent	Ms V Zupanovich and with her Mr B Hogan

Order

HAVING heard Ms M In de Braekt on behalf of the Appellant and Ms V Zupanovich and with her Mr B Hogan on behalf of the Respondent, the Public Service Appeal Board, pursuant to the powers conferred under the Industrial Relations Act 1979, hereby orders—

1. THAT within 7 calendar days of the date of this Order, the parties shall provide mutual discovery in the usual manner of all discoverable documents within their power, possession, custody and control, which are relevant to the issues of—
   (a) the establishment of any inquiry or investigation, whether preliminary or otherwise, relating to allegations and/or complaints made against Mr Kelly, provided that such documents identify the nature of the allegations and/or complaints; and
   (b) the decision that Mr Kelly not attend for duty.
2. THAT within 7 days after discovery, the above documents are to be produced for inspection only to the extent that they are relevant to the decision of the Respondent to enquire into allegations and/or complaints against Mr Kelly.
3. THAT the documents produced are to be used only and for the sole purpose of the proceedings before the Public Service Appeal Board and their contents are not to be otherwise used or divulged.

(Sgd.) P. E. SCOTT,
Commissioner,
[L.S.] on behalf of the Public Service Appeal Board.

NOTICES—Union matters—

NOTICE

FBM No. 003 of 2002

NOTICE is given of an application by the "Australian Municipal, Administrative, Clerical and Services Union of Employees, W.A. Clerical and Administrative Branch" to the Full Bench of the Western Australian Industrial Relations Commission for an alteration to rule 5 – Constitution.

The existing rule and the proposed amendment are set out below—

Existing Rule

5—CONSTITUTION

The Union shall consist of persons, male or female, engaged in any clerical capacity, including telephonists, or in the occupation of shorthand writing or typing or on calculating, billing or other machines designed to perform, or assist in performing any clerical work whatsoever within the State of Western Australia, but excepting that portion of the State within the 20th and 26th parallels of latitude and the 125th and the 129th meridians of longitude.

Provided that no person shall be a member who is not a employee within the meaning of the "Industrial Relations Act, 1979".

Proposed Rule

5—CONSTITUTION

The Union shall consist of persons, male or female, engaged in any clerical **and/or administrative** capacity, including telephonists, or in the occupation of shorthand writing or typing or on calculating, billing or other machines **including computers** designed to perform, or assist in performing any clerical **and/or administrative** work whatsoever within the State of Western Australia, but excepting that portion of the State within the 20th and 26th parallels of latitude and the 125th and the 129th meridians of longitude.

Provided that no person shall be a member who is not a employee within the meaning of the "Industrial Relations Act, 1979".

The matter has been listed before the Full Bench on Monday 9 December 2002 at 10.30 am.

A copy of the Rules of the organisation and the proposed rule amendment may be inspected on the 16th Floor, 111 St Georges Terrace, Perth.

Any organisation registered under the Industrial Relations Act 1979, or any person who satisfies the Full Bench that he/she has a sufficient interest or desires to object to the application may do so by filing a notice of objection in accordance with the "Industrial Relations Commission Regulations 1985".

(Sgd.) S. TUNA,
Deputy Registrar.

25 September 2002.