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CUMULATIVE CONTENTS AND DIGEST APPEAR AT THE END OF THIS PUBLICATION

INDUSTRIAL APPEAL COURT—Appeals against decision of Full Bench—

[2002] WASCA 241

JURISDICTION	:	WESTERN AUSTRALIAN INDUSTRIAL APPEAL COURT
CITATION	:	CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INC -v- DIRECTOR GENERAL OF DEPARTMENT FOR COMMUNITY DEVELOPMENT [2002] WASCA 241
CORAM	:	ANDERSON J (Presiding Judge) PARKER J HASLUCK J
HEARD	:	1 AUGUST 2002
DELIVERED	:	3 SEPTEMBER 2002
FILE NO/S.	:	IAC 4 of 2002
BETWEEN	:	CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INC Appellant AND DIRECTOR GENERAL OF DEPARTMENT FOR COMMUNITY DEVELOPMENT Respondent

Catchwords—

Industrial relations - Allegation of misconduct against public sector employee - Conduct outside workplace and work hours - Whether "misconduct" - Test to be applied

Public Sector Code of Ethics - Whether Code applies to conduct of employee outside workplace

Appointment of independent party to conduct investigation - Whether denial of procedural fairness

Whether employer entitled to commence disciplinary proceedings where criminal proceedings against employee withdrawn

Legislation—

Industrial Relations Act 1979, s 80E, s 90

Public Sector Management Act 1994, s 9, s 80, s 81

Result—

Appeal allowed in part

Category: A

Representation—

Counsel—

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

Solicitors—

Appellant	:	Kott Gunning
Respondent	:	State Crown Solicitor

Case(s) referred to in judgment(s)—

Henry v Ryan [1963] Tas SR 90

Hospital Employees Federation of Australia v Western Hospital (1991) 4 VIR 310

Hussein v Westpac Banking Corporation (1995) 59 IR 103

Case(s) also cited—

Blyth Chemicals v Bushnell (1933) 49 CLR 66

Drabsch v Buckley & Anor [1999] NSWSC 122

McManus v Scott-Charleton (1996) 140 ALR 625

Parker & Ors v Miller QC & Ors, unreported; FCt SCt of WA; Library No 980249; 8 May 1998

R v BBC; ex parte Lavelle [1983] 1 All ER 241

Rose v Telstra Corp Ltd; unreported; AIRC Q9292; 4 December 1998

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1 **ANDERSON J (Presiding Judge)**: This is an appeal pursuant to s 90 of the *Industrial Relations Act* from a decision of the Full Bench handed down on 5 March 2002 in which the Full Bench upheld an appeal against an order made by the Public Service Arbitrator permanently staying disciplinary proceedings commenced by the respondent against a public service officer employed in the Department for Community Services.

2 The matter began in June 2001 when the respondent received a complaint from a female public service officer employed in the Department that she had been sexually assaulted by a more senior public service officer who was also employed in the Department. The disciplinary proceedings were started as a result of this complaint.

The Disciplinary Proceedings

3 Mr H is of the age of 53 years and is currently employed as a level 6 manager in the Community Skills Training Centre which is a branch of the Department. His duties include training officers employed in the Family and Children's Service branch of the Department in community skills. Ms S is of the age of 24 years and is a level 2 welfare officer employed in Family and Children's Services. At the material time Ms S was stationed in Kalgoorlie and Mr H was stationed in Perth. They had met on previous occasions, including during September of 2000 in Carnarvon where Mr H conducted a training course in which Ms S was one of the trainees. On 21 February 2001 Mr H and a Ms Day, who was employed as a trainer in the Community Skills Training Centre in Perth, travelled to Kalgoorlie to conduct a training course on the subject of critical incident stress debriefing. Ms S was not a participant in the course.

4 After the training course finished Mr H, Ms S and several other officers employed in the Department met for drinks and later for dinner. How this was arranged is in dispute. The facts that are about to be stated are taken from the statement which was made by Ms S to police in about March 2000 and which was provided by her to the respondent in support of her complaint against Mr H. This statement has not yet been tested. After dinner several members of the group, including Ms S and Mr H, continued socialising, first at one hotel and then at another, until about midnight. Ms S then invited the group back to her house in Kalgoorlie and a number of people, including Mr H, accepted that invitation. More alcohol was consumed. After an hour or so the group began to break up and by about 2 am the only persons present in the house were Mr H and Ms S. According to Ms S she was under the influence of alcohol. During the evening Mr H had spoken of his skills and experience as a masseuse and from time to time during the evening he had practised his skills on one or two female members of the group by manipulating their shoulders.

5 After everyone else had left the house Mr H offered to give Ms S a full body massage and she accepted that offer which involved taking off all her clothes and lying face down on a couch, having oil poured on her body and having her body rubbed by Mr H. This continued for some time. According to Ms S, as she was lying face down on the couch, Mr H pushed her legs apart and penetrated her vagina and then her anus with a finger. Ms S said she responded to this by remonstrating with Mr H, telling him that he had "gone way too far" and that it was "time that you went home". In her statement she said that she called him a taxi and walked him to the front door and that after he left she "went straight to my bathroom and I vomited".

6 According to Ms S, she confided to a fellow officer in her Department and later reported the matter to one of the psychologists in the Family and Children's Services division. Other people became involved, including representatives of the appellant which was Ms S's union. There was uncertainty whether the matter should or could be dealt with under the *Public Sector Management Act* as a disciplinary matter. Ultimately on 7 March 2001 Ms S made a formal report to police.

7 Mr H was asked to attend at the police station in Perth on 23 March 2001, which he did with a solicitor. He was advised by his solicitor to exercise his right of silence, which he did, whereupon he was charged with the offence of sexual penetration without consent contrary to s 325 of the *Criminal Code*. A complaint of that very serious offence was laid in the Court of Petty Sessions. The matter was then referred to the Director of Public Prosecutions and the Director came to the conclusion that there was no reasonable prospect of obtaining a conviction and did not present an indictment. Mr H was discharged from the complaint on 6 June 2001.

8 On 11 June 2001 Ms S made a complaint against Mr H to Mr Lex McCulloch, the Executive Director, Metropolitan Service Delivery, Family and Children's Services in consequence of which Mr McCulloch wrote to Mr H as follows—

> "Dear …[Mr H's given name]
>
> **Allegations of Misconduct**
>
> I refer to your letter of 12 June 2001 in which you advised me of the Director of Public Prosecutions' decision to discontinue prosecution of a charge against you.
>
> On 11 June 2001 I received a complaint from … [Ms S] detailing serious allegations arising from your conduct towards her following a training exercise in Kalgoorlie on 20 February 2001.
>
> I am presently investigating the nature and extent of these allegations and will advise you of my intended action in due course. You are hereby directed not to contact or in any way communicate with … [Ms S] until this matter is resolved.
>
> Yours sincerely
>
> Lex McCulloch
>
> Executive Director
>
> Metropolitan Service Delivery"

9 Section 81 of the *Public Sector Management Act* is in the following terms—

> "81 Procedure when breach of discipline suspected
>
> (1) An employing authority may, when it suspects that a person has committed a breach of discipline whilst serving as an employee in its public sector body and has given the person such notice in writing of the nature of the suspected breach of discipline as is prescribed, give the person a reasonable opportunity to submit an explanation to the employing authority.
>
> (2) After having given the respondent the reasonable opportunity referred to in subsection (1), the employing authority may—
>
> (a) if it is not the Minister, investigate or direct another person to investigate; or
>
> (b) if it is the Minister, direct another person to investigate,
>
> the suspected breach of discipline in accordance with prescribed procedures.
>
> …"

10 On 6 July 2001 Mr McCulloch wrote again to Mr H confirming his intention to investigate the "nature and extent of serious allegations relating to your behaviour towards" Ms S and advising him that he had appointed Dr Maureen Smith "to conduct a formal and independent investigation into these matters and determine whether there is any substance to matters raised within … [Ms S's] complaint". The letter also advised Mr H that he was entitled to have a colleague or representative capable of providing advice to him present during any interview or meeting with Dr Smith and that upon completion of her investigation, Dr Smith would compile a report of her findings "inclusive of recommendations". Mr H responded to this letter maintaining his innocence and denying "any offence had taken place". He accused Ms S of being "mischievous".

11 Dr Maureen Smith is in private practice in Applecross as a management consultant. She is a fellow of the Australian Institute of Management and a member of the Australian Institute of Company Directors. Her terms of reference were—

> "Using the balance of probabilities as your test, I seek your determination on the following matters—
>
> (1) Whether … [Ms S's] allegations regarding to … [Mr H's] conduct towards her are found to have substance;
>
> (2) If so, whether … [Mr H's] alleged conduct towards … [Ms S] occurred within a social or work related context given that … [Mr H] was in Kalgoorlie on departmental business;
>
> (3) Whether … [Mr H's] alleged conduct towards … [Ms S] was inappropriate;
>
> (4) Whether … [Mr H's] alleged conduct towards … [Ms S] constituted misconduct given the requirement that whilst acting as an authorised representative of the department he must at all times adhere to—
>
> • WA Public Sector Code of Ethics
>
> • *Public Sector Management Act* of 1994, in particular section 9, General Principles of Official Conduct
>
> • FCS Code of Conduct"

12 Dr Smith commenced her investigation on 6 July and personally interviewed nine people and interviewed a further four by telephone. She attempted to interview Mr H, but he declined to be interviewed.

13 Dr Smith reported to Mr McCulloch on 3 August 2001 purporting to make positive findings against Mr H under each of the four terms of reference. On 31 August 2001 Mr McCulloch sent to Mr H a letter described as a "Notice of Suspected Breaches of Disciplines" in which he said—

> "On 9 August 2001 I received a report from Dr Smith. I have considered the contents of the report and have made some preliminary inquiries into matters raised in it and by it. I now give you notice that, pursuant to section 81(1) of the *Public Sector Management Act 1994* I suspect you have committed the following breaches of discipline—
>
> (1) On 22 February 2001 you sexually penetrated … [Ms S] without her consent and thereby committed an act of misconduct;
>
> (2) On 22 February 2001 you sexually penetrated … [Ms S] without her consent and thereby contravened the WA Public Sector Code of Ethics, specifically the Key Principles of Justice, Respect for Persons and Responsible Care;
>
> (3) On 22 February 2001 you sexually penetrated … [Ms S] without her consent and thereby contravened a provision of the PSMA 1994 applicable to you, namely, section 9(b), in that you failed to act with integrity in the performance of official duties;
>
> (4) On 22 February 2001 you sexually penetrated … [Ms S] without her consent and thereby contravened a provision of the PSMA 1994 applicable to you, namely, section 9(c), in that you failed to exercise the proper courtesy, consideration and sensitivity expected of you in your dealings towards a fellow employee.
>
> In accordance with section 81(1) I am giving you the opportunity to submit an explanation to me in relation to the allegations. You have until close of business Friday, 7 September 2001 to submit your written response to these allegations.
>
> Copies of Dr Smith's report and relevant provisions of the *Public Sector Management Act 1994* and the Western Australian Public Sector Code of Ethics are attached.
>
> Yours sincerely"

Application to Public Service Arbitrator

14 The disciplinary proceedings went no further. On 5 September 2001 the appellant filed a notice of application in the Commission applying to the Public Service Arbitrator under s 80E and s 80F of the *Industrial Relations Act* seeking to have the respondent's "actions and/or decisions, and/or any related matter or thing of the respondent specifically in relation to the respondent's actions in relation to … [Mr H] to be reviewed, nullified, modified or varied as the Public Service Arbitrator in his/her jurisdiction determines upon the hearing of the matter".

15 Twenty one grounds were put forward as grounds on which the application was made and a total of 22 particulars of the grounds as a whole were also included. It is not necessary to comment on the way in which the grounds and particulars are pleaded, save to say that they appear to be unduly prolix and argumentative and to descend into narrative.

16 The sections of the *Industrial Relations Act* pursuant to which these proceedings were brought are in the following terms—

> "80E **Jurisdiction of Arbitrator**
>
> (1) … An arbitrator has exclusive jurisdiction to inquire into and deal with any industrial matter relating to a Government officer, a group of Government officers or Government officers generally.
>
> …
>
> (5) Nothing in subsections (1) or (2) shall affect or interfere with the exercise by an employer in relation to any Government officer, or office under his administration, of any power in relation to any matter within the jurisdiction of an Arbitrator, but any act, matter or thing done by an employer in relation to any such matter is liable to be reviewed, nullified, modified or varied by an Arbitrator in the course of the exercise by him of his jurisdiction in respect of that matter under this Division.
>
> 80F **By whom matters may be referred to Arbitrator**
>
> (1) … an industrial matter may be referred to an Arbitrator under section 80E by an … organisation or association …"

17 The Arbitrator, Commissioner P E Scott, heard the matter on 11 October 2001 and reserved her decision until 22 October 2001 when reasons were delivered together with a set of minutes of proposed orders. Final orders were made on 30 October 2001 as follows—

> "(1) That the respondent shall cease any and all disciplinary action against … [Mr H] in relation to allegations made by … [Ms S] and is prohibited from reinstigating any such action in relation to those allegations;
>
> (2) That the investigation and report by Dr Maureen Smith for and on behalf of the respondent in relation to allegations of misconduct against … [Mr H] is hereby void *ab initio*;
>
> (3) That within seven days of the date of this order the respondent shall remove from … [Mr H's] personal file all documentation connected with or flowing from the investigation and report by Dr Maureen Smith."

18 There is a rather curious feature of the proceedings before the Arbitrator. The appellant's main contention was that the respondent had no right to conduct an investigation into the conduct of Mr H because that conduct did not "occur in the workplace or in the course of an employee discharging authorised duties … in the employment relationship", to use the words of the application. The appellant's case was that it was a private matter and not a breach of discipline "whilst serving as an employee" within the meaning of s 81(1) of the *Public Sector Management Act*. In short, it was the appellant's case that the conduct alleged could not be misconduct.

19 In examining this contention, the Arbitrator might have been expected to confine herself to those facts which were alleged by Ms S in support of her complaint. The Arbitrator might have been expected to simply ask herself the question whether if all of the factual material put forward by Ms S in support of her complaint was true, did that factual material disclose grounds on which the Director could suspect that Mr H had committed a breach of discipline whilst serving as an employee. I think that would have been the proper and better approach. Instead the Arbitrator heard evidence from Mr H, and only from him. Mr H was allowed to give evidence to the Arbitrator to the effect that his "official duties" ceased when he left the training venue to return to his motel. He was allowed to give his version of the circumstances under which he, Ms S and the other members of the group came to be socialising. He gave his version of his behaviour and of the behaviour of Ms S and as to how events unfolded during the course of the evening and early morning; and he was allowed to give evidence contradicting the account given by Ms S of the sexual assault upon her.

20 I do not consider that this was appropriate. If an employing authority suspects that there may have been an actionable breach of discipline, and there are reasonable grounds for that suspicion, the authority ought to be allowed to carry out its statutory duty to conduct an investigation to see whether there was in truth an actionable breach of discipline. *Prima facie* it would not seem to be a proper exercise of jurisdiction by the Public Service Arbitrator to stop the employing authority from doing so on the basis of the Public Service Arbitrator's own investigation of the facts. No doubt it is perfectly proper for the Public Service Arbitrator to stop baseless disciplinary proceedings. However, I think the judgment as to whether the proceedings are or are not baseless should be made by reference only to the matters alleged in the complaint.

21 As it happens, I think that in the end this is exactly what the Arbitrator did in fact do in this case. Although the Arbitrator summarised Mr H's evidence, it appears from her reasons for decision that she looked only at the conduct that was "alleged in respect of … [Mr H] …", as she put it, in order to determine whether she should put a stop to the investigations, which she did. There is little or no indication in her reasons that her decision to do so was based on the evidence given by Mr H. It would have been better if at the outset the Arbitrator had declined to hear that evidence.

22 The Arbitrator found—

> "26. The role of the Department, its purpose, vision and responsibility in respect of protection of children, and the Training Centre's role in the provision of training does not sufficiently relate to or touch upon the alleged conduct such as to create the necessary connection to bring the alleged conduct within the purview of an employer.
>
> 27. In those circumstances, I find that the alleged conduct did not touch the employment in circumstances which would mean that the employer is entitled to inquire into that conduct. There is not a relevant connection between the conduct and the employment. If the test were that referred to by the applicant, then I am not satisfied that the conduct alleged has, in the words of the applicant, related to … [Mr H's] performance of his duty or his working relationships."

Full Bench appeal

23 The respondent appealed from this decision to the Full Bench on a single ground expressed in the following terms—

> "1. The Commissioner erred in law in finding that the respondent's alleged conduct did not touch the respondent's employment with the appellant in circumstances which would mean that the employer is entitled to inquire into that conduct.
>
> **PARTICULARS**
>
> 1.1 There was a relevant connection between the respondent's alleged conduct and his employment with the appellant.

1.2 In any event, it could not be said that the connection between the respondent's alleged conduct and his employment with the appellant was so tenuous as to disentitle the appellant from conducting an investigation into it under section 81 *Public Sector Management Act 1994*, which investigation would have led to a full consideration of the extent of the connection between the respondent's alleged conduct and his employment with the appellant."

24 Whether this ground of appeal really does involve an error of law, as it is said to do, need not be debated. The Full Bench (President Sharkey, Chief Commissioner Coleman and Commissioner Wood) unanimously upheld the appeal, concluding that the alleged conduct did have, as they put it, a "sufficient relevant connection" to Mr H's employment to justify the proposed investigation.

Proceedings before this Court

25 There are five grounds of appeal to this Court. Although they occupy some seven pages, they seem to me to raise only the following questions of law—

- With respect to the misconduct alleged in item (1) of the Director's notice of suspected breaches of discipline, as the alleged misconduct did not occur in the hours of duty and did not occur in the workplace, could it amount to an act of misconduct within the meaning of s 80(c) of the *Public Sector Management Act* and, if so, what is the test?
- With respect to the misconduct alleged in item (2) of the Director's notice of suspected breaches of discipline, does the Public Sector Code of Ethics extend to behaviour occurring outside the hours of duty and outside the workplace?
- With respect to the misconduct alleged in items (3) and (4) of the Director's notice of suspected breaches of discipline, do the requirements of s 9(b) and s 9(c) of the *Public Sector Management Act* apply to the conduct of public sector employees outside their hours of duty and outside their workplace?
- Did the report of Dr Smith so taint the proceedings as to require that the proceedings be permanently stayed?
- Should the Full Bench have permitted the appellant (respondent before them) to rely on a notice of contention?
- Are the disciplinary proceedings barred in point of law having regard for the withdrawal of the criminal proceedings against Mr H?

26 Other matters are pleaded in the grounds of appeal, but they seem to me to raise only questions of fact.

27 I have already set out the relevant parts of s 81. The concept of "breach of discipline" referred to in that section is to be understood in the light of the preceding section which is in the following terms—

"80. **Breaches of discipline**

An employee who—

(a) disobeys or disregards a lawful order;

(b) contravenes—

(i) any provision of this Act applicable to that employee; or

(ii) any public sector standard or code of ethics;

(c) commits an act of misconduct; or

(d) is negligent or careless in the performance of his or functions,

commits a breach of discipline."

28 Section 80(b)(i) means that conduct which is not in accordance with s 9 may be a breach of discipline, s 9 being a provision of the Act applicable to public sector bodies and employees. Section 9 is in the follow terms—

"9. **General principles of official conduct**

The principles of conduct that are to be observed by all public sector bodies and employees are that they—

(a) are to comply with the provisions of—

(i) this Act and any other Act governing their conduct;

(ii) public sector standards and codes of ethics; and

(iii) any code of conduct applicable to the public sector body or employee concerned;

(b) are to act with integrity in the performance of official duties and are to be scrupulous in the use of official information, equipment and facilities; and

(c) are to exercise proper courtesy, consideration and sensitivity in their dealings with members of the public and employees."

29 Section 80(b)(ii) means that conduct not in accordance with the Public Sector Code of Ethics may be a breach of discipline.

30 I shall now try to deal with each of the questions of law in the order in which they are set out above.

- *With respect to the misconduct alleged in item (1) of the Director's notice of suspected breaches of discipline, as the alleged misconduct did not occur in the hours of duty and did not occur in the workplace, could it amount to an act of misconduct within the meaning of s 80(c) of the Public Sector Management Act and, if so, what is the test?*

31 The acts of Mr H which are said to constitute misconduct could be judged by ordinary standards to be misconduct. Ms In de Braekt submitted that this is beside the point. She submitted that for the purposes of the *Public Sector Management Act* misconduct is a defined term and the definition is contained in s 9 and the conduct of Mr H, as related by Ms S, is not within the definition.

32 The first part of this submission cannot be accepted. The phrase "act of misconduct" in s 80 is not to be construed as if it read "non-compliance with section 9". If that had been intended, that is how it would have been expressed. Alternatively, if the word "misconduct" was to have a special or limited meaning for the purposes of the Act, provision would have been made in the definition section. In my opinion, nothing in the Act indicates that parliament intended the word "misconduct" to have any

special meaning in s 80. It is to be given its ordinary meaning which is simply conduct which is improper or immoral by the standards of ordinary people. Therefore, a public service officer who conducts himself or herself in such a manner is *prima facie* guilty of misconduct within the meaning of s 80. The conduct alleged against Mr H is conduct which could be considered improper or immoral by ordinary standards.

33 It may be accepted that parliament did not intend that misconduct wherever or whenever occurring should be regarded as a breach of discipline calling for disciplinary action on the part of the public sector employer. Off-duty misconduct may be so unrelated to the public sector employment as to be incapable of amounting to a breach of discipline. It may be conduct which is irrelevant to the office itself, to the standing of the officer within that office and to his perceived capacity to discharge the functions of the office. It may be accepted for the purposes of this case that if this was shown, there will not have been "misconduct" within the meaning of s 80. The act of misconduct, as to whether it is a breach of discipline, is to be evaluated by reference to the objects of the *Public Sector Management Act*. Speaking very broadly, those objects are the administration and management of the public service. The objects of the Act are not achieved by requiring public sector officers to conduct all aspects of their lives as if there was no distinction at all between their public sector responsibilities and their private activities.

34 Where is the line to be drawn? The common law test has been expressed as being that the misconduct must be "relevant to the employment" or have a "relevant connection to the employment": ***Hussein v Westpac Banking Corporation*** (1995) 59 IR 103. In McCullum, Pittard and Smith "Labour Law: Cases and Materials" (2nd) 1990 at page 140 the test is said to be whether the misconduct "touches the employment". In ***Hospital Employees Federation of Australia v Western Hospital*** (1991) 4 VIR 310 at 324 Lawrence DP thought that the discreditable conduct "should be considered in terms of whether or not the employee has breached an express or implied term of his or her contract of employment". The implied term which Lawrence DP had in mind is not formulated, but perhaps he had in mind a term to the effect that an employee is not to conduct himself in a manner that tends to undermine his capacity to perform his duties or diminish his or her status and authority to the extent that it affects fitness to discharge the duties of his or her office. That conduct of such a kind in private life may be misconduct against his or her employer is well accepted. It is necessary to refer only to the well-known case of ***Henry v Ryan*** [1963] Tas SR 90, a judgment of Burbury CJ. I wish it was still possible to write such succinct judgments. Burbury CJ said, at 91—

> "'Discipline' in this sense involves more than mere obedience to lawful orders. It is a wide concept and I have no doubt extends to conduct of a police officer when off duty so far as that conduct may affect his fitness to discharge his duties as a police officer … Discreditable conduct in his private life may … clearly affect his status and authority as a police officer in the discharge of his public duties and in his relations with the public.
>
> Misconduct in his private life by a person discharging public or professional duties may be destructive of his authority and influence and thus unfit him to continue in his office or profession."

35 In my opinion, the discreditable conduct alleged in this case could amount to misconduct within the meaning of s 80 and, therefore, could amount to a breach of discipline. I think the Full Bench was perfectly correct so to conclude. Whilst the circumstances remain to be fully investigated, there is, on the face of it, a connection between the conduct and the employment. Mr H had met and apparently befriended Ms S at a training course which he had conducted and in which she was a participant. She was a junior officer and he was a level 6 manager 30 years her senior. The renewal of the acquaintanceship came about in a workplace context in that he was to go to Kalgoorlie to conduct a training session and she was stationed in Kalgoorlie in her employment with the Department. This appears to be all that they had in common. The group which met to socialise after the training session were all (or most of them were) public sector employees employed in the Department. They were, in a broad sense, fellow workers and Mr H was the most senior and very considerably senior to Ms S. Discreditable behaviour on his part towards any member of the group might tend to diminish his status, authority and influence within the Department in the eyes of those junior to him and thus might affect his fitness to carry out his duties. These are matters which are proper for investigation in the proposed disciplinary proceedings.

- *With respect to the misconduct alleged in item (2) of the Director's notice of suspected breaches of discipline, does the Public Sector Code of Ethics extend to behaviour occurring outside the hours of duty and outside the workplace?*

36 Ms In de Braekt, on behalf of the appellant, submitted that it could not be found that Mr H had contravened the Public Sector Code of Ethics, as intimated in par (2) of the Director's notice to Mr H, because no part of the Code regulated what she called "the private lives of officers", nor was it directed at conduct other than conduct within the performance of official duties.

37 I am not persuaded that the Code of Ethics is so confined. On page 5 of the Code under the heading "What is the Code of Ethics" there is the following statement—

> "The Code articulates the way in which public sector employees interact with each other and their stakeholders."

38 The Code is said to be based on certain fundamental principles, one of which is "Respect For Persons" (see page 10 of the Code). That principle is said to involve, *inter alia*, "promoting the physical, mental and social wellbeing of others" and "respecting the rights of individuals …".

39 I think that what this means is that in their interaction with each other there must be respect for each other and each other's rights and physical and mental wellbeing. It would be going too far, perhaps, to hold that the Code is intended to impose ethical standards of that description on public sector employees whenever and wherever they may "interact". The interaction might take place in circumstances that have no relevance at all to the status or position within the public sector of the employees, in which case it would be easy to see that misbehaviour of one towards the other could not be regarded as a breach of discipline. I think that whether a particular case is on one side of the line or the other will always depend on all of the circumstances and will be a matter of judgment. Suffice it to say that the line is not necessarily to be drawn in every case by reference to the workplace itself or the hours of duty.

- *With respect to the misconduct alleged in items (3) and (4) of the Director's notice of suspected breaches of discipline, do the requirements of s 9(b) and s 9(c) of the Public Sector Management Act apply to the conduct of public sector employees outside their hours of duty and outside their workplace?*

40 Ms In de Braekt submitted that it could not be found that Mr H had failed to act with integrity in the performance of official duties contrary to s 9(b), which is the breach of discipline alleged in item (3) of the notice, because the alleged misconduct was not in the performance of official duties. She submitted that the Full Bench acknowledged this and their acknowledgment of it should have led them to uphold the Arbitrator's stay of the investigation at least into that suspected breach of discipline.

41 I think this submission must be accepted. The members of the Full Bench did acknowledge that the conduct itself occurred out of hours when neither Ms S nor Mr H were actually performing official duties. That is the only conclusion that was open on the facts set out in Ms S's statement. On that statement of facts Mr H could not be held to have failed "to act with integrity in the performance of official duties" within the meaning of s 9(b) in that in no relevant sense was it Mr H's official duty to socialise with Ms S.

42 Ms In de Braekt also submitted that it could not be found that Mr H had failed to comply with the requirements of s 9(c) which is the breach of discipline alleged in item (4) of the notice. As I understood her argument, she submitted that the requirement in s 9(c) to exercise proper courtesy, consideration and sensitivity in dealings with employees is a requirement imposed on public sector bodies in dealings between public sector bodies and their employees. It could not, therefore, refer to Mr H's dealings with Ms S. According to the argument, the requirement to exercise proper courtesy, consideration and sensitivity in dealings with members of the public did not apply in this case either because Mr H was not dealing with a member of the public in socialising with Ms S. It is difficult to reconcile this submission with s 9 as both "public sector bodies" and "employees" are referred to in the introductory passage of s 9. The intention to bind employees, as well as public sector bodies, appears clear. Further, as s 9(c) concludes with reference to both the "public" and "employees", the dealings of employees with other employees appears necessarily to be within the operation of s 9(c). In other words, s 9(c) imposes principles of conduct on both public sector bodies and public sector employees and identifies the beneficiaries of those principles of conduct as being both the public and public sector employees. Relevantly to this case, therefore, the subsection means that in their dealings with each other public sector employees are to be courteous, considerate and sensitive.

43 Given the context and purpose of the Act, the regulation of the dealings of one public sector employee with another would appear to be both appropriate and sensible. In any event, that is the effect of the statutory language.

44 The question, therefore, arises what "dealings" are within the intended operation of s 9(c)? Given the objects of the Act, the discussion of misconduct, in the context of s 80 and s 9, earlier in the reasons, is of general relevance to this question. For the purposes of s 9(c), if the dealing in question is not in the course of public sector employment, at the least it would need to be "relevant" to that employment, or have a "relevant connection" to that employment, for it to be within the intended scope of s 9(c).

45 It is neither necessary nor practicable to examine this aspect further at this stage as the relevant facts are yet to be determined by investigation. What is presently known offers a sufficient prospect that the dealing was relevantly connected to the public sector employment of both Mr H and Ms S that it would be proper for the proposed investigation pursuant to s 81(2) to be conducted. Of course, on investigation, the relevant dealings may be revealed to be entirely personal and private and outside the scope of s 9(c).

- *Did the report of Dr Smith so taint the proceedings as to require that the proceedings be permanently stayed?*

46 In the notice of application to the Public Service Arbitrator it was pleaded by ground 16 that—

> "Formal conclusions reached in an unlawful investigation by the respondent (and its agents) about the alleged misconduct of an employee, prior to the undertaking of a lawful investigation pursuant to section 81 of the *Public Sector Management Act*, denies the employee natural justice and procedural fairness.

47 The complaint underlying this ground of application was that whilst it might have been permissible for the Director-General to enlist the aid of others to see if there were grounds to suspect a breach of discipline which ought to be investigated, this is not what the Director-General did. Instead he engaged Dr Smith on terms of reference which really required her to conduct the investigation itself, with the result that the Smith report amounted to a determination in the nature of a final determination against Mr H in respect of the complaint being investigated. The appellant's criticism of this aspect of the proceedings would appear to be justified. How the report might have been ultimately used in the further investigations is another matter, but it is easy to see why Mr H would wish to obtain an order under s 80E(5) of the *Industrial Relations Act* reviewing the decision to obtain the Smith report, and to have that report removed from all further consideration. This is the effect of Commissioner Scott's orders in relation to Dr Smith's report and there was no challenge to those orders before the Full Bench, nor before this Court.

48 What remains, however, is the submission that the report of Dr Smith must have made an indelible impression upon the Director so as to lead him to a state of prejudgment. This submission is not without substance. When an officer receives a notice to the effect that he is suspected of committing a breach of discipline and that there is to be an investigation in which he will be given an opportunity to be heard, he would not expect to receive with the notice a detailed report of a consultant following upon a comprehensive investigation by that consultant and containing the conclusion that the officer had in fact committed a breach of discipline. The officer might reasonably apprehend that the judgment had been made and all that remained was empty formality. If the inquiry was then to proceed and was determined, or apparently determined, on the strength of the findings made in the report, I think the determination could not stand. There would have been a denial of procedural fairness. The officer would be in the unfair situation of taking part in an investigation which was nothing more than, or which appeared to be nothing more than, the rubber stamping of the results of an antecedent investigation and plainly that is not what is contemplated by the provisions of Div 3 of Pt V.

49 In this case, however, there is no real danger that this might happen. The Public Service Arbitrator has made directions, the effect of which are that no further reference may be made to Dr Smith's report. There is no reason to suppose that any further use will be made of it should the disciplinary proceedings continue. I do not accept that the Director could not now proceed to conduct an investigation in a manner which is fair to Mr H. He having been directed, in effect, to put Dr Smith's report out of his mind, there is no good reason to suppose that he will not do so.

50 I should add that what I have said above is not to be taken as a criticism of Dr Smith. There is no ground whatever for criticising Dr Smith. She did exactly what she was commissioned to do, and very promptly too.

- *Should the Full Bench have permitted the appellant (respondent before them) to rely on a notice of contention?*

51 There is no provision in the *Industrial Relations Act* or the regulations made under that Act for the filing of notices of contention. This does not mean that a respondent to an appeal to the Full Bench who wishes to contend that the decision below should be affirmed on grounds other than those relied on below may not advance such arguments. There is a distinction between, on the one hand, seeking to have the decision below varied or set aside, in which case there must be a notice of appeal, and, on the other hand, seeking to support the decision below by pointing out that it is sustainable on grounds other than those relied on by the tribunal whose decision is appealed from. There is no reason in principle why a respondent should be precluded from advancing arguments in support of the decision below in addition to the matters upon which the decision is expressly based. As I understand the judgment of the Full Bench in this case, they did not shut out the respondent's arguments which were set out in the notice of contention. They simply declined to recognise the notice of contention as a substantive proceeding. I think it was correct of the Full Bench to point out to counsel for the respondent that there is no provision for a notice of contention to be lodged in an appeal to the Full Bench and to decline to treat the notice of contention as a formal proceeding. Anyway, there can be no ground for complaint. The Full Bench heard and considered the arguments and I am not persuaded that they erred in the approach they took to the respondent's case on this procedural point.

- *Are the disciplinary proceedings barred in point of law having regard for the withdrawal of the criminal proceedings against Mr H?*

52 This is a double-jeopardy argument and is entirely misconceived. There is no double jeopardy in this case. Mr H did not stand trial in the criminal court. But even if he had, and had been acquitted, there is no rule of law which would have operated as a bar to subsequent disciplinary proceedings. Ms In de Braekt presented what I must say, with all due respect, was a rather obscure argument to the effect that the "Crown" may not have two bites at the cherry. All that need be said about this is that there is no reason in principle why and no authority that I know of to the effect that a public official against whom criminal conduct is alleged but not proved may not be found guilty of misconduct in office in respect of that same conduct.

Conclusion

53 Whilst I would uphold the appeal to the very limited extent that the Full Bench should have upheld the stay order in respect of the proposed investigation into the allegations of misconduct contained in item (3) of the Director's notice of 31 August 2001, the appeal should otherwise be dismissed. The investigation should be allowed to proceed in respect of items (1), (2) and (4) in the Director's notice.

54 **PARKER J**: I agree with the orders proposed by Anderson J for the reasons given by his Honour.

55 **HASLUCK J**: I have had the advantage of reading in draft the reasons for judgment of the Presiding Judge. I entirely agree with that judgment and with the orders proposed.

2002 WAIRC 06850

WESTERN AUSTRALIAN INDUSTRIAL APPEAL LCOURT

PARTIES	CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED, APPLICANT *v.* DIRECTOR GENERAL, DEPARTMENT FOR COMMUNITY DEVELOPMENT, RESPONDENT
CORAM	ANDERSON J (Presiding Judge) PARKER J HASLUCK J
DATE OF ORDER	14 OCTOBER 2002
FILE NO/S.	IAC 4 OF 2002
CITATION NO.	2002 WAIRC 06850

Result	Allowed in part.
Representation	
APPELLANT	MS M M IN DE BRAEKT (AS AGENT)
Respondent	MR D J MATTHEWS (OF COUNSEL)

Order

Having heard Ms M M in de Braekt, agent for the Appellant and Mr D J Matthews, counsel for the Respondent, THE COURT HEREBY ORDERS THAT—

1. Ground of Appeal No. 1, as particularised at Particular 1.1, insofar as it appealed the decision of the Full Bench to allow a disciplinary investigation under the *Public Sector Management Act* 1994 to proceed in relation to the allegation numbered "3" in the letter to Mr Peter Han from Mr Lex McCulloch dated 31 August 2001, be allowed.
2. The appeal otherwise be dismissed.
3. There be no order as to costs.

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

FULL BENCH—Appeals against decision of Commission—

2002 WAIRC 06854

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
PARTIES	NIGEL BURCH, APPELLANT
	- and -
	ORETEK LTD, RESPONDENT
CORAM	FULL BENCH
	HIS HONOUR THE PRESIDENT P J SHARKEY
	SENIOR COMMISSIONER A R BEECH
	COMMISSIONER P E SCOTT
DELIVERED	FRIDAY, 25 OCTOBER 2002
FILE NO/S.	FBA 28 OF 2002
CITATION NO.	2002 WAIRC 06854

Decision	Appeal dismissed
Representation	
Appellant	Mr N F Burch, Appearing on his own behalf
Respondent	Mr O C Moon, as Agent

Reasons for Decision

THE PRESIDENT—

INTRODUCTION

1 This is an appeal brought pursuant to s.49 of the *Industrial Relations Act* 1979 (as amended) (hereinafter referred to as "*the Act*").

2 It is an appeal by the abovenamed appellant employee against the decision of the Commission, constituted by a single Commissioner, to dismiss an application by the appellant made pursuant to s.29 of *the Act* for want of prosecution.

3 That decision was made in matter No 1854 of 2001 on 10 May 2002 and deposited in the registry on 13 May 2002.

GROUNDS OF APPEAL

4 The grounds of appeal, as amended, are as follows:-

> "REMEDY SOUGHT
>
> That the decision of Commissioner Kenner of 9 May 2002 be set aside and the Respondent's application for dismissal be rejected, and the matter be allowed to proceed.
>
> GROUNDS FOR APPEAL
>
> 1. The Appellant has at all times wished to prosecute the substantive matter vigorously and to its natural conclusion.
>
> 2. There is a serious matter to be adjudicated. The Appellant states that he was employed in a management role by the Respondent, and states that he was unfairly dismissed and never paid.
>
> Yet the Respondent, implicitly agreeing that the Appellant was never paid, states that this was because the Appellant was never employed by the Respondent and further, was never engaged in any capacity by the Respondent.
>
> Clearly there is a gross distortion of the truth by one of the parties. The matter needs to be tried and the party guilty of the gross distortion of the truth held accountable.
>
> 3. The Respondent made application to dismiss for want of prosecution. The grounds claimed by the Respondent are found on page 4 of the transcript of the proceedings of 9 May 2002, in the last paragraph.
>
> The grounds were threefold—
>
> (a) Because of the Appellant's "unavailability"
>
> (b) Because of the Appellants "non-response to requests"
>
> (c) Because of the Appellant's "non-appearance".
>
> 4. In respect of 3(c) above, the matter of "non-appearance", Commissioner Kenner determined that proper notice had been given and that he could thus hear and determine the matter on 9 May 2002.
>
> However, as Commissioner Kenner states in his penultimate sentence on page 6 of the transcript, the determination he made was "based upon what is before me".
>
> The Appellant submits that the full facts were not before the Commissioner and that therefore an unjust determination was inadvertently made.
>
> 5. In fact, at the time of the determination, the Appellant was within Western Australia en route to Perth, and had not received the Notice of the hearing.
>
> The said Notice was posted on 1 May 2002 from the Commission to the Appellant's "last known stated address" (to use Commissioner Kenner's words).
>
> On the date of posting, 1 May 2002, this was indeed the Appellant's correct address for service. Thus there can be no question of non-compliance by the Appellant in this matter.
>
> It is mere happenstance that at the very time that the Notice was en route to rural Victoria, the Appellant was en route to Perth to take up new employment and to vigorously prosecute this present wrongful dismissal action.

Australia Post takes at least 3 business days to send a letter from Perth to rural Victoria. Thus a letter posted on Wednesday 1 May 2002 cannot be expected to be received until Monday 6 May (or commonly in practice - Tuesday 7 May 2002).

The Notice was to attend a hearing on Thursday morning 9 May 2002 at 0915.

Even if the Notice was received, it would be difficult for anyone to reasonably appear in Perth on such short notice.

In fact, the Appellant had left Victoria on Sunday 5 May 2002 by car with all his possessions for the purpose of relocating to Perth and did not receive the Notice until after the hearing.

This is why the Appellant did not in fact receive Notice and was unable to either appear or to give reasons for non-appearance, on the day.

6. The second of the Respondent's grounds for asking for dismissal (3(b) above) was the Appellant's "non-response to requests".

The Respondent failed to elaborate upon what these said "requests" in fact were. The Appellant believes that he has complied with all requests reasonably made of him, if any were in fact made.

The Respondent may be referring to the matter of production of documents - but this was not a request. It was a Notice of intention to seek an order for production. It did not require a response, and therefore no response was given.

The Appellant had every intention of complying with any subsequently made order for production, but there was no such order. In fact, the Respondent failed to pursue this matter at all.

It seems clear that the claim of "non-responses to requests" has no substance, and this seems to be reflected in the fact that Commissioner Kenner does not specifically refer to it.

7. In respect of the final ground raised by the Respondent, that of the Appellants "unavailability" (3(a) above), the Appellant's contention is that this, if true, is a direct result of the actions of the Respondent.

However the Respondent does not elaborate upon their meaning of "unavailability".

It cannot mean a blanket or universal unavailability, as the Appellant had in fact previously attended a conciliation conference by telephone.

Nor can it refer to the Appellants "unavailability" at the dismissal proceedings, as this was separately referred to by the Respondent and is addressed as 3(c) above.

So what was this "unavailability"?

It cannot refer to the application for production of documents, as the application had not been diligently pursued such as to result in a hearing which required the Appellant's attendance.

By a simple process of elimination, it must be assumed that it refers to the Appellant's reluctance to be physically available.

However this physical absence was due to the actions of the Respondent.

The Appellant will state that the Respondent made death threats against him, and that he was in reasonable and real fear of his life. The Appellant will call witnesses and adduce evidence to substantiate that his fear was real and was reasonable, and that this was why he removed suddenly to rural Victoria and would not provide the Respondent with his address or private phone number.

Notwithstanding the above, the Respondent does not appear to have been at all prejudiced by this alleged and undefined "unavailability". The Respondent was not prevented from proceeding with the application for production of documents for example, and clearly simply chose not to proceed.

8. It is thus reasonable to say that 2 of the 3 grounds for dismissal raised by the Respondent, those of alleged "unavailability" and "non-responses to request", have no real substance and seem to serve primarily to simply create a flavour of non-compliance, where no non-compliance is actually specified. And the 3rd ground, that of non-appearance on the day, has a fair and reasonable explanation and should be excused.

9. The matter raised by Commissioner Kenner independently, that of the Appellant taking "no active steps" since 17 December 2001 "to prosecute his claim" is a far more serious matter than the grounds raised by the Respondent. Whilst the Appellant is unsure of whether a determination should have been made on the basis of a ground raised independently by the Commissioner and not by the Respondent, the matter has been raised and should be now addressed.

10. The Appellant submits that there were in fact 2 matters on foot within the period of apparent inactivity from 17 December 2001 to 9 May 2002. These were the matter of whether the Appellant could be heard by remote - without physically returning to Western Australia - and the matter of the Respondent's application for production of documents.

Whilst the Appellant allows that he could have taken "active steps" during this relevant period, it was not unreasonable for him to simply await the resolution of these unresolved matters.

Furthermore, the lack of vigorous prosecution of the case by the Appellant was due to the threats made by the Respondent and the Appellants consequent fear of the Respondent and his fleeing to Victoria.

It will be shown in the statements to follow and in the oral testimony of witnesses, that circumstances changed during April 2002 such that the Appellants fear abated and he determined to return to Perth and to vigorously prosecute the case.

It is also true that the Appellant's fear abated through the natural passage of time.

11. The Appellant submits that the above is a reasonable response to the matter raised by Commissioner Kenner.

12. The Appellant further submits that there will be a grave prejudice to the Appellant if the case is not allowed to proceed, as it would then necessitate a very expensive Supreme Court action if the matter of the unfair dismissal and refusal to pay fair remuneration for work done, is ever to be tried.

13. The Appellant further submits that he has been at a disadvantage from the start in these proceedings due to the threats and intimidation made by the Respondent, and that the Commission should not allow these tactics and conduct to prevent the substantive complaint from proceeding to trial.

14. The Appellant further submits that he is at all times the weaker party in these proceedings, in that the Respondent is a public company and is backed by 2 very wealthy and related listed public companies. The Respondent is well represented and knows the rules and methods of the Court far better than the Appellant. The Appellant seeks the protection and indulgence of the Commission wherever and howsoever that it is right and proper to do so and submits that the Commission's discretion in these proceedings should act to protect the weaker party.

15. The Appellant respectfully submits that in view of all of the above, the Appeal should be upheld."

FRESH EVIDENCE

5 It was sought upon appeal to adduce fresh evidence. The fresh evidence sought to be adduced is referred to hereinafter. That evidence was permitted to and could be adduced according to the principles laid down in *FCU v George Moss Ltd* 70 WAIG 3040 (FB) and see also *McConkey v M & A's of Denmark* (2001) 81 WAIG 1561 (FB) and the cases cited therein. The fresh evidence referred to hereinafter could be admitted if it could not by reasonable diligence have been able to have been adduced at the hearing at first instance, and if it had been adduced would have resulted in a different order or orders being made and further could be admitted if it could have been accepted and relied upon by the Commission at first instance.

BACKGROUND

6 The applicant filed an application dated 19 October 2001 to the Commission, which does not seem to have been particularised, but by which he claimed that he was harshly, oppressively or unfairly dismissed on 5 October 2001 and also claimed contractual benefits which he said were denied him.

7 On the application his address was given as Ground Floor, 25 Barrack Street, Perth WA 6000. The notice of hearing of the application was sent to an address in country Victoria which appears on the notice of hearing. This, on the evidence before the Full Bench, was the appellant's sister's business address.

8 A notice of answer and counter proposal was filed on 20 November 2001.

9 The notice of hearing was dated 1 May 2002. The hearing before the Commission at first instance was listed for 9 May 2002. By s.27(1)(d) of *the Act*, the Commission is empowered to proceed to hear and determine the matter or any part of the matter thereof in the absence of any party thereto who has been duly summoned to appear or duly served with a notice of proceedings. Prior to that and subsequent to the filing of the application and its service other steps had been taken in the proceedings.

10 A Registrar's investigation was conducted with the appellant linked by telephone conference facility on 17 December 2001.

11 On the 10th or 15th day of January 2002, the respondent filed in the Commission an application for an order for inspection of documents. No answer was filed to that application on behalf of the appellant and no other action was taken on the part of the appellant in the proceedings.

12 I should add that it was requested by the agent for the respondent that the Commission "serve" the application because the address of the appellant was known only to the Commission and not to the respondent or its representative.

13 By letter dated 8 April 2002 written to the Registrar, the respondent's agent, Mr Oliver Moon, applied for the appellant's application to be struck out for want of prosecution. It is not in contention that the notice of hearing was forwarded and had arrived at the appellant's address for service in Victoria. The evidence of the appellant before the Full Bench was that he was crossing Australia by motor vehicle on his return to Perth from Victoria at the time.

THE PROCEEDINGS AND FINDINGS AT FIRST INSTANCE

14 On Thursday, 9 May 2002 at 9.15 am the respondent appeared before the Commission by its agent, Mr Oliver Moon. There was no appearance by or on behalf of the appellant.

15 The Commissioner at first instance found that the appellant had been given due notice of the proceedings and that he had not appeared and had not communicated with the Commission. The Commissioner therefore determined that the Commission was able to hear and determine the matter pursuant to s.27(1)(d) of *the Act.* The Commissioner also found that the matter could not be resolved by conciliation and that if it were to proceed then it would have to proceed by way of arbitration.

16 The Commissioner at first instance went on to find that there had been no active steps taken by the appellant to prosecute his claim since 17 December 2001; that the last contact with Commission staff by the appellant was on 6 February 2002; and that matters such as these in this jurisdiction should be prosecuted diligently; and, further, that in the light of the appellant's failure to diligently prosecute his claim and to communicate his position to the Commission, the application to strike out the appellant's application for want of prosecution, should be granted.

THE EVIDENCE

17 Evidence was adduced on behalf of the appellant in documentary form and by the written statements of the following witnesses, namely the appellant, Mr Nigel Frank Burch, and Mr Terence John McLernon and Mr Stefan Grill. The first two witnesses were cross examined.

18 Mr Burch alleged that he was employed by the respondent company. That this was so seems to be a matter in contention. There was a great deal of evidence about one Anton Billis and one Michael Giovinazzo, who were connected with the respondent company although in what capacity it is not altogether clear. There was evidence however, that Mr Billis was a "co-owner".

19 The appellant's evidence was that he had provided information about the alleged criminal acts of officers of the respondent company to the authorities. When it was discovered that he had done so, he said, he was "constructively dismissed on 5/10/01".

20 He said that the circumstances of his dismissal alarmed him in that he was, he said, threatened in a conversation involving Mr Billis, one Kevin Trezona, one Steve "Rooster", and his son Brad, one Frank O'Kane and Mr Giovinazzo with a beating, and there were allusions to other people having been killed. He said also that he was frightened for his life.

21 He said, too, that during his employment, Mr Billis, whom he referred to as a co-owner of Oretek Ltd, had often shown him a Colt 45 pistol which he frequently carried in his pocket. Mr Billis and Mr Giovinazzo, he said, had also threatened to finally "sort out" Mr McLernon whom they had enmity for. He also said in evidence that Mr John Sean McDonnell, a founding director/shareholder of the respondent would, he was told, be killed by contract. He said that he did not refer these matters to the police because the gentlemen concerned did not directly threaten Mr McDonnell but referred to his being killed by somebody else.

22 After his contract was terminated, he spent two weeks in hiding in Perth giving a statement during that time to ASIC. During this time, too, Mr McLernon said, in evidence, that Mr Giovinazzo and Mr Billis attacked Mr McLernon with a baseball bat in broad daylight.

23 On 18 October 2001, Mr McLernon told Mr Burch that "The West Australian" was about to break "the Oretek Ltd story" and the story appeared next day, 19 October 2002, in "The West Australian".

24 On 18 October 2001 Mr Burch proceeded to Victoria and resided at an address of which the respondent's officers were unaware. It was his sister's business address, he said in evidence. He also said that he was in fear of his life. On his and Mr McLernon's evidence, Mr McLernon urged him several times to return and deal with these matters, but he did not do so.

25 The application for relief at first instance was filed on 19 October 2002.

26 In March and April 2002, two Western Australian officers of ASIC visited him in Victoria and informed him that police had seized four pistols from the respondent "and its associates". These officers also confirmed that they were investigating the respondent company and that they required him in Perth to make a statement and to attend upon a formal examination.

27 He did not depose to this evidence, but asserted in writing that he was at the time when the notice of hearing was posted on his way from Victoria to Western Australia, having left Victoria on Sunday, 5 May 2002, in order to move back to Perth, and therefore did not receive the notice of hearing until after the hearing. He had with him a mobile telephone.

28 He also asserted, not on oath, that a letter posted on 1 May 2002 would not have reached him at his address in Victoria until at least Monday, 6 May 2002. He adduced evidence that he had withdrawn monies from a bank account in Ceduna in South Australia on 7 May 2002. Further, this was corroborated by the statement of one Stefan Grill, which was admitted in evidence without objection.

29 He had with him a mobile telephone on which he had contacted Dr William Harold Jay, a person associated with the respondent, whilst he, Mr Burch, was living in Victoria. Also, at all times, the respondent's officers knew that number, but not his location. He admitted that they did not threaten him whilst he was in Victoria. He also admitted that he did not report their previous threats to the police.

30 He did suffer from stress, but did not attend a doctor during this time, he said.

31 He said, too, that the seizure of the pistols from the respondent, the confirmed major investigation by ASIC, the bringing of officers and associates in court, the fact that Mr McLernon had survived, and that interfering with a witness was a serious crime, together with the passage of time caused his fears for his physical safety to abate and he returned to Perth. He said he was determined to show them, that is the respondent's officers, that he was not scared, and therefore he returned.

32 Shortly after he returned to Western Australia he was served with a Supreme Court writ on behalf of the respondent "for Breach of Confidentiality". The appellant alleged that he was assaulted and deprived of his liberty in the course of this process, and did, on this occasion, make a formal complaint to the police. He alleged that Mr Giovinazzo accosted him in the street on another occasion and made further threats.

33 In evidence, Mr Burch admitted that he had taken no steps in the proceedings after 17 December 2001; nor had had he communicated with the Commission. He ascribed his failure to prosecute the proceedings without delay to the fact that he was in hiding from the respondent's officers or employees. He also said that he was awaiting the result of the application for inspection of documents. However he did nothing to oppose or answer it. Mr Burch denied, in cross examination, that he had intentionally failed to prosecute his claim.

ISSUES AND CONCLUSIONS

34 I am not at all satisfied that the Commissioner at first instance erred in determining that he could properly hear the matter in the absence of the appellant under s.27(1)(d) of *the Act* (see *McConkey v M & A's of Denmark* (2001) 81 WAIG 1561 and the cases cited therein).

35 The Commission forwarded the notice of hearing to the address provided to it by the appellant, in Victoria. It was not denied that it had arrived there. If the evidence of the appellant that he was driving to Western Australia with his mobile telephone and did not receive the notice were accepted, it could make no difference. The Commission has no responsibility to ensure that the parties are at home to receive notices.

36 Mr Burch said in evidence that his sister, in any event, was always in attendance at the address in Victoria, which was her business address. Given that he had a mobile telephone, it is difficult to understand why he was not made aware of the notice when it arrived at his address in Victoria or why he did not check whilst he was in transit that any document had been forwarded to the address which he had provided. It was not the Commission's responsibility to give him any more notice than it did. The evidence given provides no valid reasons why he failed to attend. Further if that evidence were before the Commission at first instance it could not have properly persuaded the Commissioner not to hear and determine the matter, in the absence of the appellant for those reasons.

37 Accordingly, I am not of the opinion that the Commissioner's decision not to hear the matter in his absence might have been different if the evidence to which I have referred above (in paragraphs 25, 26 and 27), was before him. That that is so is reinforced by Mr Burch's failure to attend the proceedings or take any step in them for some time.

38 It follows that the fresh evidence referred to in paragraphs 25, 26 and 27 should not be admitted because, even if it is credible, and it was not on a fair observation of the appellant in the witness box (necessarily so), but, further, the acceptance of such evidence could not have led to a different decision by the Commission at first instance, that is a decision not to hear the matter in Mr Burch's absence. It follows too, that the fresh evidence of why Mr Burch did not proceed with proper expedition with his application is not admissible. It was reasonably adducible and procurable had Mr Burch taken proper precautions to apprise himself of the Commission's notice of hearing and taken the appropriate steps to attend or engage somebody to attend on his behalf. He did neither and therefore was not present to adduce the evidence. Hence, the condition precedent to the admission of the evidence as fresh evidence was not fulfilled in that respect and the evidence of Mr Burch, Mr McLernon and Mr Graeme, in this respect, should not be admitted.

39 I now turn to the question of the dismissal of the application for want of prosecution. The law concerning such a dismissal is laid down in this Commission in *AWU v Barminco Pty Ltd – Plutonic Project* (2000) 80 WAIG 3162 (FB). In that case, at page 3162, I said as follows:-

> "I propose to apply the principles applied in the civil courts to this application, since they form part of the law and the substantial merits of the case, with slight modification. However, as Bray CJ, with whom Mitchell and Walters JJ agreed, in Ulowski v Miller [1968] SASR 277 at 280, it must be remembered that in an application such as this, we are dealing with a discretion and it ought not to be fettered by any absolute or inflexible rules.
>
> His Honour then turned to identify five paramount matters to be considered, namely the length of the delay, the explanation for the delay, the hardship to the plaintiff if the application is dismissed and the cause of action left statute-barred, the prejudice to the defendant if the action is allowed to proceed notwithstanding the delay, and the conduct of the defendant in the litigation.

> The Full Court of the Supreme Court of Victoria held that the relevant principles laid down in Birkett v James [1978] AC 297, which are similar to those laid down in Ulowski v Miller (op cit), apply also to appeals (see Muto v Faul [1980] VR 27 (FCSC). In particular, Their Lordships in Birkett v James (op cit) held that the power of the court to dismiss an action for want of prosecution should be exercised only where the plaintiff's default had been intentional and continuous or where there had been inordinate and inexcusable delay on the part of the plaintiff or her/his lawyers giving rise to a substantial risk that a fair trial would not be possible or to seriously prejudice to the respondent."

40 I now apply those principles. I take into account the length of the delay, the explanation for the delay, whether the appellant's default had been intentional and continuous or whether there had been inordinate and inexcusable delay. In this case, there was no step taken in the proceedings after 17 December 2001, no attempt made by the appellant to advance the matter, no contact made with the Commission, and, indeed, no opposition by him to the application to produce documents. It is difficult to understand an explanation that no steps were taken in relation to that application because the appellant, on his evidence, wanted to see what would happen. The delay was intentional and continuous for nearly six months.

41 In a jurisdiction such as this where the emphasis is on swift remedies, the period of delay was clearly inordinate. The question is whether it was inexcusable.

42 It is obvious that the appellant will suffer hardship if he is deprived of an opportunity to pursue his application. There is no positive evidence of any real prejudice to the respondent, except that occasioned by having some expectation that it had been left to enjoy the fruits of its "judgment". The limitation period would operate against the appellant if the appeal were dismissed.

43 First let me say that since the evidence of why Mr Burch did not take any steps in this matter after 17 December 2001 is not admitted, then the appeal fails.

44 If that approach is wrong, which it is not, it would be necessary to consider the evidence, and I would do so as follows.

45 In this case, there was substantial evidence that the appellant fled to Victoria in fear of his life. However, he did not report the threats made to him to the police. He did make telephone calls to Dr Jay, an officer of the respondent, and that gentleman responded. Mr Burch received no threats in Victoria, and he had not reported the threats which caused him to fear for his life to the police. Although he suffered stress, on his own admission, it did not cause him to see a doctor. Further, the fact that he was assaulted when he was served with a writ on his return did not cause him to return to Victoria or to go into hiding.

46 The application which led to the decision appealed against was not an application to extend time within which to comply with procedural requirements. It was an application for the dismissal of an application for want of prosecution. The length of the delay in proceeding further with this matter was inordinate. It was nearly five months.

47 I had the advantage of observing Mr Burch in cross examination in the witness box and briefly in evidence in chief. I am not persuaded that he was in such fear of the respondents that he was incapable of taking further steps in this matter, at least after 17 December 2000 or early in the New Year. He then took no steps at all. He did not, even when he was returning to Western Australia, on his evidence ascertain what he should do to advance his application which one might have expected. He did not take steps to ensure that he was informed that he had been forwarded a notice of hearing for the application to strike out the application for want of prosecution. He did nothing to accelerate matters when the application for an order for inspection was made by filing an answer or otherwise dealing with it. I am, in any event, not persuaded that he was in such fear that he could not properly prosecute the claim at least after the first few weeks, because he received no threats in Victoria, from the respondents, although the respondent's officers are employees whom he said he feared had his telephone number. Further, no good reason was advanced by him as to why the threats made to him before his going to Victoria were not reported to the police when the assault upon him which he alleged occurred after he returned was. He was not prevented from taking part in the conference on 17 December 2001, albeit by telephone, even though he was in fear and that was a further step in the proceedings. Further, and significantly, the fear as he expressed it in evidence as a reason for taking no steps in relation to the application made on behalf of the respondent, was not the reason expressed by him for doing nothing about the application for an order for inspection as early as the 10th day of January 2002. I am not satisfied on all of the evidence that there is any reasonable excuse for his failure to prosecute the application.

48 The explanation of fear by Mr Burch for his safety was not adequate, for the reasons which I have set out above, because it was quite clear, in any event, that steps could have been taken to advance the proceedings, including a response to the application for an order for inspection of documents, even if the appellant was in hiding. There was an inordinate delay without a credible excuse. The reason he expressed was that he wanted to see what would happen with it.

49 Further, I am of opinion that the initial fear had certainly abated at or before December 2002, sufficiently for him to involve himself in a Registrar's investigation albeit by telephone from Victoria.

50 A further question usually arises as to whether the respondent is likely to be prejudiced upon the trial of the issue between the parties by any inordinate and excusable delay as there was in this case. However the prejudice in an unfair dismissal application, such as this, arises in a different manner because under the Act, as it stood, such applications had to be filed within 28 days of the dismissal complained of (see s.29(1)(b)(ii)). The respondent is therefore entitled to expect that litigation will proceed without an inordinate delay where an application for unfair dismissal is made and prejudice results in such a matter where there is inordinate and inexcusable delay occurring as it did in this case.

51 The onus lay upon the appellant to establish his case, at first instance, and he did not do so and the Commissioner did not err in finding as he did for the reason which he expressed.

52 It is not submitted that that was the case, but the period of six months from the date of the dismissal complained about was not enough for one to draw an inference that from the sheer length of time there would be prejudice.

53 However, the appellant did not establish that the Commissioner at first instance erred, for those reasons, in the exercise of his discretion (see *House v The King* [1936] 55 CLR 499) or otherwise. I would therefore dismiss the appeal.

SENIOR COMMISSIONER A R BEECH—

54 I agree that the appellant has not made out his case and have nothing further to usefully add to the Reasons for Decision of His Honour the President.

COMMISSIONER P E SCOTT—

55 I have had the benefit of reading the Reasons for Decision of His Honour, the President. I agree and have nothing to add.

THE PRESIDENT—

56 For those reasons the Full Bench dismissed the appeal.

Order accordingly

2002 WAIRC 06855

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	NIGEL BURCH, APPELLANT
	v.
	ORETEK LTD, RESPONDENT
CORAM	FULL BENCH
	HIS HONOUR THE PRESIDENT P J SHARKEY
	SENIOR COMMISSIONER A R BEECH
	COMMISSIONER P E SCOTT
DELIVERED	FRIDAY, 25 OCTOBER 2002
FILE NO/S.	FBA 28 OF 2002
CITATION NO.	2002 WAIRC 06855

Decision	Appeal dismissed
Representation	
Appellant	Mr N F Burch, Appearing on his own behalf
Respondent	Mr O C Moon, as agent

Order

This appeal having come on for hearing before the Full Bench on the 2nd day of October 2002, and having heard Mr N F Burch, appearing on his own behalf as appellant, and Mr O C Moon, as agent, on behalf of the respondent, and the Full Bench having reserved its decision in the matter, and the reasons for decision having been delivered on the 25th day of October 2002 it is this day, the 25th of October 2002, ordered by the Full Bench that appeal No. FBA 28 of 2002 be and is hereby dismissed.

By the Full Bench

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

[L.S.]

2002 WAIRC 06618

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CIVIL SERVICE ASSOCIATION OF WA INCORPORATED, APPELLANT
	- and -
	DIRECTOR GENERAL, MINISTRY OF JUSTICE, RESPONDENT
CORAM	FULL BENCH
	HIS HONOUR THE PRESIDENT P J SHARKEY
	COMMISSIONER S WOOD
	COMMISSIONER J L HARRISON
DELIVERED	WEDNESDAY, 25 SEPTEMBER 2002
FILE NO/S.	FBA 17 OF 2002
CITATION NO.	2002 WAIRC 06618

Decision	Appeal upheld; order at first instance suspended and the matter remitted to the Public Service Arbitrator
Appearances	
Appellant	Ms M In De Braekt, as agent
Respondent	Mr R J Andretich (of Counsel), by leave and with him Mr N Cinquina (Of Counsel), by leave

Reasons for Decision

THE PRESIDENT—

INTRODUCTION

1 This is an appeal by the abovenamed appellant organisation of employees against the decision of the Public Service Arbitrator, made in the form of an order on 14 March 2002 in matter No P 2 of 2001, whereby he dismissed an application made by that organisation on behalf of one of its members, Ms Blanche Bowles.

2 The appeal is brought pursuant to s.49 of the *Industrial Relations Act* 1979 (hereinafter referred to as "*the Act*").

GROUNDS OF APPEAL

3 It is against that decision that the appellant now appeals on a number of grounds. I reproduce the grounds hereunder omitting the extensive particulars:-

> "**Ground 1**
>
> The Arbitrator erred in law by finding that some, or all of the substantive matter was outside the Arbitrator's jurisdiction, by virtue of section 80E(7) of the *Industrial Relations Act 1979*.
>
> …

Ground 2

The Arbitrator erred in law by failing to void the respondent's decision to transfer Ms Bowles from Broome to Perth.

…

Ground 3

The Public Service Arbitrator ("the Arbitrator") erred in law by not correcting the failure of the Director General of the Ministry, to correct the Prison Superintendent's unlawful decision to exclude Ms Bowles from Broome Regional Prison, and/or by not voiding the exclusion decision.

…

Ground 4

The Arbitrator erred in law, and/or miscarried his discretion so as to cause a serious wrong, by not compelling the respondent to allow Ms Bowles to resume her full time duties as a level 4, Prisoner Support Officer at Broome Regional Prison.

…

Ground 5

In the alternative if any of the matters in question is found to have been beyond the Arbitrator's jurisdiction, the Arbitrator/Commissioner nonetheless erred in law, and/or miscarried his discretion so as to cause a serious wrong, in the manner in which the Arbitrator hear (sic) and determined the application.

…"

BACKGROUND

4 At all material times, the appellant was an "organisation" as that term is defined in s.7 of *the Act* (and is hereinafter referred to as "the CSA").

5 There was an application made by the abovenamed appellant on behalf of Ms Blanche Bowles, who was presumably a member of the CSA, because of a decision of the respondent to transfer her from the position of prison support officer at the Broome Regional Prison to prison support officer at the Hakea Prison, Canning Vale, and because of a decision made to exclude her from the Broome Regional Prison where she had worked, which latter decision purported to be made under s.66 of the *Prisons Act* 1981 (hereinafter referred to as "the Prisons Act"), by the superintendent of the prison.

6 At all material times, the respondent, it seems, was a "chief executive officer", as that term is defined in s.3 of the *Public Sector Management Act* 1994 (hereinafter called "the *PSM Act*"). It seems to have been accepted, too, by the parties, that Ms Bowles was an "employee" as defined in s.3 of the *PSM Act*. It also seems to have been accepted that the respondent was, at all material times, the Chief Executive Officer of a Department, which is called the Ministry of Justice, that Ms Bowles was an officer of that Department and that both the Broome Regional Prison and the Hakea Prison at Canning Vale were within the administration of the Department of which the respondent was Chief Executive Officer.

7 The application to the Public Service Arbitrator (hereinafter referred to as "the Arbitrator") was made pursuant to s.80E and s.80F of *the Act* and sought that the actions and/or decisions and/or any related matter or thing "of the respondent" specifically in relation to the transfer of Ms Bowles be reviewed, nullified, modified or varied as the Public Service Arbitrator in his/her jurisdiction determines upon hearing the matter. The application was opposed.

8 There was an amount of documentary evidence tendered to the Arbitrator. Further, there was oral evidence given on behalf of Ms Bowles by Ms Bowles herself. For the appellant (the respondent at first instance), there was evidence given by Mr Glen J Ross, Mr Phillip John Coombes-Pearce, Mr Brian William Gittos, formerly superintendent of the Broome Regional Prison, but at the time of giving evidence the superintendent of the Roebourne Prison, Ms Judith Anne McBride, records officer at the Broome Regional Prison, Mr Michael Jason Reindl, business manager at the Broome Regional Prison, Mr Gary Leonard Fitzpatrick, the operations manager at the Broome Regional Prison, and Ms Fiona Mary McDonald Wotherspoon, clinical nurse manager at the same prison. All were fellow employees of Ms Bowles at material times.

9 Ms Bowles sought, too, that the "orders" requiring her to be transferred to Canning Vale be "quashed", and that she be given suitable alternative employment in Broome. She complained, inter alia, that the decision to transfer her was unlawful. She also sought to have "voided" the decision made by the superintendent of the Broome Regional Prison, Mr Coombes-Pearce, that she be excluded from that prison.

10 There was evidence that Ms Bowles was aged 39, at the time of the hearing, and was an aboriginal person born in Broome, with a cultural background in the Broome area, and a 16 year old son. Her home is and was Broome. She had been employed by the Ministry of Justice from 10 December 1996, and is the holder of a Bachelor of Psychology degree from the University of Western Australia. Her position as a prisoner support officer involved her providing support to aboriginal prisoners. It is a criterion for that position that the prisoner support officer have "the demonstrated acceptance of the local aboriginal community".

11 On the evidence, 90% of the prison population at Broome are aboriginal persons from the local community. Ms Bowles told the Arbitrator that she did not know who the aboriginal community in Perth is and has no knowledge of those communities, other than that they are Nyungar. She is a person of the Yamatji community and her evidence was that the Nyungar people and the Yamatji people do not "get on".

12 Difficulties arose in the course of Ms Bowles' employment at the Regional Prison at Broome.

13 In August 1998, she made a complaint against one of the prison staff, one Kerry Bishop, and after that was ostracized and alienated, she said.

14 On 15 October 1998, she made a verbal complaint against a senior prison officer at the prison alleging that he sexually harassed her over time and also indecently assaulted her. Nothing, she said, happened in relation to that complaint.

15 In January 1999, she was advised that she was to be the subject of an inquiry about a complaint made against her by Ms Wotherspoon, the clinical nurse manager at the prison.

16 Ms Bowles made a complaint to the Equal Opportunity Commission in May 1999, about her treatment.

17 In July 1999, she made a worker's compensation claim on the basis of stress arising, she said, from an alleged indecent assault. Ms Bowles said that, because of the fact that she had absolutely no faith in the management system of the prison or in Perth, she felt that she could no longer effectively fulfil her role as prison support officer at the prison. She remained unfit for work until July 2000.

18 At the end of her sick leave, namely 17 July 2000, she was told not to return to the prison, and in fact, the superintendent, purporting to act pursuant to s.66 of the *Prisons Act*, excluded her from the prison. A letter from Mr Coombes-Pearce, the superintendent, to the general manager, Prison Services confirms this and refers to the fact that having regard to the matters involving Ms Bowles and unresolved issues, relating to her, he held grave concerns for the good order of the prison if Ms Bowles was to resume her duties there.

19 S.66 of the *Prisons Act* reads as follows:-

> "66. Visitor may be refused entry or removed
>
> (1) If the superintendent is of the opinion that a visitor or any other person is likely to interfere with the preservation of the good order or the security of a prison, he may, notwithstanding any other provision of this Act, refuse him entry to the prison or, if such person has been admitted to the prison, he may remove him or cause him to be removed and may use such reasonable force as is necessary for the purpose.
>
> (2) A superintendent shall forthwith notify the chief executive officer in writing of any action he takes under subsection (1)."

20 In November 2000, she received a letter from the respondent, offering her a transfer to Hakea Prison on the basis that the work required in Hakea was identical to her substantive position at Broome. It was accepted that a requirement of her occupation of the position was, as in Broome, that she have the support of the local aboriginal community. It was, of course, as I have said above, her unshaken evidence that she would not.

21 On 26 February 2001, Ms Bowles received a letter (see page 86 of the appeal book) from the General Manager of Prison Services, Mr Terry Simpson, advising her that it was not possible for her to return to the Broome Regional Prison at this time. The Ministry of Justice had, it was said, attempted to find work for her in the Broome region but unsuccessfully. The Ministry of Justice therefore, she was advised, proposed to require her to transfer to Hakea in accordance with s.65(1) of the *PSM Act*, such transfer to take effect in four weeks time. The transfer was, it was accepted, as a prison support officer at the same level as she occupied at the Broome Regional Prison.

22 Ms Bowles' evidence was that she had not been told why it was not possible for her to return to the Broome Regional Prison. She believed that she could transfer of her own initiative, but that she could not be forced to transfer, she said. Her evidence was that if there is a reasonably justifiable reason why she could not return to the prison she would be prepared to look at other level 4 positions in Broome, but that a transfer to Perth would leave her alone and alienated and would seem to her to be a form of punishment. She said that if the transfer did proceed she would resign. In fact, as at the date of hearing, at first instance, Ms Bowles had not since the purported exclusion, worked or been permitted to work at the Broome Regional Prison.

23 There was cross-examination of her concerning how she got on with a number of other persons, including the nurse manager, Ms Devereux, Mr Fitzpatrick and one Hackett.

24 There was evidence given on behalf of the respondent by Mr Glen Ross, manager of the respondent's Forensic Case Management Team in Perth, that Ms Bowles became aggressive and abusive in conversations that she had with him and with one Dr Hodgkinson.

25 Mr Ross' evidence was that the relationship between Ms Bowles and other members of the health service of the prison had become completely dysfunctional. Mr Ross supported the transfer of Ms Bowles to Hakea because the standard of relationships needed in a smaller prison such as Broome are different from the standard of relationships needed at a larger prison.

26 The superintendent of the prison, Mr Phillip John Coombes-Pearce, gave evidence that Ms Bowles was not working in the prison on 10 July 2000 when he became superintendent. He decided that she not be permitted back within the prison based upon a number of discussions he had held with the outgoing superintendent and also after approaches from staff at the prison. He also was influenced by the fact there was a court case pending which would involve a number of the staff giving evidence against Ms Bowles, also that there was the outstanding worker's compensation issue, and because of comments made to him by members of the staff that they did not feel they would be able to work under those circumstances if Ms Bowles returned to the prison. Mr Coombes-Pearce did make the decision that Ms Bowles not be permitted back in to the prison without having spoken to Ms Bowles. He did not give Ms Bowles an opportunity to respond to the various allegations against her and of which he was aware before he made the decision. Mr Coombes-Pearce purported to make his decision pursuant to s.66 of the *Prisons Act*, as I have advised.

27 There was evidence from other prison officers, including Ms McBride, the records officer, and Mr Fitzpatrick. Ms Wotherspoon, the clinical nurse manager, gave evidence and there was other evidence given about Ms Bowles' behaviour.

FINDINGS AT FIRST INSTANCE

28 The Arbitrator made the following relevant findings, at first instance, which I summarise hereunder:-

a) By concession, that the respondent has the right to transfer Ms Bowles.

b) That this power exists under s.65 of the *PSM Act*.

c) That as a matter of law the respondent is able to compulsorily transfer Ms Bowles.

d) That the CSA's attack is on the decision to transfer Ms Bowles to the Hakea Prison position.

e) That Ms Bowles does not (and did not) meet one of the essential criteria for the position of prison support officer at Hakea Prison; that is a demonstrated acceptance by the aboriginal community in the local area.

f) That for that reason alone he would be prepared to issue an order that the decision to transfer Ms Bowles to Hakea Prison be quashed.

g) That prisoner support officers are able to be transferred to other prisoner support officer positions.

h) That on the evidence there is a further reason why the decision should be quashed, namely that there had been no discussion with Ms Bowles regarding the effects of the transfer upon her or whether there were any alternatives to that transfer.

i) By failing to provide an opportunity to Ms Bowles to "have input" into the decision before it was made, the respondent acted unfairly and inevitably justified a perception of unfairness by Ms Bowles which made these proceedings inevitable.

j) That the superintendent has the power pursuant to the *Prisons Act* to make a decision to say that she is not fit to return to work. That decision is subject to review (see s.7(3) of the *Prisons Act*, where the chief executive officer has all of the powers conferred by or under that Act on a superintendent).

k) That as appeared to be assumed by the parties, exclusive jurisdiction of the Arbitrator pursuant to s.80E of *the Act* gives the Arbitrator the power to review the decision of the superintendent of Broome Regional Prison to the extent that that decision gives rise to an industrial matter relating to a government officer, a group of government officers, or government officers generally. (He accepted this, without deciding the point).

l) That the prison superintendent denied her "natural justice".

m) That the conduct of Ms Bowles and the strength of the feeling against her which was generated in those staff who gave evidence is significant.

n) That she is not able to return to work at Broome Regional Prison, nor is she eligible to be transferred to the comparable position at Hakea Prison.

o) If the jurisdiction of the Arbitrator was unencumbered by s.80E(7) of *the Act*, an order should be made preventing the transfer of Ms Bowles to Hakea Prison unless she has a demonstrated acceptance of support by the aboriginal community of the local area. He would also require the respondent to examine alternatives to the transfer with Ms Bowles and her union in accordance with the reasons for decision.

p) However, reading s.21(1)(a) and s.97(1)(a) of the *PSM Act* and s.80E(7) of *the Act* together, the "matter" in respect of which the Arbitrator does not have jurisdiction is whether minimum standards of merit, equity and probity have been met in relation to this case (see *Managing Director of the South Metropolitan College of TAFE v CSA* (1999) 80 WAIG 7 at 32 ("the *Ishmael Case*")).

q) It was argued that the decision to transfer was not one lawfully made under s.65 of the *PSM Act* and therefore there is no decision to which the public sector standard can apply, that is, no lawful transfer decision has been made; but as the Arbitrator held, these proceedings would then not be necessary because there was no valid decision to transfer Ms Bowles. The Arbitrator, in fact, found that there was no valid decision to transfer Ms Bowles. It was also argued that unless the employee affected by the decision makes a complaint under the relevant regulation of the *Public Sector Management (Review Procedure) Regulations* 1995, then the prescribed procedures are not "enlivened" to affect the Arbitrator's jurisdiction.

r) The question arose as to whether the Arbitrator had jurisdiction, and that jurisdiction is removed in respect of any matter in respect of which a procedure referred to in s.97(1)(a) of the *PSM Act* is or may be prescribed. If there is a procedure prescribed under that Act, there is no jurisdiction. It matters not whether or not the employee affected has made a complaint under regulation 8 of the *Public Sector Management (Review Procedure) Regulations* 1995. This is so whether or not the relief available to an employee in the prescribed procedures is comparable to the relief available by virtue of the jurisdiction of the Arbitrator.

s) The public sector standards in relation to the transfer establish that the outcome required is that "transfer decisions are equitable and take into account the participating organisation's work-related requirements and employee interests".

t) Matters which are allegations of breaches of the relevant public sector standard are not within the jurisdiction of the Arbitrator (see *the Ishmael Case* (op cit)).

u) The standard requires that transfer decisions meet minimum standards of merit, equity and probity (and see s.21(1) of the *PSM Act*).

v) The Arbitrator does not have jurisdiction to deal with the union's application.

w) Whether the right to transfer has been exercised harshly, oppressively or unfairly is in reality a matter regarding whether the minimum standards of merit, equity and probity have been met.

x) S.80E(7) of *the Act* means that the Arbitrator does not have the jurisdiction to enquire into and deal with the decision of the respondent to transfer Ms Bowles to the Hakea Prison, at Canning Vale.

ISSUES AND CONCLUSIONS

The Scope of the Appeal

29 This is a matter which has caused me some difficulty. The appeal, however, was argued before the Full Bench on the basis that ground 1 only was in contention and that the other grounds were not.

30 Indeed, Ms in de Braekt was good enough to concede that the other grounds were put in there as a precaution and correctly observed, too, that "the submissions focus in on ground 1".

31 The decision appealed against was the dismissal of the application for want of prosecution.

32 The Full Bench, in the course of its deliberations, indicated that it would consider the written submissions in relation to all grounds of appeal. The Full Bench did so in case it were necessary or appropriate to do so, and, to that end, gave an opportunity to the parties to make any further written submissions which they might wish to make.

33 Having regard to the written submissions for the appellant, it is quite clear to me that the parties agreed to confine the appeal to ground 1.

34 Further, in the reasons for decision at first instance the jurisdiction to deal with the exclusion of Ms Bowles from the prison was assumed. Jurisdiction was not in issue at first instance, but jurisdiction may be raised upon appeal, even if it has not been raised at first instance (see *SGS Australia Pty Ltd v Taylor* 73 WAIG 1760 (FB)).

Jurisdiction to Hear and Determine

35 Whether there was jurisdiction to hear and determine the application and make the orders sought depended on s.80E of *the Act*.

36 It was not contended that there was jurisdiction to hear and determine the application because it was an industrial matter as defined in s.7 of *the Act*.

37 It was, however, submitted on behalf of the respondent that there was no jurisdiction at first instance to do what was required, namely to make the orders sought.

38 It was also submitted that the power to transfer Ms Bowles was a statutory power conferred on the Superintendent by s.65 of the *PSM Act*, by the respondent as a Chief Executive Officer.

39 In its relevant parts, s.65(1) and (2), s.65 reads as follows:-

> "65. Transfer of public service officers other than executive officers within and between departments and organisations
>
> (1) If an employing authority considers it to be in the interests of its department or organisation to do so, that employing authority may transfer at the same level of classification a public service officer

other than an executive officer from one office, post or position in that department or organisation to another such office, post or position –

(a) for which that public service officer possesses the requisite qualifications; and

(b) the functions assigned to which are appropriate to that level of classification.

(2) If an employing authority of a department or organisation considers it to be in the interests of the Public Service to do so, that employing authority may, with the approval of the employing authority of another department or organisation and after consulting the public service officer concerned, transfer at the same level of classification a public service officer (other than an executive officer) from an office, post or position in the first-mentioned department or organisation to an office, post or position in the other department or organisation –

(a) for which latter office, post or position that public service officer possesses the requisite qualifications; and

(b) the functions assigned to which latter office, post or position are appropriate to that level of classification."

40 The finding made at first instance that the transfer was either unlawful, ultra vires or contrary to s.65 of the *PSM Ac*t and therefore invalid was not challenged on appeal.

41 It follows that because Mr Bowles could not be transferred to a position for which she was not qualified, namely the position at Hakea Prison Canning Vale, and the act of transferring her or purporting to transfer her was invalid and of no effect. The lack of qualification arose because it was not established that Ms Bowles was accepted by the local aboriginal community in Perth.

42 Mr Andretich (of Counsel), for the respondent, submitted that what in effect was sought by the applicant from the Arbitrator was a declaration that the decision to transfer or any act of transferring was void.

43 He submitted that no such declaration could be valid on the authority of *Minister of Police and Another v Western Australia Police Union of Workers* per Fielding SC (2001) 81 WAIG 356 (FB) (Scott C agreeing).

44 He submitted that the Commission, and the Commissioner constituted by the Arbitrator, could not make a declaration in isolation, as it were, that is that the Commissioner could only make a declaration as a means of resolving an industrial matter.

45 I would observe this. It is not clearly accepted in this Commission or by the Industrial Appeal Court that the power of this Commission is restricted in the manner held in *Minister of Police and Another v Western Australia Police Union of Workers* (op cit).

46 Second, it is not clear to me that any declaration which was made was not sought, or made along with other orders, or on its own, directed to the resolution of an industrial dispute and the exercise of jurisdiction in relation to an "industrial matter" as defined. Indeed, it would seem that that was precisely why the declaration was sought.

47 In any event, if a declaration was sought, it was a declaration directed to the resolution of an industrial dispute, and not an isolated declaration, but one therefore, plainly within power.

48 That was clearly the case, I find, because the dispute arose in this way. The respondent would not employ the appellant's member at the Broome Regional Prison. She, however, wished to be employed at the Broome Regional Prison and did not and does not wish to be employed away from Broome.

49 The respondent wished and purported to transfer Ms Bowles to Perth. She objected to that transfer, and the appellant contended that the transfer was beyond power and invalid.

50 To declare the transfer invalid, was clearly the use of a declaration as a means of settling an industrial dispute, because the validity of the transfer was a major matter of dispute.

51 For those reasons, if a declaration therefore, was sought and made, it would be made clearly within power and jurisdiction. In any event, the fact that such a declaration was only one of a number of remedies sought to resolve the matter (see page 11 of the appeal book) serves only to fortify the view which I have expressed.

52 Amongst the orders sought, at first instance, were orders that Ms Bowles be employed again at the Broome Regional Prison "or to a suitable alternative position in the Broome region".

53 There was also a submission that there was no jurisdiction in the Commission to declare the transfer invalid because what was being sought was the judicial review of an administrative act. That, it was submitted, on behalf of the respondent, was outside the jurisdiction of the Commission constituted by the Arbitrator, which, so constituted is not a superior court. Jurisdiction in this matter was said to be conferred, as I have said, by s.80E of *the Act*.

54 S.80E(1) of *the Act* reads as follows:-

"(1) Subject to Division 3 of Part II and subsections (6) and (7), an Arbitrator has exclusive jurisdiction to enquire into and deal with any industrial matter relating to a Government officer, a group of Government officers or Government officers generally."

55 S.80E(5) of *the Act* prescribes what the Arbitrator may do in the exercise of his jurisdiction. S.80E(5) reads as follows:-

"80E. Jurisdiction of Arbitrator—

(5) Nothing in subsection (1) or (2) shall affect or interfere with the exercise by an employer in relation to any Government officer, or office under his administration, of any power in relation to any matter within the jurisdiction of an Arbitrator, but any act, matter or thing done by an employer in relation to any such matter is liable to be reviewed, nullified, modified or varied by an Arbitrator in the course of the exercise by him of his jurisdiction in respect of that matter under this Division."

56 The section seems to prevent the Arbitrator interfering with any employer's exercise of its/his/her duties under the section in relation to any government officer or office under the administration of the employer in relation to any matter within the jurisdiction of an Arbitrator.

57 However, it is clearly and unambiguously prescribed in s.80E(5) as follows, namely that:-

"any act, matter or thing done by an employer in relation to any such matter ((ie) within the jurisdiction of an Arbitrator), is liable to be reviewed, nullified, modified or varied by an Arbitrator in the course of the exercise by him or his jurisdiction in respect of that matter under this Division."

58 It is quite clear, therefore, that the decision to transfer and the request or direction for transfer of Ms Bowles was within the jurisdicition of the Arbitrator. I say that for the reason which I express hereinafter.

59 The purported transfer of Ms Bowles was the act, matter or thing was liable to be reviewed, nullified, modified or varied by the Arbitrator in this case. That is so because it was an act, matter or thing purported to be done or done by an employer as prescribed in the *PSM Act*, s.80(E)(5), in relation to a matter within the jurisdiction of the Arbitrator. The purported transfer was clearly a matter within the definition of "industrial matter" in s.7 of *the Act* because it affected or related to or pertained to the work privileges, rights or duties of both the employer and the employee in an "industry" as defined in s.7.

60 Accordingly, it was open to the Commission to find that it was unlawful, or ultra vires by way of the review, or to enable the Arbitrator to modify or vary the act of the respondent.

61 Most cogent in this case is the power which exists under s.80E(5) of *the Act* to nullify. To "nullify" means, in its most relevant definition "To render or declare legally void or inoperative: to nullify a contract" (see "*The Macquarie Dictionary" (3rd Edition*)).

62 There is also, therefore, expressly conferred on the Arbitrator the power to nullify ((ie) to render or declare void the decision and other acts matters or things done to effect or to attempt to effect) the transfer to Hakea Prison of Ms Bowles. Equally as cogent is the express power to review contained in s.80.E(5).

63 Since the express power and jurisdiction exists to nullify any act of the Chief Executive Officer, as an employer, it follows that the Arbitrator is not prevented from doing acts or giving orders or directions which are usually confined to the process of judicial review in a court in order to review, modify, vary or nullify such an act. If there was a restriction on that power, Parliament would have expressly said so. It did not. Further, the act sought to be reviewed clearly fits within the definition of an "industrial matter" as it appears in s.7 of *the Act* (see also s.80E(1)). I would therefore find that the power to nullify, modify or otherwise deal with the decision to transfer in accordance with *the Act* was within jurisdiction. I say that because the decision to transfer Ms Bowles and the purported transfer of Ms Bowles was an act which affected and directly related to the rights, duties and obligations of both an employer and an employee in an industry as defined. The act sought to be nullified, modified, reviewed or varied was and is an act, matter or thing done by an employer in relation to a matter within the jurisdiction of the Arbitrator namely an industrial matter relating to a government officer (see s.80E(1)). It is therefore within jurisdiction whether the act complained of is or was an administrative act or not.

64 There was, therefore, clearly, express jurisdiction to vary modify or indeed to render void by declaration all or any of the acts, matters or things done effected or attempted to be done or effected by the respondent.

65 In that this related to what was done or sought to be done pursuant to statutory power under the *PSM Act* there was clear jurisdiction to nullify, vary or modify what was done.

66 The *Ishmael Case* (op cit) is authority for a number of propositions. These include S80E(7) of *the Act* which deprives the Arbitrator of jurisdiction to enquire into or deal with or refer to the Commission in Court Session or the Full Bench any matter in which a procedure referred to in s.97(1)(a) of the *PSM Act* is or may be prescribed under that Act.

67 However, the question for the Arbitrator was not and could never be whether there was a breach of the prescribed standards, because the prescribed standards could only be applicable to an act of transfer or purported act of transfer which was lawful and/or within power, not one which was void. S.97(1)(a) of the *PSM Act* does not operate in its terms, it is trite to observe, to deprive the Arbitrator of jurisdiction to determine whether there is a valid exercise of power under s.65 of the *PSM Act*. Indeed, it confers it.

68 The question was whether a valid exercise of a statutory power had taken place. The Arbitrator found that there had not been. That finding was not appealed against and therefore that is the end of that matter.

69 The Arbitrator clearly had jurisdiction to hear and determine the matter insofar as it relates to the transfer and/or decision to transfer. There was never a question of the application of the public sector standards. Jurisdiction could not, as I would find, be excluded by the operation of either s.21(1)(a)(i) and s.97(1)(a) of the *PSM Act* or s.23(2a) of *the Act*.

70 The Arbitrator was entitled to find and declare accordingly. Indeed, it was open to him to find and he should have found and declared that the purported transfer of Ms Bowles was outside power and void (see *CSA v Director General, Department of Consumer and Employment Protection* (2002) 82 WAIG 952 (FB)).

71 It was also, as the Arbitrator correctly found, open to find, (and it should have been so found), that an order should be made preventing the transfer Ms Bowles to Hakea Prison unless there was demonstrated an acceptance of her by the local aboriginal community.

The Decision to Exclude Ms Bowles from Broome Regional Prison – The *Prisons Act* 1981 - S.66

72 The other main head of complaint related to the exclusion of Ms Bowles from work and from the Broome Regional Prison by the decision of the superintendent of the prison. It is not necessary to decide that question, since it was not pursued on appeal and it was not squarely raised at first instance. However, having regard to the submissions made, if it were necessary to decide the point, I would do so as I express hereinafter. I also make some observations about findings made at first instance which were not challenged and which stand.

73 S.36(1) of the *Prisons Act* reads as follows:-

> "The chief executive officer shall designate a superintendent for each prison and an officer so designated as superintendent of a prison shall have the charge and superintendence of the prison for which he is designated and shall be responsible to the chief executive officer for the good government, good order, and security of that prison."

74 S.36(3) reads as follows:-

> "The superintendent of a prison may issue such orders to officers and to prisoners as are necessary for the good government, good order, and security of the prison of which he is superintendent."

75 S.7(1) and s.7(3) of the *Prisons Act* are relevant and I reproduce them hereunder:-

> **"7. Powers and duties of chief executive officer**
>
> (1) Subject to this Act and to the control of the Minister, the chief executive officer is responsible for the management, control, and security of all prisons and the welfare of all prisoners.
>
> (3) The chief executive officer has all of the powers conferred by or under this Act on a superintendent or other officer and may review, vary or rescind an order or direction given by a superintendent or other officer."

76 They vest the power to manage and control prisons in the Chief Executive Officer together with a power to review, rescind or vary an order or direction of a superintendent or a prison.

77 It was submitted that, by virtue of s.36(1) of the *Prisons Act*, there is imposed on the superintendent of the prison responsibility "for the good government, good order, and security of that prison". The superintendent, of course, is responsible to the chief executive officer for the good government, good order and security of the prison. That is of course, as the above mentioned extracts from s.36 prescribe, clearly the case.

78 It is noteworthy, too, that the superintendent may with the approval of the chief executive officer pursuant to s.37 of the *Prisons Act* make and issue written standing orders with respect to the management and routine of the prison. All of these sections appear in Part V – Management, control and security of prisons.

79 It is noteworthy, that, if the superintendent is of the opinion that a visitor or any other person is likely to interfere with the preservation of the good order or the security of the prison, he may, notwithstanding any other provision of that Act refuse that person entry to the prison or, if such person has been admitted to the prison, may remove that person or cause the person to be removed and may use such reasonable force as is necessary for the purpose. Those are the relevant terms of s.66 of the *Prisons Act* which I have reproduced above.

80 It does not seem to have been contended at first instance that the superintendent of the Broome Regional Prison did not notify the respondent in writing of the action taken under s.66(1) in accordance with s.66(2) of the *Prisons Act*. It can be assumed therefore, that he did so notify the respondent director. In any event, it was not at all contended that the respondent was not at all material times aware of the action taken by the superintendent and indeed it is quite clear on a fair reading of the transcript at first instance and the reasons for decision of the Arbitrator that he was so aware. There was, too, no evidence that the respondent disapproved of the action taken by the superintendent or that he reviewed, varied or rescinded, under s.7, the refusal to permit entry under s.66.

81 Ms Bowles had been absent from her employment at the Broome Regional Prison since July 1999, when she claimed stress related illness and because of conflict with other prison employees, as I have already observed, "she felt that she could no longer effectively fulfil her role as a prison support officer at the prison".

82 In July 2000, Ms Bowles was advised that she would not be permitted to return to the prison. There was a review, by the Arbitrator, in his reasons for decision, of the evidence indicating problems between Ms Bowles and key members of the prison over a substantial period of time. The Arbitrator found as follows:-

> "In conclusion, I find that Mr Coombes-Pearce would be entitled to take into account in assessing the information provided to him by those members of staff, and the previous superintendent, that Ms Bowles' working relationship with the Clinical Nurse Manager of the prison Ms Wotherspoon, a relationship which is critical, had broken down; that Ms Bowles approached Ms Wotherspoon at home and caused Ms Wotherspoon to believe that Ms Bowles was trying to intimidate and threaten her suggesting that it was Ms Wotherspoon who was going to be harmed by participating in the court cases; that Ms McBride the Records Officer of the prison felt threatened by Ms Bowles; that Ms Bowles had refused to speak informally with her direct-line manger Mr Ross when he tried to resolve an issue at the time with Ms Wotherspoon; that the relationship between Ms Bowles and Mr Ross is dysfunctional; that she does not trust the prison's operations manager Mr Fitzpatrick who is the person who guides and directs the prison support officer; that Ms Bowles did not comply with some of the administrative arrangements put into place regarding communication, including a failure to complete the occurrence book; that she would not respond to the prison's former education officer (and presently the prison's business manager) Mr Reindl's request unless he asked her formally and that she refused to be further involved in a programme when her suggestions had not been followed; that she threatened Mr Fitzpatrick and Mr Reindl with legal action after accusing them of lying; that Ms Bowles "barged in" on the previous superintendent Mr Gittos when he properly cancelled the remand prisoner's visit and that she refused to return to his office when he asked her to come back to speak to him; and finally that Mr Gittos subsequently felt that he could not rely on Ms Bowles to tell the truth of conversations that took place and he started to have a witness present with him in her presence.
>
> The above conduct by Ms Bowles and the strength of the feeling against her which it has generated in those staff who gave evidence is significant. Broome Regional Prison is a relatively small workplace. The absence of trust between Ms Bowles and those who gave evidence makes it indeed likely, in my assessment, that it would be an untenable situation for Ms Bowles to return to work at the prison in the present circumstances. Taking the above into consideration, I am far from convinced that if the superintendent had spoken to Ms Bowles and given her an opportunity to raise issues and provide responses to the allegations against her that a different outcome could have resulted. It follows that I am not prepared overturn the decision of the superintendent.
>
> The position, then, is that Ms Bowles, the prisoner support officer for the Broome Regional Prison is not able to return to work in that prison. Neither is she eligible, on the evidence before the Arbitrator, to be transferred to the comparable position at Hakea Prison. She may be able to be transferred to the position of prisoner support officer of another area if, all other things being equal, she can demonstrate an acceptance by the aboriginal community of the local area, however that is not an issue pursued in these proceedings."

83 Very clearly, the Arbitrator accepted the evidence of all the witnesses called on behalf of the respondent in preference to that of Ms Bowles. Those findings of fact based on that acceptance of evidence were not challenged on appeal as being in error. The Arbitrator went on to find that the conduct of Ms Bowles was significant. By that I understand that he found that the unsatisfactory nature of her conduct as complained of by the witnesses for the respondent was significant. The Arbitrator also found again as I understand it, that the strength of the feeling generated in the other employee witnesses by her conduct was significant. These findings were not appealed against and therefore stand.

84 The Arbitrator observed that it appeared to be assumed by the parties that the exclusive jurisdiction of the Arbitrator, pursuant to s.80E of *the Act*, gives the Arbitrator the power to review the decision of the superintendent to the extent that that decision gives rise to an industrial matter relating to a government officer, a group of government officers or government officers generally.

85 The Arbitrator, having accepted that it was so without necessarily deciding the point, drew a distinction between the jurisdiction of a Public Service Arbitrator to enquire into and deal with an industrial matter, and relating to a government officer, a group of government officers or government officers generally, and the jurisdiction of a civil court or administrative tribunal to review the decision of a public officer according to the principles of administrative law.

86 The order sought is relevantly, as the Arbitrator observed, "that the respondent facilitate Ms Bowles' return to work in Broome Regional Prison, or transfer Ms Bowles to a suitable alternative position in the Broome Region".

87 The Arbitrator then went on to observe that, to the extent that the CSA was seeking a review of the superintendent's decision on the basis of jurisdictional error on his part, or denial of natural justice on his part according to the principles of administrative law, that review was but one consideration in the Arbitrator dealing with the claim before him.

88 The Arbitrator then went on to find that when the decision of the superintendent excluded a government officer from his/her place of work, then that exclusion was the industrial matter, or part of it, brought before the Arbitrator. Thus, the Arbitrator has jurisdiction to review the decision of the superintendent as part of the Arbitrator's inquiry into and dealing with that industrial matter.

89 To that I would add this comment. As I have said above, s.80E(5) of *the Act* is quite express and unambiguous in the words which it uses to confer jurisdiction and power on the Arbitrator to review, nullify, modify or vary any act, matter or thing done by an employer in relation to any matter liable to be reviewed by the Arbitrator in the exercise of jurisdiction under s.80E.

90 The Arbitrator then went on to find that it was open to the superintendent to exclude Ms Bowles from the prison because he believed that it would be an untenable situation for her to return to work at the prison whilst the other staff who had complained to him about her were there. It was held that that was a decision which it was open for him to make. It was, however, a decision which had to be made in accordance with natural justice, because, in making it, the superintendent was directly affecting Ms Bowles' right as an employee employed in the prison to return to work.

91 It was held for the reasons expressed in paragraph 61 of the reasons for decision of the Arbitrator that the superintendent reached the decision to exclude Ms Bowles under s.66 of the *Prisons Act* and did so, denying her natural justice. The Arbitrator then went on to hold that, even though she was denied natural justice, it did not follow that she must return to work at the prison (see *Dixon v The Commonwealth of Australia* (1985) 61 ALR 173 (FC FC)).

92 That issue, the Arbitrator held, could only be decided on the evidence before him, because the issues of administrative law comprehensively do not provide the answer themselves in this matter.

93 This was expressed as being a question whether, had the superintendent discussed his intentions with Ms Bowles and taken into account what she said before he reached his decision, he could have come to a different conclusion.

94 The test is whether, if a fair process had been followed, there could have been a different outcome (see *Stead v State Government Insurance Commission* [1986] 161 CLR 141 at 145-146 (HC)), he held, correctly, on that authority.

95 The Arbitrator then considered all of the evidence and found that he accepted the evidence of the witnesses for the respondent. In particular, he found (see paragraph 68 of the Arbitrator's reasons for decision) that a number of complaints against Ms Bowles by her fellow employees and managers was made out.

96 In paragraph 69 he found as follows:-

> "The above conduct by Ms Bowles and the strength of the feeling against her which it has generated in those staff who gave evidence is significant. Broome Regional Prison is a relatively small workplace. The absence of trust between Ms Bowles and those who gave evidence makes it indeed likely, in my assessment, that it would be an untenable situation for Ms Bowles to return to work at the prison in the present circumstances. Taking the above into consideration, I am far from convinced that if the superintendent had spoken to Ms Bowles and given her an opportunity to raise issues and provide responses to the allegations against her that a different outcome could have resulted. It follows that I am not prepared overturn the decision of the superintendent."

97 Those findings were not challenged on appeal and would stand.

98 It is noteworthy that the Arbitrator then made no finding that he did not have jurisdiction to deal with the s.66 *Prisons Act* exclusion under s.80E(5) of the *PSM Act*. What he did do and what he did decide was that the decision of the superintendent to exclude Ms Bowles should not be overturned, because even if natural justice were afforded, a different result would not have resulted.

99 What the relevant grounds of appeal are directed to, are to establish that the decision of the superintendent was "unlawful".

100 In relation to the attack on the superintendent's exclusion of Ms Bowles pursuant to s.66 of the *Prisons Act*, the following allegations and submissions were made on appeal:-

a) The Director General, the respondent, should have corrected the superintendent's "unlawful" decision to exclude Ms Bowles from Broome Regional Prison, which was not a decision to transfer her.

b) The omission of the Director General to "correct" the unlawful decision was contrary to s.7 to s.9 of the *PSM Act*.

c) The decision of the superintendent was beyond the "sound range of discretion".

d) The Arbitrator erred in law and his decision miscarried in that he did not compel the respondent to allow Ms Bowles to resume her full-time duties as a level 4 prison support officer at Broome Regional Prison; this is because of the Arbitrator's power to review, modify, nullify or vary a decision of a prison superintendent to exclude an employee.

101 Reliance might be placed on the following sections of the *PSM Act*:-

a) S.30(d) which requires the Chief Executive Officer/Director General to adhere to binding orders made under that Act.

b) S.30(b) and (c) which require the Chief Executive Officer/Director General to adhere to the principles in s.7 to s.9 of the *PSM Act* and the Public Sector Code of Ethics.

c) S.7 of the *Prisons Act* which provides for the powers and duties of the Chief Executive Officer and which in its relevant parts I have reproduced supra.

d) S.64 of the *PSM Act* makes it clear that it is Ms Bowles' employer who is the Director.

e) When a s.66 power of the *Prisons Act* is exercised in relation to an employee, then the exercise of that power is subject to s.8 of the *PSM Act* as well as *the Act*.

102 The prison was Ms Bowles' workplace and the employee's position demands that she carry out her work there. It was admitted by the respondent that her exclusion from the prison was a key factor in the decision to transfer Ms Bowles to Perth.

103 It was submitted that the decision was clearly a "human resource management decision" made under the guise of s.66 of the *Prisons Act* and is subject to s.8, s.9 and s.30 of the *PSM Act*. It is not clear to me that it was a human resource management decision, even if that term is valid or acceptable. What the decision was, however, was the act of an employer in relation to an employee, which itself was done in relation to an industrial matter, as I have said above, within the meaning of s.80E(5) of *the Act*.

104 Alternatively, of course, her employment in the prison has never ceased because no valid action has been taken by her employer to terminate it or even to suspend her. Whether she has been dismissed or not or whether she is in breach of her contract of employment in that regard are other matters which I make no comment upon at this time.

105 It was submitted that the Arbitrator has power to enquire into and deal with any act, matter or thing, etc, pursuant to s.80E of *the Act*. It was submitted that the actions and decisions of the superintendent and the Chief Executive Officer/Director General were "clearly industrial matters" because they affected the rights and interests of Ms Bowles to return to work and perform her duties at the workplace, not to be unfairly and/or unlawfully transferred by the respondent to Perth.

106 It was also submitted that is was the obligation of the respondent in connection with the matter not to subject her to decisions and actions which contravened the *PSM Act* and/or industrial and administrative law principles.

107 It was submitted that the superintendent's decision to exclude her from the prison, made under the *Prisons Act*, provided no impediment to the issuing of the orders sought by the applicant before the Arbitrator, and that the Arbitrator erred in not intervening to correct the failure of the Director General not to correct the superintendent's unlawful decision.

108 The case for the respondent was that the Arbitrator has and had no jurisdiction in relation to the review of the superintendent's decision which is a decision made in the exercise of a statutory power, the review of which is a matter for the administrative law which, it was submitted, is within the exclusive province of the Supreme Court of this State (see *Minister of Police and Another v Western Australia Police Union of Workers* (FB) (op cit)).

109 The submissions for the respondent were as follows:-

a) The appellant does not seriously argue the merit of the decision made by the superintendent but focuses on the alleged unfairness.

b) The decision of the superintendent is not amenable to review in this jurisdiction. It is reviewable only by way of judicial review in the Supreme Court.

c) The power conferred upon the superintendent to exclude from the prison is one conferred to maintain the security of the prison in the public interest.

d) On this occasion its exercise only incidentally involved Ms Bowles and is too remote from her in her capacity as an employee to constitute an industrial matter capable of review.

e) That statutory power exercised by the superintendent does not relate to the work rights or duties of an employer and an employee in the industrial sense (see *Hotcopper Australia Ltd v Saab* [2002] 82 WAIG 27-28).

f) The exercise of the power conferred on the superintendent to make decisions for the security and good government of the prison are purely public in nature, and therefore only amenable to judicial review by the Supreme Court if a declaration on the grounds of invalidity is sought.

g) There is no capacity in the Commission to declare a decision unlawful on administrative review grounds.

110 Paragraphs 9 and 10 of the submissions for the applicant at first instance were as follows:-

> "It was strongly submitted on behalf of Ms Bowles that her contract of employment was location specific to Broome Regional Prison and therefore there was no capacity for her to be transferred pursuant to section 65 of the *Public Sector Management Act.*
>
> The evidence is clear that as a result of her behaviour Ms Bowles is unable to function with other employees with whom she must interact to discharge her duties and for that reason the Superintendent has determined that the security and good government of the prison requires Ms Bowles exclusion from it."

111 The submission was made that there is no capacity on the part of the respondent to transfer Ms Bowles when events have occurred which exclude the possibility of her being able to discharge her duties in the place that she says her contract of employment is limited to, namely the Broome Regional Prison. If Ms Bowles is not responsible for this situation and her contract is location specific then there has been a frustrating event, so one submission went.

112 I should observe, as I have earlier held in these reasons, that s.80E(5) of *the Act* confers in clear terms the jurisdiction on the Public Service Arbitrator to enquire into and deal with an industrial matter relating to a government officer, which Ms Bowles was accepted to be. There is also conferred the jurisdiction and the power to review, nullify, modify or vary any act, matter or thing done by an employer in relation to any matter within the jurisdiction of the Arbitrator.

113 A matter is within the jurisdiction of the Arbitrator firstly, if it is an "industrial matter", and secondly if the act, matter or thing is done by an employer in relation to an industrial matter is therefore within jurisdiction.

114 The words "industrial dispute" in the *Conciliation and Arbitration Act* 1904 (Cth), and, *a fortiori,* because the definition of "industrial matter" in s.7 of *the Act*, is wider than the definition of "industrial dispute" and must be understood in very broad terms.

115 The definition of industrial matter is intended, if I might paraphrase it, to extend to all matters which might commonly be understood to be "industrial" as the High Court unanimously held in *R v Coldham and Others; Ex parte The Australian Social Welfare Union* [1983] 153 CLR 297. "The words are not a technical or legal expression. They have to be given their proper meaning – what they convey to the man (sic) in the street. And that is essentially a question of fact".

116 That view stretches right back to the *Jumbunna Coal Mine case* of 1908 (*Jumbunna Coal Mine (No Liability) v Victorian Coal Miners' Association* [1908] 6 CLR 309).

117 It is only disputes which arise between an employer in the capacity of employer and employee in the capacity of employee which brings a matter within the definition of industrial matter in so far as those terms are defined in s.7 of *the Act* and as they appear in the context of the words of the definition of industrial matter and the meaning of those words (see s.7). The breadth of the definition of industrial matter and the terms of the definition are considered in *RGC v Mineral Sands Pty Ltd and CMEWU* (2000) 80 WAIG 2437 at page 2443-2444 per Parker J (IAC).

118 Where it is not within the power of a party to comply with such demands there can be no arbitration between the parties (see *R v Graziers' Association (NSW); Ex parte Australian Workers' Union* [1956] 96 CLR 317 at 323).

119 The decision made to exclude Ms Bowles affected her rights as an employee, and it did so directly, because she was by the exclusion from her workplace defacto suspended and/or dismissed. The evidence to justify the decision to exclude her from the prison was based on her conduct as an employee to other employees.

120 In this case, the act of the prison superintendent in excluding Ms Bowles from the process seems to have been treated by her employer, the respondent, as terminating her employment there, and in any event used as a basis for requiring her to transfer in her employment.

121 It is therefore an act clearly done by her employer through a sub-ordinate which affected, related to, or pertained to her work privileges, rights and duties and the rights and duties of her employer in an "industry" as defined.

122 That it was an act done as part of the whole industrial matter relating to her employment at Broome Regional Prison and the purported transfer of her subsequently is entirely clear. The vice in the matter is that the superintendent's exclusion was used or permitted to be used as a de facto termination or suspension of employment by Ms Bowles employer, the respondent.

123 In this case, the superintendent acted subject to the respondent who by s.7(1) of the *Prisons Act* is responsible for the management, control and security of all prisons and the welfare of all prisoners. The exclusion was also invalidly imposed beyond power on an employee for the reasons which I have expressed hereinafter and above.

124 Further, and significantly, the respondent has all the powers conferred by or under the *Prisons Act* on a superintendent or other officer and may review, vary or rescind an order or direction given by a superintendent or any other officer (see s.7(3)).

125 The order made under s.66 of the *Prisons Act* was reviewable by the respondent.

126 In my opinion, too, the power exercised by the superintendent does not apply to employees and applies to visitors or any other person ((ie) a person who enters on a temporary basis). Secondly, it is not at all clear to me that an employee who is disruptive in her relationship with her superiors and other employees is necessarily likely to interfere with the preservation of the good order or the security of the prison, and it was not established, in my opinion, in this case. In my opinion, in any event, an employee is not a "visitor or any other person", the words being used clearly ejusdem generis in the section with the word "visitor". A visitor is, of course, a person who is only temporarily in the premises.

127 I am not therefore persuaded that in excluding an employee and effecting a de facto suspension or dismissal, that the superintendent acted within power. He did act, however, without any review or variation by the respondent employer or any action taken to enable Ms Bowles to continue her employment at Broome. Thus the scene was set for her purported subsequent transfer to Perth.

128 The power under s.80E(7) of *the Ac*t is a power to modify an act done in relation to a matter within jurisdiction. The matter within jurisdiction was the exclusion of an employee followed by her purported transfer as a result of or based upon or using as a pretext the exclusion; or using this act or permitting it to be used as a de facto dismissal, or suspension.

129 In my opinion, the act complained of was clearly an act which was an industrial matter even though it purported to be performed for another purpose.

130 Within the meaning of s.80E(5), it was the act of an employer to exclude her because it was the act of her supervisor taken to resolve difficulties which arose because of the appellant's attitude and conduct as an employee, complained about by her former supervisor and her fellow employees and done ostensibly with the authority of her employer, the above mentioned respondent director.

131 As I have said, such act was not rescinded, reviewed, varied or revoked.

132 It was not, however, an act tainted by denial of natural justice or procedural fairness such that the act ought to be declared void for that reason. The Arbitrator so found, and the factual findings on which that finding was based were not challenged on appeal.

133 Therefore, as a matter of fact it was found that all the complaints about Ms Bowles conduct were warranted.

134 However, for the reasons which I have advanced above, the exclusion was not available to deal with an employee of the respondent.

135 If I am wrong in that, however, then Ms Bowles was validly excluded and it was not open on the merits to challenge the exclusion on appeal for the reasons which I have advanced, primarily because no such challenge was mounted.

Conclusions

136 If I am right, and the act of exclusion was invalid, then she was wrongly excluded from the Broome Regional Prison but a question arises as to what the status of her contract of employment is. For example, has she been suspended? Has the employer terminated the contract? Has the employer repudiated the contract? If there has been no such termination, has there been a suspension? Has any termination or suspension been fair or lawful? Is the employee in breach of her employment contract? Has Ms Bowles repudiated the contract? What should now occur?

137 I am, however, particularly mindful of the Arbitrator's observations that if he were able to declare the transfer void, he would and that there are other matters which flow from such a finding. I agree that that, of course, is the case. I have already said that the transfer should be declared void and that any transfer as suggested should be ordered not to occur.

138 What, of course, is perfectly clear is that whatever the act of the superintendent of the prison is otherwise, it was by the ostensible authority of the respondent the act of the employer and it was within jurisdiction of the Arbitrator to deal with it.

139 Accordingly, I would find that the decision to and purported act of transfer of Ms Bowles was void as being outside power, as the Arbitrator correctly found. I would find, if it were necessary to do so, that the act of exclusion of Ms Bowles from the Broome Regional Prison was also void. I would find also that the Arbitrator should have so found and declared the act beyond power. He might also have found that the same was within his jurisdiction to so find and declare.

140 I am not at all persuaded that the failure to have Ms Bowles return to work at the Broome Regional Prison, having regard to the Arbitrator's findings as to her unsatisfactory conduct in her employment was at all contrary to s.7 to s.9 of the *PSM Act*; nor, was it necessarily open to find for the same reasons that she should have been allowed to remain in her employment at Broome. However, what should occur in relation to her employment, however, is a matter, I think, for the Arbitrator to now decide.

141 However, if the act of exclusion were found to be outside power and invalid it would not matter that it was justified. However, that finding might be justified in relation to any further findings in relation to the contract of employment. That would leave a number of outstanding questions about the contract of service and the nature of the action taken or which now can or should be taken, which should be determined by the Arbitrator, to include the question of any remedies. What, of course, is quite clear and central to this matter is that the purported transfer was void as found, and that such a transfer should not be permitted.

FINALLY

142 For those reasons, ground 1 is made out. Ground 3 might in part be made out were it necessary to so find. In relation to ground 4, I would not be persuaded that the Arbitrator's discretion miscarried in not compelling the respondent to allow her to return to her duties at Broome Regional Prison since he decided the matter on another basis.

143 It is not necessary for me to consider the grounds further. I have considered the submissions and the authorities in detail. I have also considered the relevant material.

144 I make it clear that the decision and any steps taken to transfer Ms Bowles to the Hakea Prison at Canning Vale were void as found. It is and was open to the Arbitrator to make orders to prevent such a transfer.

145 I would therefore uphold the appeal for those reasons. I would suspend the operation of decision at first instance and remit the same to the Arbitrator to hear and determine according to law and these reasons.

146 **COMMISSIONER S WOOD:** I have read the reasons for decision of His Honour the President. I agree with those reasons and have nothing to add.

147 **COMMISSIONER J L HARRISON:** I have had the benefit of reading the reasons for decision of His Honour, the President. I agree with those reasons and have nothing to add.

148 **THE PRESIDENT:** For these reasons the appeal is upheld. The operation of the decision at first instance is suspended and the matter remitted to the Arbitrator to hear and determine according to law and those reasons.

Order accordingly

2002 WAIRC 06822

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED, APPELLANT - and - DIRECTOR GENERAL, MINISTRY OF JUSTICE, RESPONDENT
CORAM	FULL BENCH HIS HONOUR THE PRESIDENT P J SHARKEY COMMISSIONER S WOOD COMMISSIONER J L HARRISON
DELIVERED	WEDNESDAY, 23 OCTOBER 2002
FILE NO/S.	FBA 17 OF 2002
CITATION NO.	2002 WAIRC 06822

Decision	Order to issue in the terms contained in the minute of proposed order
Appearances	
APPELLANT	MS M IN DE BRAEKT, AS AGENT
RESPONDENT	MR R J ANDRETICH (OF COUNSEL), BY LEAVE

Supplementary Reasons for Decision

1 This matter came before the Full Bench for a speaking to the minutes of the proposed order herein on 18 October 2002. The speaking to the minutes took place at the request of the respondent.

2 For the respondent, it was submitted that order (2) of the minutes of proposed order be amended by deleting the words appearing in such order after the words "Public Service Arbitrator" in the third line, and substituting therefor the words "for further hearing and determination".

3 It was submitted that the minutes in their present form were not consistent with s.49(5) of the *Industrial Relations Act* 1979 (as amended) (hereinafter referred to as "*the Act*") in that the words of s.49(5)(c) authorises the suspension of the operation of a decision and its remission "for further hearing and determination", and that, to paraphrase this, did not authorise the imposition of conditions such as that proposed to be imposed.

4 It was also submitted, at least in passing, and as I understood the submissions, that there might be difficulty in the current form of the order for the Arbitrator because of some elements of the reasons for decision.

5 For the appellant, it was submitted that the proposed orders reflected the reasons for decision and could not be questioned on a speaking to the minutes. Further, it was submitted that the submissions for the respondent went beyond what was permissible upon a speaking to the minutes.

6 I first observe that the parties are entitled to speak to the minutes by virtue of s.35(3) of *the Act*. However, on a speaking to the minutes, it is not a time to bring fresh evidence or to make submissions as to substance. It is not a time to argue an appeal or to complain about a decision (see *Grade Pty Ltd v McCorry* (1993) 73 WAIG 2016 (FB) and the cases cited therein).

7 In this case, the minutes clearly reflected the reasons for decision, which read in paragraph 145 of my reasons for decision (as agreed with by Wood C and Harrison C) as follows:-

> "I would therefore uphold the appeal for those reasons. I would suspend the operation of decision at first instance and remit the same to the Arbitrator to hear and determine according to law and these reasons."

8 Thus, the submission that the minutes of proposed order should be amended was a submission that the reasons for decision be amended, too. It was therefore a submission as to substance, and not appropriate upon a speaking to the minutes, on the authority referred to above.

9 Further, there is nothing in s.49(5)(c) of *the Act* which prevents a matter being remitted to the Commission at first instance to be dealt with according to law and the reasons for decision of the Full Bench after an appeal. It is necessary that the Full Bench express the terms on which a matter is remitted.

10 The Commissioner at first instance, too, (the Arbitrator in this case), must know the terms on which he/she can proceed further to hear the matter as decided upon appeal.

11 As to the question of how the reasons for decision might bind or affect the Arbitrator, it is quite clear that if those questions arise (and they may not), they are matters upon which submissions can be made on behalf of the parties, and there can then be a determination by the Arbitrator of their effect after he/she has read the reasons for decision and considered the submissions.

12 Primarily, however, the submissions for the respondent were not appropriate to a speaking to the minutes, and, in fact, the minutes of proposed order accurately reflected the reasons for decision herein also.

13 For those reasons, I agreed with my colleagues to issue the order in this matter in the terms contained in the minutes of proposed order.

2002 WAIRC 06785

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED, APPELLANT
	v.
	DIRECTOR GENERAL, MINISTRY OF JUSTICE, RESPONDENT
CORAM	FULL BENCH
	HIS HONOUR THE PRESIDENT P J SHARKEY
	COMMISSIONER S WOOD
	COMMISSIONER J L HARRISON
DELIVERED	WEDNESDAY, 25 SEPTEMBER 2002
FILE NO/S.	FBA 17 OF 2002
CITATION NO.	2002 WAIRC 06785

Decision	Appeal upheld; order at first instance suspended and the matter remitted to the Public Service Arbitrator
Appearances	
APPELLANT	MS M IN DE BRAEKT, AS AGENT
RESPONDENT	MR R J ANDRETICH (OF COUNSEL), BY LEAVE, AND WITH HIM MR N CHINQUINA (OF COUNSEL), BY LEAVE

Order

This appeal having come on for hearing before the Full Bench on the 14th day of August 2002, and having heard Ms M in de Braekt, as agent, on behalf of the appellant, and Mr R J Andretich (of Counsel), by leave, and with him Mr N Cinquina (of Counsel), by leave, on behalf of the respondent, and the Full Bench having reserved its decision in the matter, and reasons for decision being delivered on the 25th day of September 2002, it is this day, the 25th day of September 2002, ordered and declared as follows—

(1) THAT appeal no. FBA 17 of 2002 be and is hereby upheld.

(2) THAT the decision of the Public Service Arbitrator in matter No. P 2 of 2001 given on the 14th day of March 2002 be and is hereby otherwise suspended and the matter is hereby remitted to the Public Service Arbitrator to hear and determine according to law and the reasons of the Full Bench.

By the Full Bench

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

[L.S.]

FULL BENCH—Unions—Application for Alteration of Rules—

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

INDUSTRIAL RELATIONS ACT 1979

The State School Teachers' Union of W.A. (Incorporated)

(Applicant)

(No 505 of 1999)

BEFORE THE FULL BENCH 9 June 1999

HIS HONOUR THE PRESIDENT P J SHARKEY
CHIEF COMMISSIONER W S COLEMAN
COMMISSIONER S J KENNER

Reasons for Decision.

THE PRESIDENT: These are the unanimous reasons for decision of the Full Bench.

1. This is an application by The State School Teachers' Union of W.A. (Incorporated) (hereinafter referred to as "the SSTUWA").

2. The applicant body is an organisation, as that is defined in s.7 of the Industrial Relations Act 1979 (as amended) (hereinafter referred to as "the Act"), which means that it is registered as an organisation under the Act.

3. The application is one made to alter the rules of the abovementioned organisation and is made pursuant to s.62(2) of the Act, which gives jurisdiction to the Full Bench to authorise the Registrar to register any alterations to the rules of an organisation which relates to its name, qualification of persons for membership or a matter referred to in s.71(2) or (5) of the Act. Otherwise, the Registrar is prohibited from registering such an alteration to the rules.

4. The application herein was filed on 13 April 1999 and is signed for and on behalf of the applicant by an unidentified person.

5. The applicant seeks that the following alteration be authorised to be registered, namely:-

(a) an alteration to Rule 4(c) by the deletion of the words "and unemployed teachers" from the third and fourth lines thereof; and

(b) an alteration to Rule 4 of the rules, by adding after Rule 4(a)(vi) the following:-

> "Notwithstanding the above, any person who is not registered with the relevant employer as available for work, has not worked as a teacher for at least two years or who no longer has a contract of employment with the relevant employer shall not be eligible for membership under sub-rule 4(a)."

6. Particulars appear in the form of copies of the rules with proposed amendments also set out and in fact gazetted in the Western Australian Industrial Gazette 79 WAIG 1253 dated 28 April 1999, the actual notice of the application being dated 14 April 1999.

7. There are no particulars to the application, as are prescribed in Regulation 8(2)(c) of the Industrial Relations Commission Regulations 1985 (as amended) (hereinafter referred to as "the Regulations), which require that a Notice of Application shall, inter alia:-

> "have attached a written statement of claim which clearly and concisely specifies the exact nature of the relief sought and the purpose of the application."

8. Pursuant to Regulation 98(1) of the Regulations, the application has been lodged in triplicate in accordance with Form 29.

9. Regulation 98(3) of the Regulations has been complied with, in that:-

> "(a) three printed or type-written copies of the registered rules of the organization or association incorporating and showing in distinctive characters, each alteration of the rules of which registration is sought;
>
> (b) three printed or type-written copies of each alteration;
>
> (c) three copies of the notice given to members in accordance with section 62(3)(b) of the Act including a statement as to how such notice was disseminated to members; and
>
> (d) three copies of the resolution authorizing the application."

have been filed.

10. Rule 44 is the "Alteration of Constitution" rule of the applicant organisation, and it requires the following to occur:-

(a) Notice of proposed alterations or amendment of, additions to or excisions from the Constitution must be forwarded to the General Secretary by the close of business on a date to be determined and published by Executive prior to each State Council.

(b) Copies of such notice of proposed alterations or amendment of, additions to or excisions from the Constitution must be published in the agenda of the relevant State Council.

(c) No clause of the Constitution shall be altered, added to, amended or excised, nor shall any new clause be made, except by a majority of not less than two-thirds of the delegates present and voting at a properly constituted meeting or session of State Council.

(d) State Council is empowered to endorse an alteration to the Constitution in words and form different to that which had been published in the agenda, provided the words and form do not change the original intention of the proposed alteration.

(e) There is a mandatory requirement that, as soon as practicable, after the completion of each State Council, all decisions made by State Council concerning constitutional amendments shall be placed in the "Western Teacher" or such other publication and distributed to all members.

(f) That publication must inform members of the change endorsed by State Council, the reasons for the change, and their right to object to the proposed alteration by forwarding a written objection to the Registrar of this Commission.

(g) There are other provisions which are not relevant to this application.

11. If any constitutional amendments referred to are matters which must be referred to the Full Bench under s.62(2) of the Act, members must be informed of their separate and additional right to object to making of the application to the Full Bench.

12. By virtue of s.62(4) of the Act, ss.55, 56 and 58(3) apply, with such modifications as are necessary, to and in relation to an application by an organisation for alteration of a rule of a kind referred to in subsection 62(2) and referred to by me above.

13. This is an application properly brought under s.62(2) of the Act and is within the jurisdiction of the Full Bench.

14. The following requirements under s.55 of the Act apply, as modified:-

(a) A notice of the application and a copy of the rules of the organisation, as they relate to the qualification of persons for membership and a notice that persons may object within the time and in the manner prescribed must be published in the Industrial Gazette. Such a notice was published in the Western Australian Industrial Gazette, as we have already observed.

(b) The application, in compliance with s.55 of the Act, was not listed before the Full Bench until after the expiration of thirty days of the date of issue of the Industrial Gazette.

15. The Full Bench is required to refuse an application such as this, unless it is satisfied as to a number of matters (see s.55(4) of the Act).

First of all, it is necessary to look at the evidence:-

There is a statutory declaration filed herein, having been declared by Patricia Byrne on 25 May 1999 (exhibit 2), a Senior Vice President of the applicant organisation, to the following effect that:-

(i) The Executive of the SSTUWA determined that State Council would be held on 20 and 21 June 1998.

(ii) The SSTUWA Executive determined that the closing date for the submission of agenda items was to be 7 May 1998.

(iii) Notices detailing the matters contained in paragraph 3 above were published in February and March editions of the "Western Teacher" on 27 February 1998 and 20 March 1998, and copies of the notices to that effect are exhibited to the declaration as "PB1" and "PB2".

(iv) The Executive, after the receipt of all matters to be included on the agenda for State Council, prepared an agenda which it published in the "WA Teachers' Journal" on 25 May 1998, not less than three weeks prior to 20 June 1998 which is exhibited as "PB3" to the declaration of Patricia Byrne.

(v) Copies of "PB3" were sent to SSTUWA branch representatives with a list of all members at their workplace or school and they were requested to distribute copies to each member. Sufficient copies were made available for this purpose.

(vi) On 20 and 21 June 1998, the SSTUWA State Council was held. She attended all sessions. The meeting of the Council was a properly constituted meeting on 20 and 21 June 1998.

(v) The WA Teachers' Journal, containing all decisions of the June State Council, including all proposed amendments to the rules and Constitution of the SSTUWA, in particular, Rule 4, were carried and the reasons for the proposed amendments (pages 19-32 of the Journal were attached and marked "PB5").

(vi) The alterations to Rule 4 were approved by a majority of not less than two-thirds of the delegates present and voting, with a quorum present, according to the minutes of the State Council Meeting ("PB6").

(vii) Copies of the WA Teachers' Journal ("PB5") were sent to all schools and places of work on 2 September 1998 to union branch representatives with a list of all members of that place of work or school and requested to distribute copies to each member. Attached and marked "PB7" are invoices which show the number of copies of the Journal printed and distributed, representing sufficient numbers for each member of the union at each place of work or school.

(viii) In "PB5", at pages 19-32, members were informed of the following:-

(a) The reasons for the proposed changes to the rule;

(b) The intention of the SSTUWA to apply to the Western Australian Industrial Relations Commission for registration of the proposed amendment to the rule;

(c) That members had a right to object to the proposed alteration by forwarding a written declaration to the Registrar of this Commission;

(d) That members have the separate and additional right to object to the making of any application by the SSTUWA to the Full Bench, pursuant to s.62(2) of the Act, by forwarding a written objection to the Registrar of this Commission.

16. There were no objections to the application for authority to alter the rules filed with the Commission or otherwise notified.

17. The rules relating elections for office provide for election by secret ballot and conform with s.56(1) of the Act.

18. The rules provide for the alteration of rules by reasonable notice, etc.

19. Reasonable steps have been taken to adequately inform the members of the intention of the organisation to apply for registration of the proposed alteration to the rules of the organisation and that the members or any of them may object to the making of the application or to those rules or any of them by forwarding a written objection to the Registrar or, indeed, to the Full Bench.

20. Having regard to the structure of the organisation and any other relevant circumstance, the members have been afforded a reasonable opportunity to make such an objection.

21. Because no person has objected, less than 5% have certainly objected.

We were satisfied, for those reasons, that all of the relevant rules, statutory provisions and regulations had been complied with and that the relevant objects of the Act (see s.6) would be advanced by the Full Bench acceding to this application.

We were also satisfied that to accede to the application would be a decision in accordance with equity, good conscience and the substantial merits of the case, for those reasons.

It was submitted that the reason expressed to and adopted by State Conference of the applicant was the reason for the alterations and sufficient reason for the Full Bench to grant the application.

That reason was that the applicant organisation's members, voting at State Conference, in accordance with the rules, wished to prevent persons no longer "working in the industry" and who are not seeking to do so, from going on receiving full membership of the applicant. Further, however, persons who are not employed but who are seeking or waiting for employment are not excluded.

In addition, and, as a consequence, "unemployed teachers" are not entitled to honorary membership. Retired teachers, as such, remain entitled to membership in accordance with Rule 4(f).

We were of the view that such situations were matters for the members to decide, and that it was open to them, being referred to s.26(1)(a) and (c) of the Act, to determine that persons not awaiting or seeking employment should not be eligible for membership. There were, of course, no submissions to the contrary, on this occasion.

For those reasons, we were satisfied that the applicant had established that the order which it sought should be made.

Order accordingly

APPEARANCES: Mr D Howlett (of Counsel), by leave, on behalf of the applicant

FULL BENCH—Unions—Application for Registration—

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

INDUSTRIAL RELATIONS ACT 1979

The Progressive Workers Federation of Western Australia - Association of Unions

(Applicant)

(No. 1403 of 1993)

BEFORE THE FULL BENCH 19 January 1994

HIS HONOUR THE PRESIDENT P J SHARKEY
CHIEF COMMISSIONER W S COLEMAN
COMMISSIONER R N GEORGE

Order

This matter having been due to come on for hearing before the Full Bench on the 19th day of January 1994, and the applicant having sought leave by letter from its Solicitor, D H Schapper, dated the 19th day of January 1994 to have the matter adjourned sine die, and having consented in writing by letter from its Solicitor, D H Schapper, dated the 19th day of January 1994 to waive its rights to speak to the minutes of proposed order in accordance with s.35(4) of the Industrial Relations Act 1979 (as amended), and the said letters having been filed herein, it is this day, the 19th day of January 1994, ordered that the hearing of application No 1403 of 1993 be and is hereby adjourned sine die.

By the Full Bench

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

FULL BENCH—Unions—Cancellation of Registration—

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

INDUSTRIAL RELATIONS ACT 1979

RAC Patrolmen's Association of Western Australia, Union of Workers

(No 1367 of 1991)

BEFORE THE FULL BENCH 4 December 1991

HIS HONOUR THE PRESIDENT P J SHARKEY
COMMISSIONER R N GEORGE
COMMISSIONER A R BEECH

Order

This matter having come on for hearing before the Full Bench on the 6th day of November 1991 and having heard Mr D H Schapper (of Counsel) on behalf of the applicant and Ms J H Smith (of Counsel) on behalf of the Registrar, as intervener, and the applicant having sought leave for the application to be adjourned sine die, and the intervener consenting to the application being adjourned sine die, it is this day, the 4th day of December 1991, ordered by consent that application No 1367 of 1991 be adjourned sine die.

By the Full Bench

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

FULL BENCH—Procedural Directions and Orders—

2002 WAIRC 06922

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ALINTAGAS NETWORKS PTY LTD, APPELLANT
	v.
	GRANT RAYMOND LUKIES, RESPONDENT
CORAM	FULL BENCH
	HIS HONOUR THE PRESIDENT P J SHARKEY
	COMMISSIONER J F GREGOR
	COMMISSIONER S WOOD
DELIVERED	MONDAY, 4 NOVEMBER 2002
FILE NO/S.	FBA 35 OF 2002
CITATION NO.	2002 WAIRC 06922

Decision	Appeal discontinued
Appearances	
APPELLANT	MR D SASH (OF COUNSEL)
RESPONDENT	MS H KETLEY (OF COUNSEL)

Order

The Notice of Appeal herein, having been filed herein on the 7th day of August 2002, and the abovenamed appellant, on the 10th day of September 2002, having filed a Notice of Discontinuance in the Registry of the Commission, and the solicitors for the abovenamed respondent, on the 14th day October 2002, having advised the Commission in writing that the respondent consents to the appeal being discontinued by the appellant, and the Full Bench having decided that the consent to the discontinuance of the appeal constituted special circumstances so as to exempt the parties from further compliance with regulation 29 of the *Industrial Relations Commission Regulations* 1985, and the parties having waived the rights conferred on them by s.35 of the *Industrial Relations Act* 1979 (as amended), and the Full Bench having so exempted them, it is this day, the 4th day of November 2002, ordered and declared, by consent, as follows—

(1) THAT there be leave granted and leave is hereby granted for appeal No FBA 35 of 2002 to be discontinued.

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

By the Full Bench

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

[L.S.]

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

INDUSTRIAL RELATIONS ACT 1979

Fadil Omerovic trading as Medina Painting Service

(Appellant)

- and -

The Western Australian Builders' Labourers, Painters and Plasterers Union of Workers

(Respondent)

(No 729 of 1997)

BEFORE THE FULL BENCH 22 September 1997
HIS HONOUR THE PRESIDENT P J SHARKEY
SENIOR COMMISSIONER G L FIELDING
COMMISSIONER C B PARKS

Order

This matter having come on for hearing before the Full Bench on the 22nd day of September 1997, and the notice of hearing having been given to the appellant through his solicitors, and there being no appearance by or on behalf of the appellant, and having heard Ms J Harrison on behalf of the respondent, and the respondent having moved that the applications herein to extend time to lodge appeal books and the appeal be dismissed, it is this day, the 22nd day of September 1997, for the reasons expressed by the Full Bench at the time of making these orders, ordered and declared as follows:-

(1) THAT the applications herein to extend time to file appeal books out of time be and are hereby dismissed.

(2) THAT appeal No 729 of 1997, filed herein on the 16th day of April 1997 against the decision of the Industrial Magistrate in complaint No 156 of 1996 made on the 26th day of March 1997, be and is hereby dismissed.

By the Full Bench

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

[L.S.]

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

INDUSTRIAL RELATIONS ACT, 1979

The Confederation of Western Australian Industry (Inc.)

and

The Construction, Mining and Energy Workers' Union of Australia, Western Australian Branch

(No. 2018 of 1989)

BEFORE THE FULL BENCH 23 August 1989
THE PRESIDENT, P.J. SHARKEY ESQ.
SENIOR COMMISSIONER G.G. HALLIWELL
COMMISSIONER G.L. FIELDING

Order

This matter having come on for hearing before the Full Bench on the 23rd day of August 1989 and having heard Mr L. Girdlestone on behalf of the applicant on an application by the abovenamed applicant for leave to file and serve a notice of objection to the

application in matter 1603 of 1988 out of time and Mr G. Young on behalf of the respondent, and the Full Bench unanimously granting the application on the 23rd day of August 1989, it is this day, the 23rd day of August 1989 ordered that:-

(1) The applicant have leave to file a notice of objection in application 1603 of 1988 prior to the 29th day of August 1989 and that time to do so be extended accordingly.

(2) The said objection be served on all the parties in application 1603 of 1988.

By the Full Bench

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

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
INDUSTRIAL RELATIONS ACT, 1979
S. Rayner and R.J. Martin
- and -
The Construction, Mining and Energy Workers' Union of Australia, Western Australian Branch
(Nos. 834 & 875 of 1990)

BEFORE THE FULL BENCH 8 June 1990
THE PRESIDENT, P.J. SHARKEY ESQ.
CHIEF COMMISSIONER W.S. COLEMAN
COMMISSIONER G.J. MARTIN

Order

This matter having been due to come on for hearing before the Full Bench on the 15th day of June 1990 and the applicants having, by their agent, in writing, by letter dated the 6th day of June 1990, applied to have application 834 and 875 of 1990 adjourned sine die, and the respondent to the applications having indicated, by letter dated the 7th day of June 1990, that they had no opposition to the matters being adjourned sine die, and both letters having been filed herein, and the Full Bench having passed judgment on the application for adjournment, it is this day the 8th day of June 1990, ordered that application 834 and 875 of 1990 be adjourned sine die.

By the Full Bench

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

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
INDUSTRIAL RELATIONS ACT, 1979
Robe River Iron Associates
and
The Construction, Mining and Energy Workers' Union of Australia, Western Australian Branch
(No. 2096 of 1989)

BEFORE THE FULL BENCH 23 August 1989
THE PRESIDENT, P.J. SHARKEY ESQ.
SENIOR COMMISSIONER G.G. HALLIWELL
COMMISSIONER G.L. FIELDING

Order

This matter having come on for hearing before the Full Bench on the 23rd day of August 1989 and having heard Mr T. Caspersz (of Counsel) on behalf of the applicant and Mr G. Young on behalf of the respondent, and the Full Bench having delivered judgement on the matter on the 23rd day of August 1989 wherein it unanimously dismissed the application, it is this day, the 23rd day of August 1989 ordered that the application for further and better particulars by the applicant in 1603 of 1988 be dismissed.

By the Full Bench

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

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
INDUSTRIAL RELATIONS ACT, 1979
Federated Clerks' Union of Australia Industrial Union of Workers, W.A. Branch
- and -
Booragoon Motor Hotel and Others
(No. 1446 of 1990)

BEFORE THE FULL BENCH 22 October 1990
THE PRESIDENT, P.J. SHARKEY ESQ.
CHIEF COMMISSIONER W.S. COLEMAN
COMMISSIONER O.K. SALMON

Order

This matter having been due to come on for hearing before the Full Bench on the 22nd day of October 1990 and the respondents by their agent, in writing, by letter, dated the 19th day of October 1990, applied to adjourn the appeal sine die, and the appellant having consented in writing, by letter dated the 18th (sic) day of October to the adjournment of the appeal, and both letters having been filed herein, and the Full Bench having granted the adjournment, it is this day the 22nd day of October 1990 ordered, by consent, that the appeal be adjourned sine die.

By the Full Bench

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

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
INDUSTRIAL RELATIONS ACT, 1979
s.49
Fremantle Arts Centre Press
- and -
J.A. Margio
(No. 2807 of 1989)

BEFORE THE FULL BENCH 30 January 1989
THE PRESIDENT, P.J. SHARKEY ESQ.
CHIEF COMMISSIONER W.S. COLEMAN
COMMISSIONER R.N. GEORGE

Order

This matter having come on for hearing before the Full Bench on the 30th day of January 1990 and having heard Mr G. Hocking (of counsel) on behalf of the appellant and there having been no appearance on behalf of the respondent, and the appellant having made an application that the appeal be adjourned sine die and the Full Bench having passed judgment on the application for adjournment and judgment being delivered on the 30th day of January 1990 wherein it found that application should be granted, it is this day, the 30th day of January 1990 ordered that the application for adjournment be granted and that appeal 2807 of 1989 be adjourned sine die.

By the Full Bench

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

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
INDUSTRIAL RELATIONS ACT, 1979
s.27
Fremantle Arts Centre Press
- and -
J.A. Margio
(No. 2816 of 1989)

BEFORE THE FULL BENCH 30 January 1989
THE PRESIDENT, P.J. SHARKEY ESQ.
CHIEF COMMISSIONER W.S. COLEMAN
COMMISSIONER R.N. GEORGE

Order

This matter having come on for hearing before the Full Bench on the 30th day of January 1990 and having heard Mr G. Hocking (of counsel) on behalf of the applicant and there having been no appearance on behalf of the respondent, and the applicant having made an application that the application for an extension of time be adjourned sine die and the Full Bench having passed judgment on the application for adjournment and judgment being delivered on the 30th day of January 1990 wherein it found that application should be granted, it is this day, the 30th day of January 1990 ordered that the application for adjournment be granted and that application 2816 of 1989 be adjourned sine die.

By the Full Bench

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

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
INDUSTRIAL RELATIONS ACT 1979
Burswood Resort (Management) Limited
- and -
Federated Liquor and Allied Industries Employees' Union of Australia, Western Australian Branch, Union of Workers and West Australian Theatrical and Amusement Employees Association (Union of Employees)
(No 1696 of 1991)

BEFORE THE FULL BENCH 6 February 1992
HIS HONOUR THE PRESIDENT P J SHARKEY
SENIOR COMMISSIONER G G HALLIWELL
COMMISSIONER O K SALMON

Order

This matter having come on for hearing before the Full Bench on the 6th day of February 1992 and having heard Mr H J Dixon (of Counsel) on behalf of the appellant and Mrs M A Drake on behalf of the firstnamed respondent and there being no appearance by or on behalf of the secondnamed respondent, and the appellant having requested that the hearing of the appeal be adjourned, and there being no objection by Mrs M A Drake on behalf of the firstnamed respondent, it is this day, the 6th day of February 1992, ordered that appeal No 1696 of 1991 be adjourned sine die.

By the Full Bench

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

2002 WAIRC 06923

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	GRANT RAYMOND LUKIES, APPLICANT
	v.
	ALINTAGAS NETWORKS PTY LTD, RESPONDENT
CORAM	FULL BENCH
	HIS HONOUR THE PRESIDENT P J SHARKEY
	COMMISSIONER J F GREGOR
	COMMISSIONER S WOOD
DELIVERED	MONDAY, 4 NOVEMBER 2002
FILE NO/S.	FBA 37 OF 2002
CITATION NO.	2002 WAIRC 06923

Decision	Appeal discontinued
Appearances	
Applicant	Ms H Ketley (Of Counsel)
Respondent	Mr D Sash (Of Counsel)

Order

The Notice of Appeal herein, having been filed herein on the 8th day of August 2002, and the abovenamed appellant, on the 21st day of August 2002, having filed a Notice of Discontinuance in the Registry of the Commission, and the solicitors for the abovenamed respondent, on the 11th day of September 2002, having advised the Commission in writing that the respondent consents to the appeal being discontinued by the appellant, and the Full Bench having decided that the consent to the discontinuance of the appeal constituted special circumstances so as to exempt the parties from further compliance with regulation 29 of the *Industrial Relations Commission Regulations* 1985, and the parties having waived the rights conferred on them by s.35 of the *Industrial Relations Act* 1979 (as amended), and the Full Bench having so exempted them, it is this day, the 4th day of November 2002, ordered and declared, by consent, as follows—

(1) THAT there be leave granted and leave is hereby granted for appeal No FBA 37 of 2002 to be discontinued.

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

By the Full Bench

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

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
INDUSTRIAL RELATIONS ACT, 1979
s.49
Australasian Meat Industry Employees' Union, Industrial Union of Workers, West Australian Branch
and
Western Australian Meat Commission and Others
(No. 2842 of 1989)

BEFORE THE FULL BENCH 27 February 1990
THE PRESIDENT, P.J. SHARKEY ESQ.
CHIEF COMMISSIONER W.S. COLEMAN
COMMISSIONER O.K. SALMON

Order

This matter having been due to come on for hearing before the Full Bench on the 7th day of March 1990 and having received a written consent application from Mr R. Farrell on behalf of the appellant and Mr K. Richardson on behalf of the respondents, it is this day, the 27th day of February 1990 ordered that the matter be adjourned sine die and the existing date for the hearing of appeal No. 2842 of 1989 of Wednesday the 7th day of March 1990 be vacated.

By the Full Bench

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

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
INDUSTRIAL RELATIONS ACT, 1979
s.49
Australasian Meat Industry Employees' Union, Industrial Union of Workers, West Australian Branch
and
Western Australian Meat Marketing Corporation
(No. 2845 of 1989)

BEFORE THE FULL BENCH 27 February 1990
THE PRESIDENT, P.J. SHARKEY ESQ.
CHIEF COMMISSIONER W.S. COLEMAN
COMMISSIONER O.K. SALMON

Order

This matter having been due to come on for hearing before the Full Bench on the 7th day of March 1990 and having received a written consent application from Mr R. Farrell on behalf of the appellant and Mr K. Richardson on behalf of the respondent, it is this day, the 27th day of February 1990 ordered that the matter be adjourned sine die and the existing date for the hearing of appeal No. 2845 of 1989 of Wednesday the 7th day of March 1990 be vacated.

By the Full Bench

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

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
INDUSTRIAL RELATIONS ACT, 1979
s.49
Australasian Meat Industry Employees' Union, Industrial Union of Workers, West Australian Branch
and
Western Australian Meat Commission
(No. 2846 of 1989)

BEFORE THE FULL BENCH 27 February 1990
THE PRESIDENT, P.J. SHARKEY ESQ.
CHIEF COMMISSIONER W.S. COLEMAN
COMMISSIONER O.K. SALMON

Order

This matter having been due to come on for hearing before the Full Bench on the 7th day of March 1990 and having received a written consent application from Mr R. Farrell on behalf of the appellant and Mr K. Richardson on behalf of the respondent, it is this day, the 27th day of February 1990 ordered that the matter be adjourned sine die and the existing date for the hearing of appeal No. 2846 of 1989 of Wednesday the 7th day of March 1990 be vacated.

By the Full Bench

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

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
INDUSTRIAL RELATIONS ACT, 1979
s.49
Mickey James Riley
- and -
Western Australian Baseball League (Inc)
(No. 1869 of 1989)

BEFORE THE FULL BENCH 31 August 1989

THE PRESIDENT, P.J. SHARKEY ESQ.
COMMISSIONER R.N. GEORGE
COMMISSIONER A.R BEECH

Order

This matter having been due to come on for hearing before the Full Bench on the 28th day of September 1989 and having received a written request from Mr G. Bartlett, agent for the applicant that leave to withdraw the application be granted, and having received written confirmation from Messrs Parker and Parker, solicitors for the the respondent that they had no objection to the withdrawal of the appeal, and the Full Bench having granted leave to withdraw the appeal, it is this day the 31st of August 1989 ordered that leave be granted to withdraw the appeal.

By the Full Bench

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

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
INDUSTRIAL RELATIONS ACT, 1979
s.27
N. Ritchie and P. Hampson
- and -
Ministry of Education
(No. 447-448 of 1990)

BEFORE THE FULL BENCH 19 March 1990

PRESIDENT, P.J. SHARKEY ESQ.
COMMISSIONER O.K. SALMON
COMMISSIONER S.A. KENNEDY

Order

This matter having come on for hearing before the Full Bench on the 19th day of March 1990 and having heard Mr N. Ritchie and Mr P. Hampson as applicants on their own behalves and Mr G. Edwards on behalf of the respondent, and having passed judgment on the matter and judgment being delivered on the said 19th day of March 1990 wherein the Full Bench found that the application should be dismissed and undertook to give reasons therefore, it is this day, the 19th day of March 1990 ordered that the application for production of documents be dismissed.

By the Full Bench

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

COMMISSION IN COURT SESSION—Matters dealt with—

2002 WAIRC 06328

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES THE AUSTRALIAN WORKERS' UNION, WEST AUSTRALIAN BRANCH, INDUSTRIAL UNION OF WORKERS & OTHERS , APPLICANTS

v.

DAMPIER SALT PTY LTD, RESPONDENT

PARTIES DAMPIER SALT PTY LTD, APPLICANT

v.

THE AUSTRALIAN WORKERS' UNION, WEST AUSTRALIAN BRANCH, INDUSTRIAL UNION OF WORKERS & OTHERS , RESPONDENTS

CORAM	COMMISSION IN COURT SESSION COMMISSIONER S J KENNER COMMISSIONER J H SMITH COMMISSIONER S WOOD
DATE	MONDAY, 26 AUGUST 2002
FILE NO/S.	CR 190 & APPLICATION 1568 OF 2001
CITATION NO.	2002 WAIRC 06328

Result	Application CR 190 of 2001 dismissed. Directions issued as to Application 1568 of 2001.
Representation	
Applicants/Respondents	Mr M Llewellyn
Respondent/Applicant	Mr F Parry And Ms Z Ludbrook of Counsel

Reasons for Decision

1 There are two applications before the Commission in Court Session. The first application, CR 190 of 2001, is the referral of a dispute between the parties pursuant to s 44(9) of the Industrial Relations Act 1979 ("the Act"), concerning the terms and conditions of employment applicable to the Port Hedland operations of Dampier Salt Ltd ("DSL"). The second application, 1568 of 2001, is an application by DSL to extend the scope of the Dampier Salt Award 1990 ("the Award") to its new operation at Port Hedland, and to make other consequential amendments.

2 The respondent unions to application 1568 of 2001 ("the Unions") counter claimed for a new award to apply to the Port Hedland operations. It was common cause that the basis of the Unions' counter proposed award was that applying to the previous operator, Cargill Australia Ltd ("Cargill").

3 Given the relief sought in both applications, it was determined by the Commission that they be heard and determined together.

4 Mr Llewellyn represented the Unions. Mr Parry and with him, Ms Ludbrook, appeared as counsel for DSL.

Application CR 190 of 2001

5 The subject matter of the referral in application CR 190 of 2001, in essence, alleges that the sale of Cargill's operations to DSL at Port Hedland, constituted a transmission of business. The issue in dispute is reflected in the memorandum of matters referred for hearing and determination which is as follows—

> *"1. The applicant and the respondent are in dispute as to the terms and conditions of employment applicable at the respondent's operations at Port Hedland, recently acquired from Cargill Salt Limited ("Cargill").*
>
> *2. The applicant says that the purchase of the operations of Cargill at Port Hedland by the respondent was in effect a transmission of business.*
>
> *3. The applicant says that the employees of Cargill were not genuinely made redundant as a result of the transmission of the business, however, were given an ex-gratia payment in lieu of a bona-fide redundancy payment. The applicant alleges that the fact that this was not a genuine redundancy was known to both Cargill and the respondent prior to the sale and the termination of the employees' contracts of employment.*
>
> *4. The applicant seeks an order of the Commission that by reason of the transmission of business the terms and conditions of employment reflected in the Cargill Australia Limited – Salt Production and Processing Award 1988 and the Cargill Salt (A Department of Cargill Australia Limited) Enterprise Bargaining Agreement 1999 should apply to the respondent.*
>
> *5. The respondent denies the allegations of the applicant and objects to and opposes the applicant's claim."*

Application 1568 of 2001

6 In relation to application 1568 of 2001, the basis for the counter claim by the Unions is set out in schedule B to the Union's notice of answer and counter proposal as follows—

> *"The Unions oppose the Claim—*
>
> *1. The claim seeks to make a new Award to apply to the operations of the Port Hedland Salt Production and Processing facility not previously covered by the Award.*
>
> *2. The Dampier Salt Award is a consent Award that is limited in its application to the Dampier and Lake McLeod sites and was negotiated to only cover those two sites.*
>
> *3. The Port Hedland operation purchased by Dampier Salt has a history of operation under the terms and condition of the Leslie Salt Award then followed by the Cargill Salt Award.*
>
> *4. The changes proposed by the applicant will not fit the enterprise as it is currently configured. The site is different from the operations at both Lake McLeod and Dampier.*
>
> *5. Such critical issues as the Classification structure does not apply nor can it apply to the Port Hedland Operation due to the different configuration of the operation at Port Hedland as compared with the Dampier and Lake McLeod operations.*
>
> *6. Not all of the Union Respondents have an interest in the Port Hedland site and traditionally have had no interest in the site.*
>
> *7. The Unions propose the following Award as per attached Schedule in lieu of the application made by Dampier Salt Limited."*

Background

7 DSL, as part of the Rio Tinto group of companies, is engaged in the industry of the growing and harvesting of salt primarily for export. It conducts its operations from three locations, they being Dampier, Lake McLeod and Port Hedland in Western Australia. DSL was formed in November 1967 and shipped its first load of salt for export in April 1972. In December 1978 DSL acquired the Lake McLeod operation and commenced production and shipment in June 1996 and August 1997 respectively. DSL acquired the Port Hedland operation from Cargill in August 2001. DSL's primary markets for its product are the Asian and South East Asian regions.

8 DSL has a salt production capacity, by sea water process, of 4 million tonnes per annum. At Lake McLeod, the salt capacity, by sub surface aquifer process, is 1.5 million tonnes per annum, with a gypsum capacity, using a surface dredging process, also of 1.5 million tonnes per annum. At its recently acquired Port Hedland operation, the subject of the present dispute before the Commission, there exists a 3 million tonne per annum salt capacity, utilising a sea water process as at Dampier.

9 At Port Hedland and Dampier, the production process is broadly as follows. Sea water is pumped into ponds in which the process of pre-concentration of brine occurs. From the concentration ponds, the water is then pumped into crystallising ponds where the growth of salt occurs. When the salt has grown to the point it is ready for harvesting, it is harvested by salt harvesting machinery from the crystallising ponds. The harvested salt is then subject to washing processes to remove impurities, and is then transported to the ship loading operations at the Port Hedland harbour.

10 The Award is a consent enterprise specific award made in 1990. The Award replaced its predecessor, that being the Salt Production and Processing - Dampier Salt (Operations) Pty Ltd - Dampier and Lake McLeod Award 1984. Since about 1995, many, if not most of DSL's employees, have entered into workplace agreements pursuant to the Workplace Agreements Act 1993. It would appear that since about this time, few employees of DSL have been subject to the Award.

11 Prior to the acquisition by DSL of Cargill's Port Hedland operation, Cargill was subject to and bound by the Cargill Australia Ltd - Salt Production and Processing Award 1988 ("the Cargill Award") and the Cargill Salt (a Department of Cargill Australia Ltd) Enterprise Bargaining Agreement 1999 ("the Cargill Agreement"). Additionally, shortly prior to the sale by Cargill of its Port Hedland operation to DSL, Cargill and the Unions negotiated a new enterprise bargaining agreement, which agreement was never implemented or registered with this Commission, because of the sale.

12 In early 2001, preliminary discussions took place between Cargill and DSL, in relation to DSL's purchase of the assets of Cargill's operation at Port Hedland. However, those negotiations ceased in about May 2001. In June 2001, negotiations for the sale resumed and were concluded with an agreement that DSL would purchase the assets of Cargill at its Port Hedland salt operations. It was a term of the sale that employees of Cargill be offered employment with DSL. In that regard, in July 2001, presentations were made to employees of Cargill as to the sale and the implications for their employment. Employees were informed that they had the option of taking a redundancy payment and accepting employment with DSL, or taking a redundancy payment without accepting employment with DSL.

13 As at 3 August 2001, some 61 of the 80 Cargill employees had accepted offers of employment with DSL for a fixed term of 12 months. The offers of employment included the option of employment under a workplace agreement or employment under a common law contract "underpinned" by the Award. Some 25 employees accepted employment on this basis, with 12 of the Cargill employees excepting workplace agreements. The remaining employees were staff employees.

14 In September 2001, DSL commenced a review of its operations, following the purchase. In about February 2002, a new structure for the Port Hedland operation was implemented and employees were made permanent offers of employment. Some 26 employees accepted offers of employment, 15 of whom were employed on a contract "underpinned" by the Award and 11 on a workplace agreement. The remaining employees to accept offers of permanent employment were staff employees.

Contentions of the Parties

Application CR 190 of 2001

15 The Unions submitted that the sale transaction between DSL and Cargill constituted a transmission of business. It was submitted that the salt operations of Cargill transmitted to DSL as a going concern: *Kenmir Ltd v Frizzell* (1968) 1 All ER 414 at 418. Reference was made by the Unions to the terms of ss 149(1)(d) and 170 MB (1) of the Workplace Relations Act 1996 (Cth) ("WRA"), dealing with transmission of business, in this regard. It was conceded in the Union's submission, that no such provision is contained in the Act. The submission was however, that by reason of the focus on enterprise bargaining by way of registration of industrial agreements pursuant to s 41 of the Act, as opposed to the operation of common rule awards, as a matter of equity and good conscience, the arrangements negotiated between Cargill and its workforce should extend to DSL as a result of the acquisition.

16 Counsel for the respondent submitted that the purpose of these proceedings should be to establish an appropriate safety net for employees of DSL. The submission was that the concept of transmission is a statutory one and was not relevant to these proceedings under the Act. Notwithstanding this, counsel further submitted that in any event, under the WRA, the Australian Industrial Relations Commission is empowered pursuant to s 149(1), to make any order appropriate to the circumstances of the case in any transmission context.

Application 1568 of 2001

17 The Unions submitted that the Commission in Court Session should not grant the application by DSL to extend the Award to Port Hedland. It was submitted that the Award was a consent award specific to the operations of DSL at Dampier and Lake McLeod. Furthermore, the Unions submitted that DSL has not applied the terms of the Award for many years, due to the use of workplace agreements. As to the terms of the Award, the Unions submitted that there are differences in the operations between Dampier, Lake McLeod and Port Hedland, which make the extension of the Award inappropriate. The Unions pointed to issues such as housing, transport, ship loading, product transport and work classifications, in this regard.

18 On the other hand, it was submitted that the Cargill Award was specifically negotiated for the Port Hedland operations and was suited to its needs. This included various industrial agreements registered pursuant to s 44 of the Act. An alternative submission was that it could be open to the Commission to vary the Award, to incorporate Port Hedland specific provisions.

19 DSL submitted that on the sale transactions being completed, former employees of Cargill who became employees of DSL, received very significant termination payments and thereafter accepted freely and voluntarily, employment on terms and conditions underpinned by the Award. Counsel submitted that the Award would be appropriate as it reflects an integration of DSL's operations at Dampier, Lake McLeod and Port Hedland. Because of the level of integration between

the three sites, counsel submitted that it would be appropriate for the Commission to extend the coverage of the Award to all three sites, consistent with this integration.

20 Furthermore, it was submitted that it would be unfair to extend the Cargill Award, which was previously in place, because of the significant benefits given to employees on termination of their employment; because employees accepted the Award when commencing with DSL; because DSL have operated on the basis that the Award would apply from August 2001 and accordingly, as a matter of equity and good conscience, this position should prevail.

21 DSL also said that to impose the Cargill Award, as claimed by the Unions, will impact on existing arrangements at Port Hedland, including Saturday night work; use of contractors; unscheduled shifts; overtime and on existing contractual arrangements between DSL and employees who accepted employment with it.

Summary of Evidence

22 Extensive evidence was led by both parties to these proceedings. For the purposes of these reasons, we propose to summarise the thrust of that evidence.

23 The Unions led evidence from a number of employees of DSL and also from officials of the Unions. Mr Harbinson has been employed at Port Hedland since January 1998 as a plant operator. He testified about a proposal that the workforce became aware of, involving consideration by Cargill to contract out much of its operations. This led to various discussions between Cargill and the Unions, as to a new industrial agreement. During the course of those negotiations, it became evident that Cargill was to sell its salt operations to DSL. Mr Harbinson gave evidence about meetings with management concerning options given to employees, in terms of employment with DSL, upon the sale taking place. Mr Harbinson elected to take employment with DSL and testified that his work effectively remained the same after the sale. He referred to two issues, they being a dispute in relation to staff performing wages employees work, and an allegation that award employees have been excluded from the ship loading operations since about January of this year.

24 Mr Nice has been employed at Port Hedland since about June 1998 as a plant operator. He has worked in the harvesting operations and also in ship loading. Mr Nice gave evidence about rumours of contracting out referred to by Mr Harbinson in his evidence. He also testified about the sale to DSL and various meetings he attended with management representatives from DSL and Cargill. Mr Nice said that he accepted an offer of employment with DSL and said that the only change that he was aware of was working hours reverting to 8 hours per day and some shift changes. He also testified that DSL initially rotated employees through all work functions but now, employees are assigned to specific tasks only. He is presently engaged as a loader for port haul and he said he has no access to ship loading operations as he did previously.

25 Mr Simpkins gave evidence about the background to the sale, similar to Messrs Harbinson and Nice. Mr Simpkins also testified about negotiations for a new industrial agreement with Cargill, which he said was concluded with the previous management. Mr Simpkins also testified that initially, nothing in his position as an electrical fitter changed. In about January or February of this year, trades employees were removed from shift and shortages in labour requirements were dealt with by contractors.

26 Evidence was also adduced for the Unions from Mr Lee. He has been employed at Port Hedland since June 1994 as a plant operator and also held a position as a shop steward for the AWU. Mr Lee also gave evidence about negotiations with Cargill for a new industrial agreement and suggestions that Cargill was to outsource much of its production operations.

27 Mr Lee testified in relation to the sale to DSL and what he understood between the two options presented to employees at the time. He said that he was informed that there would be different taxation treatment to any severance package, if he accepted employment with DSL. Mr Lee accepted employment and testified that after DSL took over, the operation was run essentially in the same way as with Cargill. He said some changes occurred such as initially being rotated through the ship loading function and some changes to shifts. Since being appointed to a permanent position, Mr Lee testified that the biggest change has been employees are now effectively allocated to one function only, whereas before they used to rotate their duties.

28 Mr Asplin is the North West organiser for the AWU based in Port Hedland and has been in that position for approximately five years. An area of Mr Asplin's responsibility involves DSL operations at Dampier and Lake McLeod and also the Port Hedland operations, both prior to and after their acquisition by DSL. Mr Asplin gave evidence about his experience at the various sites and that in his view, there are some differences. He said a major difference is that DSL operates its own fleet of haulage trucks. Also, excavators are used at Lake McLeod which is not the case at Port Hedland.

29 Mr Asplin gave detailed evidence about his involvement as an official in the negotiation of a new industrial agreement with Cargill. He also testified about his involvement on behalf of employees, in relation to the sale from Cargill to DSL. Mr Asplin also gave evidence in relation to changes to the ship loading function, in particular, his view that award employees were effectively excluded from ship loading positions when offers of permanent appointments were made by DSL. Mr Asplin testified that the Award provides inferior benefits for employees than did the Cargill Award, particularly in relation to housing conditions. Additionally, he said that the Award also contains some skill requirements for promotion within the classifications, which skills are not available at Port Hedland.

30 Mr Dumble is the general manager of the Dampier operations for DSL. In this role, Mr Dumble is responsible for managing DSL operations, including mining, production, transport and shipping of salt and gypsum at Dampier, Lake McLeod and Port Hedland. Mr Dumble gave evidence about the integration of the Dampier and Lake McLeod sites in 1995. He said that both sites are integrated and operate as a single operation with a central management team. This central management deals with matters such as allocation of production and sales, transfer of employees, sharing of equipment and its reallocation, systems commonality, inventories and spare parts. Despite this integration, Mr Dumble referred to some minor differences in the systems and practices at the sites, reflecting the nature of the two operations.

31 Mr Dumble gave evidence about his involvement in the sale of the Cargill salt operations to DSL. It was Mr Dumble's evidence that he formed the view that on this acquisition, DSL would be able to take advantage of economies of scale between the three operating sites and also to improve the Port Hedland operation. Mr Dumble testified about meetings with senior management about offers to be made to employees of Cargill. He also gave evidence about presentations to employees and about their options.

32 Upon the acquisition, Mr Dumble said that DSL undertook a business review of the Port Hedland operation. This involved an assessment of market conditions for salt and the best division of salt production between the sites. Following this, an evaluation was undertaken as to the appropriate resource allocation to meet production objectives for Port Hedland. Mr Dumble also gave evidence about the process by which employees were offered permanent positions, following the business review.

33 As to the structure of the operations after the acquisition, Mr Dumble testified that the DSL operations plan is formulated in an integrated manner for the entire operation, but noted that production was divided between the three operating sites, so that there can be profit maximisation and minimisation of risk. He said that due to the stocks on hand at Port Hedland, salt shipments were substantially increased from Dampier and Lake McLeod to enable the Port Hedland stocks to recover. Mr Dumble also gave evidence about the general integration of management structures between the three sites, with all operations managers reporting to him. Additionally, Mr Dumble said that support services including engineering, human resources, safety, environment, community and commercial are managed on a three site basis.

34 Due to differences in the operations, both Dampier and Lake McLeod operate on a continuous production basis. At Port Hedland, there is no such current requirement.

35 It was Mr Dumble's view that the Award would not be ideal for DSL at Port Hedland however, DSL would operate under the Award across all of its sites, given the nature of the integrated operation. Mr Dumble identified restrictions in the Award as being those on ordinary working hours, that being Monday to Friday on a two eight hour shift basis, the use of contractors provisions and requirements to consult with unions. He also testified that the Cargill Award would not be ideal for the operations at Port Hedland as an integrated site.

36 Mr Wienert is the operations manager at Port Hedland. He has occupied this role since August 2001 and is responsible for managing budgets, safety, employment and all operational aspects of the Port Hedland site. Mr Wienert reports to Mr Dumble. Mr Wienert also gave evidence about the sale process for Port Hedland, and the employee related issues, including the options given to employees on the transaction.

37 Mr Wienert gave evidence about the business review following DSL's acquisition at Port Hedland. This initially led to restructuring, including changing the operation to a single shift basis, Monday to Friday on a day shift only; combining the production and maintenance team; introducing a separate ship loading team; and establishing a planning team. He testified that a consequence of operational changes and reduction in tonnages was that there were 11 fewer positions needed to operate the Port Hedland site. Mr Wienert said when permanent positions were offered to employees, following the review, they were on the basis of a DSL staff contract or employment under the Award at the existing hourly rate, as previously paid by Cargill. Of the acceptances, 11 employees accepted employment under a workplace agreement and 15 accepted employment under the Award.

38 As to the operational changes, Mr Wienert said the main changes introduced included harvesting now mainly occurring Monday to Thursday on an 11 hour day shift basis whereas previously, Cargill operated Monday to Friday on a nine hour day and afternoon shifts. Port haul loading now occurs Monday to Friday on an eight hour day and afternoon shift basis, whereas previously this was worked on a nine hour day and afternoon shift basis. Additionally, the loading method has changed whereby DSL uses a front end loader as opposed to the previous system where Cargill used a dozer to push salt onto a conveyor system. Ship loading now operates as a separate ship loading team similar to the Lake McLeod operation. The maintenance operation is now performed Monday to Friday on an eight hour day shift basis only. Previously this was operated on a nine hour day shift with some nine hour afternoon shifts worked each week. Shipping movements are now managed across all three sites, depending upon production circumstances and weather.

39 Mr Wienert said the net effect of this and other changes is that the site now operates with 50 employees whereas previously, 80 employees were required under the Cargill operation.

40 As to award coverage, Mr Wienert testified that whilst it was agreed that the Award would be applied to Port Hedland, the Award was not ideal because it does not allow for sufficient flexibility in the types of rosters that are able to be worked; agreement is needed with employees and relevant unions to change rosters; there is no provision for working a continuous shift arrangement or for 12 hour shifts and there are restrictions on hours of work, length of shifts, start and finishing times and also the number of shifts that may be worked. Mr Wienert also identified a number of adverse consequences that would result in his view, if the Union's application was successful.

41 Mr Le Page is the general manager for marketing and organisation for DSL. He has occupied that role since January 1999 and is responsible for international marketing, domestic marketing and delivery of salt and gypsum. Mr Le Page is also responsible for strategic human resources and industrial relations matters.

42 Mr Le Page gave evidence about the sale of Cargill to DSL and his involvement in it. This included the presentation of options for future employment with DSL for Cargill employees. Mr Le Page said he had a meeting with various unions in July 2001 and also referred to the AWU, where he informed Mr Daly that employees of Cargill would be made redundant in accordance with clause 34 of the Cargill Award. Those employees would be paid out their long service leave entitlements on termination.

43 Mr Le Page also gave evidence about the future of the salt industry and the need for DSL to remain competitive in view of international and domestic competition. He also testified that the outlook for the salt market over the next five years is one of a major over supply, such that ongoing downward pressure on prices would remain. Because of this, Mr Le Page said that it was important to the viability of Port Hedland that it can operate flexibly and efficiently.

Consideration

Application CR 190 of 2001

44 The essence of the claim by the Unions is one based on transmission of business. The concept of transmission is a statutory one and is not one with which the common law is familiar. The original intention of the predecessors to s 149(1)(d) of the WRA was to prevent the evasion of award obligations by employers: *The Proprietors of the Daily News Ltd v The Australian Journalists Association* (1920) 27 CLR 532 at 545; *George Hudson Ltd v The Australian Timber Workers Union* (1923) 32 CLR 413.

45 It is of course the case, that there is no corresponding provision to s 149(1)(d) of the WRA in the Act. The parliament in this State has not enacted a similar provision, perhaps because of the system of common rule awards in this jurisdiction, as provided by s 37 of the Act. Whether this is so or not, the law in this jurisdiction is that even if a sale of business amounts to a transmission of business as that concept was set out in *Kenmir*, the terms of a relevant industrial instrument will not flow to the successor employer.

46 In our opinion, and without necessarily deciding whether in the instant case there has been a transmission of business, although it would appear that it would be strongly arguable that this is so, in the absence of a like statutory provision to s 149(1)(d) of the WRA, this application cannot succeed.

47 The submissions of Mr Llewellyn in support of this application, in particular those going to the effect of the trend to enterprise bargaining in this jurisdiction, as in others, raise important matters of policy which go well beyond the terms of the present applications. In essence, the Unions are seeking an order, the effect of which would be to de facto, legislate for an outcome that has not been considered by the parliament in this State, at least to date, to be appropriate. If it is

considered that there should be such a provision in the Act, then that is a matter for the parliament to deal with and not for this Commission, in our opinion.

48 We would therefore dismiss application CR 190 of 2001.

Application 1568 of 2001

49 Consideration of this application by the Commission in Court Session requires that the application be dealt with in accordance with the Act and the Commission's Wage Fixing Principles ("the Principles"). However, before turning to these matters, we firstly deal with the submission of counsel for the respondent that it is open to conclude that clause 4 - Area and Scope of the Award, extends to the Port Hedland operations of DSL, in any event.

50 Clause 4 - Area and Scope of the Award provides as follows—

> "*4. - AREA AND SCOPE*
>
> *(1) This Award shall apply to employees employed in or in connection with the production (by solar process), brine handling, harvesting, processing, hauling and shipping (including work carried out on employer owned wharf facilities) of salt and incidental work thereto, and in any classification mentioned in this Award in the area occupied and operated upon by Dampier Salt Limited - Dampier and Lake MacLeod Divisions, and;*
>
> *(2) Is restricted in its operation to the area of the State between the 18th and 26th parallel of South Latitude."*

51 Mr Parry submitted that there is some ambiguity in the interpretation of this clause, and it is open to read "and", between sub clauses (1) and (2) as "or". If the clause is read in this way, then clause 4(2) has a meaning in conjunction with clause 4(1), such that the Award, in terms of its area and scope, can operate anywhere between the 18th and 26th parallel of South Latitude in this State. As the submission went, that would mean that Port Hedland fell within the area and scope of the Award, as it is presently, because it is part of the operations of DSL.

52 For the following reasons, we are not persuaded by that argument.

53 The principles relevant to the interpretation of awards, as with other instruments, are well settled. Award provisions are to be interpreted consistent with the ordinary and natural meaning of words used in them, when taken in context: *Norwest Beef Industries Ltd v AMIEU* (1984) 64 WAIG 2424. Furthermore, modification of the conjunctions "and" and "or" and have been accepted by courts and tribunals generally where one of two circumstances arise. The first circumstance is where there has clearly been a drafting mistake in the statute or instrument concerned. The second circumstance, is the textual circumstance, in which a reading of the conjunction "and", in the context in which it is used, clearly suggests that the use of "and" is to be read as joining a list of alternatives, as for example in *Re The Licensing Ordinance* (1968) 13 FLR 143 per Blackburn J.

54 Firstly, the presumption must be that the draftsperson of the Award, in using "and" where it was used, intended clauses 4(1) and (2) to be read conjunctively.

55 Secondly, in our opinion, the meaning of clause 4 is plain and unambiguous. There is no suggestion of a mistake in its drafting. Furthermore, it is plain that clause 4(1) taken in isolation, cannot extend the Award to Port Hedland, as it was not suggested in submissions that the Port Hedland site is within an area occupied and operated upon by Dampier Salt Ltd - Dampier and Lake McLeod Divisions. When read in context, in our view, "and", consistent with drafting convention, should be interpreted conjunctively.

56 This interpretation of the clause is also consistent with the references elsewhere in the Award to Dampier and Lake Macleod specifically. For example, this occurs in relation to accommodation and power/air conditioning subsidies; remote leasing allowances; and mooring allowances at Cape Cuvier. These provisions are supportive of the application of the Award to Dampier and Lake MacLeod only.

57 Clause 4 of the Award also needs to be read with s 37(1) of the Act. Section 37 relevantly provides as follows—

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

58 It is clear that s 37 deals with both the scope and area of an award.

59 Unless an award specifies to the contrary, by s 37(1)(b) it is taken to operate throughout the State. In our opinion, the draftsperson of the Award did not intend this to be so, and this is why clause 4(2) was inserted, to be read with clause 4(1). It may be said that clause 4(2) is strictly unnecessary because of the reference to the area of the two divisions of DSL in clause 4(1). However, for the above reasons, we are not persuaded by the respondent's argument that it should be read disjunctively, to extend the Award to Port Hedland, in its present form.

60 We turn now to consider the relevant provisions of the Act and the Principles. By amendments introduced by the Labour Relations Reform Act 2002, the Act now provides as a principal object in s 6(af) as follows—

> *"(af) 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;"*

61 Furthermore, by s 26(1)(vi), in the exercise of its jurisdiction under the Act, the Commission is to have regard to—

> *"(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;"*

62 Additionally, the Principles provide at Principle 11 as follows—

> ***"11. First Award and Extension to an existing Award***
>
> *The following shall apply to the making of a first award and an extension to an existing award—*
>
> *(a) In the making of a first award, the main consideration shall be that the award meets the needs of the particular industry or enterprise while ensuring that employees' interests are also properly taken into account. Structural efficiency considerations shall apply in the making of such an award.*
>
> *(b) A new award shall have a clause providing for the minimum award wage [see Clause 9 of this Section] included in its terms.*
>
> *(c) In the extension of an existing award to new work or to award-free work the rates applicable to such work will be assessed by reference to the value of work already covered by the award, providing structural efficiency considerations including the minimum rates adjustment provisions where relevant have been applied to the award."*

63 It can be seen from the foregoing, that the Commission is required, in determining this application, to ensure that any award made meets the needs of the enterprise at Port Hedland and also, is fair to the employees of DSL at Port Hedland.

64 The Unions' case has been put predominantly on the basis that there was a transmission of business between Cargill and DSL on the sale of the Port Hedland operation. There is some evidence from the Unions as to some changes in conditions however that is fairly general in nature. The respondent's case has largely been put on the basis that the operations of DSL, at the three sites, are integrated and therefore it would be appropriate for the Award to extend to Port Hedland, consistent with this integration. This is despite the evidence and submissions of DSL, that the Award as present is not entirely suitable for the enterprise at Port Hedland.

65 Given the evidence before the Commission in Court Session, we have reservations whether findings of fact can be made, upon the evidence, to enable the Commission with confidence, to reach any conclusions that either the Unions' claimed award or the Award on the respondent's case, would be truly consistent with facilitating the efficient organisation and performance of work according to the needs of the Port Hedland enterprise on the one hand, and also being consistent with fairness to the employees at that operation, on the other.

66 In particular, we refer to the evidence of Messrs Wienert and Dumble, that a number of provisions in the Award are not consistent with the respondent's view as to the efficient performance of work at the Port Hedland enterprise. Additionally, on the evidence from the Unions, we are not persuaded that the Commission could confidently reach a conclusion that the terms of the Cargill Award, given the changes that DSL has implemented, would be consistent with that principle either. We do not say anything further as to whether such an award arrangement would be fair to the employees of DSL, however, without reaching any concluded view about the matter, the respondent's submissions as to benefits provided to employees on termination of their employment with Cargill, and the equity and good conscience of extending the Cargill Award in total, additional to those benefits, has some force in our opinion.

67 In view of these conclusions, the Commission is minded to preserve the existing wages and conditions of employment by way of an interim order, and direct the parties to confer as to the specific needs of the Port Hedland enterprise, consistent with the Act and the Principles, to which reference has been made in these reasons. Depending upon the outcome of those discussions, it could be the case that the parties agree upon appropriate amendments to the Award, to reflect the specific needs of the enterprise and conditions of employment applicable to Port Hedland, and prescribing fair wages and conditions of employment for the employees. It could also be possible, that the parties may wish to reflect the terms of any such outcome, in an industrial agreement to be registered under the Act.

68 At this point, the Commission does not wish to express any concluded view as to the form of such an outcome. Rather, we consider that the parties should be given the opportunity to address this matter themselves. However, in the event that the parties are unable to reach any agreement on these matters, further arbitration by the Commission may be necessary to finally determine these proceedings.

69 In view of our conclusions about these matters, the parties are invited to put further written submissions to the Commission as to the future course of these proceedings. In that respect, we direct that submissions shall be filed and served within 14 days of the date of these reasons for decision. The Commission will determine the future course of these proceedings, based upon those written submissions. For the purposes of any interim relief to be granted, to preserve the status quo, we invite submissions from the parties as to the ability of the Commission to make an interim award pursuant to s 36A of the Act.

2002 WAIRC 06329

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE AUSTRALIAN WORKERS' UNION, WEST AUSTRALIAN BRANCH, INDUSTRIAL UNION OF WORKERS & OTHERS, APPLICANT
	v.
	DAMPIER SALT PTY LTD, RESPONDENT
CORAM	COMMISSION IN COURT SESSION
	COMMISSIONER S J KENNER
	COMMISSIONER J H SMITH
	COMMISSIONER S WOOD
DATE	MONDAY, 26 AUGUST 2002
FILE NO/S.	CR 190 OF 2001
CITATION NO.	2002 WAIRC 06329

Result	Application dismissed. Order issued.
Representation	
Applicant	Mr M Llewellyn
Respondent	Mr F Parry And Ms Z Ludbrook of Counsel

Order

HAVING heard Mr M Llewellyn on behalf of the applicants and Mr F Parry and Ms Z Ludbrook of counsel on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders—

THAT the application be and is hereby dismissed.

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

PRESIDENT—Matters dealt with—

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

INDUSTRIAL RELATIONS ACT, 1979

Associated Surveys (Aust) Pty Ltd and Others

- and -

The Association of Draughting Supervisory and Technical Employees, W.A. Branch and Others

(No. 1710 of 1990)

BEFORE THE PRESIDENT, P.J. SHARKEY ESQ. 29 October 1990

Order

This matter having come on for hearing before me on the 29th day of October 1990 and having heard Mr D. Jones on behalf of the applicants and Mr M. McKimmie and Mr P. Cox on behalf of the respondents, and the applicants having requested an adjournment of the proceedings and the respondents having consented to the adjournment of proceedings, it is this day the 29th day of October 1990 ordered, by consent, that application 1710 of 1990 be adjourned sine die.

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

2002 WAIRC 06893

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	EPATH WA PTY LTD, APPLICANT
	v.
	IHANN ADRIANSZ, RESPONDENT
CORAM	HIS HONOUR THE PRESIDENT P J SHARKEY
DELIVERED	THURSDAY, 31 OCTOBER 2002
FILE NO/S.	PRES 32 OF 2002
CITATION NO.	2002 WAIRC 06893

Decision	Application dismissed
Appearances	
Applicant	Dr J J Edelman (Of Counsel), By Leave
Respondent	Mr T H F Caspersz (Of Counsel), By Leave

Reasons for Decision

INTRODUCTION

1 This is an application by the abovenamed applicant employer company for a stay of operation of the decision of the Commission made the 27th day of September 2002 and deposited in the office of the Registrar on the same date, in Matter No. 537 of 2002.

2 The application is made pursuant to s.49(11) of the Act and seeks a stay of the operation of the decision pending the hearing and determination of Appeal No. 47 of 2002.

3 The order appealed against was, formal parts omitted, in the following terms:-

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.

4 The notice of appeal was filed on 15th day of October 2002 and served on the same date.

5 The application for a stay was filed on the 21st day of October 2002. I am therefore satisfied that the appeal was instituted within the meaning of s.49(1), within the time prescribed by s.49(3) within the meaning of s.49(11) of the Act and that this application was filed after the appeal had been instituted and is competent in that respect. I am also satisfied that the applicant is a party to the proceedings at first instance and competent to appeal and is a party interested and therefore competent to bring this application (see s.49(3) and s.49(11)).

6 I would also observe that the application for a stay was filed on the 21st day of October 2002 which as was admitted, is some ten days after the amounts of $14,197.26 and $8492.00 were required to be paid to the respondent by the applicant herein pursuant to the order appealed against.

7 As I was informed, proceedings for the "enforcement" of the order at first instance have been already instituted in the Industrial Court at Perth.

8 This matter arose from an application made at first instance by the abovenamed respondent employee pursuant to s.29(1)(b) of the Act which was opposed by the respondent employer.

9 It was heard and determined and the orders to which I have referred to above, were made.

GROUNDS OF APPEAL

10 For convenience sake I reproduce the grounds of appeal as follows:-

1. The Commissioner erred in law in finding that the Respondent (the Applicant in the initial proceedings) had been unfairly dismissed due to the absence of reasonable notice by finding that the Respondent only received notice of termination of his employment when the Respondent was notified that the purchaser of the business had decided not to re-employ him in circumstances in which—
   a) Any decision by the purchaser of the business not to re-employ the Respondent in the purchaser's business was a decision for the purchaser of the business;
   b) Upon sale of the Appellant's business all of the employees' positions with the Appellant ceased to exist (as the Respondent knew); and
   c) The Respondent was a director of the Appellant's business, supported the sale from mid-January 2002 and had reasonable notice of the sale;
2. The Commissioner erred in law in finding that the Respondent had been "unfairly dismissed" because the Appellant failed to pay the Respondent a redundancy payment and treat the Respondent in like manner to other employees when—
   a) there is no legal entitlement to a redundancy payment;
   b) there was no evidence that any redundancy payment was made to any other employee
3. The Commissioner erred in law in finding that the Respondent had been denied a contractual entitlement for unpaid "call outs" when the Respondent's claim was for rostered overtime which was to be unpaid in the Respondent's contract of employment.

PRINCIPLES

11 The principles applicable to applications such as this are as follows and have been most recently expressed in *DVG Morley City Hyundai v Fabbri* 2002 82 WAIG 2440 at paragraph 19—

> "The principles by which applications pursuant to s.49(11) of the Act are determined are well settled in this Commission. Amongst others, the reasons for decision in *AWU v BHP Iron Ore Ltd* 81WAIG 406 properly expresses them at pages 407-408:-
>
> I reproduce hereunder the relevant extract from *CSA v Director General, Department of Transport* 80 WAIG 2855 at 2856:-
>
> These principles have been laid down in a number of cases, including *Gawooleng Dawang Inc v Lupton and Others* 72 WAIG 1310, *Director General of the Ministry for Culture and the Arts v CSA and Others* 79 WAIG 670 and *City of Geraldton v Cooling* 80 WAIG 1751.
>
> It is for the applicant to establish that the stay should be granted. It is, of course, an underlying principle that the successful party is entitled to the fruits of her/his/its order, award or declaration.
>
> For the applicant to succeed, it must be established that there is a serious issue to be tried, that the balance of convenience favours the applicant and that other factors consistent with the application of s.26(1)(a), s.26(1)(b) and/or s.26(l)(c) of the Act, if they exist, require that the application be granted.
>
> If these ingredients exist, then exceptional circumstances exist which warrant the granting of the application as a matter of equity, good conscience and the substantial merits of the case. (I say that to further explain the principles.)
>
> The need to prevent there being any more uncertainty than is necessary, in industrial matters, is important, too (see *Re Moore; Exparte Pillar* [1991] 65 AIJR 683 at 685 (HC)).
>
> I would add the following further observations.
>
> Before weighing other factors the court needs to be satisfied that there is an arguable case on appeal, (in this jurisdiction a serious issue to be tried also described as a strong case), to ensure that the appeal has not been lodged simply to delay execution (see *Croney v Nand* [1999] 2 Qd R 342 at 348-9 (CA)).
>
> If an appeal may be nugatory a stay will be granted. An appeal will be nugatory when because of the respondent's financial state there is no reasonable prospect of recovering monies paid to him pursuant to the judgment.
>
> An appeal will be nugatory too, if the appellant can show that without a stay of execution he/she will be ruined (see *Lino Type Hell Finance Ltd v Baker* (Practice Note) [1992] 4 All ER 887 at 888).
>
> Inconvenience and the possibility of risk to the appellant's property do not constitute special circumstances (see *Cox v Simeon* (SC (WA) Full Court Lib No 5063 7 September 1983, unreported)).
>
> The onus is on the applicant, of course, to demonstrate a proper basis for a stay, as I have observed above, which will be fair to all the parties and the court will weigh the balance of convenience and the rights of the parties as I have observed above (see *Alexander v Cambridge Credit Corp Ltd* (1985) 2 NSWLR 685 at 694).

> The mere preservation of the status quo, nor by themselves, the merits of the appeal are not sufficient. Further, it is not sufficient to constitute special circumstances that the appeal is arguable, is being pursued in good faith and with expedition and that the stay will not prejudice anybody (see *Hamersley Iron Pty Ltd v Lovell* (No 2) (1998) 20 WAR 79 and 80, 88 (PC)).
>
> Appropriate circumstances may exist within the context of the balance of convenience if serious injury will result to the applicant unless a stay is granted (see *McBride v Sandland* (No 2) (1918) 25 CLR 369 and 315) and, as I have observed, an appeal will be nugatory when, because of the respondent's financial state, there is no reasonable prospect of recovering monies paid to him/her pursuant to the judgment, but appropriate circumstances are not limited to that situation and will exist whenever there is a real risk that it would not be possible for a successful appellant to be restored substantially to his/her former position (see *Federal Commission of Taxation of Commonwealth of Australia v The Myer Emporium Ltd* (No 1) [1986] 160 CLR 221 at 223)."

12 The applicant is said to be contemplating liquidation but it was common ground that that would not occur until these matters were completed.

13 I now deal with this application according to the principles outlined above.

SERIOUS ISSUES TO BE TRIED

14 The first question to consider is whether there is a serious issue to be tried. First of all, it was submitted that grounds 1 and 2 of the grounds of appeal raised questions of such importance that they should be referred on appeal as a case stated to the Industrial Appeal Court pursuant to the powers contained in s.49(9) of the Act.

15 It is trite to observe that that is not a power which the President exercising jurisdiction under s.49(11) can exercise. The President can only state a case when a question of law arises "in any proceedings in the Full Bench" (see s.49(9)). These proceedings are patently not proceedings in the Full Bench.

16 It is also trite to observe that such a submission does not resolve the question whether for the purposes of this application, the grounds of appeal raise a serious issue or issues to be tried.

17 First, however, it was submitted that there was a serious issue to be tried because the Commission had erred in law in deciding that the applicant at first instance (the respondent in this application) had been unfairly dismissed due to the absence of reasonable notice of termination given to him.

18 The Commission found that the respondent did not receive reasonable notice of the termination of his contract, and then determined that reasonable notice was not constituted by the three weeks which he was paid, as and from the 28th day of February 2002, when his employment ended, notice having been given to him on the 25th day of February 2002 (see paragraphs 28 and 29).

19 The Commission determined that three months notice was a reasonable period of notice and ordered compensation calculated at the rate of three months of salary less the amount already paid in lieu of notice.

20 The crux of the applicant's submission was that the Commissioner could not find that the respondent could be given more notice than he had already been given. That was because he was one of those persons, who as a shareholder and director of the respondent, made the decision to sell the applicant's business which brought about the termination of his employment and indeed made all employee's positions redundant.

21 It was submitted that he was therefore constantly informed of the negotiations and knew that his employment was likely to end. It was therefore submitted that the notice he had as a director, because of his part in negotiations and the decision to sell the applicant's business, sufficed as notice of termination to him as an employee pursuant to his contract of employment.

22 I agree with the submissions for the respondent that the notice required to be given in order to terminate a contract is a notice in accordance with that contract.

23 The contract of employment was between the applicant company and the respondent, its employee.

24 The reasonableness of notice is to be assessed at the time when the notice is given (see *Martin-Baker Aircraft Co. Ltd v Canadian Flight Equipment Ltd* [1955] 2 QB 556 at 581).

25 The Commissioner made a finding as to the date when the notice was given which finding does not seem to have been challenged.

26 A director can be an employee of a company as well as its director (see *Lee v Lees Air Farming Pty Ltd* (1961) AC 12 and see also *Crawford Fitting Co. v Sydney Valve and Fittings Pty Ltd* (1988) 14 NSWLR 438 (C.A.)).

27 A company, it is trite to observe, has a legal personality that is separate from its directors or shareholders (see *Salomon v Salomon & Co. Pty Ltd* [1897] AC 22) and as I have already observed the contract in this matter was between the respondent company and the applicant.

28 I was told without contradiction that the applicant led no evidence at first instance. It was submitted for the respondent that notice of termination was not given to the respondent as an employee. I would require more cogent arguments than was submitted on this occasion to persuade me that knowledge of sale of the business by the director is notice given pursuant to a contract of employment of termination of employment to an employee of the company whether that employee is a director or not, so as to constitute notice in accordance with the contract.

29 If no express notice is provided for in a contract of employment (see *Tarrozzi v WA Italian Club (Inc)* 71 WAIG 2499 (FB)) then the courts can imply reasonable notice. A termination of the contract requires notices to be given to the employee by his employer.

30 On the submissions made to me in this matter, there is no serious issue to be tried in relation to that finding (it can be properly argued that Tarozzi's case (op cit) was properly applied).

31 By way of further observation I would note that of course if there were an express term in the contract providing for a period of notice to be given that this argument would simply not arise. That, I think, illustrates the flaw in the applicants' argument.

32 Next it was submitted that there was a serious issue to be tried, because it was alleged that the Commissions' finding that because the respondent was not paid a redundancy payment the dismissal was unfair, was in error.

33 It was submitted that there was no contractual entitlement to be paid a redundancy payment having regard to the reasons for decision of the Industrial Appeal Court in *Dellys v Elderslie Finance Corporation Ltd* (2002) 82 WAIG 1193 (IAC). Thus, it could not be deemed to be an element of unfairness in the dismissal that a reasonable redundancy payment was not made.

34 It is the case that the Commissioners' finding was not made in relation to any "legal" entitlement but that the failure to pay a redundancy payment when he was dismissed was evidence of unfairness to the respondent given that the respondent was not treated as others were.

35 What the Commission decided is supported by the principle applied in *Rogers v Leighton Contractors Pty Ltd* (1999) 79 WAIG 3551, if it were necessary to find any such support. That decision relies on a number of authorities and applies them for the proposition that a termination for redundancy, not accompanied by a reasonable redundancy payment, is unfair (see pages 3552 and 3554).

36 Further, the submission that there was no evidence that other employees were paid a redundancy payment is entirely discounted by Exhibit A2, the sample letter to employees, which on a fair reading purports to offer a redundancy payment for all employees (see paragraph 35 of the reasons for decision).

37 I am not persuaded that for those reasons there is a serious issue to be tried on that point.

38 The third submission was that the Commission erred in finding that the applicant was denied a contractual entitlement to unpaid call out payments because he did not make a claim. It was further submitted that the applicant made a claim for rostered overtime which the contract provided was to be unpaid.

39 The Commissioner, in fact, found that the contract provided separately for call outs which were expressed separately from overtime. The evidence was that the Commission found that the respondent was rostered to handle call outs.

40 The Commissioner found that the call out duties were performed and that he was rostered to handle call outs. He found also that the contract provided for the payment of call outs and that he had performed these duties.

41 On the basis of that reasoning I am not persuaded that there is a serious issue to be tried on that issue.

42 Overall no serious issue to be tried has been established to exist in the grounds of appeal by the applicant in these proceedings.

BALANCE OF CONVENIENCE

43 The substance of the submission for the applicant was that a substantial sum of money was involved, and if it were paid over to the respondent and the appeal was successful, there would be problems with recovery. It was also submitted that the respondent had been employed on a full time basis since 4 June 2002 and that, therefore, he would not suffer hardship by being deprived of funds which, as it was put, would need to be "preserved for the possibility of a successful appeal". The applicant therefore volunteered to pay the amount of the order into an interest bearing account pending the hearing and determination of the appeal.

44 The submission in response was that there was a delay in filing the application for a stay which meant that the applicant did not have clean hands. The delay meant that the "enforcement" proceedings were required to be taken, and were taken.

45 It was submitted from the bar table on behalf of the applicant that because of the question of a later liquidation there was a difficulty and time involved in obtaining instructions.

46 Further, it was submitted correctly that the respondent is entitled prima facie to the fruits of his litigation, which is of course correct.

47 It was also submitted, for the respondent, that the alleged administrative difficulties of recovering monies paid are neither a valid or alternative weighty consideration. It was also submitted that paying monies into an interest bearing account was still denying him the fruits of litigation which of course it is.

48 In this case it is quite clear that the respondent has been deprived of the fruits of his litigation. It is quite clear, as was properly admitted, that the application for a stay was made after the first payment was required to be made pursuant to the order of the Commission.

49 However, it is fair to say that it was not a lengthy period after. It was not such a lengthy period that I would place much weight on the argument that the applicant lacks "clean hands".

50 There is no suggestion that the failure to grant an order for a stay would render the appeal nugatory. Indeed the suggestion was, implicitly, that there was a capacity in the respondent to repay the monies albeit that this would involve the incurring of "administrative expenses". By administrative expenses I assume it would mean whatever steps were necessary to be taken to recover the monies.

51 It was also submitted that the balance of convenience was so identifiable with the strength of the serious issue to be tried that meant that the balance of convenience lay with the applicant.

52 In my opinion, given that the respondent established that he had been deprived of the fruits of his judgement without good reason, then that is a difficult proposition to establish. In any event, for the reasons expressed above, the applicant has not established to me a strong case upon appeal on what has been put to me on this application (see *DVG Morley City Hyundai v Fabbri* (2002) 82 WAIG 2440 at 2442 (paragraph 19)).

53 It is certainly not sufficient merely to cite some administrative expense as sufficient to establish that the balance of convenience lies with the applicant.

54 It has not at all been established that the monies are unlikely to be recovered or repaid, if they are paid to the respondent.

FINALLY

55 For those reasons the equity, good conscience and substantial merits of the case lie with the respondent. They certainly have not been established by the applicant as it is required to do, to lie with the applicant, for the reasons which I have expressed above.

56 The applicant has not established that its interests should outweigh those of the respondent by the application of s.26(1)(c).

57 There have been failures to comply with procedural directions by either party which are not satisfactory but these should not be allowed on this occasion to prevent this matter of being dealt with on its merits as I have done. I will give any necessary directions to prevent that occurring.

58 For all of those reasons I dismissed the application.

2002 WAIRC 06881

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	EPATH WA PTY LTD, APPLICANT
	v.
	IHANN ADRIANSZ, RESPONDENT
CORAM	HIS HONOUR THE PRESIDENT P J SHARKEY
DELIVERED	WEDNESDAY, 30 OCTOBER 2002
FILE NO/S.	PRES 32 OF 2002
CITATION NO.	2002 WAIRC 06881

Decision	Application dismissed
Appearances	
Applicant	Dr J J Edelman (Of Counsel), By Leave
Respondent	Mr T H F Caspersz (Of Counsel), By Leave

Order

This matter having come on for hearing before me on the 29th day of October 2002, and having heard Dr J J Edelman (of Counsel), by leave, on behalf of the applicant, and Mr T H F Caspersz (of Counsel), by leave, on behalf of the respondent, and I having reserved my decision on the matter, and having determined that my reasons for decision will issue at a future date, it is this day, the 30th day of October 2002, ordered that application PRES 32 of 2002 be and is hereby dismissed.

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

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
INDUSTRIAL RELATIONS ACT, 1979
s.49(11)
Fremantle Arts Centre Press
- and -
J.A. Margio
(No. 2808 of 1989)

BEFORE THE PRESIDENT, P.J. SHARKEY ESQ. 30 January 1989

Order

This matter having come on for hearing before the me on the 30th day of January 1990 and having heard Mr G. Hocking (of counsel) on behalf of the appellant and there having been no appearance on behalf of the respondent, and the applicant having made an application that the application for a stay of orders be adjourned sine die and having passed judgment on the application for adjournment and judgment being delivered on the 30th day of January 1990 wherein I found that application for adjournment should be granted, it is this day, the 30th day of January 1990 ordered that the application for adjournment be granted and that application 2808 of 1989 be adjourned sine die.

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

2002 WAIRC 06808

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	LIM CHHORDARY VOEUK T/A TATE STREET LUNCH BAR, APPLICANT
	- and -
	NATASHA LEE SMITH, RESPONDENT
CORAM	HIS HONOUR THE PRESIDENT P J SHARKEY
DELIVERED	TUESDAY, 22 OCTOBER 2002
FILE NO/S.	PRES 31 OF 2002
CITATION NO.	2002 WAIRC 06808

Decision	Application dismissed
Appearances	
Applicant	Mr B S Hanbury (Of Counsel), By Leave
Respondent	Mr T C Crossley-Solomon, As Agent

Reasons for Decision

INTRODUCTION

1 This is an application by the abovenamed applicant employer. The application is brought pursuant to s.49(11) of the *Industrial Relations Act* 1979 (as amended) (hereinafter referred to as "*the Act*") and, by it, the applicant seeks an order for the stay of the operation of an order made by a single Commissioner in application No 1373 of 2002 on 23 July 2002, the order having been deposited in the Registry on 23 July 2002. The application was made on 8 October 2002 at 9.45 am according to the time and date stamp on it.

2 The notice of appeal herein was filed on 8 October 2002, which is over three months after the decision appealed against was filed in the Registry, a little earlier than the application for a stay, according to the time and date stamp on it. At the same time, there were filed applications to extend time within which to file the notice of appeal.

3 S.49 of *the Act* requires that a notice of appeal be instituted within 21 days of the date thereof.

4 The substance of the order appealed against is that the applicant employer pay to the respondent the sum of $8740.96 by way of compensation as follows:-

a) within seven days of the date of the order, $573.14

b) every week for a period of thirteen weeks, the sum of $573.14

c) the amount of $717 within fifteen weeks of the date of the order.

5 The grounds of the application are manifestly inadequate.

6 There is an affidavit tendered by the solicitor for the applicant, Mr Beau Stanley Hanbury (of Counsel), and marked as Exhibit 1.

GROUNDS OF APPEAL

7 I reproduce hereunder grounds 3 and 4 of the grounds of appeal, which Mr Hanbury was good enough to advise in court are the only grounds intended to be relied on upon appeal:-

> "The appellant appeals against the whole of the reasons for decision of Commissioner JH Smith made the l9th June 2002 in the said application on the following grounds;
>
> …
>
> 3. The learned Commissioner erred in law in awarding the respondent 16 weeks pay.
>
> PARTICULARS
>
> 3.1 The amount claimed by the respondent in her application was 3 months pay
>
> 3.2 The respondent had been employed by the applicant for about 5 weeks
>
> 3.3 The respondent maintained that reinstatement was impractical but there was no evidence to support this and in any event, the reasons given were not supportive.
>
> 4. The learned Commissioner erred in her finding that reinstatement was not practical.
>
> ORDERS SOUGHT
>
> 6. The appellant seeks orders as follows;
>
> 6.1 That the decision of the learned Commissioner awarding the respondent the sum of $8740.96 be set aside;
>
> 6.2 That in lieu thereof this Honourable Commission order that the appellant pay the respondent such lesser sum as may be just in the circumstances on such terms and conditions as may be necessary;
>
> 6.3 Such further or other orders as this Honourable Commission thinks fit."

PRINCIPLES

8 The principles which apply to the determination of applications for a stay made pursuant to s.49(11) of *the Act* were most recently expressed by the Commission, constituted by the President, in *Bamboo Holdings Pty Ltd v Halligan* 82 WAIG 966 at 967-968, and are as follows:-

> "The principles which apply to applications for a stay were most recently expressed by the Commission, constituted by the President, in *Stanley and Others t/a Communique Communications v Bryant* 82 WAIG 785 at 787 and are as follows:-
>
> "The principles by which applications pursuant to s.49(11) of the Act are determined are well settled in this Commission (see *Commissioner of Police v CSA* 81 WAIG 2553 at 2554):-
>
> "The principles by which applications pursuant to s.49(11) of the Act are determined are well settled in this Commission. Amongst others, the reasons for decision in *AWU v BHP Iron Ore Ltd* 81 WAIG 406 properly expresses them at pages 407-408:-
>
> "I reproduce hereunder the relevant extract from *CSA v Director General, Department of Transport* 80 WAIG 2855 at 2856:-
>
> "These principles have been laid down in a number of cases, including *Gawooleng Dawang Inc v Lupton and Others* 72 WAIG 1310, *Director General of the Ministry for Culture and the Arts v CSA and Others* 79 WAIG 670 and *City of Geraldton v Cooling* 80 WAIG 1751.
>
> It is for the applicant to establish that the stay should be granted. It is, of course, an underlying principle that the successful party is entitled to the fruits of her/his/its order, award or declaration.
>
> For the applicant to succeed, it must be established that there is a serious issue to be tried, that the balance of convenience favours the applicant and that other factors consistent with the application of s.26(1)(a), s.26(1)(b) and/or s.26(1)(c) of the Act, if they exist, require that the application be granted.
>
> If these ingredients exist, then exceptional circumstances exist which warrant the granting of the application as a matter of equity, good conscience and the substantial merits of the case. (I say that to further explain the principles.)"

> The need to prevent there being any more uncertainty than is necessary, in industrial matters, is important, too (see *Re Moore; Ex parte Pillar* [1991] 65 ALJR 683 at 685 (HC)).""

I would add the following further observations.

Before weighing other factors the court needs to be satisfied that there is an arguable case on appeal, (in this jurisdiction a serious issue to be tried also described as a strong case), to ensure that the appeal has not been lodged simply to delay execution (see *Croney v Nand* [1999] 2 Qd R 342 at 348-9 (CA)).

If an appeal may be nugatory a stay will be granted. An appeal will be nugatory when because of the respondent's financial state there is no reasonable prospect of recovering monies paid to him pursuant to the judgment.

An appeal will be nugatory too, if the appellant can show that without a stay of execution he/she will be ruined (see *Lino Type Hell Finance Ltd v Baker* (Practice Note) [1992] 4 All ER 887 at 888).

Inconvenience and the possibility of risk to the appellant's property do not constitute special circumstances (see *Cox v Simeon* (SC (WA) Full Court Lib No 5063 7 September 1983, unreported)).

The onus is on the applicant, of course, to demonstrate a proper basis for a stay, as I have observed above, which will be fair to all the parties and the court will weigh the balance of convenience and the rights of the parties as I have observed above (see *Alexander v Cambridge Credit Corp Ltd* (1985) 2 NSWLR 685 at 694).

The mere preservation of the status quo, nor by themselves, the merits of the appeal are not sufficient. Further, it is not sufficient to constitute special circumstances that the appeal is arguable, is being pursued in good faith and with expedition and that the stay will not prejudice anybody (see *Hamersley Iron Pty Ltd v Lovell* (No 2) (1998) 20 WAR 79 and 80, 88 (FC)).

Appropriate circumstances may exist within the context of the balance of convenience if serious injury will result to the applicant unless a stay is granted (see *McBride v Sandland* (No 2) (1918) 25 CLR 369 and 375) and, as I have observed, an appeal will be nugatory when, because of the respondent's financial state, there is no reasonable prospect of recovering monies paid to him/her pursuant to the judgment, but appropriate circumstances are not limited to that situation and will exist whenever there is a real risk that it would not be possible for a successful appellant to be restored substantially to his/her former position (see *Federal Commission of Taxation of Commonwealth of Australia v The Myer Emporium Ltd* (No 1) [1986] 160 CLR 221 at 223)."

BACKGROUND

9 The respondent made application to the Commission, constituted by a single Commissioner, on 25 July 2001 claiming, pursuant to s.29(1)(b)(i) of *the Act*, that she had been harshly, oppressively or unfairly dismissed by the applicant on 19 July 2001. The application was opposed at first instance by the abovenamed applicant employer.

10 On 2 May 2002, the matter was heard and determined. The applicant employer appeared in person and, English not being her first language, gave evidence with the assistance of an interpreter. Indeed, as well, written submissions were filed on her behalf on 15 May 2002, with the consent of the Commission.

11 Whilst the applicant employer did not attend upon the speaking to the minutes on 23 July 2002, at first instance, there was before the Commission a letter written by James Chong & Co, Barristers and Solicitors, dated 27 June 2002, purporting to make submissions in respect of the speaking to the minutes.

12 It was also asserted in submissions on behalf of the respondent and not denied, that Ms Smith has received no payments from the employer pursuant to the order made by the Commission, and no explanation or satisfactory explanation has been advanced as to why that was the case when there was no application for a stay made for almost three months.

13 On 19 July 2002, the applicant at first instance filed claim No M 250 of 2002 in the Industrial Court at Perth seeking to "enforce" the Commission's order. The employer failed to respond to that application.

14 On 3 October 2002, the applicant at first instance sought judgment on that claim by interlocutory application. There followed the filing of the notice of appeal and the applications for extension of time which were filed herein. Presumably, that application has not yet been completed.

15 As I have said, the applicant, whom it was agreed has difficulties with the English language, has made no attempt to comply with the order and therefore paid no monies pursuant to it. It is also clear that nothing was done until the "enforcement" proceedings commenced and a period of almost three months had elapsed by way of instituting an appeal or making this application for a stay.

16 There is nothing before me to persuade me that those language difficulties or any other satisfactory reason existed or exists for the failure to comply with the order or the failure to make this application for a stay until almost three months after the decision appealed against. In relation to the question of language difficulties, it is noteworthy that the Commissioner at first instance made findings which are not challenged upon appeal, that the applicant employer's command of the English language was adequate.

17 The affidavit of Mr Hanbury does not provide any valid reason why the application for a stay was made after such a long delay, and/or why there was a failure to comply with the order. The applicant employer was neither called to give evidence, nor was any affidavit sworn by her tendered.

WAS THE APPEAL INSTITUTED WITHIN THE MEANING OF S.49(11) OF *THE ACT*?

18 First, let me make it clear that the applicant is a party to the proceedings at first instance in which the decision appealed against was made, and is therefore a person competent to make the application as a "person who has a sufficient interest" within the meaning of s.49(11) of *the Act*. S.49(3) provides that any party to the proceedings wherein the decision was made can institute an appeal.

19 The question is whether the application was made "At any time after the appeal was instituted …". The notice of appeal has been filed and served. However, to be validly instituted within the requirements of s.49(3) of *the Act*, the appeal must be instituted within 21 days of the date of the decision. Thus, the filing of the appeal must have occurred within 21 days of 23 July 2002, the date of the decision. Palpably it did not. The appeal was not filed within 21 days, but was filed a substantial time later. It was not therefore instituted within the meaning of s.49(3) or s.49(11) of *the Act* within 21 days (see *Whitehouse Hotels Pty Ltd v Lido Savoy Pty Ltd* [1974] 131 CLR 333 (HC)). There is no jurisdiction therefore in the President under s.49(11) to hear and determine this application, because no appeal has been instituted within the meaning of s.49(3) or s.49(11). Certainly, there are filed applications to extend time within which to institute the appeal, but these are matters which the Full Bench only can determine, not the President. This application, for those reasons, therefore, I hold incompetent. For those reasons, I dismissed it.

BALANCE OF CONVENIENCE

20 This is a matter where the applicant has failed to comply with the order made at first instance for almost three months without satisfactory explanation. The applicant also failed to file an application for a stay until almost three months after the decision appealed against, and the same applies to the filing of a notice of appeal. Indeed, the application for a stay and the notice of appeal were filed only some weeks after the proceedings commenced in the Industrial Magistrate's Court to enforce this order, in fact, approximately six weeks after this occurred. In the meantime, no satisfactory reason has been advanced by the applicant for denying the respondent the fruits of her judgment. That is, of course, aggravated by the fact that she was, in fact, dismissed on 19 July 2001, which is about 15 months ago.

21 The balance of convenience plainly lies with the respondent, who has been deprived, without good reason, and by inordinate and unexplained or unsatisfactorily explained delay, of the fruits of her judgment. It has not been established by the applicant, for those reasons, that the balance of convenience does at all lie with her. Indeed, for those reasons, the balance of convenience lies with the respondent.

SERIOUS ISSUE TO BE TRIED

22 In this case, no order for reinstatement was sought, which arguably properly leads to a conclusion that such an order was impracticable. Further, there was an expectation for future employment which supported the finding of quantum of compensation.

23 There may be a serious issue to be tried. However, if there is, it is entirely outweighed as a consideration by the weight of the balance of convenience as a factor.

FINALLY

24 There was no jurisdiction to hear and determine this application, and I dismissed it for that reason. In any event, the balance of convenience manifestly and clearly lies and lay with the respondent who had been deprived of the fruits of her "judgment" by the unexplained delay in complying with the order and by the unexplained delay in purporting to institute an appeal, and in making this application some weeks after proceedings to enforce the order had been instituted. In any event, for all of the reasons which I have expressed, the equity, good conscience and substantial merits of the case lie clearly with the respondent. If they do not, it has not been established otherwise. Her interests should and do therefore weigh far more heavily in the balance in these proceedings than that of the applicant (see s.26(1)(c) of *the Act*).

25 For all of these reasons, too, no exceptional circumstances have been established which would require me to make an order to stay the operation of the decision at first instance. For those reasons, too, I dismissed the application.

2002 WAIRC 06791

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	LIM CHHORDARY VOEUK T/A TATE STREET LUNCH BAR, APPLICANT - and - NATASHA LEE SMITH, RESPONDENT
CORAM	HIS HONOUR THE PRESIDENT P J SHARKEY
DELIVERED	MONDAY, 21 OCTOBER 2002
FILE NO/S.	PRES 31 OF 2002
CITATION NO.	2002 WAIRC 06791

Decision	Application dismissed
Appearances	
Applicant	Mr B S Hanbury (Of Counsel), By Leave
Respondent	Mr T C Crossley-Solomon, As Agent

Order

This matter having come on for hearing before me on the 21st day of October 2002, and having heard Mr B S Hanbury (of Counsel), by leave, on behalf of the applicant and Mr T C Crossley-Solomon, as agent, on behalf of the respondent, and I having determined that the application should be dismissed and that my reasons for decision will issue at a future date, it is this day, the 21st day of October 2002, ordered that application No PRES 31 of 2002 be and is hereby dismissed.

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

[L.S.]

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
INDUSTRIAL RELATIONS ACT 1979
Slee and Stockden Pty Ltd
- and -
Jonathon David Blewitt
(No 341 of 1992)

BEFORE HIS HONOUR THE PRESIDENT
P J SHARKEY

1 April 1992

Order

This matter having come on for hearing before me on the 1st day of April 1992 and having heard Mr J G Fiocco (of Counsel) on behalf of the applicant and Mr M D Cuomo (of Counsel) on behalf of the respondent, it is this day, the 1st day of April 1992, ordered, by consent, as follows—

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

(2) THAT the order made by the Commission on the 24th day of February 1992 in matter No 454 of 1991 be wholly stayed pending the hearing and determination of appeal No 340 of 1992, or until further order, but subject to and conditional upon the applicant complying with the orders and conditions hereinafter expressed.

(3) THAT the applicant shall, on or before the 28th day of April 1992, pay the total amount ordered to be paid by the Commission in its order of the 24th day of February 1992 in matter No 454 of 1992 into a NATWEST Bank Interest Bearing Account offering the best obtainable interest rates.

(4) THAT such account shall be in the joint names of an shall justly be administered by the Solicitors for the applicant, Messrs Hopkins Rattigan, and Mr M D Cuomo (of Counsel) on behalf of the respondent, and no funds to be withdrawn until further order of this Commission.

(5) That all or any liability for tax or charges of any kind which might become due and payable in respect of such account shall be paid from the account.

(6) THAT all administration expenses in respect of the said account shall be paid from the account.

(7) THAT in the event of any failure to comply with these conditions, each or all of them, then there be liberty to apply on 48 hours notice to revoke this order or any part thereof, and/or for any other necessary orders.

(8) THAT in the event of the appeal herein being dismissed, then the monies in such account, including any interest earned by the same, shall be paid forthwith without any reduction to the respondent.

(9) THAT in the event of the appeal herein being upheld, then the monies in such account, including any interest earned by the same, shall be paid forthwith to the applicant without any reduction.

(10) THAT the President may at any time upon application by any party hereto and without affecting the generality of his ability to give further directions:-

(a) Fix further directions.

(b) Direct that the account be administered by some other person or persons in lieu of the person or persons referred in paragraph (4) hereof.

(11) THAT there be liberty to apply on 48 hours notice in relation to the clarification of this order or for any ancillary orders or directions necessary to achieve what these orders require.

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

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
INDUSTRIAL RELATIONS ACT, 1979
State School Teachers Union of W.A. (Inc.)
and
Mr T. Brown
(No. 350 of 1989)

BEFORE PRESIDENT P.J. SHARKEY ESQ. 1 March 1989

Order

This matter having come on for hearing before the President on the 1st day of March 1989 and having heard Ms C.L. Tan (of Counsel) on behalf of the applicant and Mr T. Brown, the respondent, in person, and having heard an application for further and better particulars in matter No. 297 of 1989, and having passed judgement on the matter on the 1st day of March 1989, wherein I granted the application and gave reasons therefore, it is this day, the 1st day of March 1989 ordered that further and better particulars be served on the applicant and that the applicant have leave to apply for further and of the answer filed herein.

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

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
INDUSTRIAL RELATIONS ACT, 1979
State School Teachers Union of W.A. (Inc.)
and
Mr T. Brown
(No. 350 of 1989)

BEFORE PRESIDENT P.J. SHARKEY ESQ. 1 March 1989

Order

This matter having come on for hearing before the President on the 1st day of March 1989 and having heard Ms C.L. Tan (of Counsel) on behalf of the applicant and Mr T. Brown, the respondent, in person and having heard an application for an adjournment of the matter, and having passed judgement on the matter on the 1st day of March 1989, wherein I dismissed the application and gave reasons therefore, it is this day the 1st day of March 1989 ordered that the application for an adjournment be dismissed.

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

PRESIDENT—Unions—Matters dealt with under Section 66—

2002 WAIRC 06935

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	TERENCE MCPARLAND, APPLICANT - and - THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS, RESPONDENT
CORAM	HIS HONOUR THE PRESIDENT P J SHARKEY
DELIVERED	TUESDAY, 5 NOVEMBER 2002
FILE NO/S.	PRES 30 OF 2002
CITATION NO.	2002 WAIRC 06935

Decision	Application dismissed
Appearances	
Applicant	Mr T Mcparland, In Person
Respondent	Mr T J Dixon (Of Counsel), By Leave

Reasons for Decision

INTRODUCTION

1 This is an application by the abovenamed applicant (hereinafter called "Mr McParland") made pursuant to s.66 of the *Industrial Relations Act* 1979 (as amended) (hereinafter referred to as "*the Act*").

2 At all material times, the respondent was an "organisation", as that word is defined in s.7 of *the Act*. At all material times, Mr McParland was either a member of the respondent organisation or had been a member. It was not the position that he had applied for membership and had not been admitted to membership. However, for those reasons, it was clear that I had jurisdiction to hear and determine this application.

3 Put briefly, by this application Mr McParland alleges that on 28 March 2002, when he went to the office of the respondent at 27 Moore Street, Perth, in order to pay his membership subscription in accordance with the account received by him, his membership renewal was refused and his membership of the respondent has not been renewed. It is not denied that that occurred or that he is no longer a member.

4 The crux of the complaint was that the termination of his membership, which had occurred by the respondent not accepting his half yearly subscription payable in advance, was an act in breach of rule 8(2). It was also alleged by Mr McParland that the respondent had not acted fairly and impartially in exercising its powers under the rules.

5 By the application Mr McParland seeks the following orders (see paragraph 10):-

> "10. The Applicant seeks Orders that—
>
> (i) The CFMEU accepts the Applicant's half-yearly subscriptions totalling $238 for the period 31 March 2002 until 30 September 2002 forthwith;
>
> (ii) The CFMEU not impose any additional levies, fees, fines or other monetary impost upon the Applicant for late payment of the subscriptions referred to above;
>
> (iii) Terence McParland's financial membership of the CFMEU be declared to be continuous and unbroken if the Applicant pays his first half-yearly subscription within 14 days of this Order."

6 The application is opposed on the following grounds:-

> "1. The Applicant is not eligible to be a member of the Construction, Forestry, Mining and Energy Union of Workers.
>
> 2. The Applicant is in receipt of a pension and is not employed or usually employed in the callings enumerated in clause 4 of the Rules of the Construction, Forestry, Mining and Energy Union of Workers ('the Rules').
>
> 3. Rule 4.7 of the Rules states that 'no person shall be a member who is not an employee within the meaning of the Industrial Relations Act (WA) 1979 as amended'."

7 I assume for the purposes of this application that The Construction, Forestry, Mining and Energy Union of Workers is the respondent and that the application is only addressed to the secretary on its behalf.

BACKGROUND

8 The only evidence given in this matter was by the applicant, Mr Terence McParland, on oath. No evidence was adduced on behalf of the respondent. Mr McParland gave evidence that he was at all times an employee who was employed in the building and construction industry. He had worked as a builders' labourer, for plasterers, in the refractory trade, and generally in the building and construction industry.

9 He said that he has been at various times an officer and/or perhaps employee of the respondent or its predecessor or predecessors.

10 In the 1980's, he was secretary of the Builders Labourers Federation in the Australian Capital Territory. He has, it was not denied, been a financial member of the respondent or its predecessor or predecessors for about 18 or 20 years. Needless to say, there is no evidence that that ACT body bears any relationship to the respondent.

11 In April 1998, he had been employed as a casual organiser by the respondent, but his employment or appointment was terminated by the then secretary of the respondent, Mr Kevin Noel Reynolds. One assumes that Mr McParland was not elected as an organiser under rule 16, but was appointed by the executive of the respondent as a special organiser under rule 17. It was not suggested to me that the secretary had no power to terminate his appointment as an organiser.

12 In recent years, Mr McParland stood for the office of secretary of the respondent against Mr Reynolds. Since 1998, he has been unemployed and first of all in receipt of unemployment benefits and then in recent material times he has been in receipt of a commonwealth government allowance which is called "Newstart Mature Age Allowance" and which I was told exists to enable a person to live whilst seeking employment. (That has been his only income). The nature of this benefit, as explained in evidence, was not disputed. Mr McParland emphasised that this benefit was not a pension as such, emphasising further that he was not eligible for the old age pension until he was 65 years of age.

13 In any event, for the last three to four years, Mr McParland has not been in employment. He has, however, for a number of years been a financial member of the respondent or its predecessors, even whilst he was unemployed.

14 On 28 March 2002, he attended at 3.15 pm at the registered office of the respondent, as I have said, in order to pay his membership subscription for the following six month period which constituted, of course, a renewal of his membership.

15 When he initially attempted to pay his subscription he was advised that he could not pay it because the computers were "down". He then offered to pay his subscription again, but one, Mr Tony Kelly, an organiser with the respondent, told him "We won't take your money off you, due to the hardship as mentioned in the "Sunday Times" regarding receiving the mature age pension". He added "Terry, I am only acting on instructions". Mr McParland alleged "They took my ticket because I was on a pension".

16 He later received a final account for the amount which he had tried to pay. Mr McParland said that he did not pay it because he said that the computer spewed these things out, and because he did not want to surrender his continuity of membership by so doing.

17 He gave evidence that he still wishes to work, and, indeed, has to work, even though he is aged 62, because of his children and because he is not eligible for an aged pension until he turns 65.

18 It was a substantial ground of complaint by Mr McParland that he was unable to obtain employment in the building and construction industry without a ticket ((ie) without a ticket evidencing his membership of the respondent (referred to in rule 10 of the respondent's rules)).

19 It was also his evidence that he had applied for a number of positions in the building and construction industry, it would seem informally, and these efforts had been unsuccessful. He attributed his difficulties in obtaining employment and his inability to obtain such employment in the building industry, at least in part, to his having stood for the office of secretary against Mr Reynolds in 2000. He described himself as a "hot potato" and "unemployable as a result". He said that he had been seeking work. He does wish to stand for office again, on his evidence, or at least not to be precluded from standing for office in the respondent. His evidence was not shaken in those respects, and I accept it and find accordingly.

ISSUES AND CONCLUSIONS

20 The respondent's case was that Mr McParland had been refused renewal of membership because he was no longer eligible for membership.

21 The case was further that he was no longer eligible for membership because:-

a) He was in receipt of a pension and not employed or usually employed in the callings enumerated in rule 4 of the rules of the respondent.

b) He was ineligible because he was not an "employee" within the meaning of rule 4(7) of the same rules because a person who was not an employee within the meaning of s.7 of *the Act* is precluded from membership.

22 In s.7 of *the Act* an employee is defined by definitions (a) and (b) most relevantly as follows:-

> "**"employee"** means, subject to section 7B—
>
> (a) any person employed by an employer to do work for hire or reward including an apprentice or trainee;
>
> (b) any person whose usual status is that of an employee;"

23 There are no provisions in *the Act* which at all resemble s.261(1) and (2) of the *Workplace Relations Act* 1996 (Cth), which provisions read as follows:-

> "261(1) **[Entitlement]** Subject to any award or order of the Commission, a person who is eligible to become a member of an organisation of employees under the eligibility rules of the organisation that relate to the occupations in which, or the industry in relation to which, members are to be employed is, unless of general bad character, entitled, subject to payment of any amount properly payable in relation to membership—
>
> (a) to be admitted as a member of the organisation; and
>
> (b) to remain a member so long as the person complies with the rules of the organisation.
>
> 261(2) **[Continued eligibility]** Subsection (1) does not entitle a person to remain a member of an organisation if the person ceases to be eligible to become a member and the rules of the organisation do not permit the person to remain a member."

24 Further, there is no provision in *the Act*, such as s.144 of the *Conciliation and Arbitration Act* 1904, which was discussed in *Owens and Others v Australian Building Construction Employees and Builders Labourers Federation* (1978) 19 ALR 569 at 571-572 (FC-FC), and which reads as follows:-.

> "(1) A person employed in connexion with an industry, or engaged in an industrial pursuit, is, unless he is of general bad character, entitled, subject to payment of any amount properly payable in respect of membership, to be admitted as a member of an organization (being an organization of employees in or in connexion with that industry or of employees engaged in that industrial pursuit) and to remain a member so long as he complies with the rules of the organization.
>
> "(2) Sub-section (1) does not entitle a person to be admitted as a member of an organization unless he is included in a category of persons who are eligible for membership of the organization under the rules of the organization, or to remain a member if he ceases to be so included and the rules do not permit him to remain a member.
>
> "(2A) Subject to sub-section (2), sub-section (1) has effect notwithstanding the rules of the organization except to the extent that it expressly requires compliance with those rules.

"(3) For the purposes of this section —

(a) a person whose usual occupation is that of employee in an industry or engagement in an industrial pursuit; or

(b) a person who is qualified to be an employee in an industry or to engage in an industrial pursuit and desires to become such an employee or so to engage,

shall be deemed to be employed in that industry or to be engaged in that industrial pursuit.

"(4) …

"(5) Where a question or dispute arises as to the entitlement under this section of a person to be admitted as, or to remain, a member of an organization, that person, a person who is or desires to become the employer of that person or the organization may apply to the Court for a declaration as to the entitlement of that first-mentioned person under this section."

25 The rules of the respondent comprise the compact between its members, even after registration of the organisation (see *Roots v Mutton and Others* (1979-1980) 28 ALR 439 (FC-FC)).

26 I should also observe that rules are to be construed not narrowly or technically ((ie) generously) (see *R v Aird; Ex parte AWU* [1973] 129 CLR 654 at 659 (HC) and see also *R v Cohen and Others; Ex parte Motor Accidents Insurance Board* (1979-1980) 27 ALR 263 at 264 (HC) per Barwick CJ). Rules must nonetheless be construed as a legal document would be (see the same authorities and *HSOA v Minister for Health* (1981) 61 WAIG 616 at 618 (IAC) per Brinsden J with Smith J agreeing).

27 I do have to say, however, that, since the rules govern membership, and the eligibility rule in particular, which is mandatory, governs membership, if a person ceases to be eligible to be a member that person cannot be a member. (As to the mandatory nature of eligibility rules see the principles laid down in *R v The Commonwealth Court of Conciliation and Arbitration and Others; Ex parte The Brisbane Tramways Company Ltd and Another* [1914] 19 CLR 43 (HC) and also *United Grocers, Tea and Dairy Produce Employees' Union of Victoria v Linaker* [1916] 22 CLR 176 (HC)).

28 If that is not the case, then I would require submissions to be made to persuade me otherwise, but none such were made.

29 The eligibility rule of the respondent's rules is rule 4. Rules 6, 7, 8 and 10 provide for cessation of membership in various ways. Rules 6, 7 and 8 read as follows:-

"**6 - REGISTER OF MEMBERS**

A Register of Members shall be kept by the Secretary. The Register shall show the names and addresses of all members, the date of joining the Union and of resignation or demise, or the date when he or she otherwise ceased to be a member of the Union, and all entrance fees, contributions, levies and fines and all other fees paid into and benefits received from the funds of the Union by all members. The Register shall be purged on not less than four occasions in each year by striking off the names of members whose membership has ended under Rule 8 of these rules.

7 - MEMBERS STRUCK OFF

Any member having been struck off the books and wishing to again become a member of the Union shall pay an entrance fee equal to the amount of the arrears of contribution, levies, fines and fees standing against him or her when so struck off.

8 - TERMINATION OF MEMBERSHIP

(1) Termination of membership of the Union shall be effected by the giving of written notice of intention to resign. The notice of resignation shall be delivered in person or by certified mail to the Union office. The resignation takes effect from the day on which it is received by the Union or on such later date as may be specified in the notice but the member remains responsible for any subscriptions, fees, levies or fines owing up to and including the date of termination of membership.

(2) Where a member's subscription has expired and has not been renewed, on expiration of a period of three months, the membership is terminated but the member shall be responsible for any subscriptions, fees, levies or fines owing up to and including the date of termination of membership.

(3) Notice of resignation does not relieve a member from liability for any fees, contributions, levies or fines which may become payable during the notice period."

30 S.64A and s.64B of *the Act* provide for termination of membership by resignation by the member and for termination of membership for non payment of subscription. S.64D provides for the purging of the register of members of an organisation where membership has ended in accordance with s.64A or s.64B.

31 I would also add that in *Troja v Australasian Meat Industry Employees' Union (Victorian Branch)* (1978-1979) 23 ALR 18 (FC-FC), the court accepted the principle that the rules of the organisation in question in relation to termination of membership had to be complied with to effectively terminate membership. This principle was accepted by Sweeney J in *Re an application by Sims* (1980) Current Review 576. In *Cook v Crawford* (1982) 62 FLR 34 at 79-81 (FC-FC) one member of the Full Court of the Federal Court, Keely J, expressly rejected an argument that members of the organisation in question could be treated as having resigned as a result of conduct such as failing for a period to pay dues to the organisation where they had not resigned in accordance with the rules of the organisation (see the discussion of these matters by Moore DP in *Re Australian Federation of Principals Employed in Catholic Schools* [1991] 43 IR 378 at 382-383 (AIRC)).

32 The rules provide also, I observe incidentally, for candidates for election to any office to be financial members of the union continuously for one year immediately preceding the next closing date for nominations (see rule 23).

33 The evidence in this matter, which I accept, leads me to find that for at least 14 or 15 years Mr McParland was an employee, but not continuously, employed in the building and construction industry as a builders' labourer or in plastering or in refractory work. He was also during that time engaged as an employee or an officer of industrial organisations, and most recently as an officer of the respondent until about four years ago. It was not submitted to me that an officer is not an employee of the respondent within the meaning of s.7 of *the Act*. For four years or thereabouts he has been unemployed and in receipt of unemployment benefits and the "Newstart" benefit. I am so satisfied and find, on his own evidence.

34 Since he has not been in employment for about four years he relied on the fact that for many years he was usually an employee or usually employed in an industry as prescribed by rule 4.

35 Further, of course, and significantly, if a person is not an employee within the meaning of s.7 of *the Act* and rule 4, then he is prohibited from membership. The last paragraph of rule 4 reads as follows:-

> "The Union may admit to membership all other persons whether employees in the foregoing callings or vocations or not as have been appointed or elected officers of the Union, provided that no person shall be a member who is not an employee within the meaning of the Industrial Relations Act (WA) 1979 as amended".

36 In order to be eligible, he would have to be a person whose "usual status is that of an employee" within the meaning of the definition to which I have referred above in s.7 of *the Act*. (I was cited no authorities about the meaning of that phrase).

37 If he does not meet that requirement, he is simply not eligible for membership. The question is whether his usual status is that of an employee. It is quite clear that the word "usual" has been defined in a number of cases, but there is not a relevant definition for my purposes. The word "usual" means, in its most relevant definition, "habitual or customary" (see *The Macquarie Dictionary 3rd Edition*). In the same dictionary the word "status" is defined to mean "condition, position or standing, socially, professionally or otherwise".

38 The crucial facts, as I find them, are these. For three to four years approximately, up to the date of the hearing, and including the date when Mr McParland's attempt to pay his six month subscription in advance was rejected, namely 28 March 2002, Mr McParland was not employed at all as an officer of the respondent which would have otherwise rendered him eligible for membership; nor was he employed at all in any of the vocations, callings, occupations, activities or capacities referred to in rule 4, which, if he were so employed, would have rendered him eligible for membership. I make those observations subject to the length or otherwise of the period during which he might have been so employed and the times when he was so employed, which facts would be very material.

39 During those four years he was in receipt of unemployment benefits for some of the time, and for the rest of the time has been and is presently in receipt of the "Newstart" benefit. There is no evidence that for those three to four years he has been employed at all, that is employed by an employer pursuant to a contract of service. It is therefore clear that he has neither been employed or usually employed in any occupation, calling, endeavour or capacity which would render him eligible for membership of the respondent for three to four years pursuant to rule 4. If he had been employed during that that time even with some interruptions to that employment he might, depending on the actual facts, be said to have been "usually employed", but he was not. If he was an officer of the respondent during that time, he might also have been eligible, but he was not an officer during that time, provided that an officer could be said to be an employee. Again, whether he was eligible for membership would depend on the periods during which he was an officer and the length of his service as an officer, but he was not an officer during the last four years. He was therefore, at least as early as 28 March 2002, and, indeed, earlier than that, ineligible for membership for those reasons. I so find.

40 If that were a wrong finding, which it is not, it is quite clear that he was not an "employee" during that period of approximately four years within the definition contained in *the Act*. There is no evidence that he was ever a person employed by an employer to do work for hire or reward, even as a trainee within the meaning of definition (a) of an employee in s.7 of *the Act*. He clearly did not come within the definitions (c) and (d) of the definition of employee in *the Act*, on the evidence.

41 The only question then is whether he was an employee as defined because his "usual status (was) that of an employee" within definition (b) of s.7 of *the Act*. It is clear to me that his usual status was not that of an employee during the same period of four years or thereabouts because he has not been in employment for about four years. That is too long a period to enable me to conclude that his customary or habitual ((ie) usual status) was that of an employee. In fact, he was a person during that time in receipt of unemployment benefits and of another benefit which apparently exists to enable persons to more readily find employment. He did not obtain employment during that time, even during the time when he had a ticket.

42 I would also add that the fact that he cannot get a ticket or might be ineligible to stand for office within the respondent, however unfortunate those consequences undoubtedly are, is and cannot be relevant to my determination of this matter, which depends on the application of the rules and *the Act* to the facts.

43 What I have to decide is whether upon the application of the facts to the proper construction of the rules Mr McParland has established that there is a breach of the rules. Therefore, as I find, since he was not an employee as defined in *the Act*, he was not eligible, at least as at 28 March 2002, for membership of the respondent.

44 It was not part of Mr McParland's case that whatever the reason the act of terminating or forcing the termination of his membership or the result achieved was not authorised by the rules, having regard to *Troja v Australasian Meat Industry Employees' Union (Victorian Branch)* (FC-FC) (op cit) and the other authorities to which I have referred above. An argument might be available on that point, and I make no judgment on it at this time. However, none of the authorities which I cite above relate to the situation such as this where the applicant was not an employee at the material time and where an organisation of employees cannot by definition contain persons who are not "employees" as defined.

45 I turn briefly to the allegation of unfairness or lack of impartiality in the decision made on 28 March 2002. There may have been unfairness in the procedure adopted, but, in the end, it cannot be said that it affected or tainted the result (see *Stead v State Government Insurance Commission* [1986] 161 CLR 141 (HC)). That ground is not therefore made out.

46 For the reasons which I have expressed above, Mr McParland was and is ineligible for membership of the respondent. For all of those reasons, I will dismiss the application.

Order accordingly

2002 WAIRC 06399

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
PARTIES	TERENCE MCPARLAND, APPLICANT
	v.
	THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS, RESPONDENT
CORAM	HIS HONOUR THE PRESIDENT P J SHARKEY
DELIVERED	WEDNESDAY, 4 SEPTEMBER 2002
FILE NO/S.	PRES 30 OF 2002
CITATION NO.	2002 WAIRC 06399

Appearances

Applicant Mr T Mcparland, On His Own Behalf

Respondent Mr T Dixon (Of Counsel), By Leave

Orders and Directions

This matter having come on for a directions hearing before me on the 4th day of September 2002, and having heard Mr T McParland, on his own behalf as applicant, and Mr T Dixon (of Counsel), by leave, on behalf of the respondent, and having made such orders and given such directions as are necessary or expedient for the expeditious and just hearing and determination of this matter, and the parties herein having consented to the waiving of the requirements of s.35 of the *Industrial Relations Act 1979* (as amended), it is this day, the 4th day of September 2002, ordered and directed as follows:-

(1) THIS application be listed for hearing and determination at 10.00am on Thursday, the 19th day of September 2002.

(2) THAT the applicant do make available to the solicitors for the respondent for discovery, inspection and the taking of copies, all such documents on which he intends to rely at the hearing of this application; and that such inspection and discovery be completed five working days prior to the date of hearing.

(3) THAT the respondent make available for discovery and inspection any list or record of persons who were or are available to perform casual work for the years 2001 and 2002, subject to the provision that the names of such persons will not be revealed to any other persons without the consent of any such person or the order of this Commission.

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

2002 WAIRC 06543

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES TERENCE MCPARLAND, APPLICANT

v.

THE SECRETARY, THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS, RESPONDENT

CORAM HIS HONOUR THE PRESIDENT P J SHARKEY

DELIVERED THURSDAY, 19 SEPTEMBER 2002

FILE NO/S. PRES 30 OF 2002

CITATION NO. 2002 WAIRC 06543

Decision Application adjourned

Appearances

Applicant Mr T Mcparland, On His Own Behalf

Respondent Mr T Dixon (Of Counsel), By Leave

Order

This matter having come on for hearing before me on the 19th day of September 2002, and having heard Mr T McParland, on his own behalf as applicant, and Mr T Dixon (of Counsel), by leave, on behalf of the respondent, and the parties having waived their rights pursuant to s.35 of the *Industrial Relations Act* 1979 (as amended), it is this day, the 19th day of September 2002, ordered that application PRES 30 of 2002 be adjourned to a date to be fixed.

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

2002 WAIRC 06936

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES TERENCE MCPARLAND, APPLICANT

- and -

THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS, RESPONDENT

CORAM HIS HONOUR THE PRESIDENT P J SHARKEY

DELIVERED TUESDAY, 5 NOVEMBER 2002

FILE NO/S. PRES 30 OF 2002

CITATION NO. 2002 WAIRC 06936

Decision Application dismissed

Appearances

Applicant Mr T Mcparland, In Person

Respondent Mr T J Dixon (Of Counsel), By Leave

Order

This application having come on for hearing before me on the 25th day of October 2002, and having heard Mr T McParland, on his own behalf, as applicant, and Mr T J Dixon (of Counsel), by leave, on behalf of the respondent, and having reserved my decision in the matter, and reasons for decision being delivered on the 5th day of November 2002, it is this day, the 5th day of November 2002, ordered that application No PRES 30 of 2002 be and is hereby dismissed.

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

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

INDUSTRIAL RELATIONS ACT, 1979

L.B. Carter, A. Faccioni, J. Little and N.C. Webb

- and -

M.A. Drake, Interim Secretary/Treasurer Federated Liquor and Allied Industries Employees' Union of Australia, Western Australian Branch, Union of Workers

(No. 1875 of 1990)

BEFORE THE PRESIDENT, P.J. SHARKEY ESQ. 23 November 1990

Order

This matter having come on for a directions hearing before me on the 23rd day of November 1990 and having heard Mr L.B. Carter on behalf of the applicants and Mr N. Pope (of Counsel) on behalf of the respondent, and the applicants having applied for the matter to be adjourned sine die and the respondent having not objected to the adjournment of the matter sine die, it is this day the 23rd day of November 1990 ordered that application 1875 of 1990 be adjourned sine die.

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

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

INDUSTRIAL RELATIONS ACT, 1979

s.66

K.S. Svendsen and V.J. Rhodes

- and -

Executive of the State School Teachers Union of W.A. (Inc.)

(Nos. 2577 and 2584 of 1989)

BEFORE THE PRESIDENT, P.J. SHARKEY ESQ. 4 December 1989

Application for adjournment - matters already before Commission in another application - that matter to be disposed of first - application granted.

Reasons for Decision.

THE PRESIDENT: I heard an application by the respondent union for these applications to be adjourned. Having regard to the fact that application No. 2239(3) of 1989 (Doherty v. Fazio, Acting Returning Officer of the S.S.T.U.W.A., the S.S.T.U.W.A., and Executive of the S.S.T.U.W.A.), and the orders which I am being asked to make, would, in my opinion, subsume and pre-empt these applications, it would seem to me not in the interest of justice that these applications be heard before I have disposed of matter No. 2239(3) of 1989 (Doherty v. Fazio, Acting Returning Officer of the S.S.T.U.W.A., the S.S.T.U.W.A., and Executive of the S.S.T.U.W.A.). In other words, to hear these applications would involve the strong risk of unnecessary duplication. I will allow the applications for adjournment and order accordingly.

Order accordingly

Appearances: Mr K.S. Svendsen as applicant on his own behalf.
Mr V.J. Rhodes as applicant on his own behalf.
Mr T. Boronovskis for the respondent.
Mrs B.A. Dornan as a respondent on her own behalf.
Ms J.S. Hutchinson as a respondent on her own behalf.
Mr R.D.R. Pratt as a respondent on his own behalf.

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

INDUSTRIAL RELATIONS ACT, 1979

s.66

K.S. Svendsen

- and -

Executive of the State School Teachers Union of W.A. (Inc.)

(No. 2577 of 1989)

BEFORE THE PRESIDENT, P.J. SHARKEY ESQ. 22 November 1989

Order

This matter having come on for hearing before me on the 22nd day of November 1989 and having heard Mr K.S. Svendsen on his own behalf as applicant and Mrs B.A. Dornan on her own behalf as a respondent, Mr R. Pratt on his own behalf as a respondent, Ms J.S. Hutchinson on her own behalf as a respondent and Mr T. Boronovskis on behalf of the Executive of the State School Teachers Union of W.A. (Inc.) and having heard an application by Mr T. Boronovskis on behalf of the Executive of State School Teachers Union of W.A. (Inc.) that the matter be adjourned sine die pending the final determination of application 2239 of 1989, and having passed judgement on the application for adjournment on the 22nd day of November 1989, wherein I granted the application, and undertook to give reasons therefore, it is this day the 22nd day of November 1989 ordered that application 2577 of 1989 be adjourned sine die.

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

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

INDUSTRIAL RELATIONS ACT, 1979

s.66

V.J. Rhodes

- and -

Executive of the State School Teachers Union of W.A. (Inc.)

(No. 2584 of 1989)

BEFORE THE PRESIDENT, P.J. SHARKEY ESQ. 22 November 1989

Order

This matter having come on for hearing before me on the 22nd day of November 1989 and having heard Mr V.J. Rhodes on his own behalf as applicant and Mrs B.A. Dornan on her own behalf as a respondent, Mr R. Pratt on his own behalf as a respondent, Ms J.S. Hutchinson on her own behalf as a respondent and Mr T. Boronovskis on behalf of the Executive of the State School Teachers Union of W.A. (Inc.) and having heard an application by Mr T. Boronovskis on behalf of the Executive of State School Teachers Union of W.A. (Inc.) that the matter be adjourned sine die pending the final determination of application 2239 of 1989, and having passed judgement on the application for adjournment on the 22nd day of November 1989, wherein I granted the application, and undertook to give reasons therefore, it is this day the 22nd day of November 1989 ordered that application 2584 of 1989 be adjourned sine die.

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

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

INDUSTRIAL RELATIONS ACT, 1979

M. Gurgone

- and -

Executive, TAFE Committee and Chairman of the TAFE Committee of the State School Teachers Union of W.A. (Inc.) and the State School Teachers Union of W.A. (Inc.)

(No. 2089 of 1990)

BEFORE THE PRESIDENT, P.J. SHARKEY ESQ. 14 December 1990

Order

This matter having come on for hearing before me on the 14th day of December 1990 and having heard Mrs M. Gurgone on her own behalf as the applicant and Mr E. Harken on behalf of the respondents, and whereas all the parties agree that the TAFETA selection process requires refinement and whereas the parties consent to these orders being made to facilitate that process and do not prejudice the issues between them being determined on their merits if necessary, it is this day, the 14th day of December 1990, ordered as follows—

(1) THAT as an interim arrangement the President of the State School Teachers Union of W.A. (Inc.) shall nominate the 1991 TAFETA Executive Member and the TAFETA Conference Delegates for the 1991 TAFETA Annual Meeting.

(2) THAT further all TAFE members of the State School Teachers Union of W.A. (Inc.) shall be given the opportunity during term one of 1991 to vote by way of devolution process pursuant to the rules of the State School Teachers Union of W.A. (Inc.) on which selection process should be put to Conference 1991 as the Executive endorsed process for constitutional amendment for the selection of TAFETA delegates and TAFETA Executive members.

(3) (a) THAT the devolution question referred to in paragraph (2) hereof shall include as one of the options, Conference decision 160 of the 1990 Conference of the respondent State School Teachers Union of W.A. (Inc.).

(b) THAT a second option be posed as part of the said devolution question which shall include a process which selects TAFETA delegates and the TAFETA Executive Member by way of an election across the whole of the TAFE membership of the said State School Teachers Union of W.A. (Inc.).

(4) THAT there be liberty to apply to any of the parties in respect of these orders generally.

(5) THAT the proceedings are otherwise adjourned sine die.

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

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
INDUSTRIAL RELATIONS ACT, 1979
s.66
C. Bastow
- and -
The Plumbers and Gasfitters Employees' Union of Australia,
West Australian Branch, Industrial Union of Workers
(No. 2631 of 1989)

BEFORE THE PRESIDENT, P.J. SHARKEY ESQ. 7 December 1989

Order

This matter having come on for hearing before me on the 7th day of December 1989 and having heard Mr C. Bastow on his own behalf as the applicant and Mr P.J. Marsh (of counsel) on behalf of the respondent, and an application for an adjournment having been made by the applicant Mr C. Bastow and the respondent having no objection to the matter being adjourned, it is this day the 7th day of December 1989 ordered that the matter be adjourned sine die.

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

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
INDUSTRIAL RELATIONS ACT, 1979
M. Braysich and P. Flanigan
- and -
State School Teachers Union of Western Australia, (Inc.)
(No. 806 & 807 of 1990)

BEFORE THE PRESIDENT, P.J. SHARKEY ESQ. 28 June 1990

Reasons for Decision.

THE PRESIDENT: These were two applications heard together by consent under s.66 of the Industrial Relations Act, 1979 (as amended) (hereinafter referred to as the Act).

It is quite clear that this application was competent in that the applicant's were members of the respondent which is an organisation deemed to be registered under s.73(3)(A) of the Act (and see S.S.T.U.W.A. deregistration decision unreported No. 24 of 1989)

The applications (as amended) herein were in the following terms respectively:

Application 806:-

"SCHEDULE "A"

Pursuant to section 66 of the Industrial Relations Act 1979 the Applicant hereby applies for the following Order:

1. That the President make such Order or give such directions relating to the Rules of the Respondent Union making the Respondent Union abide by and observe the Respondent Union's Rules.

SCHEDULE "B"

REASONS FOR APPLICATION

The union President Ed Harken and the Executive have broken Union rules in the negotiation of this package.

Justice Sharkey has previously ruled that Policy can be interpreted as RULE.

Union Policy can be considered as Union Rule. The rules which have been broken are as follows.

1. UNION POLICY ON PROMOTION P59 9.4

   That any changes in promotional structures be discussed with those Union members who may be directly affected before the Executive agree to any policy change by the Education Ministry"

2. Conference Motion 104 Passed as Policy at the Union Conference 1989

   "That the following reclassification of Group C High and Senior High Schools as Group B schools, the Union take immediate action to ensure that the nexus be maintained between the salary of Deputy Principals Group C High and Senior High Schools and Senior Teachers classification.

3. IN ADDITION the Executive DID NOT follow the direction of the Industrial Commission which invoked that "... employees generally agree to the provisions of the package ..." No membership input and fine tuning has been allowed. The package has been signed, sealed and delivered by the Union Executive.

4. A letter from Ed Harken to the Union Membership in general (134/SB 23rd January) stated that the broadbanding would not be endorsed without approval of the broad membership.

5. This application is made pursuant to s.66 of the Industrial Relations Act, 1979 (as amended)."

Application 807:-

"Statement Attached to Form I

In two points the agreement breaches Union Policy in connection with changes to the promotion system (See Policy S9.4). These are

(i) Changes to the relative status of District High Class II Principals relative to Deputy Principals High and Senior High will affect career prospects in relation to promotion to Principal High and Senior High Schools.

(ii) Opening administrative positions outside the teaching service (page 29 of agreement) will also have serious implications for future promtion of Deputy Principals, Senior Teachers and other members of the union.

In addition

The agreement without reference to the membership is contrary to the memorandum of Oct 31st 1989 (Section 4.1)

Finally

There has been insufficient time to study all the implications of the agreement."

and

"Pursuant to Section 66

That the President makes such order or give such direction relating to the rules of the Respondent Union making the Respondent Union abide by an observe the Respondent Union's Rules."

and

"The applicant seeks the following order:

(i) That the president order that the respondent union withdraw its consent to those sections of the memorandum of agreement of the 27th day of April 1990 made between the intervener and the respondent union which relate to broadbanding and the promotion system as it impinges on deputy principals, senior teachers and any other teachers.

(ii) That the system used for broadbanding based on the Integra survey conducted in 1989 be not used in any subsequent broadbanding or promotional system."

Further the words "stay of hearing" were deleted from the notice of application in 807 of 1990.

The grounds for intervention filed by the intervener who was permitted to intervene without objection were as follows in relation to application 806 of 1990:-

(1) Since October 1989 the Ministry of Education and the Respondent Union have been negotiating in accordance with the State wage principle (69 WAIG 2013).

(2) Agreement between those parties is recorded in a memorandum of agreement which has been presented to the Government School Teachers' Tribunal ("the Tribunal"). The Tribunal has heard submissions and has ordered that the Government School Teachers' Salaries Award 1981 be varied by 3 per cent but has yet to hear submissions in support of the new salary structure which the parties seek to introduce from 1st July 1990. Those proceedings are know as Matter T1/89.

(3) Matter T1/89 is an industrial matter relating to teachers in that it relates to salaries or ranges of salaries for teachers (section 7 Industrial Relations Act).

(4) This application is similarly an industrial matter relating to teachers in that it seeks to stay Matter T1/89 on the grounds of the Union's alleged non-compliance with a State School Teachers' Union of W.A. policy on promotional structures.

(5) The Government School Teachers' Tribunal has exclusive jurisdiction to inquire into and deal with any industrial matter relating to teachers (section 78(1) Industrial Relations Act).

(6) This application is not an application under Section 66 in that it does not seek an order or directions relating to the rules of the Union, their observance or non-observance or manner of observance (Section 66(2)).

(7) As a consequence of paragraphs 3, 4, 5 and 6 the President has no jurisdiction to hear this application.

(8) Further, even if the President has jurisdiction to hear this application under Section 66, he has no power to grant the orders sought:

   (a) Section 66 provides for powers of the President relating to disallowance, alteration and interpretation of Union rules. There is no power granted to stay other proceedings.

(b) The President also has power with respect to the remedy, rectification, reversal etc or any act, matter or thing done in pursuance of a disallowed rule (Section 66(2)(ca)). Since there is no application before the president to disallow a rule, paragraph (ca) does not arise.

(c) Where the legislature intended to confer upon the President a power to stay proceedings, such power is granted explicitly, see s.49(11).

(9) The structural efficiency principle was endorsed by the Commission in its reasons in the General Order delivered September 8th 1989 (69 WAIG 2913).

(10) Rule 27(b) of the Union Rules is inconsistent with that General Order in that the rule requires preservation of a pre-existing nexus between certain salaries.

(11) As a consequence of paragraphs 9 and 10, the rule upon which the applicant relies is itself suseptible to an application under Section 66(2) for disallowance. The President should not accede to the present application, because to do so would be to facilitate an attack on proceedings properly conducted pursuant to endorsed wage fixing principles, where that attack is itself founded on a suspect Union rule.

(12) Further, if the application were successful many teachers would have the salary increases due from 1st July 1990 delayed, with the resultant potential for further industrial disputation.

(13) In the submission of the intervener, the President, in exercise of his powers pursuant to Sections 14(1) and 27(1)(a), should dismiss the application on the grounds that the proceedings are not desirable in the public interest."

In relation to application 807 of 1990 the grounds for intervention were the same as application 806, which are set out above, except paras 9, 10 and 11 were excluded.

The unions answers and counterproposals are lengthy and set out details why no orders should be made, denying breaches of the rules, denying that an agreement in the legal or even quasi-legal sense has been arrived at and making other assertions directed to jurisdiction and the exercise of discretion inter alia. The answers and counterproposals are filed herein and I will not set them out verbatim here. I nonetheless advert hereinafter to their effect.

Mr Braysich is a senior teacher and a member of the senior teachers association, a professional body which represents those teachers.

Mr Flanigan is a deputy-principal and a member of the equivalent professional body.

Much of their complaints went to the problems involved with their situation and that of their colleagues, the applications broadly revolving around grievances which the applicants have with the Memorandum of Agreement between the respondent and the intervener which was put before me in various forms, namely exhibit 3 (dated the 24th day of April 1990), exhibit 9 (undated), exhibit 28 (dated the 4th day of April 1990) and exhibit 50 (dated the 27th day of April 1990).

This is an agreement which is intended to be placed before the Government School Teachers' Tribunal by the respondent and intervener and which covers a wide range of set conditions including the introduction of the concept of broadbanding.

The Government Schools Teachers' Tribunal is a body which exists by virtue of Part IIA, Division 1 of the Act.

It has exclusive jurisdiction in relation to industrial matters if I may paraphrase it, involving the respondent union and the intervener. Indeed if it had jurisdiction, the applicant's concerns might be raised before it.

The agreement as such covers a wide ranging set of conditions including the introduction of the concept of broadbanding or at least its introduction in a particular form.

There are other complaints which the applicants make. Firstly there is a complaint that a number of resolutions of conference policy of the respondent were not complied with and rules of the respondent were not complied with. In particular it is asserted that broadbanding disadvantaged and disadvantages, the applicants and is unjust because put briefly it inserts more steps in the promotion ladder for both deputy principals and senior teachers. Further, it is based on a "Bipers" method of assessment of the positions, "Bipers" itself being based on an "Integra Survey" which, it was asserted, was invalid and taken in circumstances and in a manner which would render the results much open to question.

In addition, it was asserted that this agreement had been entered into without proper consultation in accordance with the rules and policy decision of the respondent.

The hearing had proceeded to the point where the respondent's President had given evidence in chief, the applicants cases had been completed but there had been no cross-examination of the President of the respondent.

No evidence had been adduced to that point on behalf of the intervener and it was necessary because of the commitments of the Commission to adjourn the matter till the 11th day of July 1990.

I should add that it is now possible to hear this matter further on the 2nd and 3rd days of July 1990.

However, the applicant's applied for interim orders in the following terms:-

(1) Mr Braysich in application 806 of 1990:-

"This application seeks to gain an interim order under the powers within this act for the President to make such appropriate orders to ensure that the respondent union shall not proceed with matter T1/89 before Martin C. whilst the matter 806 of 1990 is still being determined..."

(2) Mr Flanigan in application 807 of 1990:-

"The applicant in 807 of 1990, Peter Flanigan, hereby applies for an interim order to be issued against the State School Teachers Union of WA. I ask that the following order be issued against the said union: That the State School Teachers Union of WA be directed to withdraw its consent from those sections of the memorandum of agreement now before the Teachers Tribunal as T1 of 1989 dealing with broadbanding in the promotions system until such time as this case is resolved..."

The applications sought orders relating to the rules as prescribed in s.66(2) of the Act. The basis of the applications can be described in that context hereunder.

Policy item 9.4 in the respondent's policy document (dated August 1988 and exhibit 2 herein), provides that any changes in promotional structures be discussed with those Union members who may be directly affected before the Executive agree to any policy change by the Education Ministry (see exhibit 2).

Resolution 3.11 of the decisions of the 91st Annual Conference of the State School Teachers' Union of Western Australia of October 1989 (exhibit 16 herein) expressly provides:-

"That there be no loss of conditions, or positions, and no trade offs for Primary, Secondary or TAFE in any restructuring"

Resolution 59, provides that "the Union ask members for their approval through special meetings of any restructuring proposals, and that the proposals, be submitted to members in such a way which allows them to make mutually exclusive decisions about the various proposals."

It was asserted that the respondent was in breach of those resolutions and policy decisions. It was also asserted by the applicants that the respondent was in breach of its rules. Of course the Executive is required to conduct its affairs in accordance with the rules of the union ("this Constitution") (see Rule 18(a)). Further, it is required to abide by and conform to all decisions and directions of Conference (see Rule 18(b)(i)). Thus it is alleged that by being in breach of those items, the Executive and thus the Union is in breach of its rules. It is also asserted that in reaching the "agreement", exhibit 50, the respondent was in breach of rules because the agreement is contrary to Object 2(a), and also perhaps, although it was not expressly submitted, it was an unreasonable exercise of the Executives power to control the affairs of the union. Rule 27(a) and (b) were also relied upon but these provide that Conference is the supreme authority of the union and the authority of its decisions.

The applications for interim orders were heard on the 21st and 22nd days of June 1990 and a minute of proposed order issued because of the urgency of the matter on the 25th day of June 1990. There was a speaking to the minutes on the 27th day of June 1990 and I was on that occasion asked to prepare urgent reasons for decision so that an expedited appeal to the Industrial Appeal Court might occur.

Firstly, the application clearly related to the fact that the respondent union and intervener asserted that the package contained in the agreement had to operate as at the 1st of July 1990 because that is what had been promised.

Mr Braysich and Mr Flanigan submitted further that this was not so but that the matter could wait, there being 41 million dollars set aside.

All the parties were of the view that whatever decision I made on the application for an interim order there would be substantial industrial unrest.

The first question at issue in relation to the application for an interim order was whether I had the power to make such an order, as Mr Drake-Brockman submitted that I did not.

I drew the parties attention to Brown v. S.S.T.U.W.A. (Inc.) and Others 69 WAIG 1390 in which I had held that I did have such a power. I rely on my reasoning in that case and the authorities cited therein.

My power to make that order which one might have expected depends on the words of s.66 of the Act. And in particular no new matters were raised which were not raised before me in Brown's Case (op. cit.) by counsel, nor was it sought to persuade me in any detail that my reasoning in Brown's Case (op. cit.) was wrong.

This is an application unlike Drinkwater's Case, (R. v. Drinkwater and Another, 127 CLR 1) which deals directly with the rules.

S.66 contains a wide power to resolve applications and the President can "make such orders or give such directions relating to the rules of the organisation, there observance or non-observance or the manner of their observance, either generally or in the particular as he considers to be appropriate."

The plain language of the section also, in its subsections gives an example of how wide the power to make orders is, (see the variety of orders available from s.66(2)(a) to s.66(2)(f) inclusive).

It provides a wide mechanism to the President to resolve matters under s.66 relating to rules, to put it simply.

The power to make an interim order is specifically given by the rules because of the section. S.66(2) gives the power to the President to make such order or give such direction as relating to the rules as "he considers appropriate". There is no prohibition on interim orders or on injunctive orders. The orders or directions must relate to the rules, their observance or non-observance etc. They are such orders or directions as the President considers appropriate. There is no prohibition upon the making of interim orders.

It is a section which, in my opinion, confers a power on the President which should not be read down.

Indeed, even if one departs from the plain words and applies s.18 of the Interpretation Act, 1984 and s.6(f) of the Act, that is still borne out. The construction which I place upon it which is one which would promote at least one purpose or object underlying the statute and that is to promote the democratic control of organisations as s.6(f) of the Act requires.

Thus such a construction should be preferred by virtue of s.18 to the construction urged upon me by Mr Drake-Brockman.

The construction which he urged upon me would mean that a person such as Mr Braysich or Mr Flanigan might make an application the purpose of which would be overtaken by events. Those events then might render such an application vain and any relief under s.66 nugatory. Thus, one could have a series of applications under s.66 which would be useless exercises from the point of view of an applicant and result in an applicant being unable to obtain relief when it might be just that he or she would otherwise obtain it.

No argument was advanced to me by Mr Drake-Brockman which would persuade me otherwise.

Further, jurisdiction in the Commission as otherwise constituted in relation to an industrial matter would not prevent the exercise of the President's jurisdiction under s.66. It was not sought to persuade me at least in any direct sense that this was not the case, and I am firmly of that view having regard to the plain words of the section, that I am right in that view.

I therefore have both jurisdiction and power in the terms of the order which I have made to make it.

I now turn to the question of the exercise of my discretion.

Firstly the matter was put to me on the basis that the salary increases which were part of the agreement exhibit 50 had to date from 1 July 1990. I must say that nothing of any substance, other than the fact that a promise had been made was submitted to me in that regard. Secondly it was submitted that the "agreement" could not be made retrospective under the Principles. However, the agreement cannot be entered into by the S.S.T.U.W.A. ultra vires or contrary to its rules. The respondent's case as I understood it is that if there was a failure to confer or to adequately confer with members including the applicants before entering into the agreement exhibit 50, then this had been remedied by subsequent discussions with the professional bodies involved. However, it was also the respondent's case as I understand it that the "agreement" exhibit 50 is not a document set solidly and immutable but was one that was evolving. It would therefore seem to me to follow from that, that the agreement could be varied upon negotiation or otherwise. My discretion, when a specific criteria as statutorily prescribed for me, must be exercised within the confines of the statute, the objects of which are in signposts. There is some difficulty in determining this application for an interim order in that the evidence is only reached a half complete stage.

In the exercise of my discretion, it is clear that if the respondent seeks to have the "agreement" ratified by the Government School Teachers Tribunal as it proposes to so seek within seven days of the 22nd of June 1990 then this application will be pre-empted and any order rendered nugatory. The damage to the applicants if their cases were able to made out is obvious. Thus far there is sufficient evidence for the purpose of making an order only that the promotional paths of deputy principals and senior teachers had extra promotional steps added to indicate prima facie that there might be a detriment suffered by them and perhaps suffered by them

contrary to the rules for the purpose of making these orders only. But there is also sufficient evidence at this stage, that it evolved upon a study which might be invalid or unsatisfactorily conducted which was accepted by the union as part of the basis of settlement at least implicitly. I make no findings on those matters, because I have not heard all the evidence or submissions in detail.

The damage which might be suffered in the short term by the applicants is greater than that to other members of the respondent.

I draw no final conclusions on that evidence and make no findings. There is sufficient evidence, taken at its best, to base this order on. I do not think it helpful to make detailed findings before all the evidence is completed. The interim orders however, terminates on the 29th June 1990 unless renewed and the damage which would be suffered by the respondent in that time is in fact almost non-existent. In the longer term, that of course might not be the case depending on the evidence and any further submissions. My order reflects that either party has the right to apply to have these orders extended.

Indeed, exhibit 67, The Western Teacher i.e. the union journal, reveals the 1st day of July 1990 is not the firm deadline which was my first impression upon the submission made to me. It says "The S.S.T.U. is keen to have the matter resolved so that it can proceed as near as possible to the July 1st day for the pay increases." If the applicant's evidence were accepted, there would be a prima facie case for relief.

There are no irreversible consequences of making these orders because the hearing of the matters has not been completed and, in any event, the orders expire on the 29th of June 1990, and new orders must be sought after that.

I do not know whether the applicants could be heard as intervener's before the Government School Teachers' Tribunal. Therefore I am unable to say how much their situation might be remedied were that to occur. That is a matter within the purview and for the decision of that body if it is raised before it. In any event insufficient material was put before me to persuade me that it could or would, or that I should consider that aspect.

I also had proposed to order that the parties engage in a conference convened by the Registrar to resolve their differences. It was submitted that I had no power to make such orders. Further it was submitted on behalf of the intervener that he should not be in receipt of such an order. On behalf of the respondent it was submitted that I had no power to make such an order. Therefore a certain reluctance to enter into any attempt of a concrete nature to resolve this matter was evinced. I therefore did not order such a course as a condition of the stay although it was in my power to do so. I say that, because at first blush, under s.66, interpreting the section on the plain words as I have reflected upon them above, and in the light of s.6(b) applied by virtue of s.18 of the Interpretation Act 1984 if that were necessary, that is the clear power. In any event, nothing of any substance was said to persuade me that I did not have that power. However, due in this case to the lack of agreement on the part of the intervener and respondent to such a course at least insofar as it was expressed to me, I did not add such a provision as a condition of the orders.

It is just and correct within s.26(1)(a) and s.26(1)(c) of the Act for me to make these orders at this time on these submissions and the evidence thus far, and at this stage of proceedings. There is a matter of sufficient substance still to be tried. The damage to the applicants at this time is greater than that ascribable to the respondent or intervener. There are no serious, irreversible consequences of making the orders for the intervener and respondent. The applications were sufficiently prompt.

For those reasons I made the interim orders.

Appearances: Mr M. Braysich on his own behalf as an applicant
Mr P. Flanigan on his own behalf as an applicant
Mr A. Drake-Brockman (of counsel) on behalf of the respondent
Mr K Pettit (of counsel) on behalf of the intervener

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
INDUSTRIAL RELATIONS ACT, 1979
M. Braysich and P. Flanigan
- and -
State School Teachers Union of W.A. (Inc.)
(Nos. 806 and 807 of 1990)

BEFORE THE PRESIDENT, P.J. SHARKEY ESQ. 26 September 1990

Reasons for Decision on an Application for an Interim Order

THE PRESIDENT: This was a renewed application for a second interim order directing the State School Teachers Union of W.A. (Inc.) (hereinafter referred to as "the union") and the Ministry of Education to withdraw its consent from those sections of the memorandum of agreement now before the Government School Teachers Tribunal as T1 of 1989.

S.66 of the Industrial Relations Act, 1979 (as amended) (hereinafter referred to as "the Act") gives wide powers to the President, including the power to make interim orders.

The principles which govern the granting of interim orders were enunciated by the President in Brown v. S.S.T.U.W.A 69 WAIG 1390 and Braysich and Flanigan v. S.S.T.U.W.A. (Nos. 806 and 807 of 1990) (unreported) at pages 9-11.

I had earlier granted an interim order in this matter on the 27 June 1990 in similar terms. However, since the granting of that order, I had heard further evidence. In particular, I had heard the evidence in chief and some cross-examination of Mr Edward Harken, President of the union. Obviously, one could not form the conclusive view as to the reliability or value of his evidence until cross-examination was completed.

The question, of course, which arose, was the imminent application before the Government School Teachers Tribunal to ratify the said "agreement".

I make the comment that after I hear full submissions and all the witnesses, including their cross-examination, my views may well be different.

The attack on the alleged agreement was on the basis that it was made contrary to or ultra vires the rules of the union, including those decisions of Conference and the union, which by the rules bind the union.

I heard some submissions to the effect that a matter which had involved months of negotiations should not be held up by a s.66 application. The answer to that is quite clear. If I decide on the facts and according to law and in the proper exercise of my discretion that such an order should be made under s.66(2) of the Act, relating to the rules, as I put it broadly, then that is the order which should be made, whether the agreement is some months in the construction or not. I say that because an organisation registered under the Act can conduct its affairs because it is registered, and in accordance with its rules.

In this case it is alleged that the "agreement" was entered into contrary to the rules.

There was some evidence of consultation with members and some argument still open on the evidence as to whether Conference decisions had been complied with.

In addition, insofar as the complaint about the Bipers system and the part it played, there was insufficient evidence that its use perpetuated an injustice or caused an erroneous result.

In any event, it was, on the evidence thus far available to me, a tool of the intervener.

Having regard to the evidence available thus far, and to the interests of the applicants and the union and its members, I concluded, with quite substantial benefits being delayed to the members at large, that I should not make the interim order sought and I dismissed the application for an interim order. That, of course, does not mean that at the conclusion of the hearing my order might not be different.

The application for a further interim order is thus dismissed.

Appearances: Mr M. Braysich on his own behalf as an applicant

Mr P. Flanigan on his own behalf as an applicant

Mr A. Drake-Brockman (of counsel) on behalf of the respondent

Mr K. Pettit (of counsel) on behalf of the intervener

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

INDUSTRIAL RELATIONS ACT, 1979

s.66

M.P. Jackson

- and -

State School Teachers Union of W.A. (Inc.) and Others

(No. 2570 of 1989)

BEFORE THE PRESIDENT, P.J. SHARKEY ESQ. 17 November 1989

Liberty to apply - union meeting - restraint sought - relief from service - balance of convenience - application granted

Reasons for Decision.

THE PRESIDENT: This was an application pursuant to liberty to apply granted in my order of 9 November 1989 by Mr Malcolm Peter Jackson, a respondent to the proceedings. The application was said to be urgent on the basis that the Executive of the respondent union was meeting on Sunday, 12 November 1989 to fill Committee/Board positions. Mr Jackson sought a restraint of this occurring.

The application was then filed by him and received at 1.00 p.m. on 10 November 1989. It was heard at 5.30 p.m. on 10 November 1989. Mr Jackson had been directed to serve all of the respondents in the matter, but sought relief from that because of the short time involved and the difficulties involved in effecting service. In the normal course of events, that relief would not have been forthcoming. However, because of the prima facie reason for the application, I saw fit so to do.

Those persons who appeared were Mr Jackson in person, Ms T. Grimshaw in person and Mr N. Pope representing the respondent union upon the instructions of the President of the respondent union as he informed me.

It was clear that the purpose of the meeting of the Executive on 12 November 1989, according to exhibit 1, included dealing with an agenda item "a) the election of Union Committees/Boards".

The submission was that since the Executive held office currently until further order of the President of the Commission, the status quo should be preserved also in relation to the existing Union Committees and Boards.

It seemed in the circumstances therefore to me that the balance of convenience lay with that question not being determined by Executive on 12 November 1989, and I therefore adjourned the application for further argument on 20 November 1989, allowing any of the parties to set these interim orders aside by application should they wish, after service of a minute of proposed order upon them.

Appearances: Mr M.P. Jackson as applicant

Ms T.E. Grimshaw as a respondent

Mr N. Pope (of Counsel) on behalf of the respondent union

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

INDUSTRIAL RELATIONS ACT, 1979

s.66

M.P. Jackson

- and -

State School Teachers Union of W.A. (Inc.) and Others

(No. 2570 of 1989)

BEFORE THE PRESIDENT, P.J. SHARKEY ESQ. 20 November 1989

Interim Order

This matter having come on for hearing before me on the 10th day of November 1989 and having heard Mr M.P. Jackson on his own behalf as applicant and Mr N. Pope (of counsel) on behalf of the first named respondent, the State School Teachers Union of W.A. (Inc.) and Ms T.E. Grimshaw on her own behalf as a respondent and having issued interim orders and directions it is this day, the 10th day of November 1989 ordered and directed as follows:

(1) I order that a copy of application 2570 of 1989 and the letter attached thereto dated the 10th day of November 1989 be served on all the parties named in application 2239 of 1989 within 4 days of the date hereof save and except that service upon the applicant in application 2239 of 1989 must be effected by personal service or service upon a person apparently over the age of 16 years at the applicant's normal place of residence.

(2) I declare that service upon all parties except the applicant Mr John Doherty be effected by leaving a copy for each of the said parties at the office of the respondent union with directions for the same to be brought forthwith to the notice of such parties.

(3) I order and direct that elections for union committees/boards be not held until further order.

(4) I adjourn the hearing of application 2570 of 1989 to the 20th day of November 1989 at 10am.

(5) I order that there be liberty to apply in respect of these orders and in particular liberty to any of the parties hereto to apply to set these orders aside.

(6) I direct that the matters referred to in my order of the 9th day of November 1989 in matter 2239 of 1989 be listed for further order, direction or declaration on the 20th day of November 1989 at 10am.

(7) I direct that service of this minute of proposed interim order be effected as provided in para 1 and 2 hereof.

(8) I order and direct that a copy of this minute of proposed order be tabled at the meeting of the executive of the respondent union scheduled to be held on Sunday the 12th day of November 1989 immediately upon the opening of such meeting.

(Sgd.) P. J. SHARKEY,

[L.S.] President.

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

INDUSTRIAL RELATIONS ACT, 1979

s.66

D A Sheahan

and

State School Teachers Union of W.A. (Inc.)

(No. 805 and 806 of 1989)

BEFORE THE PRESIDENT, P.J. SHARKEY ESQ. 16 June 1989

Order

This matter having come on for hearing before me on the 16th day of June 1989 and having heard Mr D.A. Sheahan on his own behalf as applicant and Mr T. Boronovskis on behalf of the Respondent, and the parties having agreed that the matter be adjourned sine die it is this day the 16th day of June 1989, by consent ordered that matter no.s 805 and 806 of 1989 be adjourned sine die.

(Sgd.) P. J. SHARKEY,

[L.S.] President.

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
INDUSTRIAL RELATIONS ACT, 1979
s.66
D.A. Sheahan
- and -
The State School Teachers Union of W.A. (Inc.)
(No. 2655 of 1989)

BEFORE THE PRESIDENT, P.J. SHARKEY ESQ. 4 December 1989

Order

This matter having come on for hearing before me on the 4th day of December 1989 and having heard Mr D.A. Sheahan on his own behalf as applicant and Mr T. Boronovskis on behalf of the respondent, and the applicant having made an application to adjourn the proceedings sine die, and there having been no objection from the respondent, it is this day, the 4th day of December 1989 ordered that the application be adjourned sine die.

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

PUBLIC SERVICE ARBITRATOR—Awards/Agreements—Variation of—

2002 WAIRC 06831

GRAYLANDS SELBY-LEMNOS AND SPECIAL CARE HEALTH SERVICES AWARD 1999
NO. PSA A1 OF 1999

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MINISTER FOR HEALTH, APPLICANT
	v.
	THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED AND OTHERS, RESPONDENTS
CORAM	COMMISSIONER P E SCOTT
	PUBLIC SERVICE ARBITRATOR
DATE OF ORDER	THURSDAY, 24 OCTOBER 2002
FILE NO.	P 35 OF 2002
CITATION NO.	2002 WAIRC 06831

Result Award varied

Order

HAVING heard Mr S Gregory on behalf of the applicant, Ms J van den Herik on behalf of The Civil Service Association of Western Australia Incorporated, Mr C Panizza on behalf of the Hospital Salaried Officers Association of Western Australia (Union of Workers) and Ms D MacTiernan on behalf of The Australian Liquor, Hospitality and Miscellaneous Workers Union, Western Australian Branch, 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 and from the 16th day of October 2002.

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

SCHEDULE

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

This Award shall extend to and bind—

(1) all Government Officers employed at Graylands Selby-Lemnos and Special Care Health Services (GSL) by the Metropolitan Health Service Board in any calling in which they are eligible for membership of the Hospital Salaried Officers Association of Western Australia (Union of Workers) (the HSOA); including all salaried employees (being professional administrative, clerical, technical and supervisory employees) (including any employed in the callings listed in Schedule M to this Award)

(2) the HSOA;

(3) the CSA to the extent that the organisation had eligible financial members employed by the employer at GSL on the 6th of May 1998, who continue to be a member and be employed at GSL, in any calling in which they are eligible for membership of the CSA; and

(4) the Metropolitan Health Service Board, or its successor (the employer);

(5) provided that the Award shall not extend the coverage of the HSOA or the CSA to, or bind the employer in regard to, any employees employed in callings which at the 6th of July 1995 would have made the employees eligible for coverage by an Award or Agreement of the Australian Liquor, Hospitality & Miscellaneous Workers Union."

(6) Provided that the Hospital Salaried Officers Award 1968 (No. 39 of 1968) shall apply to an employee, instead of this Award, where an employee states in writing that he or she wishes the Hospital Salaried Officers Award to apply to him or her instead of this Award.

(7) This Award does not apply to persons who commence employment after the date on which subclause (6) takes effect.

2002 WAIRC 06830

HOSPITAL SALARIED OFFICERS' AWARD 1968

NO. 39 OF 1968

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ASHBURTON HEALTH SERVICE AND OTHERS, APPLICANTS
	v.
	HOSPITAL SALARIED OFFICERS ASSOCIATION OF WESTERN AUSTRALIA (UNION OF WORKERS) AND OTHERS, RESPONDENTS
CORAM	COMMISSIONER P E SCOTT
	PUBLIC SERVICE ARBITRATOR
DATE OF ORDER	THURSDAY, 24 OCTOBER 2002
FILE NO.	P 34 OF 2002
CITATION NO.	2002 WAIRC 06830

Result Award varied

Order

HAVING heard Mr S Gregory on behalf of the applicant, Ms J van den Herik on behalf of The Civil Service Association of Western Australia Incorporated, Mr C Panizza on behalf of the Hospital Salaried Officers Association of Western Australia (Union of Workers) and Ms D MacTiernan on behalf of The Australian Liquor, Hospitality and Miscellaneous Workers Union, Western Australian Branch, 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 and from 16th day of October 2002.

[L.S.]

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

SCHEDULE

1. Clause 2. – Arrangement: Immediately following "Schedule H – Extended Area of Operation" insert new title as follows—

Schedule I - Callings

2. Clause 3. – Scope: Delete this clause and insert the following in lieu thereof—

(1) This Award shall apply to workers employed by employers bound by this Award in any of the classifications referred to in Schedules D, E or F attached to this Award and to the employers employing those workers.

(2) Subject to the provisions of Clause 4. - Scope, of the Graylands Selby-Lemnos and Special Care Health Services Award 1999 and further to subclause (1) of this Clause, this award shall extend to and bind-

(a) workers employed by the Board of the Metropolitan Health Services at Graylands Selby-Lemnos and Special Care Health Services, with effect from the date on which this subclause takes effect, in any calling in which they are eligible for membership of the Hospital Salaried Officers Association of Western Australia (Union of Workers) (the HSOA); including all salaried workers (being professional administrative, clerical, technical, and supervisory workers) (including any employed in the callings listed in Schedule I to this Award)—

(b) the HSOA; and

(c) the Board of the Metropolitan Health Services;

(d) provided that the coverage of this award as specified by this subclause, shall not extend the coverage of the HSOA to, or bind the employer in regard to any workers employed in callings which at 6 July 1995 would have made them eligible for coverage by an award or agreement of the Australian Liquor, Hospitality & Miscellaneous Workers' Union.

(3) In the case of workers to whom the Graylands Selby-Lemnos and Special Care Health Services Award 1999 applies, this Award will apply to each worker who states in writing that he or she wishes this Award to apply instead of the Graylands Selby-Lemnos and Special Care Health Services Award 1999.

3. Schedule H – Extended Area of Operation: Immediately after this Schedule insert new title and Schedule as follows—

SCHEDULE I – CALLINGS

ARCHITECT
AUDIOLOGIST
BIO-CHEMIST
BIO-ENGINEER
CHEMIST
CLINICAL PSYCHOLOGIST
DENTAL OFFICER
DENTIST
DIETITIAN
ENGINEER
LIBRARIAN
MEDICAL IMAGING TECHNOLOGIST
MEDICAL SCIENTIST
NUCLEAR MEDICINE TECHNOLOGIST
OCCUPATIONAL THERAPIST
PHARMACIST
PSYCHOLOGIST
PHYSICIST
PHYSIOTHERAPIST
PODIATRIST
RADIATION THERAPIST
RESEARCH OFFICER
SCIENTIFIC OFFICER
SOCIAL WORKER
SPEECH PATHOLOGIST
ULTRASONOGRAPHER
ACCOUNTANT
ACCOUNTING OFFICER
ACCOUNTING SERVICES OFFICER
ADMINISTRATIVE ASSISTANT (ADMINISTRATIVE/MANAGER)
ADMINISTRATIVE OFFICER
ADMINISTRATOR
ADMISSIONS OFFICER
ASSET MANAGEMENT OFFICER
AUDITOR
BEREAVEMENT OFFICER
BUDGETING OFFICER
CASEMIX OFFICER
CASHIER
CATERING MANAGER
CATERING OFFICER
CLAIMS MANAGEMENT OFFICER
CLEANING SERVICES OFFICER
CLEANING SERVICES SUPERVISOR
CLINIC LIAISON OFFICER
CO-ORDINATOR ALLIED HEALTH
CO-ORDINATOR ALLIED HEALTH EARLY DISCHARGE
CO-ORDINATOR PATIENT INFORMATION SYSTEMS
CO-ORDINATOR TRANSPORT
CO-ORDINATOR-HUMAN RESOURCES
CO-ORDINATOR-SUPPORT SERVICES
COMMUNITY HEALTH OFFICER
COMPUTER ASSISTANT
COMPUTER SERVICES OFFICER

COMPUTER SYSTEMS OFFICER
CONSULTANT (NOT MEDICAL)
CURATOR OF ART
DATA MANAGER
DIRECTOR (FINANCE & INFORMATION TECHNOLOGY)
DIRECTOR - OTHER THAN DIRECTOR OF NURSING OR MEDICINE
DIRECTOR OF ADMINISTRATION SERVICES
DIRECTOR OF INFORMATION SERVICES
ENGINEER
ESTABLISHMENTS OFFICER
EXECUTIVE ASSISTANT
EXECUTIVE OFFICER
FARM SUPERVISOR
FINANCE OFFICER
FIRE AND SAFETY OFFICER
GENERAL MANAGER
GENERAL SERVICES SUPERVISOR
GRADUATE ASSISTANT
GROUNDS SUPERVISOR
HEALTH EDUCATION OFFICER
HUMAN RESOURCES OFFICER
INDUSTRIAL OFFICER
INFORMATION PLANNING OFFICER
INFORMATION SERVICES OFFICER
LANGUAGE SERVICES OFFICER
LINEN SERVICES MANAGER
MANAGER (CSSD)
MANAGER ACCOUNTING SERVICES
MANAGER INFORMATION SYSTEMS
MANAGER ORDERLY & TRANSPORT SERVICES
MANAGER, OTHER THAN NURSE MANAGER
MANAGER-HUMAN RESOURCES
MATERIALS MANAGEMENT SYSTEMS CO-ORDINATOR
MEDICAL RECORDS OFFICER
MORBIDITY CODING OFFICER
MUSEUM CURATOR
OCCUPATIONAL HEALTH & SAFETY OFFICER
OCCUPATIONAL HEALTH OFFICER
PATIENTS' FEES OFFICER
PAYMASTER
PERSONNEL OFFICER
PHARMACY STORE OFFICER
PLANNING OFFICER
POLICY OFFICER/ANALYST
PRINCIPAL INDUSTRIAL OFFICER
PROJECT OFFICER
PROPERTY OFFICER
PUBLIC RELATIONS OFFICER
PURCHASING & STORES OFFICER
PURCHASING OFFICER
PURCHASING SUPPLY OFFICER
QUALITY ASSURANCE OFFICER
QUALITY IMPROVEMENT OFFICER
REHABILITATION OFFICER
RELIEVING OFFICER
RISK MANAGEMENT OFFICER
SALARIES OFFICER
SECURITY OFFICER
SENIOR ABORIGINAL HEALTH OFFICER
SERVICES OFFICER

STAFF CLERK
STORES OFFICER
SUPERINTENDENT
SUPPLY MANAGER
SUPPLY OFFICER
SYSTEMS ADMINISTRATOR
TRAINING OFFICER
TRANSPLANT CO-ORDINATOR
TRANSPORT LIAISON OFFICER
WARDEN
WAREHOUSE CONTROLLER
WORKERS COMPENSATION OFFICER
ACCOUNTS CLERK
ADMINISTRATIVE ASSISTANT
ASSISTANT CASHIER
ASSISTANT MEDICAL RECORDS OFFICER
ASSISTANT PATIENTS' FEES OFFICER
CLERK
COMMUNITY HEALTH CLERK
DATA PROCESSING OFFICER
ENGINEERING CLERK
ENQUIRIES CLERK
FILING CLERK
JUNIOR ADMINISTRATIVE ASSISTANT
KEY PUNCH OPERATOR
MAILROOM CLERK
MEDICAL RECORDS CLERK
MEDICAL SECRETARY
MEDICAL TYPIST
MORBIDITY CODING CLERK
P.A.T.S CLERK
PUBLIC RELATIONS ASSISTANT
PURCHASING CLERK
RECEIVAL LIAISON OFFICER
RECEPTIONIST
RESEARCH ASSISTANT
SALARIES CLERK
SECRETARY
SHORTHAND TYPIST
STORES ASSISTANT
SURGICAL APPLIANCE CLERK
SWITCHBOARD OPERATOR
TELEPHONIST
TRANSPORT CLERK
TYPIST
WORKERS COMPENSATION CLERK
ANAESTHETIC TECHNICIAN
ANIMAL HOUSE TECHNICIAN
ARCHITECTURAL DRAUGHTSPERSON
ART THERAPIST
ASSISTANT CATH LAB TECHNICIAN
ASSISTANT IN PHARMACY
AUDIO METRICIAN
AUDIO VISUAL ASSISTANT
BIO-ENGINEERING TECHNICIAN
CARDIAC TECHNICIAN
CARDIOLOGY TECHNICIAN
CATERING OFFICER
CATH LAB TECHNICIAN
CLINICAL PERFUSIONIST

CRAFT WORKER
CYTOTECHNICIAN
DARK ROOM ASSISTANT
DENTAL THERAPIST
DRAUGHTSPERSON
E.C.G RECORDIST
EEG/EMG RECORDIST
FILM PROCESSOR
HANDICRAFT INSTRUCTOR
HANDICRAFT WORKER
LABORATORY TECHNICIAN
LIBRARY ASSISTANT
LIBRARY TECHNICIAN
MAINTENANCE ENGINEER
MAXILLO FACIAL TECHNICIAN
MEDICAL ARTIST
MEDICAL PHOTOGRAPHER
MORTUARY TECHNICIAN
NEUROPHYSIOLOGY TECHNICIAN
OCCUPATIONAL THERAPY ASSISTANT
ORTHOPAEDIC APPLIANCE ASSISTANT
ORTHOPAEDIC APPLIANCE TECHNICIAN
ORTHOPAEDIC FOOTWEAR MAKER
ORTHOPAEDIC TECHNICIAN
ORTHOPTIST
ORTHOTIC TECHNICIAN
ORTHOTIST
OUTREACH WORKER
PHARMACY ASSISTANT
PHARMACY INTERN/TRAINEE
PHLEBOTOMIST
PHYSIOTHERAPIST ASSISTANT
PRODUCTION ASSISTANT
REHABILITATION TECHNOLOGIST
RESEARCH OFFICER
RESPIRATORY TECHNICIAN
SECURITY OFFICER
SHIFT ENGINEER
SPECIMEN CONTROL OFFICER
TECHNICAL ASSISTANT
TECHNICAL OFFICER
TECHNICIAN
TECHNICIAN (AIR SYSTEMS)
TECHNICIAN (BIOENGINEERING)
TECHNICIAN (CONDITION MONITORING)
TECHNICIAN (DIALYSIS)
TECHNICIAN (ELECTRICAL SYSTEMS)
TECHNICIAN (ELECTRONICS)
TECHNICIAN (INSTRUMENTS)
TECHNICIAN (MECHANICAL)
TECHNICIAN (PHYSICS)
TECHNICIAN (RADIOISOTOPES)
THEATRE TECHNICIAN
THERAPY ASSISTANT
TRADE INSTRUCTOR
UROLOGY ASSISTANT
UROLOGY TECHNICIAN
WELFARE OFFICER
X-RAY ASSISTANT
CATERING SERVICES SUPERVISOR

CLEANING SERVICES SUPERVISOR
CLERK IN CHARGE
CSSD SUPERVISOR
FOOD SERVICES SUPERVISOR
OFFICE SUPERVISOR
SUPERVISOR (ADMINISTRATION)
SUPERVISOR ADMISSION CENTRE
SUPERVISOR CODING
SUPERVISOR FILING SYSTEMS
SUPERVISOR PREPARATION
SUPERVISOR-CARDIAC CATHETER LABORATORY

ANY OF THE ABOVE CALLINGS MAY BE READ AS APPROPRIATE IN CONJUNCTION WITH THE FOLLOWING PREFIXES * SUFFIXES.

ASSISTANT
CHIEF
CO-ORDINATOR
DEPUTY
DIRECTOR
IN-CHARGE
MANAGER
OFFICER
REGIONAL
SENIOR
SUPERINTENDENT
SUPERVISOR
TRAINEE

*NOTE: In some cases, the use of the prefix may cause some callings/classes of employees to be considered under more than one heading."

2002 WAIRC 06943

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 MIN FOR HEALTH AND OTHERS, RESPONDENTS
CORAM	COMMISSIONER P E SCOTT
	PUBLIC SERVICE ARBITRATOR
DATE OF ORDER	WEDNESDAY, 6 NOVEMBER 2002
FILE NO.	P 25 OF 2002
CITATION NO.	2002 WAIRC 06943

Result Award varied

Order

HAVING heard Mr G Bucknall on behalf of the applicant and Mr M Taylor 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 and from the 1st day of July 2002.

[L.S.]

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

SCHEDULE

1. Clause 15. – Meal Money: Delete this clause and insert the following in lieu thereof—

A worker required to work overtime before or after his ordinary working hours on any day shall, when such additional duty necessitates taking a meal away from his usual place of residence, be supplied by his employer with any meal required or be reimbursed for each meal purchased at the rate of $7.75 for breakfast, $9.55 for the midday meal, and $11.50 for the evening meal: Provided that the overtime worked before or after the meal break totals not less than two hours. Such reimbursement shall be in addition to any payment for overtime to which he is entitled.

2. Clause 25. – Removal Allowance: Delete this clause and insert the following in lieu thereof—

(1) (a) The provisions of this clause shall apply to an employee who terminates employment with one employer bound by this award and commences with another employer bound by this award if that employee complies with the following:-

(i) The classification of the new position is higher than the classification of the employee's former position, or, the classification of the new position is the same or lower than the classification of the employee's former position and the employee is changing employment on account of illness over which the employee has no control.

(ii) The employee commences with the new employer within one working week of the expiration of any period for which payment in lieu of annual leave or holidays has been made by the employer from whom the employee resigned, or, if no such payment has been made, within one working week of the day on which resignation became effective.

(b) The employee shall be reimbursed by the new employer:-

(i) The actual reasonable cost of conveyance for the employee and dependants.

(ii) The actual cost (including insurance) of the conveyance of an employee's household furniture, effects and appliances up to a maximum volume of 35 cubic metres, provided that a larger volume may be approved by the employer in special cases.

(iii) An allowance of $519.00 for accelerated depreciation and extra wear and tear on furniture, effects and appliances for each occasion that an employee is required to transport furniture, effects and appliances.

Provided that the employer is satisfied that the value of household furniture, effects and appliances moved by the employee is at least $3,106.00.

(2) An employee who terminates employment solely for the employee's convenience or is terminated on account of misconduct must bear the whole cost of removal unless otherwise determined by the old employer prior to removal.

(3) An employee shall be reimbursed the full freight charges necessarily incurred in respect of the removal of his motor vehicle. If authorised by the new employer to travel to a new locality in his own motor vehicle, reimbursement shall be as follows—

(a) Where the worker will be required by the new employer to maintain a motor vehicle as a term of employment, reimbursement for the distance necessarily travelled shall be on the basis of the appropriate rate prescribed by subclause (1) of Clause 20. - Motor Vehicle Allowance of this award.

(b) Where the employee will not be required by the new employer to maintain a motor vehicle as a term of employment, reimbursement for the distance necessarily travelled shall be on the basis of one-half of the appropriate rate prescribed by subclause (3) of Clause 20. - Motor Vehicle Allowance of this award.

(4) Where practicable furniture, effects and appliances, shall be removed by State-owned transport. Where it is impracticable to use State-owned transport the employee shall, before removal is undertaken, obtain quotes from at least two carriers which shall be submitted to the new employer, who may authorise the acceptance of the more suitable—

Provided that the maximum amount prescribed by subclause (1)(b)(ii) of this clause is not exceeded without the written approval of the new employer having first been obtained.

(5) The new employer may, in lieu of conveyance, authorise payment of an amount not exceeding the maximum prescribed by subclause (1)(b)(ii) of this clause to compensate for loss in any case where an employee with prior approval of the employer, disposes of his furniture, effects and appliances instead of removing them to his new locality—

Provided that such payment shall not exceed the sum which would have been paid if such furniture, effects and appliances had been removed by the cheapest method of transport available.

(6) Where an employee occupies hospital accommodation where furniture is provided and as a consequence is obliged to store furniture, the employee shall be reimbursed the actual cost of such storage up to a maximum allowance of $964.00 per annum. Actual cost is deemed to include the premium for adequate insurance coverage of the value of the furniture stored. An allowance under this subclause shall not be paid for a period in excess of four years without the approval of the employer.

(7) In the case of an employee without dependants an application for any reimbursement under this clause shall be considered by the employer.

(8) Newly appointed employees shall be entitled to receive the benefits of this clause if they are required by the employer to participate in any training course prior to being posted to their respective positions. This entitlement shall only be available to employees who have completed their training and who incur costs when moving to their first posting.

(9) Receipts must be produced for all sums claimed.

(10) (a) The application of this clause shall so far as the Perth Dental Hospital is concerned be made as if the various clinics of the hospital are separate employers and shall include those employees who have been transferred from one clinic to another.

(b) This clause shall not apply to employees engaged by the Royal Perth Hospital, Sir Charles Gairdner Hospital, Fremantle Hospital, Princess Margaret Hospital for Children and King Edward Memorial Hospital for Women.

(c) This clause shall not apply to employees who resign from one employer in the metropolitan area and commence with another employer in the metropolitan area.

(11) The allowances prescribed in this clause shall apply from 1 July 2000 and shall be varied in accordance with any movement in the equivalent allowances in the Government Officers Salaries, Allowances and Conditions Award 1989.

3. Clause 30. – District Allowance: Delete subclause (7) of this clause and insert the following in lieu thereof—

(7) DISTRICT ALLOWANCES

(a) Officers without dependants [Subclause (2)(a)]

COLUMN I DISTRICT NO.	COLUMN II STANDARD RATE $ p.a.	COLUMN III EXCEPTIONS TO STANDARD RATE TOWN OR PLACE	COLUMN IV $ p.a
6	3,304	Nil	Nil
5	2,704	Fitzroy Crossing	3,641
		Halls Creek	
		Turner River Camp	
		Nullagine	
		Liveringa (Camballin)	3,383
		Marble Bar	
		Wittenoom	
		Karratha	3,184
		Port Hedland	2,962
4	1,362	Warburton Mission	3,660
		Carnarvon	1,282
3	858	Meekatharra	1,362
		Mount Magnet	
		Wiluna	
		Laverton	
		Leonora	
		Cue	
2	616	Kalgoorlie	206
		Boulder	
		Ravensthorpe	813
		Norseman	
		Salmon Gums	
		Marvel Loch	
		Esperance	
1	Nil	Nil	Nil

(b) Officers with dependants [Subclause (2)(b)]

Double the appropriate rate as prescribed in (a) above for officers without dependants.

The allowances prescribed in this subclause shall operate from the beginning of the first pay period commencing on or after July 1, 2002.

2002 WAIRC 06809

PUBLIC SERVICE ALLOWANCES (MORTUARY STAFF) AWARD 1985

NO. 3 OF 1985

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED, APPLICANT
	v.
	WESTERN AUSTRALIAN CENTRE FOR PATHOLOGY AND MEDICAL RESEARCH, RESPONDENT
CORAM	COMMISSIONER P E SCOTT
DATE OF ORDER	WEDNESDAY, 23 OCTOBER 2002
FILE NO.	P 39 OF 2002
CITATION NO.	2002 WAIRC 06809

Result Award varied

Order

HAVING heard Mr M Sims on behalf of the applicant and Mr J Lange 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—

1. THAT the Public Service Allowances (Mortuary Staff) Award 1985 (No. 3 of 1985) be varied in accordance with the following Schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after the 13th day of September 2002.

2. THAT the application otherwise be and is hereby dismissed.

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

[L.S.]

SCHEDULE

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

Officers covered by this Award are hereby granted an allowance of $1,513 per annum, payable by fortnightly instalments.

This allowance is compensation for the following matters—

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

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

AWARDS/AGREEMENTS—Variation of—

2002 WAIRC 06744

ACTIV FOUNDATION (SALARIED OFFICERS) AWARD, NO. 13 OF 1977

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	HOSPITAL SALARIED OFFICERS ASSOCIATION OF WESTERN AUSTRALIA (UNION OF WORKERS), APPLICANT
	v.
	THE BOARD OF MANAGEMENT, ACTIV FOUNDATION INCORPORATED, RESPONDENT
CORAM	COMMISSIONER P E SCOTT
DATE OF ORDER	MONDAY, 14 OCTOBER 2002
FILE NO.	APPLICATION 1242 OF 2002
CITATION NO.	2002 WAIRC 06744

Result Award varied

Order

HAVING heard Ms C Thomas on behalf of the applicant and Mr M O'Connor on behalf of the respondent, and by consent, the Commission, pursuant to the powers conferred under the Industrial Relations Act, 1979, hereby orders—

THAT the Activ Foundation (Salaried Officers) Award, No. 13 of 1977 be varied in accordance with the following Schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after the 29th day of August 2002

(Sgd.) P. E. SCOTT,
Commissioner.

[L.S.]

SCHEDULE

1. Schedule B – Minimum Salaries: Delete clause (2) of this schedule 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

LEVELS	CURRENT	ASNA	NEW
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
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

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.

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 06946

ACTIV FOUNDATION (SALARIED OFFICERS) AWARD

No. 13 of 1977

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES HOSPITAL SALARIED OFFICERS ASSOCIATION OF WESTERN AUSTRALIA (UNION OF WORKERS), APPLICANT

v.

THE BOARD OF MANAGEMENT, ACTIV FOUNDATION INCORPORATED, RESPONDENT

CORAM COMMISSIONER P E SCOTT

DATE OF ORDER WEDNESDAY, 6 NOVEMBER 2002

FILE NO. APPLICATION 1102 OF 2002
CITATION NO. 2002 WAIRC 06946

Result Award varied

Order

HAVING heard Mr G Bucknall on behalf of the applicant and Mr M O'Connor on behalf of the respondent, and by consent, the Commission, pursuant to the powers conferred under the Industrial Relations Act, 1979, hereby orders—

THAT the ACTIV Foundation (Salaried Officers) Award, No. 13 of 1977 be varied in accordance with the following Schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after the 4th day of November 2002.

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

SCHEDULE

1. Clause 15. – Meal Money: Delete this clause and insert the following in lieu thereof—

An employee required to work overtime before or after his ordinary working hours on any day, shall, when such additional duty necessitates taking a meal away from his usual place of residence, be supplied by his employer with any meal required or be reimbursed for each meal purchased at the rate of $7.75 for breakfast, $9.55 for the midday meal, and $11.50 for the evening meal: Provided that the overtime worked before or after the meal break totals not less than two hours. Such reimbursement shall be in addition to any payment for overtime to which he is entitled.

2. Clause 27. – Removal Allowance: Delete this clause and insert the following in lieu thereof—

(1) When a married employee is transferred in the employer's interest or in the ordinary course of promotion or transfer, or on account of illness due to causes over which the employee has no control, he shall be reimbursed—

(a) The actual reasonable cost of conveyance of himself and his wife and children under 16 years of age or other children wholly dependent upon him.

(b) The actual reasonable cost up to an amount of $1100.00 for conveyance of his furniture, including insurance of such furniture whilst in transit unless a higher sum is approved by the employer in any special case: Provided that only necessary household furniture, effects and appliances shall be taken into account.

In the event of a dispute, the matter may be referred to the Board of Reference for determination.

(c) An allowance of $519.00 for accelerated depreciation and extra wear and tear on furniture, effects and appliances: Provided that the employer is satisfied that the value of household furniture, effects and appliances moved by the employee is at least $3,106.00.

In the case of a single employee, an application for any reimbursement under this clause shall be considered by the employer.

(2) An employee who is transferred solely at his own request or on account of misconduct must bear the whole cost of his removal unless otherwise determined by the employer prior to removal.

(3) An employee shall be reimbursed the full freight charges necessarily incurred in respect of the removal of his motor vehicle. If authorised by the employer to travel to a new locality in his own motor vehicle, reimbursement shall be as follows—

(a) Where the employee will be required to maintain a motor vehicle for use on official business at his new headquarters, reimbursement for the distance necessarily travelled shall be on the basis of the appropriate rate prescribed by clause 21 - Motor Vehicle Allowance of this award.

(b) Where the employee will not be required to maintain a motor vehicle for use on official business at his new headquarters, reimbursement for the distance necessarily travelled shall be on the basis of one-half of the appropriate rate prescribed by clause 21 - Motor Vehicle Allowance of this award.

(4) Where practicable furniture, effects and appliances, shall be removed by State-owned transport. Where it is impracticable to use State-owned transport the employee shall, before removal is undertaken, obtain quotes from at least two carriers which shall be submitted to the employer, who may authorise the acceptance of the more suitable: Provided that the maximum amount prescribed by subclause (1)(b) of this clause is not exceeded without written the approval of the employer having first been obtained.

(5) The employer may, in lieu of conveyance, authorise payment of an amount not exceeding the maximum prescribed by subclause (1)(b) of this clause to compensate for loss in any case where an employee with prior approval of the employer disposes of his furniture, effects and appliances instead of removing them to his new headquarters: Provided that such payment shall not exceed the sum which would have been paid if such furniture, effects and appliances had been removed by the cheapest method of transport available.

(6) Where an employee is transferred to the employer's accommodation where furniture is provided and as a consequence is obliged to store his own furniture, he shall be reimbursed the actual cost of storage up to a maximum allowance of $964.00 per annum. An allowance under this subclause shall not be paid for a period in excess of one year without the approval of the employer.

Provided that nothing in this subclause shall preclude the employer from reimbursing an employee the actual cost of storage where it exceeds the prescribed maximum allowance, if the employer considers that cost has been necessarily and reasonably incurred in the circumstances of a particular case.

(7) Newly appointed employees shall be entitled to receive the benefits of this clause if they are required by the employer to participate in any training course prior to being posted to their respective positions. This entitlement shall only be available to employees who have completed their training and who incur costs when moving to their first posting.

(8) Receipts must be produced for all such sums claimed.

3. Clause 32. – District Allowance: Delete subclause (7) of this clause and insert the following in lieu thereof—

(7) District Allowances

(a) Officers without dependants (subclause (2)(a))—

COLUMN I DISTRICT NO.	COLUMN II STANDARD RATE $ p.a.	COLUMN III EXCEPTIONS TO STANDARD RATE TOWN OR PLACE	COLUMN IV RATE $ p.a.
6	3,203	Nil	Nil
5	2,704	Fitzroy Crossing	3,641
		Halls Creek	
		Turner River Camp	
		Nullagine	
		Liveringa (Camballin)	3,383
		Marble Bar	
		Wittenoom	
		Karratha	3,184
		Port Hedland	2,962
4	1,362	Warburton Mission	3,660
		Carnarvon	1,282
3	858	Meekatharra	1,362
		Mount Magnet	
		Wiluna	
		Laverton	
		Leonora	
		Cue	
2	616	Kalgoorlie	206
		Boulder	
		Ravensthorpe	813
		Norseman	
		Salmon Gums	
		Marvel Loch	
		Esperance	
1	Nil	Nil	Nil

(b) Officers with dependants (Subclause (2)(b))

Double the appropriate rate as prescribed in (a) above for officers without dependants.

2002 WAIRC 06960

AIR CONDITIONING AND REFRIGERATION INDUSTRY (CONSTRUCTION AND SERVICING) AWARD

No. 10 of 1979

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE AUTOMOTIVE, FOOD, METALS, ENGINEERING, PRINTING AND KINDRED INDUSTRIES UNION OF WORKERS - WESTERN AUSTRALIAN BRANCH AND ANOTHER, APPLICANTS
	v.
	DIRECT ENGINEERING SERVICES PTY LTD AND OTHERS, RESPONDENTS
CORAM	COMMISSIONER J F GREGOR
DATE	FRIDAY, 8 NOVEMBER 2002
FILE NO.	APPLICATION 1235 OF 2002
CITATION NO.	2002 WAIRC 06960

Result	Award varied
Representation	
Applicant	Mr C. Young Appeared On Behalf Of The Applicant
Respondent	Mr P. Moss Appeared On Behalf Of The Respondent

Reasons for Decision

1 On 9th July 2002 The Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers - Western Australian Branch (the Union) applied to the Commission to vary the Air Conditioning and Refrigeration Industry

(Construction and Servicing) Award No. 10 of 1979. As is required by the Industrial Relations Commission Regulations 1985, Schedule B set out the form of the variation.

2 Schedule B embodies the executive form of the Order sought and in paragraph 1 describes the amendments to be made to Clause 2. – Arrangement. Paragraph 2 describes the amendments to be made to Clause 2A and so on through to paragraph 7 which shows changes that the parties wish to effect to Clause 29. – Wages.

3 Procedural requirements having been met and at the request of the Union the Commission listed the matter for hearing on 14th October 2002 at which time Mr C. Young appeared for the Union and Mr P. Moss appeared for Direct Engineering Services Pty Ltd and Others, the Respondents to the application.

4 The transcript of proceedings records the consent of the parties to an amended schedule which is in exactly the same form as the Schedule B attached to the original application. It can be seen from the transcript that the Commission indicated that it had not prepared Minutes of Proposed Order for distribution and that Mr Young told the Commission an amended schedule would be filed.

5 In due course such a schedule was filed but it was in a different form to the schedule attached to both the original application and the amended schedule put before the Commission on the date of hearing.

6 The difference in the schedule is that it contains what appears to be citations, described as a 'preamble', said to be for the purpose of the recording the underpinning reasons for the amendments to the award.

7 The Commission having determined that such 'preamble' should not, because it would have no legal effect, be part of a an executive order of the Commission produced Minutes of Proposed Order in the form of the amended schedule produced to the Commission at the date of hearing and distributed those Minutes of Proposed Order to the parties.

8 The Respondent agreed to the Commission's Minutes of Proposed Order but the Union, through its advocate Mr Young, did not and asked that there be a further Speaking to the Minutes. Mr Young was requested to submit grounds why a further Speaking to the Minutes be held and he did so by electronic mail on 30th October 2002.

9 The Commission having considered those submissions decided that it did not need to hear from the parties in person and could decide the matter on the written submissions.

10 It seems the reason to include in the 'preamble' Order is that it provides a permanent record for the parties to, so it is said, enable certainty in the method of varying the award and the periods for the various variations. It is said the approach would create certainty and predictability for the parties to awards of the Commission.

11 That may well be so but the matters which form part of the 'preamble' in my view cannot form part of the executive order of the Commission.

12 If the parties wish to file a note of the reasons for which they have given their consent to the amendment they are perfectly free to do so and the Commission will keep that as part of its record.

13 The purpose of the executive part of the Order is to ensure there be a clear instruction of the amendments ordered to an award by the Commission in the exercise of its powers. It seems to me that the so called 'preamble' would be unenforceable as an amendment to the award. As a matter of fact, the 'preamble' does not and cannot amend the award, only changes to the existing clauses to awards can do so. Alternatively if I am wrong about that and the Award can be so amended it will soon be superfluous verbiage which has the potential to clutter the document decreasing its practical utility.

14 In short the intention of the Union to record the reasons for its consent in an Order in the way suggested, is misconceived. If such reasons need to be recorded that can be done by filing a note with the Commission, the parties exchanging of documents, or by recording the relevant information on transcript during the proceedings.

15 Finally I note the final form of Orders is a matter for the Commission. The Orders are a result of the exercise by the Commission of the powers vested in it by the Industrial Relations Act, 1979 to make and amend Awards which, with respect, is the province of the Commission, not the parties. It is a mistake for any party to believe that it can direct the Commission as to form that Orders to amend the Awards should take.

16 An Order amending the Award to reflect the consent of the parties will now issue.

2002 WAIRC 06959

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE AUTOMOTIVE, FOOD, METALS, ENGINEERING, PRINTING AND KINDRED INDUSTRIES UNION OF WORKERS - WESTERN AUSTRALIAN BRANCH AND ANOTHER, APPLICANTS
	v.
	DIRECT ENGINEERING SERVICES PTY LTD AND OTHERS, RESPONDENTS
CORAM	COMMISSIONER J F GREGOR
DATE	FRIDAY, 8 NOVEMBER 2002
FILE NO.	APPLICATION 1235 OF 2002
CITATION NO.	2002 WAIRC 06959

Result Award varied

Order

HAVING heard Mr C. Young on behalf of the Applicants and Mr P. Moss for the Respondents, and by consent, the Commission pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders:

THAT the Air Conditioning and Refrigeration Industry (Construction and Servicing) Award No. 10 of 1979 be varied in accordance with the following Schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after 1 November 2002.

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

SCHEDULE

1. Clause 2. – Arrangement: Delete the number and title "2A. – State Wage Case Principles – June 1991" from this clause.

2. Clause 2A. – State Wage Case Principles – June 1991: Delete the title and clause.

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

(f) Subject to the provisions of paragraph (g) of this subclause, an employee required to work overtime for more than two hours shall be supplied with a meal by the employer or be paid $8.62 for a meal and if, owing to the amount of overtime worked, a second or subsequent meal is required, the employee shall be supplied with each such meal by the employer or be paid $5.83 for each meal so required.

4. Clause 17. – Car Allowance: Delete subclause (3) of this clause and insert in lieu the following—

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

RATES OF HIRE FOR USE OF EMPLOYEE'S
OWN VEHICLE ON EMPLOYER'S BUSINESS
MOTOR CAR

Area Details	Engine Displacement (in cubic centimetres)		
	Rate per kilometre (Cents)		
Distance Travelled Each Year on Employer's Business	Over 2600cc	1600cc - 2600cc	1600cc and Under
Metropolitan Area	64.1	57.4	50.0
South West Land Division	65.6	58.9	51.2
North of 23.5o South Latitude	72.1	64.9	56.4
Rest of the State	67.8	60.8	52.8
Motor Cycle (in all areas)	22.1¢ per kilometre		

5. Clause 18. – Allowance for Travelling and Employment in Construction Work: Delete paragraphs (a), (b) and (c) of subclause (2) of this clause and insert in lieu the following—

(a) On places within a radius of 50 kilometres from the General Post Office, Perth - $13.67 per day.

(b) For each additional kilometre to a radius of 60 kilometres from the General Post Office, Perth - 72 cents per kilometre.

(c) Subject to the provisions of paragraph (d) hereof, work performed at places beyond a 60 kilometre radius from the General Post Office, Perth shall be deemed to be distant work unless the employer and the employees, with the consent of the Union, agree in any particular case that the travelling allowance for such work shall be paid under this clause, in which case an additional allowance of 72 cents per kilometre shall be paid for each kilometre in excess of the 60 kilometre radius.

6. Clause 19. – Distant Work: Delete subclauses (6) and (7) of this clause and insert in lieu the following—

(6) An employee, to whom the provisions of subclause (1) of this clause apply, shall be paid an allowance of $27.83 for any week-end the employee returns home from the job, but only if—

(a) the employee advises the employer or the employer's agent of such intention not later than the Tuesday immediately preceding the week-end in which the employee so returns;

(b) the employee is not required for work during that week-end;

(c) the employee returns to the job on the first working day following the week-end; and

(d) the employer does not provide, or offer to provide, suitable transport.

(7) Where an employee, supplied with board and lodging by the employer, is required to live more than 800 metres from the job, the employee shall be provided with suitable transport to and from that job or be paid an allowance of $12.30 per day, provided that where the time actually spent in travelling either to or from the job exceeds 20 minutes, that excess time shall be paid for at ordinary rates, whether or not suitable transport is supplied by the employer.

7. Clause 29. – Wages:

A. Delete subclauses (2) to (8) inclusive of this clause and insert in lieu the following—

(2) (a)

Classification	Base Rate $	Special Payment $	Arbitrated Safety Net Adjustments $	Total Rate Per Week $
Instrument Fitter	380.10	80.00	108.00	568.10
Welder - Special Class	371.40	80.00	108.00	559.40
Welder	362.80	80.00	108.00	550.80
Tradesperson	362.80	80.00	108.00	550.80
Refrigeration Fitter	362.80	80.00	108.00	550.80
Boilermaker -Structural Steel Tradesperson	362.80	80.00	108.00	550.80
Sheetmetal Employee -				
First Class	362.80	80.00	108.00	550.80
Second Class - 1st six months in industry	310.20	64.30	106.00	480.50
Thereafter	327.20	66.80	106.00	500.00

Classification	Base Rate $	Special Payment $	Arbitrated Safety Net Adjustments $	Total Rate Per Week $
Certificated Rigger or Scaffolder	345.70	68.90	106.00	520.60
Rigger or Scaffolder -Other	334.70	67.60	106.00	508.30
Tool and Material Storeperson	322.90	65.80	106.00	494.70
Tradesperson's Assistant	310.20	64.30	106.00	480.50
Tradesperson's Assistant who from time to time uses a grinding machine	311.70	65.80	106.00	483.50
Lagger -				
1st six months' experience	310.20	63.40	106.00	479.60
2nd & 3rd six months' experience	311.70	65.40	106.00	483.10
4th & 5th six months' experience	315.90	65.60	106.00	487.50
Thereafter	317.40	66.60	106.00	490.00

(b) A Certified Rigger, other than a Leading Hand, who in compliance with the provisions of the regulations made pursuant to the Construction Safety Act 1972, is responsible for the supervision of other employees shall be deemed to be a Leading Hand and be paid the additional rate prescribed for a leading hand placed in charge of not less than three and not more than 10 other employees.

(3) Apprentices—

(a) Wages per week expressed as a percentage of the "Tradesperson's " rate—

Five Year Term -	%
First Year	40
Second Year	48
Third Year	55
Fourth Year	75
Fifth Year	88
Four Year Term -	%
First Year	42
Second Year	55
Third Year	75
Fourth Year	88
Three and a Half Year Term -	%
First six months	42
Next Year	55
Following Year	75
Final Year	88
Three Year Term -	%
First Year	55
Second Year	75
Third Year	88

(b) For the purpose of paragraph (a) of this subclause, "Tradesperson's rate" means the base rate and the special payment prescribed in subclause (2) of this clause for the classification "Tradesperson".

(4) (a) In addition to the appropriate rates of pay prescribed in this clause, an employee shall be paid—

(i) $36.60 per week if engaged on the construction of a large industrial undertaking or any large civil engineering project.

(ii) $33.00 per week if engaged on a multi-storey building, but only until the exterior walls have been erected and the windows completed and a lift made available to carry the employee between the ground floor and the floor upon which he/she is required to work. A multi-storey building is a building which, when completed, will consist of at least five storeys.

(iii) $19.40 per week if engaged otherwise on construction work falling within the definition of construction work in Clause 5. - Definitions of this award.

(b) Any dispute as to which of the aforesaid allowances apply to particular work shall be determined by the Board of Reference.

(5) Leading Hands—

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

		$
(a)	If placed in charge of not less than three and not more than 10 other employees	20.70
(b)	If placed in charge of more than 10 and not more than 20other employees	31.60
(c)	If placed in charge of more than 20 other employees	40.80

(6) Casual Employees—

A casual employee shall be paid 20 per cent of the ordinary rate in addition to the ordinary wage for the calling in which the employee is employed.

(7) The classification "Sheetmetal Worker - Second Class - First Six Months' Experience in Industry" shall only be applied to an employee who commences employment in the industry after July 25, 1979.

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

(i) $11.44 per week to such tradesperson or second-class sheetmetal employee; or

(ii) in the case of an apprentice a percentage of $11.44 being the percentage which appears against the year of apprenticeship in subclause (3) hereof,

for the purpose of such tradesperson, second-class sheetmetal employee or apprentice supplying and maintaining tools ordinarily required in the performance of work as a tradesperson, second-class sheetmetal employee or as an apprentice.

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

(c) An employer shall provide for the use of tradesperson, second-class sheetmetal employee and apprentice all necessary power tools, special purpose tools and precision measuring instruments.

(d) A tradesperson, second-class sheetmetal employee or an apprentice shall replace or pay for any tools supplied by the employer, if lost through the employee's negligence.

2002 WAIRC 06769

ARTWORKERS AWARD.

No. A30 of 1987.

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS, APPLICANT
	v.
	TOWN OF NARROGIN, AVON VALLEY ARTS SOCIETY INC, RESPONDENTS
CORAM	COMMISSIONER J F GREGOR
DATE	THURSDAY, 17 OCTOBER 2002
FILE NO.	APPLICATION 1200 OF 2002
CITATION NO.	2002 WAIRC 06769

Result Award varied

Order

HAVING heard Mr T. Kucera (of Counsel) on behalf of the Applicant and there being no appearance for the Respondents, the Commission pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders:

THAT the Artworkers Award be varied in accordance with the following Schedule and that such variation shall have effect from the first pay period on or after 14 October 2002.

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

SCHEDULE

1. Clause 6. – Wages: Delete paragraph (c) of subclause (3) of this clause and insert in lieu the following—

(c) Construction Allowance 17.39

An employee shall not be entitled to this construction allowance except when required to work "on site" or any work in connection with the erection of a building or to carry out work which the employer and the union agree is construction work or in default of agreement, that is so declared by a Board of Reference.

2. Clause 7. – Special Rates and Provisions: Delete this clause and insert in lieu the following—

(1) Confined Space

An employee required to work in a confined space, being a place the dimensions or nature of which necessitates working in a cramped position or without sufficient ventilation, shall be paid 52 cents per hour or part thereof in addition to the rates otherwise prescribed in this award.

(2) Toxic Substances

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

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

(c) An employee using toxic substances or materials of a like nature shall be paid 52 cents per hour extra. Employees working in close proximity to employees so engaged shall be paid 40 cents per hour extra.

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

(3) Wet Work

An employee required to work in a place where water is continually dripping on him/her so that his/her clothing and boots become wet or where there is water underfoot shall be paid 42 cents per hour or part thereof in addition to the rates otherwise prescribed in this award.

(4) Dirty Work

An employee engaged on dirty work shall be paid 42 cents per hour or part thereof in addition to the rates otherwise prescribed in this award.

(5) Spray Application - Painters

A painter engaged on all spray applications carried out in other than a properly constructed booth, approved by the Department of Labour and Industry, shall be paid 42 cents per hour or part thereof in addition to the rates otherwise prescribed in this award.

(6) Height Money

An employee required to work on a chimney stack, spire, tower, radio or television mast or tower, air shaft, cooling tower, water tower or silo, where the construction exceeds fifteen metres in height shall be paid for all work above fifteen metres, 42 cents per hour or part thereof, with an additional 42 cents per hour or part thereof for work above each further fifteen metres in addition to the rates otherwise prescribed in this award.

(7) Swing Scaffold

(a) An employee employed—

(i) on any type of swing scaffold or any scaffold suspended by rope or cable, or bosun's chair or cantilever scaffold; or

(ii) on a suspended scaffold requiring the use of steel or iron hooks or angle irons at a height twenty feet or more above the nearest horizontal plane,

shall be paid $3.02 for the first four hours or part thereof and 62 cents for each hour thereafter on any day in addition to the rates otherwise prescribed in this award.

(b) A solid plasterer when working off a swing scaffold shall be paid an additional 9 cents per hour.

(8) Site Allowances

Where an employee is engaged on a construction site where the parties have agreed to a site allowance to compensate for all special factors and/or disabilities on a project, he/she shall be paid such site allowance. Provided that where it has been agreed that such site allowance shall be paid in lieu of any of the special rates above, such rates shall not be paid.

(9) Travel Allowance

A fares allowance of $13.30 per day shall be paid to employees required to work away from their usual place of employment.

2002 WAIRC 06871

BUILDING TRADES AWARD 1968

No. 31 of 1966

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS, APPLICANT
	v.
	CRYSTAL SOFTDRINKS, WALSH'S GLASS, COPRAL ALUMINIUM, RESPONDENTS
CORAM	COMMISSIONER J F GREGOR
DATE	FRIDAY, 25 OCTOBER 2002
FILE NO.	APPLICATION 1204 OF 2002
CITATION NO.	2002 WAIRC 06871

Result Award varied

Order

HAVING heard Mr T. Kucera (of Counsel) on behalf of the Applicant and Mr K.J. Dwyer for the Chamber of Commerce & Industry WA and Mr K. Richardson for the Master Builders' Association of Western Australia (Union of Employers), and by consent, the Commission pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders:

THAT the Building Trades Award 1968 be varied in accordance with the following Schedule and that such variation shall have effect from the first pay period on or after 14 October 2002.

(Sgd.) J. F. GREGOR,
Commissioner.

[L.S.]

SCHEDULE

1. Clause 10. – Wages: Delete subclause (5) of this clause and insert in lieu the following—

(5) Construction Allowance: (per week) $19.68. An employee shall not be entitled to this construction allowance except when required to work "on site" on any work in connection with the erection or demolition of a building or to carry out work which the employer and the union agree is construction work or in default of agreement, that is so declared by the Board of Reference.

2. Clause 12. – Leading Hands: Delete subclause (1) of this clause and insert in lieu the following—

(1) An employee specifically appointed to be a leading hand who is placed in charge of—

		Per Week $
(a)	not more than one employee, other than an apprentice, shall be paid	12.63
(b)	more than one and not more than five other employees shall be paid	28.18
(c)	more than five and not more than ten other employees shall be paid	35.76
(d)	more than ten other employees shall be paid	47.62

In each case, in addition to the rate prescribed for the highest classification or employee supervised, or his/her own rate, whichever is the highest.

3. Clause 13. – Special Rates and Provisions: Delete this clause and insert in lieu the following—

(1) General conditions under which special rate is payable—

(a) The special rates prescribed in this clause shall be paid irrespective of the times at which work is performed and shall not be subject to any premium or penalty condition.

(b) Where more than one of the following rates provide a payment for disabilities of substantially the same nature then only the highest of such rates shall be payable.

(2) Insulation: An employee handling charcoal, pumice, granulated cork, silicate of cotton, insulwool, slag wool or other recognised insulating material of a like nature or working in the immediate vicinity so as to be affected by the use thereof shall be paid $0.56 per hour or part thereof in addition to the rates otherwise prescribed in this award.

(3) Hot Work—

(a) An employee required to work in a place where the temperature has been raised by artificial means to between 46 degrees and 54 degrees Celsius shall be paid $0.44 per hour or part thereof in addition to the rates otherwise prescribed in this Award or in excess of 54 degrees Celsius shall be paid $0.56 per hour or part thereof in addition to the said rates.

(b) Where such work continues for more than two hours the employee shall be entitled to a rest period of 20 minutes after every two hours work without loss of pay, not including the special rate prescribed in paragraph (a) hereof.

(4) Cold Work—

(a) An employee required to work in a place where the temperature is lowered by artificial means to less than zero degrees Celsius shall be paid $0.45 per hour or part thereof in addition to the rates otherwise prescribed in this award.

(b) Where such work continues for more than two hours the employee shall be entitled to a rest period of 20 minutes after every two hours' work without loss of pay, not including the special rate prescribed in paragraph (a) hereof.

(5) Confined Space: An employee required to work in a confined space, being a place the dimensions or nature of which necessitates working in a cramped position or without sufficient ventilation shall be paid $0.56 per hour or part thereof in addition to the rates otherwise prescribed in this award.

(6) Toxic Substances—

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

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

(c) An employee using toxic substances or materials of a like nature shall be paid $0.56 per hour extra. Employees working in close proximity to employees so engaged shall be paid $0.45 per hour extra.

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

(7) Asbestos: Employees required to use materials containing asbestos or to work in close proximity to employees using such materials shall be provided with and shall use all necessary safeguards as required by the appropriate occupational health authority and where such safeguards include the mandatory wearing of protective equipment (i.e. combination overalls and breathing equipment or similar apparatus) such employees shall be paid $0.56 per hour extra whilst so engaged.

(8) Dry Polishing or Cutting of Tiles: An employee required to dry polish tiles with a machine or to cut tiles with an electric saw shall be paid $0.56 per hour or part thereof in addition to the rates otherwise prescribed in this award.

(9) Bitumen Work: An employee handling hot bitumen or asphalt or dipping materials in creosote shall be paid $0.56 per hour or part thereof in addition to the rates otherwise prescribed in this award.

(10) Roof Repairs: An employee engaged on repairs to roofs shall be paid $0.56 per hour or part thereof in addition to the rates otherwise provided in this award.

(11) Wet Work: An employee required to work in a place where water is continually dripping on him/her so that his/her clothing and boots become wet or where there is water underfoot shall be paid $0.45 per hour or part thereof in addition to the rates otherwise prescribed in this award.

(12) Dirty Work: An employee engaged on dirty work shall be paid $0.45 per hour or part thereof in addition to the rates otherwise prescribed in this award.

(13) An employee engaged in repairs to sewers shall be paid at the rate of $0.45 per hour or part thereof in addition to the rates otherwise prescribed in this award.

(14) An employee working in a dust-laden atmosphere in a joiners' shop where dust extractors are not provided or in such atmosphere caused by the use of materials for insulating, deafening or pugging work (as, for instance, pumice, charcoal, silicate of cotton or any other substitute), shall be paid at the rate of $0.45 per hour or part thereof in addition to the rates otherwise prescribed in this award.

(15) Scaffolding Certificate Allowance: A tradesperson who is the holder of a scaffolding certificate or rigging certificate issued by the Department of Occupational Health, Safety and Welfare and is required to act on that certificate whilst engaged on work requiring a certificated person shall be paid $0.45 per hour or part thereof in addition to the rates otherwise prescribed in this award but this allowance shall not be payable cumulative on the allowance for swing scaffolds.

(16) Spray Application - Painters: A painter engaged on all spray applications carried out in other than a properly constructed booth, approved by the Department of Occupational Health, Safety and Welfare, shall be paid $0.45 per hour or part thereof in addition to the rates otherwise prescribed in this award.

(17) Cleaning Down Brickwork: An employee required to clean down bricks using acids or other corrosive substances shall be supplied with gloves and be paid $0.41 per hour or part thereof in addition to the rates otherwise prescribed in this award.

(18) Bagging: An employee engaged upon bagging brick or concrete structures shall be paid $0.41 per hour thereof in addition to the rates otherwise prescribed in this award.

(19) Furnace Work: An employee engaged in the construction or alternation or repairs to boilers, flues, furnaces, retorts, kilns, ovens, ladles and similar refractory work shall be paid $1.20 per hour or part thereof in addition to the rates otherwise prescribed in this award.

(20) Acid Work: An employee required to work on acid furnaces, acid stills, acid towers and all other acid resisting brickwork shall be paid $1.20 per hour or part thereof in addition to the rates otherwise prescribed in this award.

(21) Plasterers using flintcote shall be paid $0.30 per hour extra except where flintcote is applied by hawk and trowel to walls and ceilings when the rate shall be $0.56 per hour extra.

(22) Chemical and Manure Works and Oil Refineries: Journeymen and builders' labourers working on chemical and manure works or oil refineries shall **receive $0.19** per hour in addition to the prescribed rate.

(23) Height Money: An employee required to work on a chimney stack, spire, tower, radio or television mast or tower, air shaft, cooling tower, water tower or silo, where the construction exceeds 15 metres in height shall be paid for all work above 15 metres, $0.45 per hour or part thereof, with an additional $0.45 per hour or part thereof for work above each further 15 metres in addition to the rates otherwise prescribed in this award.

(24) Swing Scaffold—

(a) An employee employed—

(i) on any type of swing scaffold or any scaffold suspended by rope or cable, or bosun's chair cantilever scaffold; or

(ii) on a suspended scaffold requiring the use of steel or iron hooks or angle irons at a height of 20 feet or more above the nearest horizontal plane.

shall be paid $3.26 for the first four hours or part thereof and $0.66 for each hour thereafter on any day in addition to the rates otherwise prescribed in this award.

(b) A solid plasterer when working off a swing scaffold shall be paid an additional **$0.11** per hour.

(c) No apprentice with less than two years' experience shall use a swing scaffold or bosun's chair.

(25) Plumbing—

(a) A plumber doing sanitary plumbing work on repairs to sewer drainage or wastepipe services in any of the following places:-

(i) Infectious and contagious diseases hospitals or any block or portion of a hospital used for the care of or treatment of patients suffering from any infectious or contagious disease.

(ii) Morgues, shall be paid $0.45 per hour or part thereof in addition to the rates otherwise prescribed in this award.

(b) A plumber doing work on a ship of any class:-

(i) whilst under way; or

(ii) in a wet place, being one in which the clothing of an employee necessarily becomes wet to an uncomfortable degree or one in which water accumulates underfoot; or

(iii) in a confined space; or

(iv) in a ship which has done one trip or more in a fume or dust-laden atmosphere, in bilges, or when cleaning blockages in soil pipes or waste pipes or repairing brine pipes; shall be paid $0.55 per hour or part thereof in addition to the rates otherwise prescribed in this award.

(c) A plumber carrying out pipework in a ship of any class under the plates in the engine and boiler rooms and oil fuel tanks shall be paid $1.17 per hour or part thereof in addition to the rates otherwise prescribed in this award.

(d) A plumber required to enter a well nine metres or more in depth for the purpose in the first place of examining the pump, pipe or any other work connected therewith, shall be paid $2.32 for such examination and $0.83 per hour thereafter for fixing renewing or repairing such work.

(e) Permit Work: Any licenced plumber called upon by his/her employer to use the licence issued to him/her by the Metropolitan Water Supply, Sewerage and Drainage Board for a period in any one week shall be paid $30.71 for that week, in addition to the rates otherwise prescribed in this award.

(f) Plumbers on Sewerage Work: Plumbers or apprentices in their third, fourth or fifth year, on work involving the opening up on house drains or wastepipes for the purpose of clearing blockages or for any other purpose, or work involving the cleaning out of septic tanks or dry wells, shall be paid a minimum of $2.42 per day in addition to the prescribed rate whilst so employed.

(26) Explosive Powered Tools: An operator of explosive powered tools, being an employee qualified in accord with the laws and regulations of the State of Western Australia to operate explosive powered tools is required to use an explosive powered tool shall be paid $1.06 for each day on which he uses such tool in addition to the rates otherwise prescribed in this award.

(27) Secondhand Timber: Where whilst working with secondhand timber, an employee's tools are damaged by nails, dumps or other foreign matter on the timber, shall be entitled to an allowance of $1.76 per day on each day upon which his tools are so damaged provided that no allowance shall be payable under this clause unless it is reported immediately to the employer's representative on the job in order that the claim may be proved.

(28) Computing Quantities: An employee, other than a leading hand, who is regularly required to compute or estimate quantities of materials in respect of the work performed by others shall be paid $3.26 per day or part thereof in addition to the rates otherwise prescribed in this award.

(29) Setter Out: A setter out in a joiner's shop shall be paid $4.81 per day in addition to the rates otherwise prescribed by this award but where an employee qualifies for this allowance and is appointed leading hand he/she shall be paid whichever amount is the higher but not both.

(30) Detail Worker: A detail worker shall be paid $4.81 per day in addition to the rates otherwise prescribed in this award but where an employee qualifies for this allowance and is appointed leading hand he/she shall be paid whichever amount is the higher but not both.

(31) Spray Painting - Painters—

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

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

(c) Where from the nature of the paint or substance used in spraying a respirator would be of little or no practical use in preventing the absorption of fumes or materials from substances used by an employee in spray painting, the employee shall be paid a special allowance of $1.34 per day.

(32) Brewery Cylinders - Painters—

(a) A painter required to work in brewery cylinders or stout tuns shall be allowed 15 minutes spell in the fresh air at the end of each hour worked by him. Such fifteen minutes shall be counted as working time and paid for accordingly.

(b) A painter working in a brewery cylinder or a stout tun shall be paid at the rate of time and one half. When working overtime on such work a painter shall, in addition to the overtime rate payable, be paid one half of his ordinary rate.

(33) Fumes—

An employee required to work in a place where fumes of sulphur or other acid or other offensive fumes are present shall be paid such rates as are agreed upon between him/her and the employer.

(34) (a) Lead Paint Surfaces: No surface painted with lead paint shall be rubbed down or scraped by a dry process.

(b) Width of Brushes: All paint brushes shall not exceed 125mm in width and no kalsomine brush shall be more than 175mm in width.

(c) Meals not to be taken in paint shop. No employee shall be permitted to have a meal in any paint shop or place where paint is stored or used.

(35) Loads—

Where bricks are being used the employee shall not be required to carry—

(a) more than 40 bricks each load in a wheelbarrow (on a scaffold) to a height of 4.5 metres from the ground;

(b) more than 36 bricks each load in a wheelbarrow over and above a height of 4.5 metres on a scaffold.

The type of wheelbarrow shall be agreed upon with the Union.

(36) Grinding Facilities—

The employer shall provide adequate facilities for the employees to grind tools and employees shall be allowed time to use the same whenever reasonably necessary.

(37) First Aid Outfit—

The employer shall provide a sufficient supply of bandages and antiseptic dressings for use in cases of accident.

(38) Water and Soap—

Water and soap shall be provided at each shop or on each job by the employer for use by the employees.

(39) Provision of Boiling Water—

The employer shall provide boiling water at each shop for the use of his/her employees at lunch time.

(40) (a) The employer shall supply a safety helmet for each of his/her employees requesting one on any job where, pursuant to the regulations made under the Occupational Health, Safety and Welfare Act 1984, a employee is required to wear such helmet.

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

(41) Electrical Sanding Machines—

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

(a) The weight of each such machine shall not exceed 5.9 kilograms.

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

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

(d) Employers shall also provide and supply goggles of suitable type provided that the goggles with celluloid lenses shall not be regarded as suitable.

(e) All employees shall use the protective equipment supplied when using electrical sanding machines of any type.

(42) Protective clothing for bricklayers and bricklayers' labourers engaged on construction or repair of refractory brickwork—

(a) Gloves shall be supplied when employees are engaged on repair work and shall be replaced as required, subject to employees handing in the used gloves.

(b) Boots shall be supplied upon request of the employees after six weeks' employment, the cost of such boots to be assessed at $20.00 and employees to accrue credit at the rate of $1.00 per week.

Employees leaving or being dismissed before 20 weeks' employment shall pay the difference between the credit accrued and the $20.00. The right to accrue credit shall commence from the date of request for the boots.

In the event of boots being supplied and the employee not wearing them whilst at work, the employer shall be entitled to deduct the cost of the boots if the failure to wear them continues after one warning by the employer.

Upon issue of the boots, employees may be required to sign the authority form in or to the effect of the Annexure to the clause. Boots shall be replaced each six months, dating from the first issue.

(c) Where necessary when bricklayers are engaged on work covered by subclauses (19) and (20) of this clause, overalls will be supplied upon the request of the employee and on the condition that they are worn while performing the work.

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

(a) Subject to the provisions of subclause (3) - Exemptions of this clause each employer shall make monthly contributions to the fund in respect of all eligible employees at the rate of 9% of ordinary time earnings.

2002 WAIRC 06817

BUILDING TRADES (CONSTRUCTION) AWARD 1987
No. R14 of 1978

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS, APPLICANT
	v.
	ADSIGNS PTY LTD, APOLLO CONSTRUCTION, ASSOCIATED SHOPFITTERS PTY LTD, RESPONDENTS
CORAM	COMMISSIONER J F GREGOR
DATE	WEDNESDAY, 23 OCTOBER 2002
FILE NO.	APPLICATION 1207 OF 2002
CITATION NO.	2002 WAIRC 06817

Result Award varied

Order

HAVING heard Mr T. Kucera (of Counsel) on behalf of the Applicant and Mr K.J. Dwyer for the Chamber of Commerce & Industry WA and Mr K. Richardson for the Master Builders' Association of Western Australia (Union of Employers), and by consent, the Commission pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders:

THAT the Building Trades (Construction) Award 1987, No. R14 of 1978 be varied in accordance with the following Schedule and that such variation shall have effect from the first pay period on or after 14 October 2002.

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

SCHEDULE

1. Clause 8. – Rates of Pay: Delete this clause and insert in lieu the following—

(1) Except as elsewhere provided in this Award the rates of pay payable to an employee (other than an apprentice) shall be that prescribed herein calculated as an hourly rate in accordance with subclause (4) of this clause.

(2) Weekly Rate: The following amounts shall be applied for the purpose of the calculation in subclause (4) of this clause of the hourly rate to apply under this Award.

			Base Rate $	Supplementary Payment $	Arbitrated Safety Net Adjustment $	Weekly Rate $
(a)	(i)	Bricklayers, stoneworkers, stonemasons, carpenters, joiners, painters, signwriters, glaziers, and plasterers roof tile fixers	365.20	52.10	108.00	525.30
	(ii)	Plumber and/or gasfitter	368.00	52.10	108.00	528.10
	(iii)	Plumber holding registration in accordance with the Metropolitan Water Supply, Sewerage and Drainage Act:				
		Base Rate	368.00			
		Reg. Allowance $ 17.30	385.30	52.10	108.00	545.40
	(iv)	Marker/Setter Out	378.60	52.10	108.00	538.70
	(v)	Special Class Tradesman	385.00	52.10	108.00	545.10
(b)	(i)	Group 1				
		Rigger	362.30	52.10	106.00	520.40
		Drainer	362.30	52.10	106.00	520.40
		Dogman	362.30	52.10	106.00	520.40
	(ii)	Group 2				
		Scaffolder	346.70	52.10	106.00	504.80
		Powder Monkey	346.70	52.10	106.00	504.80
		Hoist or Winch Driver	346.70	52.10	106.00	504.80
		Concrete Finisher	346.70	52.10	106.00	504.80
		Steel Fixer including Tack Welder	346.70	52.10	106.00	504.80
		Concrete Pump Operator	346.70	52.10	106.00	504.80
	(iii)	Group 3				
		Bricklayer's Labourer	335.10	52.10	106.00	493.20
		Plasterer's Labourer	335.10	52.10	106.00	493.20
		Assistant Powder Monkey	335.10	52.10	106.00	493.20
		Assistant Rigger	335.10	52.10	106.00	493.20
		Demolition Worker (after three months' experience)	335.10	52.10	106.00	493.20
		Gear Hand	335.10	52.10	106.00	493.20
		Cement Gun Operator	335.10	52.10	106.00	493.20
		Concrete Cutting or Drilling Machine Operator	335.10	52.10	106.00	493.20
		Pile Driver	335.10	52.10	106.00	493.20
		Tackle Hand	335.10	52.10	106.00	493.20
		Jackhammer Hand	335.10	52.10	106.00	493.20
		Mixer Driver (Concrete)	335.10	52.10	106.00	493.20
		Steel Erector	335.10	52.10	106.00	493.20
		Aluminium Alloy Structural Erector	335.10	52.10	106.00	493.20
		Gantry Hand or Crane Hand	335.10	52.10	106.00	493.20
		Concrete Gang Including Concrete Floater	335.10	52.10	106.00	493.20
		Steel or Bar Bender to Pattern or Plan	335.10	52.10	106.00	493.20
		Concrete Formwork Stripper	335.10	52.10	106.00	493.20
		Concrete Pump Hose Hand	335.10	52.10	106.00	493.20
		Trades Labourer	335.10	52.10	106.00	493.20
		Brick Paver Labourer	335.10	52.10	106.00	493.20
		Brick Cleaner/Labourer	335.10	52.10	106.00	493.20

		Base Rate $	Supplementary Payment $	Arbitrated Safety Net Adjustment $	Weekly Rate $
(iv)	Group 4 Builders' Labourers Employed on Work Other Than Specified in Classifications (i) to (iii)	306.60	52.10	106.00	464.70

(c) Supplementary Payments

Supplementary payments set out in this clause represent payments in lieu of equivalent overaward payments.

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

These arbitrated safety net adjustments shall be offset against any equivalent amount in the rate of pay received by employees since 1 November 1991 above the rate prescribed in the Award. For these purposes over award rates of pay in any industrial agreement affecting employees whose terms of employment are also regulated by the award shall likewise be liable to absorption unless contrary to the terms of the industrial agreement.

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

(3) Industry Allowance

The industry allowance at the rate of $19.80 per week to be paid to each employee is to compensate for the following disabilities associated with construction work:-

(a) Climate conditions when working in the open on all types of work.

(b) The physical disadvantage of having to climb stairs or ladders.

(c) The disability of dust blowing in the wind, brick dust and drippings from concrete.

(d) Sloppy and muddy conditions associated with the initial stages of the erection of a building.

(e) The disability of working on all types of scaffolding or ladders other than a swing scaffold, suspended scaffold, or a bosun's chair.

(f) The lack of the usual amenities associated with factory work (e.g. meal rooms, change rooms, lockers).

(4) Hourly Rate Calculation - Follow the Job Loading

(a) The hourly rate of pay to be paid to an adult employee (other than an apprentice) shall be calculated to the nearest cent (less than half a cent to be disregarded) by multiplying the sum of the amounts prescribed in subclause (2) and the amount prescribed in subclause (3) and where applicable in subclauses (6), (7), (8) and (9) of this clause by 52 and dividing the result by 50.4 by adding to that the amount prescribed in subclause (5) of this clause and by dividing the total by 38.

(b) The aforementioned calculation shall take into account a factor of eight days in respect of the incidence of loss of wages for periods of unemployment between jobs.

(5) Special Allowance

The special allowance at the rate of $7.70 per week to be paid to each employee is to compensate for the following:-

(a) Excess travelling time incurred by employees in the building industry;

(b) The removal of loadings from the various building awards consequent upon the introduction of this paid rates award in the industry.

(6) Tool Allowance

Tool allowances shall be paid to tradesmen as prescribed hereunder:-

	Per Week $
Carpenters, Joiners, Plumbers, Stonemasons, Stoneworkers	20.90
Plasterers, Fixers	17.20
Bricklayers	14.80
Roof Tile Fixers	10.90
Signwriters, Painters, Glaziers	5.20

(7) Location Allowance

Where applicable location allowances in accordance with Appendix A will be paid.

(8) Underground Allowance

(a) (i) Subject to paragraph (b) hereof, an employee required to work underground shall be paid an allowance of $9.66 per week in addition to the allowance prescribed in subclause (3) of this clause and any other amount prescribed for such employee elsewhere in this award.

(ii) Where a shaft is to be sunk to a depth greater than six metres the payment of the underground allowance shall commence from the surface.

(iii) This allowance shall not be payable to an employee engaged upon "pot and drive" work at a depth of 3.5 metres or less.

(b) Where an employee is required to work underground for no more than four days or shifts in any ordinary week he/she shall be paid an underground allowance in accordance with the provisions of paragraph (t) of subclause (1) of Clause 9. - Special Rates and Provisions in lieu of the allowance prescribed in paragraph (a) hereof.

(9) Plumbing Trade Allowance

Plumbers shall be paid an allowance at the rate of $15.70 per week to compensate for the following classes of work and in lieu of the relevant amounts in Clause 9. - Special Rates and Provisions whether or not such work is performed in any one week. When working outside the categories listed hereunder, a plumber shall receive the appropriate rates provided for in the said Clause 9. - Special Rates and Provisions.

(a) General Plumber

(i) Clearing stoppages in soil or waste pipes, or sewer drain pipes, also repairing and putting same in proper order;

(ii) Work in wet places;

(iii) Work requiring a swing scaffold, swing seat or rope;

(iv) Dirty or offensive work;

(v) Work in any confined space;

(vi) Work on a ladder exceeding eight metres in height.

(b) Mechanical Services Plumber

(i) Handling charcoal, pumice, granulated cork, silicate of cotton, insulwool, slag wool, or other recognised insulation material of a like nature or working in the immediate vicinity so as to be affected by the use thereof;

(ii) Work in a place where the temperature has been raised by artificial means to between 46 and 54 degrees celsius or exceeding 54 degrees celsius;

(iii) Work in a place where fumes of sulphur or other acid or other offensive fumes are present;

(iv) Dirty or offensive work;

(v) Work in any confined space;

(vi) Work on a ladder exceeding eight metres in height.

(c) Roof Plumber

(i) Work on the fixing of aluminium foil insulation on roofs or walls prior to the sheeting thereof;

(ii) Use of explosive powered tools;

(iii) Work requiring use of materials containing asbestos or to work in close proximity to employees using such materials shall be provided with and shall use all necessary safeguards as required by the appropriate occupational health authority including the mandatory wearing of protective equipment (i.e. combination overalls and breathing equipment or similar apparatus);

(iv) Dirty or offensive work;

(v) Work requiring a swing scaffold, swing seat or rope;

(vi) Work on a ladder exceeding eight metres in height.

(10) Leading Hands

(a) A person specifically appointed to be a leading hand shall be paid at the rate of the undermentioned additional amounts above the rate of the highest classification supervised, or his/her own rate, whichever is the highest, in accordance with the number of persons in his/her charge:-

		Weekly Base Only $	Rate Per Hour $
(i)	In charge of not more than one person	16.60	0.34
(ii)	In charge of two and not more than five persons	27.80	0.76
(iii)	In charge of six and not more than ten persons	35.50	0.96
(iv)	In charge of more than ten persons	47.30	1.29

(b) The hourly rate prescribed in paragraph (a) hereof is calculated to the nearest cent (less than half a cent to be disregarded) by multiplying the weekly base amount by 52 and dividing the result by 50.4 and by dividing the amount by 38.

(11) Licensed Plumbers Accepting Responsibility

Any licensed plumber called upon by his/her employer to use the licence issued to him/her by the Metropolitan Water Supply, Sewerage and Drainage Board for a period in any week - $30.70 for that week.

(12) Plumber Acting on Welding Certificate

A plumber who is requested by his/her employer to hold the relevant qualifications and has obtained a certificate of competency pursuant to procedures as set out by the Standards Association of Australia or other relevant recognised codes, or, who may have to carry out work which is subject to other special tests but not a normal trade test, and is required by his/her employer to act on such qualifications, shall be paid an additional 41 cents per hour for oxyacetylene welding and 41 cents per hour for electric welding for every hour of his/her employment whether or not he/she has in any hour performed work relevant to those qualifications held.

(13) Lead Work

A plumber engaged in leadburning or lead work in connection therewith shall be paid an additional $1.39 per hour.

(14) Ship's Plumbing

A plumber engaged on plumbing work in connection with ships shall be paid an additional 97 cents per hour.

(15) Casual Hands

In addition to the rate appropriate for the type of work, a casual hand shall be paid an additional 20 per cent of the rate per hour with a minimum payment as for three hours employment. The penalty rate herein prescribed shall be deemed to include, inter alia, compensation for annual leave.

(16) Site Allowances

The Union on behalf of its members may request an employer to consider a site allowance to compensate for all special factors and/or disabilities on a project.

Where the parties have considered the merit of the claim and have agreed on a proposed rate, it shall be referred to the Commission for ratification.

Where agreement cannot be reached, the parties shall refer the matter to the Commission which shall determine an appropriate rate, if any, to compensate for such special factors and/or disabilities: Provided, however, that the Commission may determine that such site allowance shall be paid in lieu of any of the special rates related to conditions on the site as prescribed in Clause 9 subclause (1).

The Commission shall ratify or determine such matters on the criteria outlined in the Full Bench Decision of the Conciliation and Arbitration Commission dated February 25, 1983 (Print F1957).

Where the procedure prescribed by this subclause is being followed, work shall continue normally.

A site allowance determined in accordance with this subclause shall be deemed to be prescribed by this Award.

2. Clause 9. – Special Rates and Provisions: Delete subclause (1) of this clause and insert in lieu the following—

(1) In addition to the rates otherwise prescribed in this Award, the following rates shall be payable to employees covered by the said Award—

(a) Insulation

An employee handling charcoal, pumice, granulated cork, silicate of cotton, insulwool, slag wool, limpet fibre, vermiculite or other recognised insulating material of a like nature or working in the immediate vicinity so as to be affected by the use thereof 55 cents per hour or part thereof.

(b) Hotwork

An employee who works in a place where the temperature has been raised by artificial means to between 46 degrees and 54 degrees Celsius - 45 cents per hour or part thereof, exceeding 54 degrees celsius - 55 cents per hour or part thereof.

Where such work continues for more than two hours, the employee shall be entitled to 20 minutes rest after every two hours work without loss of pay, not including the special rate provided by this paragraph.

(c) Cold Work

An employee who works in a place where the temperature is lowered by artificial means to less than zero degrees Celsius shall be paid 45 cents per hour.

Where such work continues for more than two hours, the employee shall be entitled to 20 minutes rest after every two hours work without loss of pay, not including the special rate provided by this paragraph.

(d) Confined Space

An employee required to work in a confined space shall be paid 55 cents per hour or part thereof.

("Confined Space" means a place the dimensions or nature of which necessitate working in a cramped position or without sufficient ventilation.)

(e) Swing Scaffold—

(i) an employee required to work from any type of swing or any scaffold suspended by rope or cable, bosun's chair, or suspended scaffold requiring use of steel or iron hooks or angle irons shall be paid the appropriate allowance set out below corresponding to the storey level at which the anchors or bracing, from which the stage is suspended, has been erected.

Such allowance shall be paid for minimum of four hours' work or part thereof until construction work (as defined) has been completed.

Height of Bracing	First Four Hours $	Each Additional Hour $
0-15 storeys	3.23	0.67
16-30 storeys	4.17	0.86
31-45 storeys	4.91	1.00
46-60 storeys	8.06	1.66
Greater than 60 storeys	10.28	2.12

Provided that an apprentice with less than two years' experience shall not use a swing scaffold or bosun's chair, and further provided that solid plasterers when working off a swing scaffold shall receive an additional 11 cents per hour.

(f) Explosive Powered Tools

An operator of explosive powered tools, as defined in this award, who is required to use an explosive powered tool, shall be paid $1.06 for each day on which he/she uses such a tool.

(g) Wet Work

An employee working in any place where water is continually dripping on him/her so that clothing and boots become wet, or where there is water underfoot, shall be paid 45 cents per hour whilst so engaged.

(h) Dirty Work

An employee engaged on unusually dirty work shall be paid 45 cents per hour.

(i) Towers Allowance

An employee working on a chimney stack, spire, tower, radio or television mast or tower, air shaft (other than above ground in a multi-storey building), cooling tower or silo, where the construction exceeds fifteen metres in height shall be paid 45 cents per hour for all work above fifteen metres, and 45 cents per hour for work above each further fifteen metres.

Provided that any similarly constructed building, or a building not covered by Clause 10. - Multi-Storey Allowance, which exceeds 15 metres in height may be covered by this subclause, or by that clause by agreement or where agreement is not reached, by determination of the Commission.

(j) Toxic Substances

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

(ii) Employees using such materials will be provided with and shall use all safeguards as are required by Clause 29. - Protection of Employees and the appropriate Government authority or in the absence of such requirement such safeguards as are defined by a competent authority or person chosen by the union and the employer.

(iii) Employees using toxic substances or materials of a like nature shall be paid 55 cents per hour. Employees working in close proximity to employees so engaged shall be paid 45 cents per hour.

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

(k) Fumes

An employee required to work in a place where fumes of sulphur or other acid or other offensive fumes are present shall be paid such rates as are agreed upon between him/her and the employer; provided that, in default of agreement, the matter may be referred to a Board of Reference for the fixation of a special rate.

Any special rate so fixed shall apply from the date the employer is advised of the claim and thereafter shall be paid as and when the fume condition occurs.

(l) Asbestos

Employees required to use materials containing asbestos or to work in close proximity to employees using such materials shall be provided with and shall use all necessary safeguards as required by the appropriate occupational health authority and where such safeguards include the mandatory wearing of protective equipment (i.e. combination overalls and breathing equipment or similar apparatus) shall be paid 55 cents per hour extra whilst so engaged.

(m) Furnace Work

An employee engaged in the construction or alteration or repairs to boilers, flues, furnaces, retorts, kilns, ovens, ladles and similar refractory work shall be paid $1.18 per hour. This additional rate shall be regarded as part of the wage rate for all purposes.

(n) Acid Work

An employee required to work on the construction or repairs to acid furnaces, acid stills, acid towers and all other acid resisting brickwork shall be paid $1.18 per hour. This additional rate shall be regarded as part of the wage rate for all purposes.

(o) Cleaning Down Brickwork

An employee required to clean down bricks using acids or other corrosive substances shall be paid 41 cents per hour. While so employed employees will be supplied with gloves by the employer.

(p) Bagging

Employees engaged upon bagging brick or concrete structures shall be paid 41 cents per hour.

(q) Bitumen Work

An employee handling hot bitumen or asphalt or dipping materials in creosote shall be paid 55 cents per hour.

(r) Roof Repairs

Employees engaged on repairs to roofs shall be paid 55 cents per hour.

(s) Computing Quantities

Employees who are regularly required to compute or estimate quantities of materials in respect to the work performed by other employees shall be paid $3.23 per day or part thereof.

Provided that this allowance shall not apply to an employee classified as a leading hand.

(t) Underground Allowance

(i) An employee required to work underground for no more than 4 days or shifts in an ordinary week shall be paid $ 1.93 a day or shift in addition to any other amount prescribed for such employees elsewhere in this award.

Provided that an employee required to work underground for more than four days or shifts in an ordinary week shall be paid an underground allowance in accordance with the provisions of subclause (8) of Clause 8. - Rates of Pay.

(ii) Where a shaft is to be sunk to a depth greater than 6 metres the payment of the underground allowance shall commence from the surface.

(iii) This allowance shall not be payable to employees engaged upon “pot and drive” work at a depth of 3.5 metres or less.

(u) Plumbing

(i) A plumber doing sanitary plumbing work or repairs to sewer drainage or waste pipe services in any of the following places—

(aa) Infectious and contagious diseases hospitals or any block or portion of a hospital used for the care of or treatment of patients suffering from any infectious or contagious disease; or

(bb) Morgues—

shall be paid 41 cents per hour or part thereof.

(ii) A plumber required to enter a well 9 metres or more in depth for the purpose in the first place of examining the pump, pipe or any other work connected therewith shall be paid $1.91 for such examination and 85 cents per hour thereafter for fixing, renewing or repairing such work.

(iii) A plumber or an apprentice to plumbing, other than one in his/her first or second year of apprenticeship, on work involving the opening up of house drains or waste pipes for the purpose of clearing blockages or for any other purpose or on work involving the cleaning out of septic tanks or dry wells shall be paid a minimum of $2.37 per day.

(v) (a) An employee who—

(i) is appointed by his or her employer to be responsible for carrying out first aid duties as they may arise; and

(ii) holds a recognised first aid qualification (as set out hereunder) from the Australian Red Cross Society, St John Ambulance Association or similar body; and

(iii) is required by his or her employer to hold a qualification at that level; and

(iv) the qualification satisfies the relevant statutory requirement pertaining to the provision of first-aid services at the particular location where the employee is engaged;

(v) those duties are in addition to his or her normal duties, recognising what first aid duties encompass by definition;

shall be paid at the following additional rates to compensate that person for the additional responsibilities, skill obtained, and time spent acquiring the relevant qualifications;

(A) an employee who holds the Basic First Aid certificate or equivalent qualification recognised under the Occupational Safety and Health Act 1984 - $1.90 per day; or

(B) an employee who holds at least a Senior First Aid certificate, Industrial First Aid certificate or equivalent, or higher qualification recognised under the Occupational Safety and Health Act 1984 - $2.98 per day.

(b) In payment of an allowance under this clause, a person shall be paid only for the level of qualification required to be held, and there shall be no double counting for employees who hold more than one qualification.

(c) An employer shall be under no obligation to provide paid training leave or other payment of any kind to employees to acquire or update first aid qualifications.

(w) Heavy Blocks

(i) Employees lifting other than standard bricks

An employee required to lift blocks (other than cindcrete blocks for plugging purposes) shall be paid the following additional rates—

Where the blocks weigh over 5.5 kg and under 9 kg - 45 cents per hour.

Where the blocks weigh 9 kg or over and up to 18 kg - 80 cents per hour.

Where the blocks weigh over 18 kg –$1.13 cents per hour.

An employee shall not be required to lift a building block in excess of 20 kg in weight unless such employee is provided with a mechanical aid or with an assisting employee; provided that an employee shall not be required to manually lift any building block in excess of 20 kg in weight to a height of more than 1.2 metres above the working platform.

Provided that this subclause shall not apply to employees being paid the extra rate for refractory work.

(ii) Stonemasonry Employees

The employer of stonemasonry employees shall provide mechanical means for the handling, lifting and placing of heavy blocks or pay in lieu thereof the rates and observe the conditions prescribed in paragraph (i) herein.

(x) Plaster or Composition Spray

An employee using a plaster or composition spray shall be paid an additional 45 cents per hour whilst so engaged.

(y) Slushing

An employee engaged at “Slushing” shall be paid 45 cents per hour.

(z) Dry Polishing of Tiles

Employees engaged on dry polishing of tiles (as defined) where machines are used shall be paid 55 cents per hour or part thereof.

(aa) Cutting Tiles

An employee engaged at cutting tiles by electric saw shall be paid 55 cents per hour whilst so engaged.

(bb) Second Hand Timber

Where, whilst working with second hand timber, an employee’s tools are damaged by nails, dumps or other foreign matter on the timber he/she shall be entitled to an allowance of $1.75 per day on each day upon which his/her tools are so damaged, provided that no allowance shall be payable under this paragraph unless it is reported immediately to the employer’s representative on the job in order that he/she may prove the claim.

(cc) Height Work - Painting Trades

An employee working on any structure at a height of more than 9 metres where an adequate fixed support not less than 0.75 metres wide is not provided, shall be paid 41 cents per hour in addition to ordinary rates. This subclause shall not apply to an employee working on a bosun’s chair or swinging stage.

This provision shall not apply in addition to the Towers Allowance prescribed in paragraph (i) of this subclause.

(dd) Brewery Cylinders - Painters

A painter in brewery cylinders or stout tuns shall be allowed 15 minutes' spell in the fresh air at the end of each hour worked by him/her.

Such 15 minutes shall be counted as working time and shall be paid for as such. The rate for working in brewery cylinders or stout tuns shall be at the rate of time and one-half. When an employee is working overtime and is required to work in brewery cylinders and stout tuns he/she shall, in addition to the overtime rates payable, be paid one half of the ordinary rate payable as provided by Clause 8. - Rates of Pay of this award.

(ee) Certificate Allowance

A tradesman who is the holder of a scaffolding certificate or rigging certificate issued by the Department of Industrial Affairs and is required to act on that Certificate whilst engaged on work requiring a certificated person shall be paid an additional 45 cents per hour.

Provided that this allowance shall not be payable cumulative on the allowance for swing scaffolds.

(ff) Spray Application - Painters

An employee engaged on all spray applications carried out in other than a properly constructed booth approved by the Department of Industrial Affairs shall be paid 45 cents per hour extra.

(gg) Bricklayer Operating Cutting Machine

One bricklayer on each site to operate the cutting machine and to be paid 55 cents per hour or part thereof whilst so engaged.

(hh) Spray Painting - Painters

(i) Lead paint shall not be applied by a spray to the interior of any building and no surface painted with lead paint shall be rubbed down or scraped by a dry process.

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

(iii) Where from the nature of the paint or substance used in spraying a respirator would be of little or no practical use in preventing the absorption of fumes or materials from substances used by an employee in spray painting, the employee shall be paid a special allowance of $1.27 per day.

(ii) Grindstone Allowance

Where a grindstone or wheel is not made available as required by Clause 32(5)(b) of the award, an allowance of $4.75 per week shall be paid in lieu of same to each Carpenter or Joiner.

3. Clause 10. – Multi-Storey Allowance: Delete subclause (3) of this clause and insert in lieu the following—

(3) Rates For Multi-Storey Buildings

Except as provided for in subclause (4) of this clause, an allowance in accordance with the following table shall be paid to all employees on the building site. The second and subsequent allowance scales shall, where applicable, commence to apply to all employees when one of the following components of the building - structural steel, re-inforcing steel, boxing or walls, rises above the floor level first designated in each such allowance scale.

"Floor Level" means that stage of construction which in the completed building would constitute the walking surface of the particular floor level referred to in the table of payments.

From commencement of Building to Fifteenth Floor Level - 36 cents per hour extra;

From Sixteenth Floor Level to Thirtieth Floor Level - 44 cents per hour extra;

From Thirty-first Floor Level to Forty-fifth Floor Level - 67 cents per hour extra;

From Forty-sixth Floor Level to Sixtieth Floor Level - 85 cents per hour extra;

From Sixty-first Floor Level Onwards – $1.07 per hour extra.

The allowance payable at the highest point of the building shall continue until completion of the building.

4. Clause 50. – Superannuation: Delete paragraph (b) of subclause (2) of this clause and insert in lieu the following—

(b) The level of contributions required under the Superannuation Guarantee (Administration) Act 1992 are as follows—

Financial Year	(1 July - 30 June)
Percentage	
6	1996 - 97
6	1997 - 98
7	1998 - 99
7	1999 - 00
8	2000 - 01
9	2001 - 02

5. Appendix F – Asbestos Eradication: Delete clause (5) of this appendix and insert in lieu the following—

In addition to the rates prescribed in this award, an employee engaged in asbestos eradication (as defined) shall receive **$**1.49 per hour worked in lieu of Special Rates prescribed in Clause 9(1) with the exception of subclauses (b), (c), (e), (x), (ab) and (af).

6. Appendix G – Laser Equipment: Delete clause (4) of this appendix and insert in lieu the following—

Where an employee has been appointed by his employer to carry out the duties of a laser safety officer he shall be paid an allowance of $1.84 per day or part thereof whilst carrying out such duties. The allowance shall be paid as a flat amount without attracting any premium or penalty.

2002 WAIRC 06770

BUILDING TRADES (GOLDMINING INDUSTRY) AWARD
Nos. 29 & 32 of 1965 and 4 of 1966

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS, APPLICANT
	v.
	LAKE VIEW AND STAR LIMITED, GREAT BOULDER GOLD MINES LTD, GOLD MINES OF KALGOORLIE (AUST) LTD, RESPONDENTS
CORAM	COMMISSIONER J F GREGOR
DATE	THURSDAY, 17 OCTOBER 2002
FILE NO.	APPLICATION 1196 OF 2002
CITATION NO.	2002 WAIRC 06770

Result Award varied

Order

HAVING heard Mr T. Kucera (of Counsel) on behalf of the Applicant and there being no appearance for the Respondents, the Commission pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders:

THAT the Building Trades (Goldmining Industry) Award be varied in accordance with the following Schedule and that such variation shall have effect from the first pay period on or after 14 October 2002.

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

SCHEDULE

1. Clause 12. – Leading Hands: Delete this clause and insert in lieu the following—

Leading Hands in charge of not less than three and not more than ten employees shall be paid at the rate of	$16.90
More than ten and not more than 20 other employees at the rate of	$25.20
More than 20 employees at the rate of	$32.70

2. Clause 13. – Special Rates and Provisions—

A. Delete subclause (1) of this clause and insert in lieu the following—

(1) Disabilities Allowance: An employee employed outside of his/her shop on construction work shall for the time so employed be paid a disabilities allowance at the rate of $2.02 per week in addition to the prescribed rate.

B. Delete subclause (16) of this clause and insert in lieu the following—

(16) Plumbers on Sewerage Work: Plumbers employed on work involving the opening up of house drains or waste pipes for the purpose of clearing blockages or for any other purpose, or on work involving the cleaning of septic tanks or dry wells, shall be paid 44 cents per day in addition to the prescribed rate.

2002 WAIRC 06765

BUILDING TRADES (GOVERNMENT) AWARD 1968
No. 31A of 1966

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS, APPLICANT
	v.
	CONTRACT MANAGEMENT SERVICES, ROYAL PERTH HOSPITAL, KING EDWARD MEMORIAL HOSPITAL, RESPONDENTS
CORAM	COMMISSIONER J F GREGOR
DATE	MONDAY, 14 OCTOBER 2002
FILE NO.	APPLICATION 1203 OF 2002
CITATION NO.	2002 WAIRC 06765

Result Award Varied

Order

HAVING heard Mr T. Kucera (of Counsel) on behalf of the Applicant and Mr R.A. Heaperman for the Respondents, and by consent, the Commission pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders:

THAT the Building Trades (Government) Award 1968 be varied in accordance with the following Schedule and that such variation shall have effect from the first pay period on or after 14 October 2002.

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

SCHEDULE

1. Clause 9. – Wages:

A. Delete subclause (3) of this clause and insert in lieu the following—

(3) Allowance for Lost Time: Thirteen days' sick leave and follow the job (per week)—

An employee whose employment is terminated through no fault of his/her own and who has not completed nine months' continuous service with his/her employer shall, for each week of continuous employment with that employer, immediately prior to his/her termination of employment be paid the lost time allowance prescribed hereunder less any payments made to him/her in respect of sick leave during that employment—

				$
(a)	Bricklayers, stoneworkers, carpenters, joiners, painters, glaziers, signwriters, plasterers, plumbers and stonemasons			44.83
(b)	Special Class Tradesperson (as defined)			47.08
(c)	Registered Plumbers			46.57
(d)	Builders Labourers			
	(i)	Classifications (i) to (iii) inclusive		43.95
	(ii)	Classifications (iv) to (ix)		41.32
	(iii)	Classification (x)		39.95
	(iv)	Classification (xi)		37.22

NOTE: In the event of any increase or decrease in the wages and other allowances prescribed in this clause, except the tool allowances, the amounts prescribed in this subclause shall be increased or decreased by an amount equal to 9.7% of that increase or decrease.

B. Delete subclause (4) of this clause and insert in lieu the following—

(4) Disabilities Allowance (Per Week): $19.60

(a) Subject to the provisions of paragraph (b), of this subclause an allowance of $19.60 shall be paid to all employees excepting employees who are employed for the major portion of any week in or about a permanent maintenance depot or who are usually employed in or about the employer's business when an employee coming within the exception is engaged on the erection or demolition of a building exceeding 250 square feet in floor area.

(b) Employees who are directed to work temporarily in or about a permanent maintenance depot and who immediately prior to being so directed were in receipt of the allowance for a period of not less than three months shall be paid two-thirds of the allowance prescribed herein.

C. Delete subclause (7)(a) of this clause and insert in lieu the following—

(7) Plumbing Trade Allowance

Plumbers shall be paid an allowance at the rate of $15.12 per week to compensate for the following classes of work and in lieu of the relevant amounts in Clause 13. - Special Rates and Provisions of this award whether or not such work is performed in any one week. When working outside the categories listed hereunder, a plumber shall receive the appropriate rates provided for in the said Clause 13. - Special Rates and Provisions.

(a) General Plumber—

(i) clearing stoppages in soil or waste pipes, or sewer drain pipes, also repairing and putting same in proper order;

(ii) work in wet places;

(iii) work requiring a swing scaffold, swing seat or rope;

(iv) dirty or offensive work;

(v) work in any confined space;

(vi) work on a ladder exceeding eight metres in height;

(vii) work in and around abattoirs.

2. Clause 11. – Leading Hands: Delete subclause (1) of this clause and insert in lieu the following—

(1) Any employee referred to in Clause 9. - Wages of this award or a leading hand defined in paragraph (h) of subclause (3) of Clause 6. - Definitions of this award, who is placed in charge for not less than one day of—

(a) not less than three and not more than ten other employees referred to in Clause 9. - Wages shall be paid at the rate of $31.84 per week extra;

(b) more than ten and not more than twenty other employees referred to in Clause 9. - Wages shall be paid at the rate of $42.59 per week extra;

(c) more than twenty other employees referred to in Clause 9. - Wages shall be paid at the rate of $53.33 per week extra.

3. Clause 13. – Special Rates and Provisions: Delete this clause and insert in lieu the following—

(1) Conditions respecting Special Rates—

(a) The special rates prescribed in this award shall be paid irrespective of the times at which work is performed and shall not be subject to any premium or penalty conditions.

(b) Where more than one of the above rates provides payments for disabilities of substantially the same nature then only the highest of such rates shall be payable.

(2) Swing Scaffold—

(a) An employee employed—

(i) on any type of swing scaffold or any scaffold suspended by rope or cable or bosun's chair or cantilever scaffold, or

(ii) on a suspended scaffold requiring the use of steel or iron hooks or angle irons at a height 6.1 metres or more above the nearest horizontal plane,

shall be paid $3.10 for the first four hours or part thereof: and 63 cents for each hour thereafter on any day in addition to the rates otherwise prescribed.

(b) A solid plasterer when working on a swing scaffold shall be paid an additional 13 cents per hour.

(c) No apprentice with less than two years' experience shall use a swing scaffold or bosun's chair.

(d) Provided that no allowance shall be payable for working on such scaffolds when used under bridges or jetties unless the height of the scaffold above the water exceeds 0.9 metres.

(3) Insulation—

An employee handling charcoal, pumice, granulated cork, silicate of cotton, insulwool, slag wool or other recognised insulation material of a like nature or working in the immediate vicinity so as to be affected by the use thereof: shall be paid 51 cents per hour part thereof: in addition to the rates otherwise prescribed.

(4) Work in Dust Laden Atmosphere

Working in a dust laden atmosphere in a joiner's shop where dust extractors are not provided in or such atmosphere caused by the use of materials for insulating, deafening or plugging work (as, for instance, pumice, charcoal, silicate of cotton, or any other substitute) or from earthworks, 51 cents per hour extra.

(5) Confined Space—

An employee required to work in a confined space, being a place the dimension or nature of which necessitates working in a cramped position or without sufficient ventilation, shall be paid 51 cents per hour or part thereof: in addition to the rate otherwise prescribed.

(6) Sewer Work—

An employee engaged in repairs to sewers shall be paid 40 cents per hour or part thereof: in addition to the rates otherwise prescribed.

(7) Sanitary Plumbing Work—

A plumber doing sanitary plumbing work on repairs to sewer drainage or waste pipe services in any of the following places—

(a) Infectious and contagious disease hospitals or any block or portion of a hospital used for the care or treatment of patients suffering from any infectious or contagious disease.

(b) Morgues—

shall be paid 43 cents per hour or part thereof: in addition to the rates otherwise prescribed.

(8) Ship Plumbing—

A plumber doing work on a ship of any class—

(a) Whilst under way; or

(b) In a wet place being one in which the clothing of an employee necessarily becomes wet to an uncomfortable degree or one in which water accumulates underfoot; or

(c) In a confined space; or

(d) In a ship which has done one trip or more in a fume or dust laden atmosphere, in bilges, or when cleaning blockages in soil pipe or waste pipes or repairing brine pipes, shall be paid 62 cents per hour or part thereof: in addition to the rate otherwise prescribed.

(e) A plumber carrying out pipe work in a ship of any class under the plates in the engine and boiler rooms and oil fuel tanks shall be paid $1.26 per hour or part thereof: in addition to the rates otherwise prescribed.

(9) Well Work—

A plumber or labourer required to enter a well nine metres or more in depth for the purpose in the first place of examining the pump, pipe or any other work connected therewith, shall be paid $2.21 for such examination and 72 cents per hour extra thereafter for fixing, renewing or repairing such work.

(10) Permit Work—

Any licensed plumber called upon by his/her employer to use the licence issued to him/her by the Metropolitan Water Supply, Sewerage and Drainage Board for a period in any one week shall be paid $13.32 for that week in addition to the rates otherwise prescribed.

(11) Plumbers on Sewerage Work—

Plumbers or apprentices in their third, fourth or fifth year, on work involving the opening up of house drains or waste pipes for the purpose of clearing blockages or for any other purpose, or work involving the cleaning out of septic tanks or dry wells, shall be paid a minimum of $2.20 per day or part thereof: in addition to the prescribed rate.

(12) Height Money—

An employee required to work on a chimney stack, spire, tower, air shaft, cooling tower, water tower exceeding fifteen metres in height shall be paid for all work above fifteen metres, 43 cents per hour thereof: with an additional 43 cents per hour or part thereof: for work above each further fifteen metres in addition to the rates otherwise prescribed.

(13) Barge Work

A Main Roads Employee required to work on scaffolding which is mounted on a barge is to be paid an allowance of $3.96 per day, or majority thereof, or $1.97 per half day, or part thereof, for such work.

(14) Furnace Work—

An employee engaged in the construction or alteration or repairs to boilers, flues, furnaces, retorts, kilns, ovens, ladles and similar refractory work or on underpinning shall be paid $1.13 per hour or part thereof: in addition to the rates otherwise prescribed.

(15) Hot Work—

(a) An employee required to work in a place where the temperature has been raised by artificial means to between 46° Celsius and 54° Celsius shall be paid 43 cents per hour or part thereof: in addition to the rates otherwise prescribed, or in excess of 54° Celsius shall be paid 51 cents per hour or part thereof: in addition to the said rates.

(b) Where such work continues for more than two hours the employee shall be entitled to a rest period of twenty minutes after every two hours' work without loss of pay, not including the special rate prescribed in paragraph (a) hereof.

(16) Cold Work—

(a) An employee required to work in a place where the temperature is lowered by artificial means to less than 0° Celsius shall be paid 43 cents per hour or part thereof: in addition to the rates otherwise prescribed in this award.

(b) Where such work continues for more than two hours the employee shall be entitled to a rest period of twenty minutes after every two hours' work without loss of pay, not including the special rate prescribed in paragraph (a) hereof.

(17) Swanbourne and Graylands: Employees required to work at the Swanbourne and Graylands Hospitals controlled by the Mental Health Service shall be paid at the rate of 43 cents per hour in addition to the prescribed rate.

(18) Flintcote: Plasterers using flintcote shall be paid 43 cents per hour or part thereof: except when flintcote is applied by hawk and trowel to walls and ceilings when the rate shall be 74 cents per hour extra in addition to the prescribed rate.

(19) Dirty Work—

(a) An employee employed on excessively dirty work which is more likely to render the employee or his/her clothes dirtier than the normal run of work, shall be paid 43 cents per hour extra in addition to the prescribed rate (with a minimum payment of four hours when employed on such work).

(b) This shall not apply to an employee in receipt of the allowance prescribed in subclause (4) of Clause 9. - Wages of this award nor to a worker in receipt of the allowance prescribed in subclause (27) hereof.

(20) Stonemason on Wall—

A stonemason working on the wall (cottage work and foundation work in coastal stone excepted) shall be paid 43 cents per hour thereof: in addition to the rates otherwise prescribed.

(21) Setter Out—

A setter out (other than a leading hand) in a joiner's shop shall be paid $4.15 per day in addition to the rates otherwise prescribed.

(22) Detail Employee—

A detail employee (other than a leading hand) shall be paid $4.15 in addition to the rates otherwise prescribed.

(23) Spray Painting - Painter—

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

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

(c) Where from the nature of the paint or substance used in spraying, a respirator would be of little or no practical use in preventing the absorption of fumes or materials from substance used by an employee in spray painting, the employee shall be paid a special allowance of $1.13 per day.

(24) Lead Paint Surfaces—

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

(b) Width of Brushes: All brushes shall not exceed 127 millimetres in width and no kalsomine brush shall be more than 177.8 millimetres in width.

(c) Meals not to be taken in paint shop. No employee shall be permitted to have a meal in any paint shop or place where paint is stored or used.

(25) Spray Application - Painters—

A painter engaged on all applications carried out in other than a properly constructed booth approved by the Department of Labour and Industry shall be paid 43 cents per hour or part thereof: in addition to the rates otherwise prescribed in this award.

(26) An employee who is a qualified first aid person and is appointed by his/her employer to carry out first aid duties in addition to his/her usual duties shall be paid an additional rate of $1.46 per day.

(27) Toxic Substances—

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

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

(c) An employee using toxic substances or materials of a like nature shall be paid 51 cents per hour extra. Employees working in close proximity to employees so engaged shall be paid 40 cents per hour extra.

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

(28) Abattoirs—

An employee, other than a plumber in receipt of the plumbing trade allowance, employed in an abattoir shall be paid such rate as is agreed upon between the parties, or, in default of agreement, the rate determined by the Board of Reference.

(29) Fumes—

An employee required to work in a place where fumes of sulphur or other acid or other offensive fumes are present shall be paid such rates as are agreed upon between him/her and the employer.

(30) Asbestos—

Employees required to use materials containing asbestos or to work in close proximity to employees using such materials shall be provided with and shall use all necessary safeguards as required by the appropriate occupational health authority and where such safeguards include the mandatory wearing of protective equipment (ie. combination overalls and breathing equipment or similar apparatus) such employees shall be paid 51 cents per hour whilst so engaged.

(31) Explosive Powered Tools—

An operator of explosive powered tools, being an employee qualified in accord with the laws and regulations of the State of Western Australia to operate explosive powered tools, who is required to use an explosive powered tool shall be paid $1.00 for each day on which he/she used a tool in addition to the rates otherwise prescribed.

(32) Wet Work—

An employee required to work in a place where water is continually dripping on him/her so that his/her clothing and boots become wet or where there is water underfoot shall be paid 43 cents per hour or part thereof: in addition to the rates otherwise prescribed in this award.

(33) Cleaning Down Brickwork—

An employee required to clean down bricks using acids or other corrosive substances shall be supplied with gloves and be paid 40 cents per hour or part thereof: in addition to the rates otherwise prescribed in this award.

(34) Bagging—

An employee engaged upon bagging brick or concrete structures shall be paid 40 cents per hour or part thereof: in addition to the rates otherwise prescribed in this award.

(35) Bitumen Work—

An employee handling hot bitumen or asphalt or dripping materials in creosote shall be paid 51 cents per hour or part thereof: in addition to the rates otherwise prescribed in this award.

(36) Scaffolding Certificate Allowance—

A tradesperson who is the holder of a scaffolding certificate or rigging certificate issued by the Department of Labour and Industry and is required to act on that certificate whilst engaged on work requiring a certified person shall be paid 43 cents per hour or part thereof: in addition to the rates otherwise prescribed in this award but this allowance shall not be payable cumulative on the allowance for swing scaffolds.

(37) Dry Polishing or Cutting of Tiles—

An employee required to dry polish tiles with a machine or to cut tiles with an electric saw shall be paid 51 cents per hour or part thereof: in addition to the rates otherwise prescribed in this award.

(38) Secondhand Timber—

Where, whilst working with second-hand timber, an employees tools are damaged by nails, dumps or other foreign matter on the timber, he/she shall be entitled to an allowance of $1.46 per day on each day upon which his/her tools are so damaged, provided that no allowance shall be payable under this clause unless it is reported immediately to the employer's representative on the job in order that the claim may be proved.

(39) Roof Repairs—

An employee engaged on repairs to roofs shall be paid 47 cents per hour or part thereof: in addition to the rates otherwise provided in this award.

(40) Computing Quantities—

An employee, other than a leading hand, who is required to compute or estimate quantities of materials in respect of the work performed by others shall be paid $3.12 per day or part thereof: in addition to the rates otherwise prescribed in this award.

(41) Loads—

Where bricks are being used the employee shall not be required to carry—

(a) More than 40 bricks each load in a wheelbarrow (or a scaffold) to a height of 4.6 metres from the ground.

(b) More than 36 bricks each load in a wheelbarrow over a height of 4.6 metres on a scaffold.

The type of wheelbarrow shall be agreed upon with the union.

(42) Grinding Facilities—

The employer shall provide adequate facilities for the employees to grind tools either at the job or at the employer's premises and the employees shall be allowed time to use the same whenever reasonably necessary.

(43) First Aid Outfit—

On each job the employer shall provide sufficient supply of bandages and antiseptic dressings for use in case of accidents.

(44) Water and Soap—

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

(45) (a) The employer shall supply a safety helmet for each of his/her employees requesting one on any job where, pursuant to the regulations made under the Construction Safety Act, 1972, an employee is required to wear such helmet.

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

(46) Provision of Boiling Water—

The employer shall, where practicable provide boiling water for the use of his/her employees on each job at lunch time.

(47) Sanitary Arrangements—

The employer shall comply with the provisions of section 102 of the Health Act, 1911.

(48) Attendants on Ladders—

No employees shall work on a ladder at a height of over 6.1 metres from the ground when such ladder is standing in any street, way or lane where traffic is passing to and fro, without an assistant on the ground.

(49) Electrical Sanding Machines—

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

(a) The weight of each such machine shall not exceed 5.9 kilograms.

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

(c) Employers shall provide and supply respirators of a suitable type, to each employee and shall maintain same in an effective and clean state at all times.

Where respirators are used by more than one employee, each such respirator shall be sterilised or a new pad inserted after use by each such employee.

(d) Employers shall also provide and supply goggles of suitable type provided that the goggles with celluloid lenses shall not be regarded as suitable.

(e) All employees shall use the protective equipment supplied when using electrical sanding machines of any type.

(50) Dam Walls—

Adequate precautions shall be taken by all employers for the safety of workers employed on the retaining walls of dams. Any dispute as to the adequacy of precautions taken shall be referred to the Board of Reference.

(51) The Secretary or any authorised officer of the union shall have the right to visit any job for the purpose of ascertaining whether work is being performed in accordance with the provisions of the Construction Safety Act, 1972, and any regulations made thereunder. Should he/she be of the opinion that the work being carried out is not in accordance with those provisions the Secretary or any authorised officer of the union shall inform the employer and the employees concerned accordingly and may report any alleged breach of Act or the regulations to the Chief Inspector of Construction Safety.

(52) Where the employer provides transport to and from the job the conveyance used for such transport shall be provided with suitable seating and weatherproof covering.

(53) An employee engaged on work at Fremantle Prison shall be paid 43 cents per hour extra.

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

(55) Building tradespersons engaged solely on outside work at Homeswest shall be given one winter jacket per year to be replaced on a fair wear and tear basis.

4. Schedule C – Hospital Environment Allowance: Delete this schedule and insert in lieu the following—

Notwithstanding the provisions of Clause 13. - Special Rates and Provisions of this Award, the following allowances shall be paid to maintenance employees employed at hospitals listed hereunder:-

1. (a) For work performed in a hospital environment - $11.49 per week.

(b) For disabilities associated with work performed in—

Difficult access areas;

Tunnel complexes;

Areas with great temperature variation: - $4.00 per week.

Princess Margaret Hospital

King Edward Memorial Hospital

Sir Charles Gairdner Hospital

Royal Perth Hospital

Fremantle Hospital

2. For work performed in a hospital environment - $7.74 per week.

Kalgoorlie Hospital

Osborne Park Hospital

Albany Hospital

Bunbury Hospital

Geraldton Hospital

Mt Henry Hospital

Northam Hospital

Swan Districts Hospital

Perth Dental Hospital

3. For work performed in a hospital environment - $5.48 per week.

Bentley Hospital

Derby Hospital

Narrogin Hospital

Port Hedland Hospital
Rockingham Hospital
Sunset Hospital
Armadale Hospital
Broome Hospital
Busselton Hospital
Carnarvon Hospital
Collie Hospital
Esperance Hospital
Katanning Hospital
Merredin Hospital
Murray Hospital
Warren Hospital
Wyndham Hospital

4. The monetary amounts prescribed in this Schedule shall be adjusted in accordance with any decision of the Commission in Court Session which alters wage rates generally following movements in the Consumer Price Index and which is subsequently reflected by amendment to the allowances contained in Clause 13. - Special Rates and Provisions of the Building Trades (Government) Award No. 31A of 1966.

5. Appendix D – Award Restructuring: Delete clause (8)(b) of this appendix and insert in lieu the following—

(b) (i) In addition to the rates contained in paragraph (a) of this subclause, employees designated in classification levels to 7 inclusive shall receive an all purpose industry allowance of $12.19.

(ii) This allowance shall be paid in two instalments as follows—

(aa) $6.16 of the allowance shall be paid after the first twelve months of government service; and

(bb) the remaining $6.03 shall be paid on 24 months of government service.

2002 WAIRC 06815

EARTH MOVING AND CONSTRUCTION AWARD

No. 10 of 1963

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS, APPLICANT
	v.
	GOLDFIELDS CONTRACTORS PTY LTD, BELL BROS PTY LTD, HOT MIX LTD, RESPONDENTS
CORAM	COMMISSIONER J F GREGOR
DATE	WEDNESDAY, 23 OCTOBER 2002
FILE NO.	APPLICATION 1202 OF 2002
CITATION NO.	2002 WAIRC 06815

Result Award varied

Order

HAVING heard Mr T. Kucera (of Counsel) on behalf of the Applicant and Mr K.J. Dwyer for the Respondents, and by consent, the Commission pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders:

THAT the Earth Moving and Construction Award be varied in accordance with the following Schedule and that such variation shall have effect from the first pay period on or after 14 October 2002.

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

SCHEDULE

1. Clause 24. – Allowances and Special Provisions: Delete this clause and insert in lieu the following—

(1) Dirt Money—

A dirt allowance of $0.46 per hour shall be payable in connection with work deemed to be more than ordinarily dirty; cases of dispute to be determined by the Board of Reference.

(2) Confined Space—

Workers working in confined space shall be paid an allowance of $0.55 per hour. "Confined space" means one of which the dimensions are such that the workman must work in an unusually stooped or cramped position or without adequate ventilation or where confinement within a limited place is productive of unusual discomfort to him.

(3) Wet Work—

(a) Any worker working in water or "wet places" shall be paid an extra allowance of $3.59 per day or part of a day.

(b) "Wet places" shall mean places where, in the performance of the work the splashing of water and mud saturate the worker's clothing or where protection is not provided to prevent splashings or dripping sufficient to saturate his clothing, and shall include wet material or wet ground in which it is impracticable for the worker wearing ordinary working boots to work without getting wet feet. Provided that this clause shall not apply to men working on surfaces made wet by rain.

(c) In exceptional cases where the work is excessively wet and which are not covered by paragraph (b) hereof, an extra allowance may be agreed upon, or failing agreement, determined by the Board of Reference.

(d) Subject to paragraph (c), the engineer in charge or the foreman shall decide whether any allowance is payable under this clause.

(e) Workers called upon to work overtime in water or in wet places shall receive an extra $3.59 or the appropriate allowance fixed by the Board of Reference for each eight hours or portion thereof, of overtime worked and such allowance shall be treated as portion of the wage for the calculation of overtime. For all other purposes, the extra payment shall be deemed an allowance.

(4) A multi-storey allowance shall be paid to all employees to whom this award applies engaged on site in the construction of a multi-storey building as defined in accordance with the following:-

From commencement of building to 15th floor level - $0.35 per hour extra.

From 16th floor level to 30th floor level - $0.44 per hour extra.

From 31st floor level to 45th floor level - $0.67 per hour extra.

From 46th floor level to 60th floor level - $0.85 per hour extra.

From 61st floor level onwards - $1.09 per hour extra.

For the purposes of this subclause a multi-storey building means a building which will, when complete, consist of 5 or more storey levels and any other structure which does not have regular storey levels but which exceeds 15 metres in height.

2. Clause 32. – Superannuation: Delete paragraph (a) of subclause (2) of this clause and insert in lieu the following—

(a) In accordance with this clause and subject to the Trust Deed of the relevant fund, on behalf of each eligible employee an employer shall contribute to a relevant superannuation fund a superannuation contribution, equivalent to nine per cent of such eligible employee's ordinary time earnings each week, (rounded to the nearest 10 cents), provided that—

3. Appendix 1:

A. Delete clause (5) of this appendix and insert in lieu the following—

(5) Industry Allowance

In addition to the rates specified in subclause (2) an industry allowance of $19.52 per week should be paid to all employees under this award to compensate for the disabilities usually associated with building and steel construction work.

B. Delete clause (8) of this appendix and insert in lieu the following—

(8) Allowances and Special Provisions

(a) Dirt Money

A dirt allowance of 46 cents per hour shall be payable in connection with work deemed to be more than ordinarily dirty; cases of dispute to be determined by the Board of Reference.

(b) Confined Space

Workers working in confined space shall be paid an allowance of 55 cents per hour. "Confined space" means one of which the dimensions are such that the workperson must work in an unusually stooped or cramped position or without adequate ventilation or where confinement within a limited place is productive of unusual discomfort to him/her.

(c) Wet Work

(i) Any worker working in water or "wet places" shall be paid an extra allowance of $3.59 per day or part of a day.

(ii) "Wet places" shall mean places where, in the performance of the work the splashing of water and mud saturate the worker's clothing or where protection is not provided to prevent splashings or dripping sufficient to saturate his/her clothing, and shall include wet material or wet ground in which it is impracticable for the worker wearing ordinary working boots to work without getting wet feet. Provided that this clause shall not apply to workers working on wet surfaces made wet by rain.

(iii) In exceptional cases where the work is excessively wet and which are not covered by paragraph (ii) hereof, an extra allowance may be agreed upon, or failing agreement, determined by the Board of Reference.

(iv) Subject to paragraph (iii), the engineer in charge or the foreperson shall decide whether any allowance is payable under this clause.

(v) Workers called upon to work overtime in water or in wet places shall receive an extra $3.59 or the appropriate allowance fixed by the Board of Reference for each eight hours or portion thereof, of overtime worked and such allowance shall be treated as portion of the wage for the calculation of overtime. For all other purposes, the extra payment shall be deemed an allowance.

(d) A multi-storey allowance shall be paid to all employees to whom this Appendix applies engaged on site in the construction of a multi-storey building as defined in accordance with the following:-

From commencement of building to 15th floor level - 35 cents per hour extra.

From 16th floor level to 30th floor level - 44 cents per hour extra.

From 31st floor level to 45th floor level - 67 cents per hour extra.

From 46th floor level to 60th floor level - 85 cents per hour extra.

From 61st floor level onwards - $1.09 per hour extra.

For the purposes of this subclause a multi-storey building means a building which will, when complete, consist of 5 or more storey levels and any other structure which does not have regular storey levels but which exceeds 15 metres in height.

2002 WAIRC 06823

ENGINE DRIVERS' (BUILDING AND STEEL CONSTRUCTION) AWARD

No. 20 of 1973

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS, APPLICANT
	v.
	MASTER BUILDERS ASSOCIATION OF WA, CIVIL AND CIVIC PTY LTD, TOM'S CRANE & PLANT HIRE, RESPONDENTS
CORAM	COMMISSIONER J F GREGOR
DATE	WEDNESDAY, 23 OCTOBER 2002
FILE NO.	APPLICATION 1206 OF 2002
CITATION NO.	2002 WAIRC 06823

Result Award varied

Order

HAVING heard Mr T. Kucera (of Counsel) on behalf of the Applicant and Mr K.J. Dwyer for the Chamber of Commerce & Industry WA and Mr K. Richardson for the Master Builders' Association of Western Australia (Union of Employers), and by consent, the Commission pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders:

THAT the Engine Drivers' (Building and Steel Construction) Award No. 20 of 1973 be varied in accordance with the following Schedule and that such variation shall have effect from the first pay period on or after 14 October 2002.

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

SCHEDULE

1. Clause 24. – Allowances and Special Provisions: Delete this clause and insert in lieu the following—

(1) An employee required to work in a place where the temperature has been raised by artificial means to between 46° and 54° Celsius shall be paid $0.45 per hour or part thereof in addition to the rates otherwise prescribed in this award, or in excess of 54° Celsius shall be paid $0.54 per hour or part thereof in addition to the said rates.

(2) Dirt Money: a dirt allowance of $0.45 per hour or part thereof shall be payable in connection with work deemed to be unusually dirty; cases of dispute to be settled by a Board of Reference.

(3) Height Allowance:

(a) Tower crane drivers shall be paid a height allowance in accordance with the following schedule, the height to be measured from ground level, i.e. street level to floor of crane cabin—

From ground level up to and including 30 metres - $0.35 per hour.
Over 30 metres and up to 45 metres - $0.43 per hour.
Over 45 metres and up to 60 metres - $0.73 per hour.
Over 60 metres - $0.35 per hour additional for each 15 metres over 60 metres.

(b) Mobile crane drivers, when employed for any day or part thereof on a building site where a multi storey building is being or is to be constructed shall be paid a multi-storey allowance in accordance with the following table:-

From commencement of building to 15th floor level - $0.35 per hour extra.
From 16th floor level to 30th floor level - $0.43 per hour extra.
From 31st floor level to 45th floor level - $0.65 per hour extra.
From 46th floor level to 60th floor level - $0.83 per hour extra.
From 61st floor level onwards - $1.07 per hour extra.

2. Clause 27. – Wages: Delete subclause (5) of this clause and insert in lieu the following—

(5) Industry Allowance

In addition to the rates specified in subclause (2) an industry allowance of $19.25 per week should be paid to all employees under this award to compensate for the disabilities usually associated with building and steel construction work.

3. Clause 35. – Superannuation: Delete paragraph (a) of subclause (2) of this clause and insert in lieu the following—

(a) In accordance with this clause and subject to the Trust Deed of the relevant fund, on behalf of each eligible employee an employer shall contribute to a relevant superannuation fund a superannuation contribution, equivalent to 9% of such eligible employee's ordinary time earnings each week, (rounded to the nearest 10 cents), provided that—

4. 4th Schedule – Special Site Provisions: Delete 1. in Part 1 of this schedule and insert in lieu the following—

1.	S.E.C. Kwinana	$0.92 per hour for each hour worked and 5 cents per hour footwear allowance for each hour worked.

2002 WAIRC 06805

ENGINE DRIVERS' (GENERAL) AWARD NO. R 21A OF 1977

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS, APPLICANT
	v.
	COCA-COLA BOTTLERS, MASSEY-FERGUSON (AUST) LTD, JAMES HARDIE & CO PTY LTD, RESPONDENTS
CORAM	COMMISSIONER J F GREGOR
DATE	TUESDAY, 22 OCTOBER 2002
FILE NO.	APPLICATION 1199 OF 2002
CITATION NO.	2002 WAIRC 06805

Result Award varied

Order

HAVING heard Mr T. Kucera (of Counsel) on behalf of the Applicant and Mr K.J. Dwyer for the Respondents, and by consent, the Commission pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders:

THAT the Engine Drivers' (General) Award be varied in accordance with the following Schedule and that such variation shall have effect from the first pay period on or after 14 October 2002.

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

SCHEDULE

1. Clause 19. – Wages—

A. Delete subclause (2) of this clause and insert in lieu the following—

(2) Additions to Weekly Wage Rates

(a) An Engine Driver, Electric Motor Attendant or Fireperson engaged as hereinafter specified shall have his/her wage increase as follows—

		Per Week $
(i)	Attending to refrigerating and/or air compressor or compressors	$22.84
(ii)	Attending to an electric generator or dynamo exceeding 10 kw capacity	$22.84
(iii)	Attending to switchboard where the generating capacity is 350 kw or over	$7.27
(iv)	An Engine Driver who attends a boiler or boilers	$22.84

(b) Employees employed on boiler cleaning inside the boiler of flues of combustion chamber shall be paid an additional rate of $1.12 per hour whilst so engaged.

B. Delete subclause (3) of this clause and insert in lieu the following—

(3) Industry Allowance

(a) In addition to the rates prescribed in this clause an amount of $19.88 per week shall be paid to employees engaged under this award in rock quarries, limestone quarries and sand pits to compensate for dust and climatic conditions when working in the open and for deficiencies in general amenities and facilitates. Provided that employees in the limestone quarries of Cockburn Cement Ltd shall be paid an amount of $0.48 per hour in lieu of the $19.88 referred to in this subclause.

(b) (i) In addition to the rates prescribed in this clause a driver of an overhead electric crane, mobile crane, front end loader or tractor, employed by Cockburn Cement Limited shall, subject to as hereinafter provided, be paid an allowance of $0.19 per hour.

(ii) The allowance prescribed in this paragraph is to compensate for the extra duties, including servicing and re-fuelling of machines, associated with the work practices of Cockburn Cement Limited and shall be paid for each hour worked in a quarry, or for each hour worked elsewhere on shifts other than day shift Monday to Friday.

2. Clause 23. – Superannuation: Delete paragraph (a) of subclause (2) of this clause and insert in lieu the following—

(a) Subject to the provisions of subclause (3) - Exemptions of this clause each employer shall make monthly contributions to the fund in respect of all eligible employees at the rate of 9% of ordinary time earnings.

2002 WAIRC 06764

ENGINE DRIVERS (GOVERNMENT) AWARD 1993,
No. A 5 of 1983

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS, APPLICANT *v.* BOARD OF MANAGEMENT-FREMANTLE HOSPITAL, COMMISSIONER FOR MAIN ROADS, THE MINISTER FOR WORKS, RESPONDENTS
CORAM	COMMISSIONER J F GREGOR
DATE	MONDAY, 14 OCTOBER 2002
FILE NO.	APPLICATION 1197 OF 2002
CITATION NO.	2002 WAIRC 06764

Result Award varied

Order

HAVING heard Mr T. Kucera (of Counsel) on behalf of the Applicant and Mr R.A. Heaperman for the Respondents, and by consent, the Commission pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders—

THAT the Engine Drivers' (Government) Award 1983 be varied in accordance with the following Schedule and that such variation shall have effect from the first pay period on or after 14 October 2002.

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

SCHEDULE

Clause 24. – Wages—

A. Delete subclause (2)(b) of this clause and insert in lieu the following—

(b) Employees employed on boiler cleaning inside the boiler or flues or combustion chamber shall be paid $1.01 per hour while so engaged. Provided that this allowance shall not be payable to employees who are in receipt of the industry allowance or construction work allowance prescribed in subclause (1) of Clause 19. - Special Provisions of this Award.

B. Delete subclause (3) of this clause and insert in lieu the following—

(3) Additions to Wage Rates			Per Week
			$
(a)		A classified employee engaged as hereinafter specified shall have his/her wage rate increased as follows:	
	(i)	Attending to refrigerator and/or air compressor or compressors	22.00
	(ii)	Attending to an electric generator or dynamo exceeding 10 watt capacity	22.00
	(iii)	Attending to a switchboard where the generating capacity is 350kw or more	7.07
	(iv)	In charge of plant as defined	22.00
	(v)	Leading Fireperson, where two or more Firepersons are employed on one shift (per shift)	0.48

(b) Employees employed on boiler cleaning inside the boiler or flues or combustion chambers shall be paid $1.06 per hour while so engaged. Provided that this allowance shall not be payable to employees who are in receipt of the industry allowance or construction allowance prescribed in subclause (1) of Clause 19. - Special Provisions of this Award.

2002 WAIRC 06877

FAST FOOD OUTLETS AWARD 1990

NO. A14 OF 1990

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE SHOP, DISTRIBUTIVE AND ALLIED EMPLOYEES' ASSOCIATION OF WESTERN AUSTRALIA, APPLICANT
	v.
	AUSTRALIAN LIQUOR, HOSPITALITY AND MISCELLANEOUS WORKERS UNION, WESTERN AUSTRALIAN BRANCH AND OTHERS, RESPONDENTS
CORAM	COMMISSIONER S WOOD
DATE OF ORDER	TUESDAY, 29 OCTOBER 2002
FILE NO.	APPLICATION 1465 OF 2002
CITATION NO.	2002 WAIRC 06877

Result	Award varied by consent
Representation	
Applicant	Mr T Pope
Respondent	Mr J Welch on behalf of the ALHMWU

Order

WHEREAS this is an application filed by the applicant union seeking to be named as a party to the Fast Food Outlets Award; and

WHEREAS the parties having satisfied the Commission in respect of s 38(2) of the Industrial Relations Act, 1979; and

HAVING heard Mr T Pope on behalf of the applicant and Mr J Welch on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders:

THAT the Fast Food Outlets Award 1990 No A 14 of 1990 as varied, be further varied, by consent, in accordance with the following Schedule and that such variation shall have effect from the date of this order.

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

SCHEDULE

1. Clause 2. - Arrangement

Insert "Schedule B – Named Union Party" after Schedule A – List of Respondents.

2. Insert a new Schedule B

SCHEDULE B – NAMED UNION PARTY

The Australian Liquor, Hospitality and Miscellaneous Workers Union, Western Australian Branch

The Shop, Distributive and Allied Employees' Association of Western Australia

2002 WAIRC 06793

FOREMEN (BUILDING TRADES) AWARD 1991

NO. A5 OF 1987

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS, APPLICANT
	v.
	MASTER BUILDERS OF WESTERN AUSTRALIA, WESTSWAN FORMWORK PTY LTD, BOBRIK CONSTRUCTIONS PTY LTD, RESPONDENTS
CORAM	COMMISSIONER J F GREGOR
DATE	MONDAY, 21 OCTOBER 2002
FILE NO.	APPLICATION 1198 OF 2002
CITATION NO.	2002 WAIRC 06793

Result	Award varied

Order

HAVING heard Mr T. Kucera (of Counsel) on behalf of the Applicant and Mr K. Richardson for the Respondents, and by consent, the Commission pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders:

THAT the Foremen (Building Trades) Award 1991 be varied in accordance with the following Schedule and that such variation shall have effect from the first pay period on or after 14 October 2002.

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

SCHEDULE

Clause 19. – Superannuation: Delete subclause (1) of this clause and insert in lieu the following—

(1) Each employer to whom this Award applies shall make monthly contributions to a superannuation fund at the rate of 9% of ordinary time earnings in respect of each foreman employed by that employer pursuant to this Award.

2002 WAIRC 06848

HAIRDRESSERS AWARD 1989

No. A32 of 1988

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE WEST AUSTRALIAN HAIRDRESSERS' AND WIGMAKERS' EMPLOYEES' UNION OF WORKERS, APPLICANT
	v.
	THE MASTER LADIES HAIRDRESSERS' INDUSTRIAL UNION OF EMPLOYERS OF W.A. AND OTHERS, RESPONDENTS
CORAM	COMMISSIONER S WOOD
DATE OF ORDER	FRIDAY, 25 OCTOBER 2002
FILE NO.	APPLICATION 1424 OF 2002
CITATION NO.	2002 WAIRC 06848

Result	Award varied by consent
Representation	
Applicant	Mr T Pope
Respondent	Mr L Marshall on behalf of the MLHU Ms S Thorp on behalf of the Regent Enterprises Pty Ltd T/A Sam Rifici Hair Care Centre

Order

HAVING heard Mr T Pope on behalf of the applicant and Mr L Marshall on behalf of the MLHU and Ms S Thorp on behalf of Regent Enterprises Pty Ltd t/a Sam Rifici Hair Care Centre, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders:

THAT the Hairdressers Award 1989 No. A 32 of 1988 as varied, be further varied, by consent, 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 25 October 2002.

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

SCHEDULE

1. **Clause 16 – Meal Money**

In subclause (1) delete the sum $8.50 and insert in lieu the sum $8.75.

2. Clause 22 – Tools of Trade

In subclause (4) delete the sum $5.95 and insert in lieu the sum $6.15.

3. Clause 32 – First Aid Allowance

Delete the sum $7.15 and insert in lieu the sum $7.40.

2002 WAIRC 06746

HOSPITAL SALARIED OFFICERS (AUSTRALIAN RED CROSS BLOOD SERVICE WESTERN AUSTRALIA) AWARD, 1978

No. R 17 of 1974

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	HOSPITAL SALARIED OFFICERS ASSOCIATION OF WESTERN AUSTRALIA (UNION OF WORKERS), APPLICANT
	v.
	AUSTRALIAN RED CROSS BLOOD SERVICE - NORTH WEST REGION, RESPONDENT
CORAM	COMMISSIONER P E SCOTT
DATE OF ORDER	MONDAY, 14 OCTOBER 2002
FILE NO.	APPLICATION 1244 OF 2002
CITATION NO.	2002 WAIRC 06746

Result	Award varied

Order

HAVING heard Ms C Thomas on behalf of the applicant and Mr M O'Connor on behalf of the respondent, and by consent, the Commission, pursuant to the powers conferred under the Industrial Relations Act, 1979, hereby orders—

THAT the Hospital Salaried Officers (Australian Red Cross Blood Service Western Australia) Award, 1978 (No. R 17 of 1974) be varied in accordance with the following Schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after the 29th day of August 2002

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

SCHEDULE

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

(1) The minimum rates of salaries to be paid to employees covered by this award other than those specified in subclause (2) shall be—

LEVELS	CURRENT		NEW
		ASNA	
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
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
A1	54027	3652.00	57679.00
A2	56202	3652.00	59854.00
A3	58354	3652.00	62006.00
A4	60530	3652.00	64182.00
A5	64189	3652.00	67841.00
A6	66839	3652.00	70491.00
A7	69494	3652.00	73146.00
A8	72493	3652.00	76145.00
A9	75675	3652.00	79327.00

(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) Annual increments shall be subject to the employee's satisfactory performance over the preceding twelve months.

(c) Any dispute in relation to the payment of an annual increment shall be referred to the Western Australia an Industrial Relations Commission for determination.

(d) 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 06743

HOSPITAL SALARIED OFFICERS (GOOD SAMARITAN INDUSTRIES) AWARD 1990
No. A 8 of 1989

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	HOSPITAL SALARIED OFFICERS ASSOCIATION OF WESTERN AUSTRALIA (UNION OF WORKERS), APPLICANT
	v.
	GOOD SAMARITAN INDUSTRIES, RESPONDENT
CORAM	COMMISSIONER P E SCOTT
DATE OF ORDER	MONDAY, 14 OCTOBER 2002
FILE NO.	APPLICATION 1241 OF 2002
CITATION NO.	2002 WAIRC 06743

Result Award varied

Order

HAVING heard Ms C Thomas on behalf of the applicant and Mr M O'Connor on behalf of the respondent, and by consent, the Commission, pursuant to the powers conferred under the Industrial Relations Act, 1979, hereby orders—

THAT the Hospital Salaried Officers (Good Samaritan Industries) Award 1990 (No. A 8 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 29th day of August 2002

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

SCHEDULE

1. Schedule C – Minimum Salaries:

A. Delete clause (1) of this schedule and insert the following in lieu thereof—

	CURRENT	ASNA	NEW
(1) CLERICAL OFFICER (CLASS 1):			
Under 17 years	11577	2040.00	13618.00
17 years	13128	2313.00	15441.00
18 years	15168	2672.00	17841.00
19 years	17249	3039.00	20288.00
20 years	19390	3416.00	22806.00
Adult Rates			
1st year	21316	3755.00	25071.00
2nd year	21872	3755.00	25627.00
3rd year	22616	3755.00	26371.00
4th year	23265	3755.00	27020.00

B. Delete clause (2) of this schedule and insert the following in lieu thereof—

(2) CLERICAL OFFICER (CLASS 2):			
Under 17 years	11789	1999.00	13788.00
17 years	13632	2312.00	15944.00
18 years	15768	2674.00	18441.00
19 years	18111	3072.00	21183.00
20 years	20231	3431.00	23662.00

Adult Rates			
1st year	22139	3755.00	25894.00
2nd year	22792	3755.00	26547.00
3rd year	23443	3860.00	27303.00
4th year	24090	3860.00	27950.00
5th year	24741	3860.00	28601.00
6th year	25392	3860.00	29252.00
7th year	26141	3756.00	29897.00

C. Delete clause (4) of this schedule and insert the following in lieu thereof—

(4) TECHNICAL ASSISTANTS:

Grade 1			
16 years	11078	1908.00	12986.00
17 years	13311	2292.00	15603.00
18 years	15424	2656.00	18080.00
19 years	17784	3062.00	20846.00
20 years	19967	3438.00	23406.00
Adult Rates			
1st year	21806	3755.00	25561.00
2nd year	22461	3755.00	26216.00
3rd year	23137	3755.00	26892.00
4th year	23773	3860.00	27633.00
Grade 2			
1st year	23773	3860.00	27633.00
2nd year	24183	3860.00	28043.00
3rd year	24576	3860.00	28436.00
Grade 3			
1st year	24576	3860.00	28436.00
2nd year	25029	3860.00	28889.00
3rd year	25679	3860.00	29539.00

D. After clause (7) of this schedule and insert new clause (8) as follows—

(8) 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 schedule, the rates for employees under 21 years shall be calculated using the following formula—

Current junior rate ÷ Current Adult Rate (1st year) x ASNA rate for Adult rate (1st year) = Junior ASNA rate.

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

2002 WAIRC 06814

INDUSTRIAL SPRAYPAINTING AND SANDBLASTING AWARD 1991

No. A 33 of 1987

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS, APPLICANT *v.* ABRASIVE BLASTING SERVICES PTY LTD, BLASTCOATERS PTY LTD, BLASTWORKS PTY LTD, RESPONDENTS
CORAM	COMMISSIONER J F GREGOR
DATE	WEDNESDAY, 23 OCTOBER 2002
FILE NO.	APPLICATION 1201 OF 2002
CITATION NO.	2002 WAIRC 06814

Result Award varied

Order

HAVING heard Mr T. Kucera (of Counsel) on behalf of the Applicant and Mr K.J. Dwyer for the Respondents, and by consent, the Commission pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders:

THAT the Industrial Spraypainting and Sandblasting Award 1991 be varied in accordance with the following Schedule and that such variation shall have effect from the first pay period on or after 14 October 2002.

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

SCHEDULE

1. Clause 8. – Rates of Pay:

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

(a) (i) Subject to paragraph (b) hereof, an employee required to work underground shall be paid an allowance of $9.56 per week in addition to the allowance prescribed in subclause (3) of this clause and any other amount prescribed for such employee elsewhere in this award.

(ii) Where a shaft is to be sunk to a depth greater than six metres the payment of the allowance shall commence from the surface.

B. Delete paragraph (a) of subclause (5) of this clause and insert in lieu the following—

(a) A person specifically appointed to be a leading hand shall be paid at the rate of the undermentioned additional amounts above the rate of the highest classification supervised, or his/her own rate, whichever is the highest, in accordance with the number of persons in his/her charge:-

		Weekly Base Only $	Rate Per Hour $
(i)	In charge of not more than one person	12.30	0.34
(ii)	In charge of two and not more than five persons	27.50	0.75
(iii)	In charge of six and not more than ten persons	35.00	0.96
(iv)	In charge of more than ten persons	46.50	1.26

2. Clause 9. – Special Rates and Provisions: Delete subclause (1) of this clause and insert in lieu the following—

(1) In addition to the rates otherwise prescribed in this Award, the following rates shall be payable to employees covered by the said Award—

(a) Insulation

An employee handling charcoal, pumice, granulated cork, silicate of cotton, insulwool, slag wool, limpet fibre, vermiculite or other recognised insulating material of a like nature or working in the immediate vicinity so as to be affected by the use thereof 54 cents per hour or part thereof.

(b) Hot Work

An employee who works in a place where the temperature has been raised by artificial means to between 46 degrees and 54 degrees Celsius - 44 cents per hour or part thereof, exceeding 54 degrees Celsius - 54 cents per hour or part thereof.

Where such work continues for more than two hours, the employee shall be entitled to 20 minutes rest after every two hours work without loss of pay, not including the special rate provided by this paragraph.

(c) Cold Work

An employee who works in a place where the temperature is lowered by artificial means to less than zero degrees Celsius shall be paid 44 cents per hour.

Where such work continues for more than two hours, the employee shall be entitled to 20 minutes rest after every two hours work without loss of pay, not including the special rate provided by this paragraph.

(d) Confined Space

An employee required to work in a confined space shall be paid 54 cents per hour or part thereof.

("Confined Space" means a place the dimensions or nature of which necessitate working in a cramped position or without sufficient ventilation.)

(e) Swing Scaffold

(i) An employee required to work from any type of swing or any scaffold suspended by rope or cable, bosun's chair, or suspended scaffold requiring use of steel or iron hooks or angle irons shall be paid the appropriate allowance set out below corresponding to the storey level at which the anchors or bracing, from which the stage is suspended, has been erected.

Such allowance shall be paid for minimum of four hours' work or part thereof until construction work (as defined) has been completed.

Height of Bracing	First Four Hours	Each Additional Hour
0-15 storeys	3.19	0.66
16-30 storeys	4.09	0.86
31-45 storeys	4.83	0.99
46-60 storeys	7.93	1.64
Greater than 60 storeys	10.10	2.09

Provided that an apprentice with less than two years' experience shall not use a swing scaffold or bosun's chair, and further provided that solid plasterers when working off a swing scaffold shall receive an additional 14 cents per hour.

(ii) Payments contained in this subclause are in recognition of the disabilities associated with the use of swing scaffolds.

(iii) For the purpose of Clause 9(1)(e)(i) hereof—

"Completed" means the building is fully functioning and all work which was part of the principle contract is complete.

"Storeys" shall be given the same meaning as the storey level in Clause 10(2) of this Award.

(f) Wet Work

An employee working in any place where water is continually dripping on him/her so that clothing and boots become wet, or where there is water underfoot, shall be paid 44 cents per hour whilst so engaged.

(g) Dirty Work

An employee engaged on unusually dirty work shall be paid 44 cents per hour.

(h) Towers Allowance

An employee working on a chimney stack, spire, tower, radio or television mast or tower, air shaft (other than above ground in a multi-storey building), cooling tower or silo, where the construction exceeds fifteen metres in height shall be paid 44 cents per hour for all work above fifteen metres, and 44 cents per hour for work above each further fifteen metres.

Provided that any similarly constructed building, or a building not covered by Clause 10. - Multi-Storey Allowance, which exceeds 15 metres in height may be covered by this subclause, or by that clause by agreement or where agreement is not reached, by determination of the Commission.

(i) Toxic Substances

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

(ii) Employees using such materials will be provided with and shall use all safeguards as are required by Clause 27. - Protection of Employees and the appropriate Government authority or in the absence of such requirement such safeguards as are defined by a competent authority or person chosen by the union and the employer.

(iii) Employees using toxic substances or materials of a like nature shall be paid 54 cents per hour. Employees working in close proximity to employees so engaged shall be paid 44 cents per hour.

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

(j) Fumes

An employee required to work in a place where fumes of sulphur or other acid or other offensive fumes are present shall be paid such rates as are agreed upon between him/her and the employer; provided that, in default of agreement, the matter may be referred to a Board of Reference for the fixation of a special rate.

Any special rate so fixed shall apply from the date the employer is advised of the claim and thereafter shall be paid as and when the fume condition occurs.

(k) Asbestos

Employees required to use materials containing asbestos or to work in close proximity to employees using such materials shall be provided with and shall use all necessary safeguards as required by the appropriate occupational health authority and where such safeguards include the mandatory wearing of protective equipment (i.e. combination overalls and breathing equipment or similar apparatus) shall be paid 54 cents per hour extra whilst so engaged.

(l) Furnace Work

An employee required to work on the construction or alteration or repairs to boilers, flues, furnaces, retorts, kilns, ovens, ladles and similar refractory work shall be paid $1.18 per hour. This additional rate shall be regarded as part of the wage rate for all purposes.

(m) Acid Work

An employee required to work on the construction or repairs to acid furnaces, acid stills, acid towers and all other acid resisting brickwork shall be paid $1.18 per hour. This additional rate shall be regarded as part of the wage rate for all purposes.

(n) Roof Repairs

Employees engaged on repairs to roofs shall be paid 54 cents per hour.

(o) Underground Allowance

(i) An employee required to work underground for no more than four days or shifts in an ordinary week shall be paid $1.90 a day or shift in addition to any other amount prescribed for such employees elsewhere in this award.

Provided that an employee required to work underground for more than four days or shifts in an ordinary week shall be paid an underground allowance in accordance with the provisions of subclause (3) of Clause 8. - Rates of Pay.

(ii) Where a shaft is to be sunk to a depth greater than six metres the payment of the underground allowance shall commence from the surface.

(iii) This allowance shall not be payable to employees engaged upon “pot and drive” work at a depth of 3.5 metres or less.

(p) First Aid

An employee who is qualified to provide first aid and who is appointed by his/her employer to carry out first aid duties shall be paid $1.88 per day.

(q) Fireproofing Spray: An employee using a fireproof or composition spray shall be paid an additional 44 cents per hour whilst so engaged.

(r) Height Work: An employee working on any structure at a height of more than nine metres where an adequate fixed support not less than 0.75 metres wide is not provided, shall be paid 41 cents per hour in addition to ordinary rates. This subclause shall not apply to an employee working on a bosun’s chair or swinging stage.

This provision shall not apply in addition to the Towers Allowance prescribed in paragraph (h) of this subclause.

(s) Brewery Cylinders - Painters

A painter in brewery cylinders or stout tuns shall be allowed 15 minutes' spell in the fresh air at the end of each hour worked by him/her.

Such 15 minutes shall be counted as working time and shall be paid for as such. The rate for working in brewery cylinders or stout tuns shall be at the rate of time and one-half. When an employee is working overtime and is required to work in brewery cylinders and stout tuns he/she shall, in addition to the overtime rates payable, be paid one half of the ordinary rate payable as provided by Clause 8. - Rates of Pay of this award.

(t) Certificate Allowance

A tradesman who is the holder of a scaffolding certificate or rigging certificate issued by the Department of Industrial Affairs and is required to act on that Certificate whilst engaged on work requiring a certificated person shall be paid an additional 44 cents per hour.

Provided that this allowance shall not be payable cumulative on the allowance for swing scaffolds.

(u) Spray Application - Painters

An employee engaged on all spray applications carried out in other than a properly constructed booth approved by the Department of Industrial Affairs shall be paid 44 cents per hour extra.

(v) Spray Painting—

(i) Lead paint shall not be applied by a spray to the interior of any building and no surface painted with lead paint shall be rubbed down or scraped by a dry process.

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

(iii) Where from the nature of the paint or substance used in spraying a respirator would be of little or no practical use in preventing the absorption of fumes or materials from substances used by an employee in spray painting, the employee shall be paid a special allowance of $1.24 per day.

3. Clause 10. – Multi-Storey Allowance: Delete subclause (3) of this clause and insert in lieu the following—

(3) Rates For Multi-Storey Buildings

Except as provided for in subclause (4) of this clause, an allowance in accordance with the following table shall be paid to all employees on the building site. The second and subsequent allowance scales shall, where applicable, commence to apply to all employees when one of the following components of the building - structural steel, re-inforcing steel, boxing or walls, rises above the floor level first designated in each such allowance scale.

"Floor Level" means that stage of construction which in the completed building would constitute the walking surface of the particular floor level referred to in the table of payments.

From commencement of Building to Fifteenth Floor Level - 34 cents per hour extra;

From Sixteenth Floor Level to Thirtieth Floor Level - 43 cents per hour extra;

From Thirty-first Floor Level to Forty-fifth Floor Level – 66 cents per hour extra;

From Forty-sixth Floor Level to Sixtieth Floor Level - 84 cents per hour extra;

From Sixty-first Floor Level Onwards – $1.04 per hour extra.

The allowance payable at the highest point of the building shall continue until completion of the building.

4. Appendix B – Asbestos Eradication: Delete clause (5) of this appendix and insert in lieu the following—

In addition to the rates prescribed in this award, an employee engaged in asbestos eradication (as defined) shall receive $1.45 per hour worked in lieu of Special Rates prescribed in Clause 9(1) of this award with the exception of subclauses (b), (c) and (e).

2002 WAIRC 06806

MONUMENTAL MASONRY INDUSTRY AWARD 1989

NO. A36 OF 1987

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS, APPLICANT
	v.
	BELLEVUE MONUMENTAL WORKS PTY LTD, CATHOLIC MONUMENTAL WORKS, FREMANTLE MONUMENTAL WORKS, RESPONDENTS
CORAM	COMMISSIONER J F GREGOR
DATE	TUESDAY, 22 OCTOBER 2002
FILE NO.	APPLICATION 1195 OF 2002
CITATION NO.	2002 WAIRC 06806

Result Award varied

Order

HAVING heard Mr T. Kucera (of Counsel) on behalf of the Applicant and Mr K.J. Dwyer for the Respondents, and by consent, the Commission pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders:

THAT the Monumental Masonry Industry Award 1989 be varied in accordance with the following Schedule and that such variation shall have effect from the first pay period on or after 14 October 2002.

[L.S.]

(Sgd.) J. F. GREGOR,
Commissioner.

SCHEDULE

1. Clause 7. – Wages:

A. Delete subclause (2) of this clause and insert in lieu the following—

(2) Industry Allowance—

An industry allowance at the rate of $13.80 per week shall be paid for all purposes to each adult employed in the workshop to compensate for the following disabilities associated with monumental masonry—

(a) Working in wet conditions with water underfoot.

(b) Working on dirty work.

(c) The use of acid or other corrosive substances when cleaning down stone.

(d) Working in a dusty atmosphere.

Before exercising a power of inspection the representative shall give notice of not less than 24 hours to the employer.

B. Delete paragraph (a) of subclause (3) of this clause and insert in lieu the following—

(3) Leading Hands—

(a) An employee specifically appointed to be a leading hand who is placed in charge of—

(i) not more than one employee, other than an apprentice, shall be paid $13.10 per week; or

(ii) more than one and not more than five other employees shall be paid $29.10 per week; or

(iii) more than five and not more than ten other employees shall be paid $37.80 per week; or

(iv) more than ten other employees shall be paid $49.20 per week in each case, in addition to the rate prescribed for the highest classification of employee supervised or his/her own rate, whichever is the highest.

2. Clause 8. – Superannuation: Delete paragraph (a) of subclause (2) of this clause and insert in lieu the following—

(a) Subject to the provisions of subclause (4) - Exemptions of this clause, each employer shall make monthly contributions to the fund in respect of all eligible employees at the rate of 9% of ordinary time earnings.

3. Clause 9. – Special Rates and Provisions:

A. Delete subclause (3) of this clause and insert in lieu the following—

(3) Computing Quantities—

An employee, other than a leading hand, who is regularly required to compute or estimate quantities of materials in respect of the work performed by others shall be paid $3.06 per day or part thereof in addition to the rates otherwise prescribed in this Award.

B. Delete subclause (8) of this clause and insert in lieu the following—

(8) An employee holding a Third Year First Aid Medallion of the St. John Ambulance Association, appointed by the employer to perform first aid duties, shall be paid at the rate of $8.25 per week in addition to the prescribed rate.

2002 WAIRC 06795

PEST CONTROL INDUSTRY AWARD

NO. A9 OF 1982

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE AUSTRALIAN WORKERS' UNION, WEST AUSTRALIAN BRANCH, INDUSTRIAL UNION OF WORKERS, APPLICANT
	v.
	ALLPEST (AUST) PTY LTD AND OTHERS, RESPONDENTS
CORAM	COMMISSIONER S WOOD
DATE OF ORDER	MONDAY, 21 OCTOBER 2002
FILE NO.	APPLICATION 223 OF 2000
CITATION NO.	2002 WAIRC 06795

Result	Award varied by consent
Representation	
Applicant	Mr M Llewellyn
Respondents	Mr L Joyce

Order

HAVING heard Mr M Llewellyn on behalf of the Applicant and Mr L Joyce on behalf of the Respondents, and by consent, the Commission, being satisfied that the claim complies with the terms of the Wage Fixing Principles set out in the General Order of the Commission No. 797 of 2002, dated 22 July 2002, hereby, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, orders:

THAT the Pest Control Industry Award 1982, No. A 9 of 1982, be varied in accordance with the following Schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after the 18th Day of October 2002.

(Sgd.) S. WOOD,
Commissioner.

[L.S.]

SCHEDULE

1. Clause 2. – Arrangement: Delete this clause and insert in lieu thereof the following new clause to allow for the deletion of clause 20. – Definitions and replacing that clause with a new clause 20. – National Training Wage—

2. – ARRANGEMENT

2. Clause 5. – Hours: Delete this clause and insert in lieu thereof the following new clause—

5. – HOURS

(1) (a) The provisions of this clause apply to all employees other than those engaged on shift work.

(b) Subject to the provisions of subclauses (3) and (4) of this clause the ordinary hours of work shall be an average of 38 per week to be worked on one of the following bases—

(i) 38 hours within a work cycle not exceeding seven consecutive days; or

(ii) 76 hours within a work cycle not exceeding fourteen consecutive days; or

(iii) 114 hours within a work cycle not exceeding twenty-one consecutive days; or

(iv) 152 hours within a work cycle not exceeding twenty-eight consecutive days; or

(v) where the ordinary hours being worked each day exceed 8 hours on any day, any other work cycle during which a weekly average of 38 ordinary hours are worked; or

(vi) for the purposes of paragraph (g) of subclause (3) of this clause any other work cycle during which a weekly average of 38 ordinary hours are worked as may be agreed in accordance with paragraph (g) of subclause (3).

(c) The ordinary hours of work may be worked on any or all days of the week, Monday to Friday inclusive and where the employer and employee agree, may be worked on any 5 days of the week, Monday to Saturday inclusive provided that any agreement to work ordinary hours on Saturday's shall be recorded in writing, signed by the employer and the employee and stored within the employer's time and wages records.

(d) Except in the case of shift employees, ordinary hours shall be worked between the hours of 6.00am and 6.00pm, provided that the spread of hours may be altered by agreement between the employer and the majority of employees in the plant, section or sections concerned.

(e) The ordinary hours of work shall not exceed 10 in any day provided that in any arrangement of ordinary working hours where the ordinary working hours are to exceed eight on any day, the arrangement of hours shall be subject to agreement between the employer and the majority of employees in the enterprise, section or sections concerned.

(f) Ordinary hours worked on a Saturday shall be paid for at 1.5 times the employee's ordinary hourly rate.

(g) The ordinary hours of work shall be consecutive except for a meal break which shall not be more than 1 hour or less than 30 minutes and—

(i) An employee shall not be compelled to work for more than five hours without a meal interval except where an alternative arrangement is entered into as a result of discussions as provided for in subclause (4) of this clause.

(ii) By arrangement between an employer and the majority of employees in the plant, section or sections concerned, an employee or employees may be required to work in excess of five hours, but not more than six hours, at ordinary rates of pay without a meal break.

(iii) The time of taking a scheduled meal break or rest break by one or more employees may be altered by the employer if it is necessary to do so in order to meet operational requirements.

(iv) An employer may stagger the time of taking a meal or rest break to meet operational requirements.

(v) Where an employee is instructed by the employer to continue working during the employee's usual meal interval and the meal interval is postponed for more than half an hour, the employee shall be paid at overtime rates until the employee receives their meal interval.

(h) (i) Subject to the provisions of this paragraph, a rest period of seven minutes from the time of ceasing work to the time of resuming work shall be allowed each morning.

(ii) The rest period shall be counted as time off duty without deduction of pay and shall be arranged at a time and in a manner to suit the convenience of the employer.

(iii) Refreshments may be taken by employees during the rest period but the period of seven minutes shall not be exceeded under any circumstances.

(iv) An employer who satisfies the Commission that any employee has breached any condition expressed or implied in this paragraph shall be exempted from liability to allow the rest period.

(3) (a) Except as provided in paragraph (d) of this subclause the method of implementing the 38 hour week may be any of the following—

(i) by employees working less than 8 ordinary hours each day; or

(ii) by employees working less than 8 ordinary hours on one or more days each week; or

(iii) by fixing one day of ordinary working hours on which all employees will be off duty during a particular work cycle; or

(iv) by rostering employees off duty on various days of the week during a particular work cycle so that each employee has one day of ordinary working hours off duty during that cycle; or

(v) except in the case of shift employees, where the ordinary hours of work are worked in accordance with an arrangement as provided in sub-paragraphs (iii) or (iv) of this paragraph, any day off duty shall be arranged so that it does not coincide with a holiday prescribed in subclause (1) of Clause 8. – Holidays of this Award.

(b) In each enterprise, an assessment should be made as to which method of implementation best suits the business and the proposal shall be discussed with the employees concerned, the objective being to reach agreement on the method of implementation.

(c) In the absence of agreement at the enterprise level, the procedure for resolving special, anomalous or extraordinary problems shall be for the employer to discuss the matter with the State Secretary or Assistant State Secretary of the union and if still not resolved the matter will be referred to the Western Australian Industrial Relations Commission.

(d) Different methods of implementing a 38-hour week may apply to various groups or sections of employees in the plant or establishment concerned.

(e) Notice of days off duty

Except as provided in paragraphs (f) and (g) of this subclause in cases where, by virtue of the arrangement of ordinary hours an employee, in accordance with sub-paragraphs (iii) and (iv) of paragraph (a) of this subclause, is entitled to a day off duty during the work cycle, then such employee shall be advised by the employer at least four weeks in advance of the day to be taken off duty provided that a lesser period of notice may be agreed between the employer and the employee concerned.

(f) (i) An employer, with the agreement of the majority of employees concerned, may substitute the day an employee is to take off in accordance with sub-paragraphs (iii) and (iv) of paragraph (a) of this subclause hereof, for another day in the case of a breakdown in machinery or a failure or shortage of electric power to meet the requirements of the business in the event of rush orders or some other emergency situation.

(ii) An employer and an employee may by agreement substitute the day an employee is to take off with another day.

(g) Flexibility in relation to rostered days off

Notwithstanding any other provision in this clause, where the hours of work in the enterprise or section concerned are organised in accordance with sub-paragraphs (iii) and (iv) of paragraph (a) of this subclause an employer, the union or unions concerned and the majority of employees in the enterprise, section or sections concerned may agree to accrue up to a maximum of five rostered days off in special circumstances such as where there are regular and substantial fluctuation in operational requirements in any year.

Where such agreement has been reached the accrued rostered days off must be taken within twelve months from the date of accrual.

The union shall be consulted about accruing rostered days off where they have members in any enterprise or the affected section or sections.

(4) **Shift Work**

(a) The provisions of this clause apply to shift work whether continuous or otherwise.

(b) An employer may work employees on shifts but before doing so shall give notice of the intention to the employees concerned and, where the union has members in areas affected by the shiftwork, to the union of the intended starting and finishing times of ordinary working hours of the respective shifts.

(c) Where any particular process is carried out on shifts other than day shift, and less than five consecutive afternoon or five consecutive night shifts are worked on that process, then employees employed on such afternoon or night shifts shall be paid at overtime rates.

Provided that where the ordinary hours of work are normally worked on less than five days then the provision of this paragraph shall be as if that number of consecutive shifts was substituted for five consecutive shifts.

(d) The sequence of work shall not be deemed to be broken under paragraph (c) by reason of the fact that work on the process is not carried out on a Saturday or Sunday or any other day that the employee does not normally work for the purpose of implementing a 38-hour week or on any holiday.

(e) A shift employee when on afternoon or night shift shall be paid, for such shift fifteen percent more than the employee's ordinary rate prescribed by this award.

(f) All work performed on a shift the major proportion of which falls on a Saturday shall be paid for at the rate of time and one half and such allowance shall be paid in lieu of the shift allowance prescribed in paragraph (e) of this clause.

(g) All work performed on a shift the major proportion of which falls on a Sunday shall be paid for at the rate of time and three quarters and such allowance shall be paid in lieu of the shift allowance prescribed in paragraph (e) of this clause.

(h) All work performed on a shift the major proportion of which falls on a Public Holiday shall be paid for at the rate of double time and such allowance shall be paid in lieu of the shift allowance prescribed in paragraph (e) of this clause.

(i) Time worked in excess of ordinary hours on any shift shall be paid at overtime rates unless the extra hours worked—

(i) are due to private arrangements between the employees themselves;

(ii) do not exceed two hours and is due to a relieving employee not coming on duty at the proper time; or

(iii) are for the purpose of effecting the customary rotation of shifts.

3. Clause 6. – Overtime

Delete subclause (1) of this clause and insert in lieu thereof the following—

(1) Except as hereinafter mentioned, all work performed in excess of or outside the ordinary daily working hours Monday to Saturday inclusive shall be paid at the rate of time and one half for the first two hours and double time thereafter.

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

(4) (a) When an employee without being notified on the previous day or earlier is required to continue working after the completion of ordinary hours on any day for more than two hours he shall be provided with any meal required or be paid $8.15 in lieu thereof.

(b) If the amount of overtime required to be worked necessitates a second or subsequent meal, the employer shall provide such meal(s) or pay an amount of $5.65 for each second or subsequent meal.

(c) If an employee as a consequence of receiving such notice of overtime, has provided themselves with a meal or meals and is not required to work overtime or is required to work less overtime than notified they shall be paid the amounts prescribed in paragraphs (a) and (b) of this subclause in respect of the meals provided and not then required.

(d) The provisions of this subclause do not apply where the employee can reasonably return home for a meal.

Insert a new subclause (7) as follows—

(7) **Time Off In Lieu of Overtime**

(a) By agreement between an employer and the affected employee, the employee may take paid time off instead of being paid for overtime worked.

(b) Such time off shall be taken at a time mutually agreed between the employer and the employee and shall be taken on the basis of one hour's time off without loss of pay during ordinary working hours for each hour of overtime worked.

(c) If the employee is not given the time off in lieu of overtime within 12 months from the overtime being worked or prior to the termination of their employment, the overtime shall be paid as though it would have had their been no agreement to take time off in lieu.

4. Clause 10. – Contract of Service: Delete this clause and insert the following in lieu thereof—

10. – CONTRACT OF SERVICE

(1) Except in the case of casual employees, the contract of service may be terminated by notice or payment in lieu of notice given by either side in accordance with the following table:

Period of Continuous Service	Period of Notice
Not more than 1 year	At least 1 week
More than 1 year but not more than 3 years	At least 2 weeks
More than 3 years but not more than 5 years	At least 3 weeks
More than 5 years	At least 4 weeks

(2) The period of notice that must be given by an employer when terminating an employee who is over 45 years old and who has completed at least 2 years continuous service with the employer shall be worked out by ascertaining the amount of notice required to be given under subclause (1) of this clause and increasing that notice by a further one week.

(3) Provided that nothing in this clause entitles the employee to notice or payment in lieu of notice where they are dismissed for serious misconduct that justifies instant dismissal, including malingering, inefficiency or neglect of duty, and an employee so dismissed shall be paid for the time worked up to the time of the dismissal only.

(4) If payment in lieu of notice is given, that payment must at least equal the total of all amounts that the employer would have been liable to pay to the employee had their employment continued during the notice period and must be worked out on the basis of—

(a) the employee's ordinary hours of work (even if they are not standard hours); and

(b) the amounts ordinarily payable to the employee in respect of those hours, including (for example) allowances, loadings and penalties; and

(c) any other amounts payable under the employee's contract of employment.

(5) The period of notice required to be given under this clause shall not apply in the case of casual employees, trainees or employees engaged for a specific period of time or for a specific task or tasks.

(6) **Standing Down of Employees**

(a) (i) An employer may deduct payment for any day or part of a day that an employee can not be usefully employed because of industrial action by the union party to this award or any other association or union.

(ii) If an employee is required to attend for work on any day but because of failure or shortage of electric power or breakdown of the employer's plant, vehicle or equipment or through any other cause that the employer could not reasonably prevent, work is not provided, the employee shall be provided with two hour's pay and where the employee commences work they shall be provided with four hour's employment or be paid for four hour's worked."

(7) The period of notice required to be given to a casual employee shall be one hour and if the required notice is not given, one hour's wages shall be paid by the employer or forfeited by the employee.

(8) Part time Employment

(a) A part time employee may be engaged to work for a constant number of hours each week which having regard to the various ways of averaging ordinary hours shall average less than 38 hours per week.

(b) An employee so engaged shall be paid per hour one thirty-eighth of the weekly wage prescribed for the classification in which the employee is engaged.

(c) An employee engaged on a part time basis shall be entitled in respect of annual leave, holidays, sick leave and bereavement leave arising under this award payment on a proportionate basis calculated having regard to the proportion the hours worked by them bears to 38 hours.

5. Clause 13. – Vehicle Allowance: Delete subclause (3) of this clause and insert in lieu thereof the following—

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

Rates of Hire for Use of an Employee's Own Vehicle on Employer's Business

Area and D etails	Over 2600 cc	Over 1600cc— 2600 cc	1600cc & Under
Metropolitan Area	55.6	49.8	43.3
South West Land Division	57.0	51.1	44.1
North of 23.5 South Latitude	62.5	56.2	49.0
Rest of the State	58.8	52.8	45.8
Motor Cycle (in all areas)	19.2 cents per kilometre		

6. Clause 19. – Wages: Delete this clause and insert in lieu thereof—

19. – WAGES

(1) **Classifications**

(a) '**Probationary Operator'** means an employee who has less than 3 months demonstrated experience in the pest control industry and who has not completed an accredited course in pest control techniques. At this level an employee shall work under direct supervision.

(b) **'Operator Grade 1'** means an employee who has completed 3 months probationary employment and who holds a provisional pest controllers license and is used to perform uncomplicated work. At this level an employee shall perform all the work of a Probationary operator and shall—

(i) work individually under general supervision on work that is of a routine nature;

(ii) be able to read, understand and work from simple plans;

(iii) maintain equipment and perform minor repairs; and

(iv) apply safety precautions to their own work within the context of established procedures.

(c) **'Qualified Operator Grade 2'** means an employee who has obtained a Certificate 2 in Pest Control as described in the Asset Maintenance National Pest Control Competency Framework and/or is licensed by the Public Health Department and who has at least 12 months demonstrated experience in the pest control industry. At this level an employee shall perform the work of all lower levels in addition to other functions outlined below—

(i) understands and applies quality control techniques;

(ii) understands and works from complex plans instructions and procedures;

(iii) co-ordinates work in a team environment and works individually under general instruction;

(iv) is responsible for assuring the quality of their own work;

(v) exercises good interpersonal and communication skills;

(vi) exercises discretion in decision making; and

(vii) assists in training of employees including trainees.

(d) **'Qualified Operator Grade 3'** means an employee who has obtained a certificate 3 in Pest Control as described in the Asset Maintenance National Pest Control Competency Framework and/or is licensed by the Public Health Department to carry out all forms of pest control used by the employer in the enterprise (including termite control) and uses those skills. At this level an employee shall perform the work of all lower levels and in addition shall work unsupervised and use discretion to make complex decisions involved in the performance of their duties.

(e) **'Qualified Operator Grade 4'** means an employee who is able to perform the duties of all lower levels and is used in a supervisory capacity.

(2) **Wages**

(a) The minimum weekly rate of wage payable to employees under this award shall be as follows:

Adult Employees	**Column 1**	**Column 2**	**Column 3**
	Weekly Rate $	**Weekly Rate $**	**Weekly Rate $**
Probationary Operator Under Supervision	431.40	437.75	448.10
Operator Grade 1	446.38	458.11	468.96
Qualified Operator Grade 2	475.67	488.21	499.80
Qualified Operator Grade 3	499.80	513.00	525.20
Qualified Operator Grade 4	539.43	553.72	566.92

(b) (i) Column 1 Rates shall operate from the first pay period commencing on or after 18 October 2002.

(ii) Column 2 Rates shall operate from the first pay period commencing on or after 1 February 2003.

(iii) Column 3 Rates shall operate from the first pay period commencing on or after 1 December 2003.

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

These arbitrated safety net adjustments shall be offset against any equivalent amount in the rate of pay received by employees since 1 November 1991 above the rate prescribed in the Award. For these purposes over award rates of pay in any industrial agreement affecting employees whose terms of employment are also regulated by the award shall likewise be liable to absorption unless contrary to the terms of the industrial agreement.

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

(3) **Leading Hands**

Employees appointed by the employer as a Leading Hand shall be paid the following amounts in addition to the ordinary rate of pay.

		$
(a)	If placed in charge of not less than 3 and more than 10 other employees	21.20
(b)	If placed in charge of more than 10 and not more than 20 other employees	32.60
(c)	If placed in charge of more than 20 other employees	42.10

(4) **Junior Employees**

Junior Employees shall be paid the applicable percentage of the weekly wage of a Qualified Operator—

	%
Under 16 years of Age	40
At 16 years of Age	50
At 17 years of Age	60

(5) For the purpose of this clause 'experience' shall mean experience with any employer in the pest control industry provided that the employer shall not be required to accept any or all of such experience up to the time of engagement where the employee has not been engaged in any of the classification contained within this clause for a period of twelve months or more. The onus of proof of previous experience shall rest with the employee concerned, who shall produce a certificate signed by the previous employer setting out the details of such previous experience.

7. Clause 20. – Definitions: Delete this clause and insert in lieu thereof the following new clause—

20. –NATIONAL TRAINING WAGE

The parties to this award shall comply with the terms of the *National Training Wage Award 2000 (C'th)* [CNo. 00563/98] as varied, as though bound by clause 4. – Parties Bound, of that award.

2002 WAIRC 06794

PLASTER, PLASTERGALASS AND CEMENT WORKERS' AWARD NO. A29 OF 1989

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS, APPLICANT
	v.
	BELMONT CONCRETE CO, ANDERSON INDUSTRIES PTY LTD, COLOCRETE CEMENT PRODUCTS, RESPONDENTS
CORAM	COMMISSIONER J F GREGOR
DATE	MONDAY, 21 OCTOBER 2002
FILE NO.	APPLICATION 1205 OF 2002
CITATION NO.	2002 WAIRC 06794

Result Award varied

Order

HAVING heard Mr T. Kucera (of Counsel) on behalf of the Applicant and Mr K.J. Dwyer for the Respondents, and by consent, the Commission pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders:

THAT the Plaster, Platerglass and Cement Workers' Award No. A29 of 1989 be varied in accordance with the following Schedule and that such variation shall have effect from the first pay period on or after 14 October 2002.

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

SCHEDULE

1. Clause 7. – Adult Trainee Casters: Delete subclause (4) of this clause and insert in lieu the following—

(4) A caster responsible for the training of a trainee under this clause shall be paid $2.71 per week extra whilst so engaged.

2. Clause 14. – Special Rates and Provisions: Delete subclause (1) of this clause and insert in lieu the following—

(1) Leading Hands: An employee placed in charge for not less than one day of—

		$ Per Week
(a)	Not less than three (3) and not more than ten (10) other tradesperson	12.98
(b)	More than ten (10)and not more than twenty (20)other tradesperson	20.51
(c)	More than twenty (20) other tradesperson	27.43
(d)	The rates herein prescribed shall be deemed to form part of the ordinary rate of wage of the employees concerned for all purposes of this Award	

Where the leading hand works under the supervision of a foreperson or of the employer for the major portion of the day, the extra rates set out in this subclause shall be halved.

3. Clause 28. – Superannuation: Delete paragraph (a) of subclause (2) of this clause and insert in lieu the following—

(a) Subject to the provisions of subclause (4) Exemptions of this clause, each employer shall make monthly contributions to the fund in respect of all eligible employees at the rate of 9% of ordinary time earnings.

2002 WAIRC 06745

SALARIED OFFICERS (ASSOCIATION FOR THE BLIND OF WESTERN AUSTRALIA) AWARD, 1995
No. A 5 of 1995

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	HOSPITAL SALARIED OFFICERS ASSOCIATION OF WESTERN AUSTRALIA (UNION OF WORKERS), APPLICANT
	v.
	ASSOCIATION FOR THE BLIND OF WESTERN AUSTRALIA (INCORPORATED), RESPONDENT
CORAM	COMMISSIONER P E SCOTT
DATE OF ORDER	MONDAY, 14 OCTOBER 2002
FILE NO.	APPLICATION 1243 OF 2002
CITATION NO.	2002 WAIRC 06745

Result Award varied

Order

HAVING heard Ms C Thomas on behalf of the applicant and Mr M O'Connor on behalf of the respondent, and by consent, the Commission, pursuant to the powers conferred under the Industrial Relations Act, 1979, hereby orders—

THAT the Salaried Officers (Association for the Blind of Western Australia) Award, 1995 (No. A 5 of 1995) 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

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

SCHEDULE

1. Schedule C – Minimum Salaries: Delete clause (2) of this schedule 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
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

LEVELS	CURRENT	ASNA	NEW
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) A Medical Typist or Medical Secretary shall be paid a medical terminology allowance of $1000 per annum.

For the purposes of this subclause 'Medical Typist' and 'Medical Secretary' shall mean those workers 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 histories, summaries, reports or similar material involving a broad range of medical terminology.

(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 06947

SALARIED OFFICERS (ASSOCIATION FOR THE BLIND OF WESTERN AUSTRALIA) AWARD, 1995

No. A5 of 1995

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	HOSPITAL SALARIED OFFICERS ASSOCIATION OF WESTERN AUSTRALIA (UNION OF WORKERS), APPLICANT
	v.
	ASSOCIATION FOR THE BLIND OF WESTERN AUSTRALIA, RESPONDENT
CORAM	COMMISSIONER P E SCOTT
DATE OF ORDER	WEDNESDAY, 6 NOVEMBER 2002
FILE NO.	APPLICATION 1101 OF 2002
CITATION NO.	2002 WAIRC 06947

Result Award varied

Order

HAVING heard Mr G Bucknall on behalf of the applicant and Mr M O'Connor on behalf of the respondent, and by consent, the Commission, pursuant to the powers conferred under the Industrial Relations Act, 1979, hereby orders—

THAT the Salaried Officers (Association for the Blind of Western Australia) Award, 1995 (No. A 5 of 1995) 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 4th day of November 2002.

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

SCHEDULE

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

An employee required to work overtime before or after his ordinary working hours on any day shall, when such additional duty necessitates taking a meal away from the employee's usual place of residence, be supplied by the employer with any meal required or be reimbursed for each meal purchased at the rate of $7.75 for breakfast, $9.55 for the midday meal, and $11.50 for the evening meal: Provided that the overtime worked before or after the meal break totals not less than two hours. Such reimbursement shall be in addition to any payment for overtime to which he is entitled.

2002 WAIRC 06742

SALARIED OFFICERS (PARAPLEGIC-QUADRAPLEGIC ASSOCIATION) AWARD, 1988
No. A 17 of 1986

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	HOSPITAL SALARIED OFFICERS ASSOCIATION OF WESTERN AUSTRALIA (UNION OF WORKERS), APPLICANT
	v.
	PARAPLEGIC-QUADIPLEGIC ASSOCIATION, RESPONDENT
CORAM	COMMISSIONER P E SCOTT
DATE OF ORDER	MONDAY, 14 OCTOBER 2002
FILE NO.	APPLICATION 1240 OF 2002
CITATION NO.	2002 WAIRC 06742

Result Award varied

Order

HAVING heard Ms C Thomas on behalf of the applicant and Mr M O'Connor on behalf of the respondent, and by consent, the Commission, pursuant to the powers conferred under the Industrial Relations Act, 1979, hereby orders—

THAT the Salaried Officers (Paraplegic-Quadraplegic Association) Award, 1988 (No. A 17 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 29th day of August 2002

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

SCHEDULE

1. Clause 23. – Salaries:

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

(1) CLERICAL OFFICER (CLASS 1):

Under 17 years	11578	2040.00	13618.00
17 years	13128	2313.00	15441.00
18 years	15169	2672.00	17841.00
19 years	17249	3039.00	20288.00
20 years	19390	3416.00	22806.00
Adult Rates			
1st year	21316	3755.00	25071.00
2nd year	21872	3755.00	25627.00
3rd year	22616	3755.00	26371.00
4th year	23265	3755.00	27020.00

B. Delete subclause (2) of this clause and insert the following in lieu thereof—

(2) CLERICAL OFFICER (CLASS 2):

Under 17 years	11789	1999.00	13788.00
17 years	13632	2312.00	15944.00
18 years	15767	2674.00	18441.00
19 years	18111	3072.00	21183.00
20 years	20231	3431.00	23662.00

Adult Rates			
1st year	22139	3755.00	25894.00
2nd year	22792	3755.00	26547.00
3rd year	23443	3860.00	27303.00
4th year	24090	3860.00	27950.00
5th year	24741	3860.00	28601.00
6th year	25392	3860.00	29252.00
7th year	26141	3756.00	29897.00

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

(4) TECHNICAL ASSISTANTS:

Grade 1			
16 years	11078	1908.00	12986.00
17 years	13311	2292.00	15603.00
18 years	15424	2656.00	18080.00
19 years	17784	3062.00	20846.00
20 years	19968	3438.00	23406.00
Adult Rates			
1st year	21806	3755.00	25561.00
2nd year	22461	3755.00	26216.00
3rd year	23137	3755.00	26892.00
4th year	23773	3860.00	27633.00
Grade 2			
1st year	23773	3860.00	27633.00
2nd year	24183	3860.00	28043.00
3rd year	24576	3860.00	28436.00
Grade 3			
1st year	24576	3860.00	28436.00
2nd year	25029	3860.00	28889.00
3rd year	25679	3860.00	29539.00

D. After subclause (8) of this clause and insert new subclause (9) as follows—

(9) 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 employees under 21 years shall be calculated using the following formula—

Current junior rate ÷ Current Adult Rate (1st year) x ASNA rate for Adult rate (1st year) = Junior ASNA rate.

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

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

2002 WAIRC 06748

BURSWOOD ISLAND RESORT (MAINTENANCE EMPLOYEES') AWARD

No. A22 of 1986.

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES THE PLUMBERS AND GASFITTERS EMPLOYEES' UNION OF AUSTRALIA, WEST AUSTRALIAN BRANCH, INDUSTRIAL UNION OF WORKERS and COMMUNICATIONS, ELECTRICAL, ELECTRONIC, ENERGY, INFORMATION, POSTAL, PLUMBING, AND ALLIED WORKERS UNION OF AUSTRALIA, ENGINEERING & ELECTRICAL DIVISION, WA BRANCH,

v.

BURSWOOD RESORT CASINO

and

BURSWOOD RESORT (MANAGEMENT) PTY LTD T/A BURSWOOD RESORT CASINO

v.

THE PLUMBERS AND GASFITTERS EMPLOYEES' UNION OF AUSTRALIA, WEST AUSTRALIAN BRANCH, INDUSTRIAL UNION OF WORKERS and COMMUNICATIONS, ELECTRICAL, ELECTRONIC, ENERGY, INFORMATION, POSTAL, PLUMBING, AND ALLIED WORKERS UNION OF AUSTRALIA, ENGINEERING & ELECTRICAL DIVISION, WA BRANCH

CORAM	SENIOR COMMISSIONER A R BEECH
DATE	MONDAY, 14 OCTOBER 2002
FILE NO/S.	APPLICATION 1444 OF 1996, APPLICATION 1860 OF 1996, APPLICATION 1861 OF 1996
CITATION NO.	2002 WAIRC 06748

Result	Application to vary an award discontinued
Representation	
Applicant	No appearance
Respondent	Mr P. Moss (as agent) on behalf of Burswood Resort (Management) Pty Ltd trading as Burswood Resort Casino

Order

WHEREAS application 1444 of 1996 was lodged in the Commission pursuant to section 40 of the *Industrial Relations Act 1979;*

AND WHEREAS on 24 December 1996 two further applications relating to application 1444 of 1996 were lodged in the Commission, 1860 of 1996 for an extension of time in which to file an answer and 1861 of 1996 for further and better particulars;

AND WHEREAS the Commission heard application 1860 of 1996 in conjunction with 1861 of 1996 on 21 January 1997;

AND WHEREAS application 1860 of 1996 for an extension of time was granted and 1861 of 1996 was adjourned for discussions between the parties;

ANDWHEREAS the Commission wrote to the parties on 12 August 2002 requesting them to show cause why the applications should not now be discontinued;

AND WHEREAS the Commission listed the applications For Mention Only on 11 October 2002;

AND WHEREAS Mr P. Moss (as agent) on behalf the respondents in application 1444 of 1996 wrote to the Commission supporting the discontinuance of application 1444 of 1996 and also the discontinuance of the related interlocutory matters 1860 and 1861 of 1996;

AND WHEREAS the applicant in matter 1444 of 1996 failed to attend the hearing;

AND WHEREAS the applicant has not contacted the Commission subsequent to the hearing;

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

THAT the applications be discontinued.

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

2002 WAIRC 06738

JENNY CRAIG EMPLOYEES AWARD, 1995.

No. A1 of 1994

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE AUSTRALIAN LIQUOR, HOSPITALITY AND MISCELLANEOUS WORKERS UNION, MISCELLANEOUS WORKERS DIVISION, WESTERN AUSTRALIAN BRANCH, APPLICANT
	v.
	JENNY CRAIG WEIGHT LOSS CENTRES PTY LTD, RESPONDENT
CORAM	SENIOR COMMISSIONER A R BEECH
DATE	FRIDAY, 11 OCTOBER 2002
FILE NO.	APPLICATION 356B OF 1996
CITATION NO.	2002 WAIRC 06738

Result	Application to vary an award discontinued
Representation	
Applicant	Ms D. MacTiernan on behalf of the applicant
Respondent	No appeance

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 31 July 1996;

AND WHEREAS an Order issued dividing the application into 356A and 356B of 1996;

AND WHEREAS application 356A of 1996 was finalised;

AND WHEREAS application 356B of 1996 was adjourned sine die;

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

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

THAT application 356B of 1996 be discontinued.

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

2002 WAIRC 06747

MOTOR VEHICLE (SERVICE STATION, SALES ESTABLISHMENTS, RUST PREVENTION AND PAINT PROTECTION) INDUSTRY AWARD NO. A29 OF 1980

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE AUSTRALIAN WORKERS' UNION, WEST AUSTRALIAN BRANCH, INDUSTRIAL UNION OF WORKERS, APPLICANT
	v.
	AMPOL PETROLEUM PTY LTD, ALLPIKES MT LAWLEY GARAGE, ASHTON MOTORS PTY LTD, RESPONDENT
CORAM	SENIOR COMMISSIONER A R BEECH
DATE	MONDAY, 14 OCTOBER 2002
FILE NO.	APPLICATION 770 OF 1995
CITATION NO.	2002 WAIRC 06747

Result	Application to vary an award discontinued
Representation	
Applicant	No appearance
Respondent	No appearance

Order

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

AND WHEREAS a hearing was held on 24 August 1995;

AND WHEREAS at the hearing the parties sought and were granted an adjournment;

AND WHEREAS the Commission convened several conferences;

AND WHEREAS a hearing was held on 11 June 1996;

AND WHEREAS the application was heard in conjunction with application 146 of 1996;

AND WHEREAS an Order issued finalising application 146 of 1996 and in part application 770 of 1995

AND WHEREAS the Commission wrote to the applicant requesting it advise the Commission why the application should not now be discontinued;

AND WHEREAS the Commission did not hear from the applicant;

AND WHEREAS the Commission listed this application For Mention Only;

AND WHEREAS the applicant did not attend the hearing;

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

THAT this application be discontinued.

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

AWARDS/AGREEMENTS—Interpretation of—

2002 WAIRC 06918

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	MONDAY, 4 NOVEMBER 2002
FILE NO/S.	P 6 OF 2002
CITATION NO.	2002 WAIRC 06918

Result	Application dismissed

Order

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

WHEREAS on the 11th day of June 2002 the Arbitrator convened a conference for the purpose of conciliating between the parties: and

WHEREAS at the conclusion of that conference the Applicant sought time to consider its position; and

WHEREAS on the 28th day of October 2002 the Applicant filed a Notice of Discontinuance in respect of the application;

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.

NOTICES—Award/Agreement matters—

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

APPLICATION NO. 1529 OF 2002

APPLICATION FOR VARIATION OF AWARD

ENTITLED

"BUILDING TRADES (CONSTRUCTION) AWARD 1987 R14 OF 1978"

NOTICE is given that an application has been made to the Commission by Silent Vector Pty Ltd t/a Sizer Builders under the Industrial Relations Act 1979 for a variation of the above Award.

As far as relevant, those parts of the variation which relate to area of operation or scope are published hereunder—

Clause 3 – Scope

(1) Delete the word "*and* " appearing after the semi-colon in subclause (4);

(2) Delete the period after the word "*clause*" in subclause (5), and replace with " *; and*" and

(3) Insert as sub-clause 6, the following—

To each of the unions named as parties to this award and to each officer, employee or agent of any of the unions acting with the ostensible authority of the union.

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

(Sgd) J. A. SPURLING,
Registrar.

27 September 2002.

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

APPLICATION NO. 1547 OF 2002

APPLICATION FOR VARIATION OF AWARD
ENTITLED

"COCKBURN CEMENT LIMITED AWARD 1991 NO. A14 OF 1991"

NOTICE is given that an application has been made to the Commission by The Australian Maritime Officers Union, Western Area Union of Employees under the Industrial Relations Act 1979 for a variation of the above Award.

As far as relevant, those parts of the variation which relate to area of operation or scope are published hereunder:-

Clause 3 – Area and Scope

Delete dot point 5 of subclause (1) and insert in lieu "The Australian Maritime Officers Union, Western Area Union of Employees".

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

(Sgd) J. A. SPURLING,
Registrar.

14 November 2002.

PUBLIC SERVICE ARBITRATOR—Matters Dealt With—

2002 WAIRC 06914

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED, APPLICANT
	v.
	DIRECTOR GENERAL, DEPARTMENT OF AGRICULTURE, RESPONDENT
CORAM	COMMISSIONER P E SCOTT
	PUBLIC SERVICE ARBITRATOR
DATE OF ORDER	MONDAY, 4 NOVEMBER 2002
FILE NO.	PSACR 39 OF 2002
CITATION NO.	2002 WAIRC 06914

Result Application dismissed
Representation
Applicant Mr M Amati
Respondent Mr D Matthews (of Counsel)

(Extempore)

Reasons for Decision

1 These are my Reasons for Decision in respect of the merits of the matter.

2 The Commission has convened a number of conferences in respect of the question of Mr Hollick's eligibility to be converted to permanency, and that matter not being resolved through conciliation was referred for hearing and determination under s.44 on 9 October 2002. That matter is—

> "The applicant says that its member Mr Alex Hollick has been unfairly treated by the respondent in its consideration of his eligibility to have his employment made permanent. The applicant says that Mr Hollick meets the criteria for "Conversion of Entry Level Contract Officers to Permanent Status" in accordance with the Premier's Circular No. 7/01 dated the 18th of May 2001.
>
> The applicant seeks an order that the respondent reinstate Mr Hollick to employment as a Development Officer level 2.4, convert his employment to permanency, and deem his employment with the respondent to be continuous.
>
> The respondent objects to the orders sought. The respondent says that Mr Hollick does not meet the criteria for conversion to permanent status primarily because his was a five year fixed term contract which does not meet the criterion of being "fixed term contracts continuously rolled over". The respondent also says that Mr Hollick's employment was related to work which was externally funded.
>
> The respondent says that it has acted with consideration of Mr Hollick's situation in that following the expiration of his five year contract it provided him with a further short term contract, which it extended, to enable his situation to be resolved either by his successful application for another position, or by the general resolution of the remaining issues of conversion to the public sector."

3 The evidence in this matter is that Mr Hollick was employed by the respondent initially on a series of short term contracts over a period of time prior to 1997 on a casual basis. These contracts appear in some cases to have some continuity and in others to be separated by periods of time. The last of this series was for the period 4 March 1997 to 21 March 1997. During this course of this contract Mr Hollick was successful in an application for the position of Farming Systems Development Officer level 2/4 for a 5 year term which was advertised by the respondent.

4 Between 21 March 1997 and the commencement of that new contract on 7 April 1997, Mr Hollick was not employed by the respondent. He took that time off, he says, to arrange to move to take up the five year contract. His new employment was substantially funded by National Heritage Trust funding provided on submission through the federal government, except for a period in 2000/2001 when there was insufficient such funding to cover the whole of his salary, so 20% of funds for his salary for that period only was provided by the respondent through its consolidated funding. Mr Hollick continued employment under that five year contract.

5 On 18 May 2001 the Premier's Circular 7/01 was issued titled "Conversion to Entry Level Contract Officers to Permanent Status." The Circular provides, under the heading of "Policy"—

> "A framework has been developed to convert long term entry level public sector contract officers to permanent status. (attached)."

6 There is the heading "Background" under which is noted—

> "This framework has been developed following consultation between the Ministry of Premier & Cabinet, the Department of Productivity & Labour Relations, and a number of other agencies.
>
> I am keen for this framework to be implemented immediately, and therefore request that you ensure the attached framework is forwarded to agencies within your portfolio. Please note that there is an eight week time frame to complete the conversion process commencing from the date of this Circular."

7 The Circular is signed by the Premier.

8 The attached document is headed "Framework for Conversion of Fixed Term Contracts". It contains a number of objectives, the first of which is stated as being—

> "This arrangement is put forward as a course of action to implement the Government's policy platform in relation to the use of fixed term contract employment in the public sector.
>
> The arrangement focuses on—
>
> (a) current entry level employees on fixed term contracts, where the greatest proportion of employment on fixed term contracts occur. It is proposed to provide for immediate conversion of entry level public sector employees on fixed term contracts to permanent officer status when the criteria set out below is satisfied; and
>
> (b) providing information to assist in the management of fixed term contracts in the public sector through—
>
> (i) an enhanced modes of employment policy statement; and
>
> (ii) provision of a template contract of employment and supporting information."

9 The Framework then sets out conversion criteria. Paragraph 3 of the Framework defines "conversion". That definition, so far as it relates to the matters in dispute says—

> "Conversion to permanent officer status will be authorised for all entry level public sector employees currently on fixed term contracts who—
>
> (a) have been employed on fixed term contracts continuously rolled over by the same employing authority for 12 months or more; and
>
> are not employed on a project or relief basis or engaged as a trainee or cadet.
>
> (b) …"

10 There is no suggestion that Mr Hollick is excluded on the grounds of any criteria other than (a) above.

11 Paragraph (4) of the Framework says—

> "Conversion will not be available to entry level public sector officers currently appointed on fixed term contracts where the purpose of employment is, and clearly has been, for a single project or where the task is for a finite duration."

12 I am not satisfied that paragraph (4) is entirely applicable to the applicant's situation.

13 Paragraph (8) then sets out to define some of the terms used. It says—

> "So that the strategy is managed as consistently as possible across the public sector, the following definitions will apply:"

14 For the purposes of this matter subparagraph (a) defines "continuously rolled over" to mean employees who—

> "have had an ongoing unbroken series of contracts with the same employing authority. Periods of leave corresponding to accrued entitlements will not be considered a break in service for this exercise."

15 Subparagraph (d) defines "Project or relief basis" as meaning—

> "covers all situations where work is of a finite nature including staff employed for seasonal work, on work which is externally funded, employment is purely to cover a defined period of leave, workers compensation absence or a contract basis for the period of the project."

16 The evidence before me is that upon receipt of this Circular and Framework, the respondent moved to assess its fixed term contract personnel to determine who satisfied the conversion criteria. The respondent says that Mr Hollick's case fell by the wayside when he did not meet the first part of criterion 3(a) dealing with whether he had been employed "on fixed term contracts continuously rolled over". Mr Hollick was advised that he did not meet the criteria, and, accordingly, was not converted to permanency. The respondent says that it has now also examined Mr Hollick's circumstances as to the other criteria and that his employment did not meet the criteria of project work.

17 The first question arises, then, as to whether or not Mr Hollick meets the criteria for conversion to permanency by reference to the first part of paragraph 3(a). The applicant says that a proper interpretation of these terms should include contracts referred to in the singular; that is, one contract. However, in considering the proper interpretation, meaning must be given to the words used and it must be applied in context. It would not be permissible in applying a proper interpretation of the meaning of the words to ignore words which have a clear meaning. To apply the meaning which the applicant urges would require that certain conditions which the Premier's Circular set out for permanency be ignored. Those words being, in paragraph 3(a), "on fixed-term contracts continuously rolled over", and in paragraph (8), the definition of "continuously rolled over" which makes reference to "an ongoing, unbroken series of contracts".

18 The evidence of Mr Hollick is clear that he took a break between the last short-term contract and the 5-year contract. His contract at that time, that is the short-term contract, was casual. He had not taken a break in service which might correspond to accrued entitlements to leave on the basis that there is no evidence before me of an accrued entitlement to leave.

19 While the Premier's Circular expresses an intention to create a policy framework to convert long-term entry level public sector contract officers to permanency, it is clear that not all long-term entry level public sector contract officers were intended to be converted to permanency. Only those who met the criteria established in the Framework were eligible. The Framework contained a requirement for a number of contracts; that is, more than one, and for them to be continuously rolled over.

20 One can well perceive a good reason to distinguish between a single fixed-term contract and those which formed, in effect, a continuity of employment which might be considered to be not genuine fixed-term contract employment but a sham aimed at avoiding permanency. Such was not uncommon, from my experience of the issues which came before the Commission, in respect of a number of people whose contracts were continuously rolled over, particularly those of a short-term nature. I note that it is not simply that there be an unbroken, continuous relationship between the employer and the employee but more is required.

21 It is appropriate to draw a line and the line has been drawn. Unfortunately for Mr Hollick, his circumstances do not meet the criteria for fixed-term contracts continuously rolled over. Accordingly, I find that he does not meet that criteria for conversion. It is therefore unnecessary to consider whether he meets any of the other tests.

22 However, I have considered the definition of "project" or "relief basis" and I conclude that Mr Hollick's work was very much substantially externally funded and that may be a consideration also, albeit that it is unnecessary, he having not met one of the first criteria.

23 The next question is whether, as alleged, the respondent has treated him unfairly by dealing with him in a manner inconsistent with other employees. The only other employee whose circumstances are before me is Ms Nadine Morgan. Her contractual arrangements are similar but not the same as Mr Hollick's as the contract she had immediately prior to her 5-year contract appears to have been continuous with her 5-year contract and, was in fact, absorbed by it, or into it.

24 Further, the respondent says that her conversion to permanency may have resulted from an administrative error which is being examined. That situation was brought to the respondent's attention only last week. Of itself that situation does not constitute an unfairness to Mr Hollick. An error on the part of the respondent cannot constitute the basis for a claim of inconsistent treatment. If so, then every error in any employee's favour over a matter might be used to claim that all employees ought enjoy the benefits of the error, and that would be plainly wrong.

25 I make no findings in respect of Ms Morgan's situation, that being the subject of further consideration by the respondent, and all of her information is not necessarily before me.

26 I also note that the respondent has attempted to assist Mr Hollick as best it could. At the recommendation of the Commission aimed at allowing the passage of further time during which the dispute might be resolved by the Government issuing further criteria for conversion which was foreshadowed at the time and/or to enable Mr Hollick to seek other employment, a new contract was provided to him. That contract was extended for the latter reason. In these circumstances rather than prejudice the respondent's case, its actions have demonstrated its desire to be a considerate and helpful employer to the degree that it was able. I consider that Mr Hollick has not been treated unfairly by the respondent during this process.

27 Accordingly, even if I were to find that jurisdiction resides with the Public Service Arbitrator in this matter, the matter will be dismissed.

2002 WAIRC 06948

CONVERSION OF ENTRY LEVEL CONTRACT OFFICERS TO PERMANENT STATUS

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED, APPLICANT
	v.
	DIRECTOR GENERAL, DEPARTMENT OF AGRICULTURE, RESPONDENT
CORAM	COMMISSIONER P E SCOTT
	PUBLIC SERVICE ARBITRATOR
DATE	WEDNESDAY, 6 NOVEMBER 2002
FILE NO.	PSACR 39 OF 2002
CITATION NO.	2002 WAIRC 06948

Result	Jurisdiction found
	Application to re-open dismissed
Representation	
Applicant	Mr M Amati
Respondent	Mr D Matthews (of counsel)

Further Reasons for Decision

Extempore

1 At the conclusion of the hearing on 21 October 2002, I issued my Reasons in respect of the merits of this matter and reserved my reasons in respect of jurisdiction. Since then the applicant has sought to re-open the hearing and I have now heard from the parties in respect of that matter. This now provides a useful opportunity for me to provide my Reasons regarding jurisdiction, and then to deal with the issue of the reopening of the matter.

2 In respect of the matter of jurisdiction I have had the opportunity to consider the parties' submissions. I note that the respondent says that the Arbitrator does not have jurisdiction to deal with this matter on the basis that it is a matter alleging unfairness by the respondent in its consideration of appointment of Mr Hollick. It says that on the basis of s.80E(7) of the Industrial Relations Act 1979 ("IR Act") that the Arbitrator may not inquire into or deal with any matter in respect of which a procedure referred to in section 97(1)(a) of the Public Sector Management Act 1994 ("PSM Act") is or may be prescribed under that Act.

3 Section 97(1)(a) of the PSM Act refers to procedures in relation to relief in respect of a breach of public sector standards. It refers to s.21(1)(a) of the PSM Act which provides for the establishment of minimum standards of merit, equity and probity to be complied with in the public sector. The respondent notes that there is a Public Sector Standard relating to appointment. Accordingly, the applicant's claim that the respondent has treated Mr Hollick unfairly in not appointing him is said by the respondent to be not within the jurisdiction of the Arbitrator.

4 Section 80E(7) of the IR Act states—

> "Notwithstanding subsections (1) and (6), an Arbitrator does not have jurisdiction to inquire into or deal with, or refer to the Commission in Court Session or the Full Bench, any matter in respect of which a procedure referred in section 97(1)(a) of the Public Sector Management Act 1994 is, or may be, prescribed under that Act."

5 Section 97(1)(a) of the PSM Act states—

> "Functions of Commissioner concerning relief in respect of breach of public sector standards.
>
> (1) The functions of the Commissioner under this part are—
>
> (a) to make recommendations to the Minister on the making, amendment or repeal of regulations prescribing procedures, whether by way of appeal, review, conciliation, arbitration, mediation or otherwise for employees and other persons to obtain relief in respect of the breaching of public sector standards".

6 I also refer to s.21(1)(a) of the PSM Act which refers to the functions of the Commissioner, being the Commissioner for Public Sector Standards, which says—

> "(1) The functions of the Commissioner are, having regard to the principles set out in sections 7, 8 and 9—
>
> (a) to establish public sector standards setting out minimum standards of merit, equity and probity to be complied within the Public Sector in—
>
> (i) the recruitment, selection, appointment, transfer, secondment, performance management, redeployment, discipline and termination of employment of employees; and
>
> (ii) such other human resource management activities relating to employees as are prescribed;
>
> and monitor compliance with those public sector standards."

7 I note that there has been established, pursuant to the PSM Act, Standards in Human Resource Management. One of those standards is the Recruitment, Selection and Appointment Standard. This provides—

> "Outcome
>
> The most suitable and available people are selected and appointed."

8 The Standard is—

> "The minimum standard of merit, equity and probity is met for recruitment, selection and appointment if—
>
> - A proper assessment matches a candidate's skills, knowledge and abilities with the work-related requirements of the job and the outcomes sought by the public sector body, which may include diversity.
> - The process is open, competitive and free of bias, unlawful discrimination, nepotism or patronage.
> - Decisions are transparent and capable of review."

9 The Standard in respect of Recruitment, Selection and Appointment clearly deals with the situation where a person applies for a position within the public sector in the normal course. There is to be an assessment of the candidate's skill, knowledge and ability, and those things are to be matched to the work related requirements of the job and the outcomes sought by the public sector body. The selection is to be open and competitive. Decisions are to be transparent and capable of review.

10 In the case before the Arbitrator, Mr Hollick has already been through a selection process when he was originally appointed for the position in 1997. At that point, there would have been a requirement for a proper assessment of his skills, knowledge and abilities with the work-related requirements of the job and the outcomes sought by the employer. He ought to have been subject to an open, competitive process. This is in contrast with the process for the conversion to permanency. The latter process is not a competitive process. According to the Premier's Circular, there is no assessment other than of the particulars of the contract. The employee's skills, knowledge and ability are not considered except, of course, in respect of ensuring that there are no matters associated with substandard performance or disciplinary matters.

11 I am of the view that the conversion to permanency requires an appointment, that there is no provision within the PSM Act which allows for conversion per se. Section 64 of the PSM Act provides that an officer may be appointed either for an indefinite term as a permanent officer, (s.64(1)(a)), or for a period not exceeding 5 years (s.64(1)(b)). Subsections (4) and (5) provide for arrangements for employees to be appointed to what might be described as entry level positions without the necessity for advertisements in the daily newspapers as described in subclause (4).

12 In this matter, the Arbitrator is not being asked to enforce a public sector standard. The Public Sector Standards in Human Resource Management deals with a different consideration from that dealt with in the conversion criteria. The Standard relating to appointment is clearly in the context of an appointment on competitive application. I am of the view that the Public Sector Standard relating to appointment creates no impediment to the Arbitrator's jurisdiction in this matter. (see (IAC) in *Civil Service Association and Commissioner of Police*, 82 WAIG 207).

13 In respect of the application by the applicant to re-open the hearing of this matter, I note that the applicant's case is that following the hearing of this matter and my Reasons for Decision as to merit on 21 October 2002, and indicating my intention to dismiss the matter, the Premier's Circular 2002/17 was issued on 23 October 2002 dealing with fixed term contract staff. The Circular deals with promotional positions. It applied to employees employed at the date of the Circular and to future employees. It does not indicate any intention to apply to former employees. It has no retrospective effect.

14 Mr Hollick's employment came to an end on 29 September 2002, after the respondent had provided him with a further contract of employment following my recommendation of 18 April 2002. That recommendation included consideration of a submission being before Cabinet for consideration of a further policy regarding conversion of officers on contract which had the potential to affect Mr Hollick's prospects of conversion to permanency.

15 Therefore, it was always understood that any contract offered as a result of that recommendation would not prejudice the respondent's position as to Mr Hollick having been on a single fixed term contract for 5 years which ended in April 2002. It was offered by the respondent as a conciliatory gesture, not as a right. The fact that Mr Hollick's employment ended on 29 September 2002 was not because that was when his original contract expired, but because the respondent had shown him genuine consideration. Its conduct towards him has been nothing less than fair.

16 The question then arises as to whether the Premier's Circular 2002/17 issued on 23 October 2002 has the potential to affect my decision as to whether the respondent's conduct in dealing with Mr Hollick's situation in respect of conversion to permanency was unfair or not.

17 As Mr Amati says, the Premier's Circular 2002/17 of 23 October 2002 refers to the situation as it applies now. It contains a modified definition of "continuously employed". That term, as it was contained in the previous Circular, was the subject of my Reasons for Decision issued extemporaneously on 21 October 2002. Although the applicant says that the new definition helps to clarify the situation in respect of the previous Circular, I am not satisfied that it does. It contains a definition of what "continuously employed" means now, in respect of employees employed as at 23 October 2002 and in the future, not when Mr Hollick's 5 year contract came to an end in April 2002. Further, I note that that the Premier's Circular 2002/17 contains other considerations including as to expectations of ongoing employment and the like. These are new considerations which did not apply at the time the respondent considered Mr Hollick's eligibility as it applied in April 2002.

18 In all of the circumstances then, with my previous Reasons for Decision being based on the respondent's consideration of Mr Hollick's circumstances in April 2002 and my conclusion that the respondent had not treated Mr Hollick unfairly, I am not satisfied that the Premier's Circular 2002/17 of 23 October 2002 changes that consideration in any way.

19 In all of the circumstances, I consider that it is not appropriate to reopen the hearing of this matter. There is nothing new before me which would constitute a relevant consideration. The application to reopen the hearing of this matter ought be dismissed.

20 If I am wrong in that, and the Premier's Circular 2002/17 is a relevant matter, then I take the view that it does not affect the consideration of whether the respondent unfairly considered Mr Hollick's employment in April 2002. Quite clearly, from its conduct towards him at that time and subsequently, it has not treated him unfairly.

21 Accordingly, an order shall issue for the dismissal of the application to reopen the hearing of this matter.

2002 WAIRC 06949

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED, APPLICANT
	v.
	DIRECTOR GENERAL, DEPARTMENT OF AGRICULTURE, RESPONDENT
CORAM	COMMISSIONER P E SCOTT
	PUBLIC SERVICE ARBITRATOR
DATE OF ORDER	WEDNESDAY, 6 NOVEMBER 2002
FILE NO.	PSACR 39 OF 2002
CITATION NO.	2002 WAIRC 06949

Result Jurisdiction found
Application to re-open dismissed

Order

HAVING heard Mr M Amati on behalf of the Applicant and Mr D Matthews (of counsel) on behalf of the Respondent, the Public Service Arbitrator, pursuant to the powers conferred under the Industrial Relations Act, 1979 hereby orders—

1. THAT the application to re-open the hearing of PSA CR 39 of 2002 be, and is hereby dismissed.
2. THAT PSA CR 39 of 2002 be, and is hereby dismissed.

[L.S.]

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

2002 WAIRC 06888

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED, APPLICANT
	v.
	DIRECTOR GENERAL, DEPARTMENT OF CONSUMER AND EMPLOYMENT PROTECTION, RESPONDENT
CORAM	COMMISSIONER P E SCOTT
	PUBLIC SERVICE ARBITRATOR
DATE OF ORDER	WEDNESDAY, 30 OCTOBER 2002
FILE NO/S.	P 57 OF 2001
CITATION NO.	2002 WAIRC 06888

Result Application dismissed.

Order

WHEREAS this is an application pursuant to Section 80E of the Industrial Relations Act 1979; and
WHEREAS on the 7th day of January 2002 the Arbitrator convened a conference for the purpose of conciliating between the parties; and
WHEREAS at the conclusion of that conference the parties were directed to have further discussions and advise the Arbitrator if a further conference was required; and
WHEREAS on the 14th day of January 2002 the Arbitrator convened a further conference for the purpose of conciliating between the parties; and
WHEREAS at the conclusion of that conference the parties were to file written submissions to address the interim orders sought by the Applicant; and
WHEREAS on the 15th day of February 2002 the Arbitrator dismissed the application for interim orders; and
WHEREAS on the 7th day of March the application was set down for a hearing for the Applicant to show perceived bias; and
WHEREAS on the 19th day of March 2002 the Arbitrator dismissed the application for perceived bias; and
WHEREAS on the 24th day of October 2002 the Applicant advised that it would seek to discontinue the matter; and
WHEREAS on the 25th day of October 2002 the Applicant faxed a Notice of Discontinuance in relation to the application;
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.

2002 WAIRC 06889

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CIVIL SERVICE ASSOCIATION OF WA INCORPORATED, APPLICANT
	v.
	DIRECTOR GENERAL, DEPARTMENT OF CONSUMER AND EMPLOYMENT PROTECTION, RESPONDENT
CORAM	COMMISSIONER P E SCOTT
	PUBLIC SERVICE ARBITRATOR
DATE OF ORDER	WEDNESDAY, 30 OCTOBER 2002
FILE NO/S.	P 9 OF 2002
CITATION NO.	2002 WAIRC 06889

Result Application withdrawn by leave

Order

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

WHEREAS on the 24th day of October 2002 the Applicant advised that it would seek to discontinue the matter; and

WHEREAS on the 25th day of October 2002 the Applicant faxed a Notice of Discontinuance in relation to the application; and

WHEREAS on the 29th day of October 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 06945

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
	PUBLIC SERVICE ARBITRATOR
DATE	TUESDAY, 5 NOVEMBER 2002
FILE NO.	P 5 OF 2002
CITATION NO.	2002 WAIRC 06945

Result	Order issued.
Representation	
Applicant	Mr B. Cusack
Respondent	Mr N. Cinquina

Order

WHEREAS the Public Service Arbitrator has before it an application for a conference pursuant to 80E of the *Industrial Relations Act 1979* concerning a dispute between the union and the Director General, Department of Justice in relation to an agreement reached in 1990 between the union and the then Public Service Commission for payment of an allowance to Prison Superintendents and Assistant Prison Superintendents to compensate for those persons remaining contactable and available to return to work (the 1990 agreement);

AND WHEREAS the union maintains that Prison Superintendents and Assistant Prison Superintendents should be paid pursuant to the provisions of the *Public Service Award 1992* for their availability;

AND WHEREAS on 20 September 2002 the Public Service Arbitrator decided that it would refrain from further hearing the matter providing 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;

AND WHEREAS the union formally advised the Director General on 2 October 2002 that it withdrew from the 1990 agreement effective from 4 November 2002;

AND WHEREAS on 31 October 2002 the union advised that it now seeks an Order from the Public Service Arbitrator that—

(1) Prison Superintendents and Assistant Superintendents required by the Department of Justice to make themselves contactable at all times by telephone, during off-duty periods, in order to recommence their duties immediately or as soon as possible in exceptional circumstances be paid an allowance of $3.07 for each hour or part thereof the officer is required to maintain this status; and

(2) Assistant Superintendents required by the Department of Justice to be contactable by telephone within a few hours during off-duty periods in order to recommence their duties within a few hours or immediately in exceptional circumstances receive an allowance of $1.54 for each hour or part thereof the officer is required to maintain this status;

AND WHEREAS at conference proceedings held before me on 4 November 2002 it was apparent that the parties would be unable to reach an agreement to operate from the date of the withdrawal of the union from the 1990 agreement;

AND WHEREAS the union maintains that the award should now apply to the availability of the Prison Superintendents and Assistant Prison Superintendents and the parties are unable to agree on the arrangements for out of hours contact for Prison Superintendents and Assistant Superintendents after 4 November 2002;

AND WHEREAS the Commission is of the view that an Order is necessary to maintain the status quo pending conciliation or arbitration of the union's claim thus preventing the deterioration of industrial relations in respect of the matter;

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

(1) THAT the 1990 agreement between the Civil Service Association of WA and the then Public Service Commission for payment of an allowance to Prison Superintendents and Assistant Prison Superintendents to compensate for those persons remaining contactable and available to return to work shall continue to apply according to its terms on and from 4 November 2002;

(2) THAT this order is without prejudice to the claim of the union that the provisions of the *Public Service Award 1992* apply to the after-hours availability of Prison Superintendents and Assistant Prison Superintendents;

(3) THAT this Order shall continue to operate until any further written agreement of the parties to replace the 1990 agreement or until the decision of the Commission in the arbitration of the union's claim as set out in the preamble to this Order;

(4) THAT either party may apply to vary or cancel this Order upon 48 hours' notice to the other party of its intention to do so.

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

2002 WAIRC 06508

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE 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.	PSAC 20 OF 2002
CITATION NO.	2002 WAIRC 06508

Result	Preliminary point - dismissed.
Representation	
Applicant	Mr J. Ross
Respondent	Mr N. Cinquina

Reasons for Decision

1 On 23 May 2002 the applicant union (CSA) applied to the Public Service Arbitrator under s.80E of the *Industrial Relations Act 1979* for a declaration that in relation to its member Georgina Westlund the respondent has breached the requirements of the *Public Sector Management Act 1994* in sections 8 & 9 and for orders—

(1) That the respondent "cease and desist workplace bullying".

(2) That the respondent provide the necessary assistance to re-locate Ms Westlund to a suitable alternative position within the public sector.

(3) That the respondent place Ms Westlund on paid leave from the date she last worked until the date she is permanently placed in a suitable alternative position within the public service.

(4) That all leave entitlements utilised during the period referred to in the preceding order be fully reinstated.

(5) That the period referred to in the preceding order shall be regarded as service for all purposes of Ms Westlund's employment.

2 The respondent has filed a Notice of Answer opposing the application and states, amongst other things, that on 12 February 2001 Ms Westlund lodged a workers' compensation claim alleging she was suffering from work induced stress. The respondent states that the workers' compensation claim has been referred to a Review Officer for hearing and determination. The respondent states that the relief being sought by the CSA in this application is substantially similar to the relief being sought by Ms Westlund in the application before Workcover. He submits for that reason that the Commission should refrain from further considering or hearing this matter.

The Principle

3 The general principle that where two actions are brought by a person against the same person in different courts governed by the same procedure it is prima facie vexatious to bring those two actions where one will lie, was held to be relevant to procedures in this Commission by a Full Bench in *Fitzpatrick v. Baulderstone Clough Joint Venture* (1999) 79 WAIG 2310. In that matter, the Full Bench dealt with an appeal against the decision of the Commission that a claim of unfair dismissal filed in the Commission should be dismissed given that the same claim had been lodged in the Australian Industrial Relations Commission. In both the decision at first instance ((1999) 79 WAIG 862) and the appeal, the circumstances were that the applicant had claimed unfair dismissal and relief from that unfair dismissal in both the State and Federal Commissions. In that context, the similarity of the jurisdictions in their abilities to grant relief when a person has been harshly, oppressively or unfairly dismissed is most significant.

4 The same cannot be said for the circumstances in this case.

The claim in this Commission

5 The claim before the Public Service Arbitrator is set out at the commencement of these Reasons for Decision. By s.80E of the *Industrial Relations Act 1979,* subject to certain exceptions, a Public Service Arbitrator has exclusive jurisdiction to enquire into and deal with any industrial matter relating to a government officer, a group of government officers or government officers generally. The generality of the jurisdiction of the Public Service Arbitrator includes jurisdiction to deal with a claim in respect of the salary, range of salary or title allocated to the office occupied by a government officer, and a claim in respect of a decision of an employer to downgrade any office that is vacant.

6 Relevantly therefore, s.80E of the *Industrial Relations Act 1979* gives exclusive jurisdiction to the Public Service Arbitrator to enquire into and deal with the work, privileges, rights or duties of a government officer. Ms Westlund is a government officer.

7 Provided that the relief sought from the Public Service Arbitrator arises from the work, privileges, rights or duties of Ms Westlund then the claim is within the jurisdiction of the Public Service Arbitrator and exclusively so.

The *Workers' Compensation and Rehabilitation Act 1981*

8 Relevantly, the *Workers' Compensation and Rehabilitation Act 1981* is an Act to amend and consolidate the law relating to compensation for and the rehabilitation of workers suffering disability by accident or disease in the course of their employment. Its purposes are to make provision for the compensation of workers who suffer a disability and to promote the rehabilitation of those workers with a view to restoring them to the fullest capacity for gainful employment of which they are capable. Its purpose is also to promote safety measures in and in respect of employment aimed at preventing or minimising occurrences of disabilities (s.3). By s.4 the Act applies to and in respect of liability and the extent of liability to pay compensation and to pay for the provision of other benefits and the entitlement and the extent of the entitlement to receive compensation and other benefits.

9 By s.80 compensation is payable notwithstanding that the worker has received or is entitled to receive in respect of any period of incapacity any payment, allowance or benefit for annual leave. By s.84B proceedings for the resolution of a dispute in connection with a claim for compensation under the *Workers' Compensation and Rehabilitation Act 1981* is not capable of being brought other than under Part IIIA of that Act.

Conclusion

10 The scope and purpose of the *Industrial Relations Act 1979* and the *Workers' Compensation and Rehabilitation Act 1981* are different. The scope of the *Industrial Relations Act 1979*, as it applies to the jurisdiction of the Public Service Arbitrator under that Act, is to deal with industrial matters. The scope and purpose of the *Workers' Compensation and Rehabilitation Act 1981* shows that it is principally to make provision for the compensation of employees who suffer a disability in the course of their employment and to promote their rehabilitation and safety measures in and in respect of their employment aimed at preventing or minimising the occurrence of disabilities.

11 On the information before the Commission in this matter, the circumstances which have led Ms Westlund, and on her behalf the CSA, to bring applications in both jurisdictions are the same circumstances. Those circumstances are the circumstances of her employment and her allegations that bullying has resulted in an injury compensable under the *Workers' Compensation and Rehabilitation Act 1981.* However, and critically, the relief claimed in both jurisdictions is different. That should hardly be surprising given that both jurisdictions are to address different issues. This is in marked distinction to the jurisdictions of the Australian Commission and this Commission in relation to the same circumstances of a claim of harsh, oppressive or unfair dismissal.

12 Thus, here, Ms Westlund's claim under the *Workers' Compensation and Rehabilitation Act 1991* for compensation for the injury she alleges she received at work is essentially a claim for compensation and reimbursement of medical costs for events which occurred in the past. The claim brought to the Public Service Arbitrator for orders that the respondent cease and desist workplace bullying, provide assistance to relocate Ms Westlund to an alternative position and that she be placed on paid leave until that time are essentially issues regarding the performance of her work for the future.

13 Further, my attention has not been drawn to any provision of the *Workers' Compensation and Rehabilitation Act 1991* which gives the jurisdiction and power to a dispute resolution body under that Act to make the orders set out in the preceding paragraph which are claimed before the Public Service Arbitrator. It is most difficult therefore to conclude that "two actions" have been brought where one will lie.

14 Even if there is an overlap to the extent that the CSA seeks an order that all leave entitlements utilised by Ms Westlund from the date she last worked until the date she is permanently placed in a suitable alternative position within the public service be fully reinstated and that her service be regarded as continuous for that period may be matters which may be addressed by way of compensation in the relevant jurisdiction under the *Workers' Compensation and Rehabilitation Act 1981,* that overlap is not fatal. While the Public Service Arbitrator has the jurisdiction and power to make such an order, that order is quite different from an order made under the *Workers' Compensation and Rehabilitation Act 1991* for compensation notwithstanding that Ms Westlund has received annual leave for a period of incapacity.

15 It cannot be said on the evidence before the Commission that Ms Westlund is "forum shopping". Rather, the material before the Commission suggests two different schemes of claim arising from the same set of facts.

16 In that regard, I do not conclude that the respondent is placed in double jeopardy or that it is placed in an unduly onerous position in having to respond to claims in both jurisdictions.

17 Finally, even if some overlap exists in relation to reimbursement or compensation of annual leave used during this period, the requirement of this Commission to act according to equity and good conscience would ensure there is no double counting of any order made in this jurisdiction of any compensation actually received for that issue by Ms Westlund from any outcome of the workers' compensation jurisdiction.

18 The respondent has suggested that Ms Westlund and her union have filed this application before the Public Service Arbitrator as a device to gain access to documents through the process of discovery under the *Industrial Relations Act 1979*. This is said to be because there is no corresponding process of discovery pursuant to the *Workers' Compensation and Rehabilitation Act 1981.* This suggestion was made without notice to the CSA or Ms Westlund and, as a matter of fairness, the Commission did not place weight upon it. What can be said about it is merely this. The relief sought by Ms Westlund in this jurisdiction does not seem to be a frivolous claim. It is true to say as a matter of record that the CSA has also filed an application for the production of documents in relation to the claim before the Public Service Arbitrator. Orders for the production of documents are not given as a matter of right and the Public Service Arbitrator will critically examine that application in the light of any evidence on that occasion that the application has been made as device to secure access to documents relevant to the workers' compensation jurisdiction. It should not be assumed that an order in this jurisdiction for the production of documents is there merely for the asking.

19 For all of the above reasons the preliminary point is dismissed and steps will now be taken for this application to be dealt with before the Public Service Arbitrator.

———

2002 WAIRC 06875

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED, APPLICANT
	v.
	DIRECTOR GENERAL, DEPARTMENT OF JUSTICE , RESPONDENT
CORAM	SENIOR COMMISSIONER A R BEECH
	PUBLIC SERVICE ARBITRATOR
DATE	MONDAY, 28 OCTOBER 2002
FILE NO.	PSAC 20 OF 2002
CITATION NO.	2002 WAIRC 06875

Result	Order issued.
Representation	
Applicant	Mr J. Ross
Respondent	Mr N. Cinquina

Reasons for Decision - Production of Documents

1 The substantive matter before the Commission is an application by the applicant union (CSA) for a declaration that in relation to its member Georgina Westlund the respondent has breached the requirements of the *Public Sector Management Act 1994* in sections 8 and 9 and for orders—

> "(1) That the respondent "cease and desist workplace bullying".
>
> (2) That the respondent provide the necessary assistance to re-locate Ms Westlund to a suitable alternative position within the public sector.
>
> (3) That the respondent place Ms Westlund on paid leave from the date she last worked until the date she is permanently placed in a suitable alternative position within the public service.
>
> (4) That all leave entitlements utilised during the period referred to in the preceding order be fully reinstated.
>
> (5) That the period referred to in the preceding order shall be regarded as service for all purposes of Ms Westlund's employment."

2 The present application is for an order regarding the discovery of documents.

3 The application is opposed both as to the breadth of the documents sought and because of the understanding of the respondent that the documents sought are for the purpose of proceedings in relation to Ms Westlund's workers' compensation claim.

4 I have already held that the relief sought in the substantive application in this jurisdiction does not seem to be a frivolous claim. Mr Ross, representing the CSA, has categorically denied any improper purpose in this application for the discovery of documents. If the only opposition to the claim for an order for the production of documents was the breadth of the application, I would be prepared to grant the claim in principle on the basis that I consider it just that documents be produced in a claim that is not frivolous.

5 The breadth of the application is very readily determined. It is quite clear that an order for discovery is confined to what is in issue in the Notice of Application and the Notice of Answer and Counter Proposal (*ALHMWU and WA Hotels and Hospitality Association and Burswood Resort Hotel* (1995) 75 WAIG 1801 at 1805). The substantive application lodged by the Commission is for—

> "A section 44 conference and if not conciliated, a hearing pursuant to section 80E of the WA *Industrial Relations Act 1979*, for the actions, decisions, and/or any related matter of the respondent, specifically in relation to the intimidation, harassment and victimisation of Ms Georgina Westlund."

6 The particulars attached to the application relate to allegations regarding the manner in which Ms Westlund is said to have been treated.

7 The Notice of Answer and Counter Proposal contains a number of alleged facts regarding Ms Westlund's employment.

8 The present interlocutory application is "for the discovery, production and inspection of all documents in relation to the matter before the Public Service Arbitrator concerning Ms Georgina Westlund".

9 Accordingly, the issue in the Notice of Application (both substantive and interlocutory and the Notice of Answer and Counter Proposal) is the alleged bullying of Ms Westlund. Specifically, and in relation to the submissions which have been made in the interlocutory proceedings, the substantive application before the Commission is not that the respondent allows bullying of its staff in the workplace. It is an application that the respondent has allowed Ms Westlund to be bullied. Order 1 of the orders sought is therefore to be read narrowly in that context. Accordingly, the only order which may issue from the present interlocutory proceedings is an order for the discovery, inspection and production of documents in relation to the allegation of bullying of Ms Westlund. Point 6 of order 2 as sought is broader than the scope of the application.

10 I merely add this obvious comment. Had the application made to the Public Service Arbitrator by the CSA been an application addressing alleged bullying of all staff by the respondent then an order for the production, discovery and inspection of documents would be limited by that claim. That is simply not the case at present.

11 This conclusion also assists in addressing the second issue. The respondent called evidence from Mr Guest, a clinical psychologist who had seen Ms Westlund on an intermittent basis. Mr Guest's evidence is that at one point Ms Westlund informed him that she was endeavouring through the Industrial Relations Commission to obtain other information that will support her case and that this evidently related to other difficulties that staff have had at her previous place of employment that may not be accessible through the normal channels of workers' compensation. Over the objection of the CSA, I allowed Mr Guest to give evidence and accepted a report he had written of 21 June 2002. Having now had the opportunity of considering the evidence, I am unable to conclude that it supports an allegation that Ms Westlund has taken proceedings in this Commission, and as part of those proceedings sought an order for the production of documents, as a means of obtaining

documents regarding her claim in the Commission which would otherwise be unavailable in the workers' compensation jurisdiction. The application before me is made by the CSA and not Ms Westlund. The CSA is a principal and not merely an agent for its members. On that basis, and with due respect, Mr Guest's evidence was not relevant to the CSA's application.

12 As to his evidence, at best, Ms Westlund may have referred to obtaining documents relating to other staff than herself. However, Mr Guest's evidence does not form any basis for refusing otherwise the request of the CSA that an order issue for the discovery, inspection and production of documents in relation to Ms Westlund's own circumstances. Accordingly, and subject to what follows, I propose to grant the CSA's application.

13 I propose to issue an order in the terms of the CSA's application within the scope of the substantive application. Accordingly, it will not include point 6 of Order 2 as sought. It is not otherwise suggested that the order sought is oppressive.

14 The time limits otherwise proposed will be increased to 14 days in accordance with the respondent's request. I propose to restrict the use of the documents to these proceedings because I am satisfied that although Ms Westlund is entitled to have access to documents which concern her discovery that access is to assist in the conduct of litigation. Material made available on discovery cannot be used for any other purpose that the proper conduct of the proceedings in which the discovery was given (Australian Civil Procedure, Cairns, LBC 4th ed, page 372). The reduction in the breadth of the order sought has in my view also addressed the concerns which otherwise would have arisen regarding the use of documents outside the proceedings before this Commission.

15 The Minute of a Proposed Order now issues and the parties are requested to advise within 3 working days of the date of this decision whether or not a Speaking to the Minutes is requested.

2002 WAIRC 06917

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED, APPLICANT
	v.
	DIRECTOR GENERAL, DEPARTMENT OF JUSTICE , RESPONDENT
CORAM	SENIOR COMMISSIONER A R BEECH
	PUBLIC SERVICE ARBITRATOR
DATE	MONDAY, 4 NOVEMBER 2002
FILE NO.	PSAC 20 OF 2002
CITATION NO.	2002 WAIRC 06917

Result	Order issued.
Representation	
Applicant	Mr J. Ross
Respondent	Mr N. Cinquina

Order

HAVING HEARD Mr J. Ross on behalf of the application and Mr N. Cinquina on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979* hereby orders—

(1) Within 14 days of the date of this order, the respondent is to provide to the applicant, a sworn affidavit comprising of a complete, accurate and detailed list of all the documents in its power, possession and/or control in relation to Ms Georgina Westlund's employment with the Office of the Public Advocate relevant to the substantive application.

(2) The affidavit must specifically testify to the accuracy and completion of the information contained therein. Specifically the documents referred to in the affidavit are to include, but are not limited to—

- (a) all documents produced and/or considered by the respondent in connection with Ms Westlund's employment, grievance and allegations against the Public Advocate, rehabilitation program or any related issue, including but not limited to any reports, notes, memorandums, briefing notes or letters;
- (b) the respondent's Code of Conduct;
- (c) the respondent's policies, guidelines, in respect to appropriate workplace behaviour, harassment, victimisation, workplace bullying and grievance resolution;
- (d) the respondent's policies, guidelines, in respect of rehabilitation, assisted transfer and redeployment of staff;
- (e) instructions to staff or management or information contained in a manual in relation to harassment, victimisation, workplace bullying, rehabilitation, assisted transfer and redeployment;
- (f) all of the documents contained on Ms Westlund's personal file;
- (g) and any other document which may be relevant to the matters in question.

(3) For the purpose of these orders, "documents" include any hard copy (paper) or electronic recording of information (including but not limited to e-mails), whether typed or handwritten or otherwise, whether formally filed or not.

(4) The sworn affidavit list of documents is to contain the following information on the documents—

- (a) a brief description of each and every document (purpose or document type - ie. letter, report, email etc);
- (b) creation date of each document;
- (c) author/s of each document;
- (d) to whom the document was sent/for whom it was created.

(5) The information contained within the sworn list of affidavit documents is to appear in chronological order based on the document creation dates, and each document is to be individually numbered, with document number 1 being the earliest created document.

(6) Within 7 days of the applicant receiving the sworn affidavit list from the respondent, the applicant is to provide to the respondent in writing, the numbers of the documents the applicant wishes to be produced for inspection by the respondent.

(7) Within 7 days of the respondent receiving this written notification from the applicant, the respondent is to provide to the applicant with copies of all of the documents so nominated by the applicant. Such documents must be provided to the applicant in unaltered, unedited and complete condition, with an accompanying sworn affidavit by the respondent testifying to this.

(8) The documents discovered in compliance with this order are to be used on for the purposes before the Public Service Arbitrator in PSAC 20 of 2002.

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

2002 WAIRC 03773

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED, APPLICANT
	v.
	DIRECTOR GENERAL, EDUCATION DEPARTMENT OF WA, RESPONDENT
CORAM	COMMISSIONER S J KENNER
DELIVERED	TUESDAY, 18 SEPTEMBER 2001
FILE NO/S.	P 16 OF 2001
CITATION NO.	2001 WAIRC 03773

Result	Application granted. Order issued.
Representation	
Applicant	Ms M In de Braekt
Respondent	Mr J Ayling

Reasons for Decision

1 The substantive proceedings in this application relate to a claim by the applicant on behalf of a member, Mr Lewis, that actions taken by the respondent in relation to periods of sick leave taken by Mr Lewis, be reviewed, nullified, modified or varied, pursuant to the powers conferred on the Commission under the Industrial Relations Act 1979 ("the Act"), constituted as the Public Service Arbitrator.

2 In the course of dealing with this matter, the applicant filed an application for the discovery, production and inspection of documents related to the substantive proceedings. These reasons relate to that application made in Chambers.

3 Claims made by the applicant against the respondent in relation to its treatment of Mr Lewis include allegations that it exceeded and misused its powers in relation to Mr Lewis' sick leave management. It is also claimed by the applicant that the respondent has failed to comply with the requirements of the Minimum Conditions of Employment Act 1993 and generally acted ultra vires, unreasonably and breached its obligation to maintain faith and confidence in the employment relationship with Mr Lewis, in dealing with this matter.

4 A number of categories of documents are sought relating to Mr Lewis' medical condition and to the alleged treatment by the respondent of Mr Lewis' sick leave entitlements and its management of the issue generally. It was submitted by the applicant that access to the classes of documents sought are necessary to enable it to properly advance its case and are relevant to the fair and just determination of the matter before the Public Service Arbitrator.

5 The respondent did not specifically dispute the particular content of the application, but submitted that the application was premature in that further conciliation of the matter may resolve the dispute. Furthermore, it was submitted that there had been no request by the applicant for the production of the documents or classes of documents sought.

6 The relevant principles in relation to discovery, production and inspection of documents in this jurisdiction were set out by the Commission as presently constituted in *Ellis v The Grand Lodge of Western Australia of Antient Free and Accepted Masons Incorporated* (1998) 79 WAIG 1736, where, in referring to the decision of the Full Bench of this Commission in *ALHMWU v Burswood Resort Management (Ltd)* (1995) 75 WAIG 1801 it was said at 1736-1737—

> *"Discovery is not available as of right in this jurisdiction and it is for a party making an application for an order pursuant to s 27(1)(o) to establish that it would be just for such an order to be made: ALHMWU v Burswood Resort Management (Ltd) (1995) 75 WAIG 1801. In Burswood (supra) it was observed at 1805—*
>
> > *"The Commission may therefore only make an order if such order is just (see Springdale Comfort Pty Ltd t/a Dalfield Homes v BTA (op cit)(IAC)).*
> >
> > *s 26(1)(a) of the Act would not seem to be excluded from operation by the words of s 27 (1)(o) but we do not think it alters the questions to be asked and answered under s 27(1)(o).*
> >
> > *It is for the applicant for an order under s 27(1)(o), to establish that is just for such an order to be made. The expression "just" means "right and fair, having reasonable and adequate grounds to support it, well- founded and conformable to a standard of what is proper and right". See Loxton v Ryan (1921) State Reports (Qld) 79 at 84, 88 per Lukin J". Perhaps more appositely in Smith's Weekly Publishing Co Ltd v Sunday Times Newspaper Co Ltd (op cit), which was a case relating to discovery of documents, Isaacs and Rich JJ at page 562 held that "just" means "just according to law".*
>
> *In the event that the discretion to order discovery is exercised, general principles require the provision by one party to the other of a list of documents, which may be verified by affidavit, which are or have been in a party's possession, custody or*

power relating to any matter in question in the proceedings. A classic statement as to whether a document relates to a matter in question, is contained in the judgement of Brett LJ in Compagine Financiere et Commerciale du Pacifique v Peruvian Guano Company (1882) 11 QBD 55 where he observed at 63—

> *"It seems to me that every document relates to the matters in question in the action, which not only would be evidence upon any issue, but also which, it is reasonable to suppose, contains information which may not which must either directly or indirectly enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary. I have put in the words "either directly or indirectly" because, as it seems to me, a document can properly said to contain information which may enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary, if it is a document which may fairly lead him to a train of inquiry, which may have either of these two consequences".*

The case of Board v Thomas Hedley & Co Ltd (1951) 2 All ER 431 is authority for the proposition that the net is to be cast broadly in relation to determining what documents are discoverable based upon the matters in question in the action. To determine whether a document may fairly lead to a train of inquiry relevant to a matter in question, regard is to be had to the pleadings in civil litigation. In this case, regard should be had to the particulars of claim and the amended notice of answer and counter proposal: Mulley v Manifold (1959) 103 CLR 341 at 345."

7 Having regard to the matters in question in the dispute before the Public Service Arbitrator, I am satisfied that subject to one exception, it would be just, having regard to section 27(1)(o) of the Act, to issue an order for the discovery and inspection of the documents sought by the applicant. The exception is that I do not consider it appropriate to order the discovery of that class of documents sought relating to the attendances of other employees at medical practitioners, at the direction of the respondent. In my view, this class of documents, if produced, would infringe the privacy and confidentiality in respect of those employees and it is not appropriate that they be the subject of an order. In other respects, I am satisfied that the classes of documents sought satisfy the tests set out above and there was no submission by the respondent that such an order should not issue on any of the established bases to resist production of documents.

8 A minute of proposed order now issues.

2002 WAIRC 03797

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED, APPLICANT
	v.
	DIRECTOR GENERAL, EDUCATION DEPARTMENT OF WA, RESPONDENT
CORAM	COMMISSIONER S J KENNER
DELIVERED	TUESDAY, 18 SEPTEMBER 2001
FILE NO/S.	P 16 OF 2001
CITATION NO.	2001 WAIRC 03797

Result	Application granted. Order issued.
Representation	
Applicant	Ms M In de Braekt
Respondent	Mr J Ayling

Order

HAVING heard Ms M In de Braekt on behalf of the applicant and Mr J Ayling on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders—

(1) THAT discovery on affidavit is to be given by the respondent by 2 October 2001 of the following documents or classes of documents—

(i) all documents produced and/or considered by the respondent in connection with Mr Lewis' medical condition or access to sick leave or any related issue, including but not limited to any reports, notes, memorandums, briefing notes or letters;

(ii) the respondent's Code of Conduct;

(iii) the respondent's policies, guidelines, leave forms or any other such documents in relation to paid or unpaid sick leave and the respondent's approach thereto;

(iv) instructions to staff or management or information contained in a manual in relation to paid or unpaid sick leave;

(v) the report or any other documents produced by Dr Pearce in relation to Mr Lewis;

(vi) any documentation sent to or received from any other entity by the respondent in relation to Mr Lewis;

(vii) any documents forwarded to staff, in particular directions to Principals and the like, on the issue of paid or unpaid sick leave in the last 12 months;

(viii) all of the documents contained on Mr Lewis' personal file.

(2) THAT inspection of documents shall be completed by 9 October 2001.

(Sgd.) S. J. KENNER,
Commissioner.

[L.S.]

2002 WAIRC 06154

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED, APPLICANT
	v.
	DIRECTOR GENERAL, EDUCATION DEPARTMENT OF WA, RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	TUESDAY, 6 AUGUST 2002
FILE NO/S.	P 16 OF 2001
CITATION NO.	2002 WAIRC 06154

Result	Preliminary issue determined
Representation	
Applicant	Ms M in de Braekt
Respondent	Mr J Ayling

Reasons for Decision

1 This application relates to a claim by the applicant that steps taken by the respondent to direct a member of the applicant, Mr Lewis, to attend a medical practitioner pursuant to cl 22 (3) of the Public Service Award 1992 ("the Award") be declared null and void.

2 A preliminary matter has arisen, which the Commission has agreed to determine. That preliminary matter is the nature and scope of the power under cl 22 (3) of the Award, and specifically, whether the exercise of such a power is conditioned by an obligation on the respondent to accord the applicant natural justice and to not breach its implied duty to maintain faith and confidence in the employment relationship. It was agreed between the parties, that this issue would be determined on written submissions, which both the applicant and respondent duly filed, including a submission in reply from the applicant.

Background

3 The background to this matter is lengthy and in summary is as follows. Mr Lewis has been a public servant on a continuous basis for over thirty five years and it is common ground that he has an exemplary employment record. At the material times, Mr Lewis was, and is, a full time level 4 Registrar at Balcatta Senior High School. It was common ground that Mr Lewis' employment is governed by the Award.

4 On or about 7 July 2000, Mr Lewis commenced a period of sick leave which period of leave extended into 2001. It is common ground that Mr Lewis regularly provided medical certificates from a registered medical practitioner to the respondent, in respect of these absences.

5 On 19 March 2001 Mr Lewis received a letter from the respondent in relation to his period of sick leave. Because of its significance, formal parts omitted, I set this letter out in full as follows—

> *"Education Department records indicate that you have lodged a series of applications for paid sick leave from your position as Registrar at Balcatta Senior High School from 7 July 2000 onwards.*
>
> *I note that the several purported medical certificates supplied by you in support of these leave applications do not specify the nature of the illness or disability. Further, the Department is concerned about the increasing duration you have been declared as unfit for work, with the two most recent "medical certificates" specifying periods of thirteen weeks each.*
>
> *Given all of the circumstances, the Department is not prepared to continue to process your leave applications without first ascertaining the cause of your illness or any other reason for your extended absence from work.*
>
> *To that end, an appointment has been made with the Department's Occupational Physician, Dr John Pearce, so that he can examine you and assess your fitness to carry out your full duties.*
>
> *Accordingly, you are hereby directed in accordance with Cl 22(3) of the Public Service Award (1989) to attend his rooms in the Education Department Central Office building, at 151 Royal Street East Perth, at* ***2.15 pm on Monday 26 March 2001.***
>
> *In the meantime, you are also further directed not to return to work, and to remain on the sick leave to which you have declared yourself to be entitled, until such time as the Department advises you that it is satisfied you are fit to resume your full duties.*
>
> *I must warn you that, in the event that the Department is not satisfied that you are ill, or if you fail without reasonable cause to attend the appointment with Dr Pearce, the Department is likely to cease immediately any further payment for your extended leave and may consider other action including possible disciplinary action and recovery of overpaid salary.*
>
> *I understand this matter may be rather distressing for you. Occupational Services (WA) has been contracted by the Department to provide independent and confidential counselling to all employees. If you wish to avail yourself of this free service, please call them direct (telephone: 9225 4522) to make an appointment or to speak to a counsellor."*

6 It was the respondent's submission that this letter was written because of its concerns that in November 2000 and in March 2001, the periods of absence covered by the applicant's medical certificates extended to 13 weeks at a time. Furthermore, the medical certificates supplied by the applicant, did not provide any indication of the applicant's illness or disability or the likely duration of that illness or disability. The medical certificates only referred to the applicant being "unfit for work".

7 On or about 26 March 2001, the applicant attended the respondent's nominated occupational physician Dr Pearce. This led to Dr Pearce requesting the applicant's treating specialist, Dr Ng, to provide further medical details. Dr Ng wrote to Dr Pearce on 27 March 2001, leading to a report from Dr Pearce to the respondent in April 2001, that the applicant had apparently instructed Dr Ng not to provide any details of his medical condition, other than to confirm that he remained medically unfit for work, on the grounds of confidentiality.

8 The applicant submitted that Mr Lewis advised Dr Pearce that he was suffering from high blood pressure and stress. Dr Pearce also apparently reported to the respondent that there was no indication that the applicant's medical condition was likely to

change in the foreseeable future. I should also note that by letter dated 27 March 2001, Dr Ng advised Dr Pearce that the applicant had a bona fide medical condition, requiring his ongoing treatment. Dr Ng also expressed the opinion that Mr Lewis remained totally unfit for work in his substantive position, or any alternative type of work. Dr Ng did however, express the view that in due course, a graduated return to work programme may be appropriate.

9 The next event occurred on 9 May 2001 when the respondent again wrote to Mr Lewis about his situation. As the content of this correspondence is also in issue, formal parts omitted, the letter read as follows—

> *"I write further to my letter of 19 March 2001 about your extended sickness absence.*
>
> *I have now received a report from the Department's Occupational Physician, Dr John Pearce, following his examination of you on 26 March 2001 and subsequent consultation with your treating psychiatrist, Dr Frederick Ng.*
>
> *Unfortunately, it appears that under the guise of confidentiality, you have instructed Dr Ng not to provide Dr Pearce with any details about your medical condition. However, confirmation has been provided that you remain medically unfit for work, and Dr Pearce reports there is no indication that this is likely to change in the foreseeable future.*
>
> *In light of the above, I regret to advise you that the Department believes it may now be necessary to consider terminating your employment on the grounds of your incapacity, due to ill-health, to carry out your duties as a registrar in accordance with your contract of employment.*
>
> *To that end, and before making a final decision on this matter, I wish to give you an opportunity if it is your wish to provide any information, including medical evidence, that might persuade the Department that your employment should not be terminated.*
>
> *Any written response you wish to make on this matter should reach my office by no later than Friday 25 May 2001.*
>
> *In the event that no submission is received by that date, or that you are unable to dissuade the Department from its present view, you are hereby advised in accordance with Cl 7 of the Public Service Award 1989 that a recommendation is likely to be made to the Director-General that your employment as a Registrar at Balacatta Senior High School be terminated as of the close of business on Friday 15 June 2001.*
>
> *Arrangements will be made for immediate calculation of any termination payment to which you may be eligible. This may include a lump sum in lieu of any accrued annual leave or long service leave entitlements where they have not previously been taken.*
>
> *In the meantime, my previous direction to you not to return to work, and to remain on the sick leave to which you have declared yourself to be entitled, until such time as the Department advises you that it is satisfied you are fit to resume your full duties, remains in effect.*
>
> *I understand this matter may be rather distressing for you. As previously advised, Occupational Services (WA) has been contracted by the Department to provide independent and confidential counselling to all employees. If you wish to avail yourself to this free service, but have not already done so, please call them direct (telephone: 9225 4522) to make an appointment or speak to a counsellor."*

10 It was common ground, that at some point prior to the letter of 19 March 2001 referred to above, the respondent came into possession of certain information from unidentified parties, including a post card sent by Mr Lewis to staff at Balcatta Senior High School from Surfers Paradise in Queensland, in October 2000. The respondent also received information that Mr Lewis was seen at various school social functions, whilst he was on paid sick leave.

11 It was the applicant's submission, that it was this information that prompted it to direct Mr Lewis to attend upon Dr Pearce for a medical examination pursuant to cl 22 (3) of the Award. The applicant submitted that Mr Lewis was not informed of these matters until some months after his attendance on Dr Pearce. It was submitted that Mr Lewis was denied a reasonable opportunity to respond to the information in the possession of the respondent, before it exercised the power to direct him to attend on Dr Pearce. In doing so, the applicant submitted that the respondent acted unfairly and unreasonably and denied Mr Lewis natural justice, in directing him as it did: *Kioa v West* (1985) 159 CLR 550; *Annetts v McCann* (1990) 170 CLR 596; *Minister for Immigration v Teoh* (1995) 128 ALR 353.

12 The applicant's submission was that the manner of dealing with the matter by the respondent, caused Mr Lewis undue stress and pressure, and exacerbated his medical condition. It was further submitted by the applicant, that the respondent had breached its statutory obligations under the Public Sector Management Act 1994 ("PSM Act") in that it had not complied with ss 8, 9, 30 of that Act and failed to comply with the Public Sector Code of Ethics ("the Code"), in dealing with Mr Lewis in such a harsh and oppressive manner. Furthermore, the applicant submitted that the respondent, given the manner in which it treated Mr Lewis with respect to his medical condition and sick leave, breached its implied obligation to maintain faith and confidence in the employment relationship.

13 The respondent denied that it had acted unfairly towards Mr Lewis and submitted that it was entitled to exercise the power conferred upon it in cl 22(3) of the Award. It was submitted that in this case, the respondent had occasion for doubt as to the cause of the illness or the reason for the absence. It was submitted that the respondent, as a public body, has an obligation to ensure that sick leave payments made whilst an employee claims sick leave, are legitimate. Indeed, the submission was the respondent has a public duty to ensure that public monies are used appropriately. The respondent denied that it had any obligation to disclose to Mr Lewis what it described as the "extraneous materials", that being the post card and information about his attendance at social functions, prior to directing him to attend the respondent's medical practitioner pursuant to cl 22(3).

14 In a response to a notice to admit filed by the applicant, whilst the respondent admitted being aware that some people had raised doubts about the genuineness of Mr Lewis' medical condition, the respondent had not formed any definite view or even firm suspicions on the matter at the time it wrote its letter to Mr Lewis on 19 March 2001, other than to acknowledge that doubt expressed by others, and to seek to investigate the matter further.

Conclusions

15 I accept the broad proposition advanced by the applicant that public sector and private sector employment is different, in that public sector bodies are subject to general administrative law principles in the application of statutory rules, regulations and Acts of Parliament. Considerations relevant to the contract of employment are of course important, but they are not the only considerations in public sector employment: see generally *Aspects of Public Sector Employment Law* 1988, G McCarry; *Malloch v Aberdeen* (1973) 1 WLR 1578.

16 Self evidently also, the respondent, being a public sector body, is subject to the requirements of the PSM Act and related regulations, rules, and codes of conduct, including the Code. I accept the submission of the applicant in relation to the application of ss 8, 9 and 30 of the PSM Act. I observe also in passing, that s 30, although it is unnecessary to say so because the duty arises in any event, obliges a public sector body to comply with any binding award, order or industrial agreement under the Act.

17 I also accept that in Australian industrial courts and tribunals there has been a tendency to imply into employment contracts a term of trust and confidence, as an implied duty. As was said by the Full Industrial Relations Court of Australia in *Perkins v Grace Worldwide (Aust) Pty Ltd* (1997) 42 AILR 3 - 605—

> *"Trust and confidence is a necessary ingredient in any employment relationship. That is why the law imports into employment contracts an implied promise by the employer not to damage or destroy the relationship of trust and confidence between the parties without reasonable cause."*

18 (See also *Russian v Woolworths* (SA) Pty Ltd 1995 AILR 11-028; *Burazin v Blacktown City Guardian Pty Ltd* (1996) 41 AILR 3-453).

19 The first point to consider in this matter is the terms of cl 22 of the Award. Cl 22 relevantly provides as follows—

> *"(2) Medical Certificate*
>
> *(a) An application for sick leave exceeding two consecutive working days shall be supported by the certificate of a registered medical practitioner or, when the nature of the illness consists of a dental condition and the period of absence does not exceed five consecutive working days, by the certificate of a registered dentist.*
>
> *(b) The amount of sick leave granted without the production of the certificate required in paragraph (a) of this subclause shall not exceed, in the aggregate, 5 working days in any one credit year.*
>
> *(3) Where the Chief Executive Officer has occasion for doubt as to the cause of the illness or the reason for the absence, the chief executive officer may arrange for a registered medical practitioner to visit and examine the officer, or may direct the officer to attend the medical practitioner for examination. If the report of the medical practitioner does not confirm that the officer is ill, or if the officer is not available for examination at the time of the visit of the medical practitioner, or fails, without reasonable cause, to attend the medical practitioner when directed to do so, the fee payable for the examination, appointment or visit shall be paid by the officer…*
>
> *(8) No sick leave shall be granted with pay, if the illness has been caused by the misconduct of the officer or in any case of absence from duty without sufficient cause."*

20 Cl 22 was inserted into the Award on 1 December 1992 in its present form: (1993) 73 WAIG 301. It is trite to observe that the principles relevant to the interpretation of awards are those applicable generally to the interpretation of other instruments. That is, the meaning and effect of the terms of an award are to be ascertained from the meaning of the language, read in its ordinary and natural sense: *Norwest Beef Industries Ltd v Australasian Meat Industry Employees Union* (1984) 64 WAIG 2124 at 2133 per Olney J.

21 Cl 22 (3) of the Award, in so far as it deals with the exercise of a power, can be broken down into three elements. The first element is the possession by the Chief Executive Officer of an occasion for doubt. The second element is that doubt can relate to the cause of an employee's illness. The third element is the doubt can relate to the reason for the absence itself. Necessarily, when read in the context of the whole of cl 22, the second and third elements must be read disjunctively. That is, there can be occasion for doubt not as to whether an employee is in fact ill, but the cause of that illness. Secondly, there can be occasion for doubt contemplated by the clause, as to the reason for the absence, ie. whether the employee is ill or not. This construction would seem to be supported by cl 22 (8), which provides that no sick leave be provided with pay, if an employee's illness has been caused by their misconduct, or in the case of an absence without sufficient cause. The latter which at least in part, must be construed to mean an absence in relation to which, an employee is not ill.

22 For the purposes of the first element, the Chief Executive Officer must possess some "doubt". "Doubt" is defined in the Shorter Oxford Dictionary to mean—

> *"1. The (subjective) state of uncertainty as to the truth or reality of anything. a. feeling of uncertainty as to something. b. The condition of being (objectively) uncertain; a state of affairs giving occasion to uncertainty. 2. A doubtful matter or point; a difficulty. 3. Apprehension, dread, fear, danger, risk..."*

23 Thus, on its ordinary and natural meaning, for the Chief Executive Officer to exercise the power contained in cl 22 (3) of the Award, it would be necessary for the Chief Executive Officer to have some basis for a state of uncertainty about either the cause of an employee's illness or the reason for the employee's absence. That is, the Chief Executive Officer must have a proper basis for the state of uncertainty to exist. In this case, the respondent submitted that the principal reason for its doubt was the increasing duration of medical certificates, in the context of the length of Mr Lewis' absence on sick leave and the absence of any particularity for the absence. The respondent submitted that the information in its possession immediately prior to the letter of March 2001, was not in itself, the basis for any decision to direct the applicant to undertake a fitness for work examination.

24 In my opinion, this matter involves the balancing of legitimate interests of both the employer and the employee. In the case of the employee, an employee is entitled to be absent from work on paid sick leave on the basis that the employee satisfies the lawful obligations upon him or her to receive such payment and be absent from work. Correspondingly, in this case, cl 22 (3) of the Award, empowers the employer to in effect, seek a second medical opinion in the event of the prescribed conditions having been met. In my opinion, on its proper construction and having regard to relevant principles, I am not of the view that the respondent was obliged as a matter of law, to communicate with Mr Lewis the basis for its state of doubt or uncertainty before requesting that he attend the respondent's medical practitioner for an examination.

25 In the context of the length of absence from work of Mr Lewis as at March 2001, which by that time had been a period of some eight months, to receive medical certificates referring to further periods of absence through sickness of in excess of three months each, would in my opinion, on any reasonable basis, enable an employer to at least ascertain the basis for that illness/absence, and more importantly, any future prognosis in terms of a return to work. In my view, looked at from the perspective of the employer, it would be quite unreasonable, and amount to a disregard of the obligations between employer and employee, if an employee could simply continue on paid sick leave, subject to an entitlement thereto, almost indefinitely. This is so if no other reason that the employer obviously must make appropriate arrangements to staff the organisation, in the employee's absence.

26 I am not therefore persuaded that there was a breach of the principles of natural justice in the respondent not affording Mr Lewis a "hearing" as to its cause for doubt. Additionally, and in any event, I have doubts as to whether such a duty would arise, on the authorities, at that stage of the process. The consequence provided by cl 22(3) for an employee to not attend a

doctor on the direction of the employer or if the employee is not available to attend, or if the employee is found not to be ill, is the payment of the consultation fee. I do not consider that this would constitute the "destruction, defeat or prejudice to a person's rights, interests or legitimate expectations": *Annetts*. I also do not consider that there would be the destruction of any confidence with the medical practitioners that could not be accommodated by the mutual confidence between treating practitioner on the one hand, and the respondent's practitioner on the other.

27 That is not to say that at no stage of a matter arising out of a cl 22(3) referral, would the duty to afford natural justice arise. For example, if the employer was to consider some from of disciplinary action against an employee, then clearly in my view, the duty would arise and ought to be discharged.

28 Having said that however, the existence of a power such as cl 22 (3) of the Award, does not provide an unfettered right for the employer to simply direct employees to attend the respondent's medical practitioner on a whim. Based upon the above, there needs to be a proper foundation for the exercise of such a power. I do not consider however, that the respondent's failure to canvas the information in its possession with Mr Lewis, prior to exercising the power in cl 22(3) had the consequence, in an administrative law sense, that its conduct was ultra vires and void.

29 Having reached these conclusions however, in my view, the tone of some of the correspondence from the respondent to Mr Lewis was inappropriate. Reference to "purported medical certificates" and to medical certificates in quotation marks in the letter of 19 March 2001, were, in my view, insensitive and wrong. Arguably, this may have amounted to conduct in contravention of s 9 (c) of the PSM Act which required the respondent to—

> *"Exercise proper courtesy, consideration and sensitivity in their dealings with members of the public and employees."*

30 Similarly, threats of dismissal contained in the letter of 9 May 2001, were in my view, unnecessary and a somewhat heavy handed approach to the matter of Mr Lewis' situation, given his length of service and employment record with the respondent. The matter could have been dealt with by a request to meet with him and discuss the position, without the threat of dismissal.

31 I am not persuaded that the respondent has breached its implied obligation of maintaining faith and confidence in the employment relationship.

32 In my opinion, this matter can be determined, if necessary, on the basis that the offending references in the correspondence to Mr Lewis be removed by order of the Arbitrator.

33 The matter will be re-listed to hear further from the parties, as to the appropriate orders to be made, if any.

2002 WAIRC 06858

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED, APPLICANT *v.* DIRECTOR GENERAL, EDUCATION DEPARTMENT OF WA, RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	THURSDAY, 24 OCTOBER 2002
FILE NO/S.	P 16 OF 2001
CITATION NO.	2002 WAIRC 06858

Result	Order issued
Representation	
Applicant	Ms M in de Braekt as agent
Respondent	Mr J Ayling

Order

HAVING heard Ms in de Braekt as agent on behalf of the applicant and Mr J Ayling 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 following documents, in the possession of the respondent, and referred to as exhibits be amended as follows:

(a) Exhibit 1 – Letter from respondent to Mr Lewis dated 19 March 2001

(i) Paragraph two	That the word "*purported*" be deleted.
	That the words "…*with the two most recent 'medical certificates' specifying periods of thirteen weeks each*" be deleted.
(ii) Paragraph six	That the words "…*to which you have declared yourself to be entitled*" be deleted.
(iii) Paragraph seven	That the entire paragraph be deleted

(b) Exhibit 3 – Letter from respondent to Mr Lewis dated 9 May 2001

(i) Paragraph 3	That the words "…*under the guise*" be deleted and replaced with "*on the basis*".
(ii) Paragraph 4	That the entire paragraph be deleted
(iii) Paragraph 5	That the words *"…that might persuade the Department that your employment should not be terminated"* be deleted.
(iv) Paragraph 8	That the entire paragraph be deleted.
(v) Paragraph 9	That the words *"…and to remain on the sick leave to which you have declared yourself to be entitled"* be deleted and be replaced with *"and to remain on sick leave"*.

(c) Exhibit 7 – Letter from respondent to Mr Lewis dated 29 November 2001

(i) Paragraph 8	That the word "*minimal*" be deleted.
(ii) Paragraph 12	That the entire paragraph be deleted.

(2) THAT any unamended documents referred to in paragraph 1 of this order are not be contained in or stored with Mr Lewis' personal file, are to be sealed up and are not to be referred to for any purpose in connection with the employment of Mr Lewis by the respondent.

(3) THAT the application otherwise be and is hereby dismissed.

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

2002 WAIRC 06901

OPERATIONAL POLICE STAFFING LEVELS

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	WESTERN AUSTRALIAN POLICE UNION OF WORKERS, APPLICANT
	v.
	COMMISSIONER OF POLICE, RESPONDENT
CORAM	COMMISSIONER P E SCOTT
	PUBLIC SERVICE ARBITRATOR
DATE	FRIDAY, 1 NOVEMBER 2002
FILE NO.	PSAC 45 OF 2002
CITATION NO.	2002 WAIRC 06901

Result Direction issued

Direction

WHEREAS the applicant sought the assistance of the Commission in respect of its concerns regarding issues of safety arising from what it says are problems with staffing levels and deployment of police officers; and

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

WHEREAS during the course of the conference, the parties indicated that discussions had occurred, the respondent is in the process of investigating concerns raised by the applicant with a view to developing strategies to address them, and the parties are scheduled to meet on 11 November 2002 for further discussions; and

WHEREAS at the conclusion of the conference the Arbitrator issued directions to the parties as a means of reflecting the Arbitrator's encouragement of the parties to continue their discussions and make genuine attempts to resolve the issue, and report back to the Arbitrator;

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

1. THAT the parties continue the process of discussions and consultations to which they have committed themselves, for the purpose of genuinely attempting to resolve the issue of police staffing levels and deployment.
2. THAT the parties report back to the Public Service Arbitrator no later than Monday, the 18th day of November 2002, at 10.30am.

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

INDUSTRIAL MAGISTRATE—Complaints before—

2002 WAIRC 06826

INDUSTRIAL MAGISTRATE'S COURT OF WESTERN AUSTRALIA

PARTIES	JOSEPH LEE, DEPARTMENT OF CONSUMER AND EMPLOYMENT PROTECTION
	COMPLAINANT
	v.
	JOSEPH MCDONALD
	DEFENDANT
CORAM	MR W TARR I.M
DATE OF ORDER	WEDNESDAY, 9 OCTOBER 2002
FILE NO/S.	CP 1 OF 2002
CITATION NO.	2002 WAIRC 06826

Result	Proven
Representation	Mr R Andretich (of Counsel) appeared on behalf of the Complainant.
	Mr K Bonomelli (of Counsel) appeared on behalf of the Defendant.

Reasons for Decision

(*Given extemporaneously at the conclusion of the hearing, extracted from the transcript of proceedings and edited by His Worship*)

The Defendant is charged that on 10 January 2002 at Perth he threatened that the free and lawful exercise of the occupation of Brajkovich & Son Demolition Pty Ltd would be interfered with by reason of the circumstance that Chris George and others, employees or contractors of Brajkovich & Son Demolition Pty Ltd, were not members of an organisation of employees.

That is a charge contrary to the provisions of section 96E(1)(b) of the ***Industrial Relations Act 1979*** (the Act) which reads—

> ***96E. Discriminatory and injurious acts against persons because of non-membership of employee organization***
>
> *(1) A person, including an organization of employees, must not threaten that-*
>
> *(a) ...*
>
> *(b) the free and lawful exercise of a second person's trade, profession or occupation will or may be interfered with,*
>
> *by reason of circumstance that the second person or third person is not a member of an organisation of employees.*

It is alleged by the prosecution that on 10 January 2002 a demolition company, Brajkovich & Son Demolition Pty Ltd (Brajkovich), together with another business, Perth Asbestos Removal Co, were demolishing two old grandstands at the Western Australian Cricket Association grounds (the WACA) at East Perth. The prosecution claims that the Defendant, with two others, entered the site, stopping work and threatening that work would not be allowed to continue unless the employees of Brajkovich joined The Construction, Forestry, Mining and Energy Union of Workers (the CFMEU), a union registered pursuant to the Act.

A director of Brajkovich, Adrienne Brajkovich, gave evidence that he was at the WACA on 10 January 2002 and involved in the demolition of the two grandstands. Because asbestos had been found, it was necessary for the involvement of Perth Asbestos Removal Co.

Mr Brajkovich gave evidence that at about 10.00 am the Defendant, who he knew, entered the site and approached him and told Mr Brajkovich that he wanted them to stop work. He gave evidence that there was some discussion about an EBA "*and signing the boys up*".

Mr Brajkovich said he was told by the Defendant "*if we didn't join the union, work would stop*". He gave evidence that he had no intention of joining the union, but joined to keep the job going, explaining that he had machinery on site and could not afford not to keep the job going. He said he was concerned that the work may not continue and when he asked what he could do about keeping the job going, he said that the Defendant said "*sign the boys up*". He said the Defendant told him "*if you join the boys up, we can keep the job going*". Mr Brajkovich agreed to join the union and he paid $1300 for his membership and the membership of his four employees. After they were all signed up, work continued.

An employee of the company, Christopher George, gave evidence that he would not have joined the union unless asked to do so by his boss, Mr Brajkovich. He said he was not required to pay for his membership fees and did not intend staying in the industry, and, in fact, he said that he resigned from the union three weeks later when he resumed his studies.

Another employee, Mr Pukie gave evidence that he had no intention of joining the union and only did so because he was told to.

The prosecution called a couple of other witnesses, including the witness Michael Southwell, who gave evidence that he was a journalist employed by The West Australian newspaper at that time. He said that he attended the WACA on that morning at about 9.00 am. He saw the Defendant outside, went to speak to him and he asked him what was going on. He said the Defendant said "*we're going to stop work on the site*". He said that he was told that there were members of the union on the site that were not happy about non-union members working, and the Defendant was going to stop work to address the issue. He went on to say that the Defendant told him he was going to stop work until the non-members had signed up.

Later in his evidence he said that one of the reasons for the union visiting the site was that there were non-union members on site. The members of the union were not happy. He went on to say that he explained to him that if the union members downed tools, work could not continue.

As is often the situation with witnesses in similar matters, Mr Brajkovich could not remember exactly the words that were used but, in my view on the evidence, he was left with the impression, as he said, that if he did not join the union, work would stop.

The Shorter Oxford Dictionary defines "threat" as "to press, urge, try to force or induce, especially by means of menaces," and if I find that it is the case that Brajkovich joined up because they were told the site would be closed down and work would not continue, then obviously that would be a threat within the meaning, I would have thought, of section 96E of the Act.

In relation to Mr Southwell's evidence, while that evidence is not evidence of a threat to the company through Mr Brajkovich, it supports Mr Brajkovich's evidence in that the Defendant was on site for the purpose of signing up non-members of his company, and is consistent with the Defendant saying to Mr Brajkovich that if they did not sign up, work would stop.

Mr Bonomelli raised the issue of whether or not the company, as such, was being threatened, but Mr Brajkovich has given evidence that his company was engaged to do the demolition work at the WACA and that he was a director of that company and operated the business. In the context of the situation any threat to Mr Brajkovich was, in my view, a threat to the company.

The Defendant has elected not to give or call evidence, and that is his right. The law is that no adverse finding can be made as a result of that. However, the Defendant has not taken the opportunity to rebut the evidence given by the prosecution, which stands generally unchallenged except of course by the cross-examination of the witnesses.

It seems to me, on the evidence, fairly clear that Mr Brajkovich made the decision to join the union because the consequences of not joining, in his mind, were untenable. As he said, he had workers on site. He had machinery and other equipment which was on site, and it was going to be too costly for him not to join the union. In his view, and I find it to be the situation, he had no choice. It was either join the union or work would not continue at the WACA.

I find, on the evidence overall, that the charge has been proven.

W TARR,
Industrial Magistrate.

(Editors note: The Defendant was subsequently fined $1000.00 and costs in the amount of $1313.00 were awarded to the Complainant.)

UNFAIR DISMISSAL/CONTRACTUAL ENTITLEMENTS—

2002 WAIRC 06798

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	FLORENCE EDITH ANDERSON, APPLICANT
	v.
	TED KILBEY BERKELEY CHALLENGE PTY LTD, RESPONDENT
CORAM	COMMISSIONER J H SMITH
DELIVERED	TUESDAY, 22 OCTOBER 2002
FILE NO.	APPLICATION 650 OF 2002
CITATION NO.	2002 WAIRC 06798

Result	Application dismissed.
Representation	
Applicant	In person
Respondent	Ms L Gibbs (as Agent)

Reasons for Decision

1 Florence Edith Anderson ("the Applicant") filed a copy of an application on 15 April 2002 claiming that she was harshly, oppressively or unfairly dismissed by Judy Ingram of 5 Lane Street, Collie WA 6225 and Ted Kilbey. In the particulars of employer details the Applicant stated that the contact name of the Respondent (i.e. manager/supervisor) was Berkeley Challenge: Osborne Park, Judy Ingram, Ted Kilbey. The Respondent's address was stated as 5 Lane Street, Collie WA 6225. That address is Ms Ingram's residential address. The Commission file records that on 16 April 2002, one of the officers of the Commission rang the Applicant and advised her that she may want to change the Respondent's name. On 18 April 2002 the Commission received the original of the notice of application on which the name "Judy Ingram of" and the Collie address had been crossed out to amend the name of the Respondent as Ted Kilbey of Berkeley Challenge Pty Ltd. The amended application was received within 28 days of the date which the Applicant says her employment was terminated.

2 When the Applicant gave evidence she conceded that she served the amended application on Mr Kilbey at his residential address in Perth. A notice of answer and counter proposal was filed on behalf of Mr Kilbey stating that Mr Kilbey opposed the claim as the Respondent named in the application never employed the Applicant. It is not in dispute that at all material times Mr Kilbey was employed by Berkeley Challenge Pty Ltd as an area supervisor in charge of the Collie area.

3 Following receipt of Mr Kilbey's notice of answer and counter proposal Ms Anderson wrote to the Commission on 31 May 2002 challenging matters stated in the notice of answer and counter proposal. In the letter (Exhibit A) she stated—

> "On the 20th May, I received, a "Registered Post" letter, from your department, saying that Ted Kilbey, W.AIRC (sic) application No 650 OF 2002, has never employed the applicant, which is me:- Ms Flo Anderson.
>
> "This is not true," and I have enclosed 2 x pay slips, that I used to get a day or two, by post after I was paid by Berkeley Challenge Pty. Ltd., which was put into my Commonwealth Bank Account, each fortnight, in Collie."

Attached to that letter were two pay slips and the pay slips state that the Applicant's employer was Berkeley Challenge Pty Ltd.

4 It is apparent from the Applicant's evidence that at the time she filed the application and filed and served the amended application, she had not sought legal advice in relation to her claim. Since the hearing of this matter, Ms Anderson sent to the Commission a copy of a letter from Slee Anderson & Pidgeon, Lawyers, referring to a meeting with a solicitor of that firm on 1 July 2002.

5 At the hearing of this matter on 19 September 2002, the Applicant appeared in person. At that hearing the Applicant conceded that in light of the pay slips her employer is Berkeley Challenge Pty Ltd. When asked to explain why she named Mr Kilbey as her employer she testified that when she went for an interview for work as a cleaner at Coles in Collie she was informed by the cleaning supervisor Ms Judy Ingram that Mr Kilbey was "our big boss". Because she was told that, she put Mr Kilbey's name on the application and served the application on him. It is apparent from the evidence that when the Applicant's employment was terminated she was informed by Mr Kilbey by telephone that she should not attend work on 27 March 2002.

6 Ms Gibbs, on behalf of Mr Kilbey and Berkeley Challenge Pty Ltd advised the Commission that at all material times the employer of the Applicant was Berkeley Challenge Pty Ltd. A submission was made that the Applicant's application should be dismissed as the application was defective in that the Applicant incorrectly described the Respondent when there was no reasonable reason why she should think her employer was Mr Kilbey. In particular she ought to have known her employer was Berkeley Challenge Pty Ltd. Accordingly, it is claimed on behalf of the Respondent that there is no jurisdiction to determine the Applicant's claim and the application should be struck out. In particular it is contended that the Commission has no jurisdiction to amend the name of the Respondent to substitute Ted Kilbey of Berkeley Challenge Pty Ltd to Berkeley Challenge Pty Ltd as to do so would create a new cause of action against Berkeley Challenge Pty Ltd out of time by reason of operation of s.29(2) of the *Industrial Relations Act 1979* ("the Act"). Further it is argued that the Commission should not exercise its discretion to amend the application as the Applicant ought to have known who her employer was because she received weekly pay slips whilst employed by the Respondent which clearly stated that her employer was Berkeley Challenge Pty Ltd.

7 In *Rai v Dogrin Pty Ltd* (2000) 80 WAIG 1375, the decision appealed against was whether the Commission at first instance erred in refusing to allow the name of the Respondent be amended from Dogrin Pty Ltd to Julie Khan or Julie Khan and Opel Khan. The application to amend was made at the conclusion of a substantive hearing. Documentary evidence tendered on behalf of the Applicant was confusing in that at least three payslips identified Dogrin Pty Ltd as the employer, whereas a group certificate named Julie and Opel Khan trading as "Bibendum at the Colonnade" as the employer. At the hearing at first instance, it was submitted on behalf of the Respondent to the appeal, that on the authority of *The Owners of Johnston Court Strata Plan No. 5493 v Dumancic* (1990) 70 WAIG 1285, that this was the case of a wrong party being named, not a misdescription of the party's name. At the appeal the Appellant contended that the amendment sought was properly made when regard was had to the principles enunciated by the High Court in *Bridge Shipping Pty Ltd v Grand Shipping SA and Anor* (1991) 173 CLR 231.

8 In *Bridge Shipping Pty Ltd v Grand Shipping SA and Anor* (op cit) Philip Morris Ltd had engaged the Appellant to arrange for the carriage of containers to Melbourne. When the containers arrived at Melbourne they were damaged. Philip Morris Ltd sued the Appellant. The Appellant issued a Third Party notice against the registered owner of the vessel. The Appellant later discovered the vessel had been under charter to another company which had therefore been the carrier of the goods. The Appellant then sought to substitute the charterer as third party in place of the owner. The amendment was refused. The majority of the High Court held that because the Appellant had intended to sue the owner of the vessel believing that its right of action lay against the owner, the Appellant had not "made a mistake in the name of the party" within sub rule (4) of Rule 36.01 of the Rules of the Supreme Court of Victoria. Sub rule (4) allowed the Victorian Supreme Court to correct mistakes in the name of a party under sub rule (1) which empowered the Court to correct any defect or error in any proceeding. One of the questions considered by the High Court was whether Rule 36.01 sub rule (4) was restricted to cases of misnomer, clerical error and misdescription *per se*. At 248 Toohey J observed—

> "The issue is whether the substitution sought by Bridge Shipping is by reason of a "mistake in the name of a party". Bridge Shipping says that there was such a mistake. It thought that Grand Shipping was the carrier of the goods; it knows now that Rainbow Line was the carrier. But, answers Rainbow Line, there was no mistake in the name of a party. This is not a case of Bridge Shipping intending to join Rainbow Line as a third party and getting the name wrong. It meant to join Grand Shipping because it was the owner of the ship and Bridge Shipping assumed (wrongly, as it turned out) that the bill of lading was issued on behalf of Grand Shipping."

9 In considering the history of sub rule (4) of Rule 36.01, McHugh J (with whom Brennan and Deane JJ agreed) considered a similar English provision and observed that Donaldson LJ in *Evans Constructions Co Ltd v Charrington & Co Ltd* [1983] QB 810 gave the English provision a wide meaning. In that case at 821 Donaldson LJ observed—

> "… there is a real distinction between suing A in the mistaken belief that A is the party who is responsible for the matters complained of and seeking to sue B, but mistakenly describing or naming him as A, and thereby ending up suing A instead of B. The rule is designed to correct the latter and not the former category of mistake. Which category is involved in any particular case depends upon the intentions of the person making the mistake and they have to be determined on the evidence in the light of all the surrounding circumstances."

10 McHugh J at 258 in *Bridge Shipping* observed *Evans Construction Co Ltd v Charrington & Co Ltd* was followed by Clarke J in *Lloyd Steel (Aust) Pty Ltd v Jade Shipping SA* (1985) 1 NSWLR 212. McHugh J held at 261 that *Evans v Charrington* and *Lloyd Steel* were correctly decided.

11 In *Rai v Dogrin Pty Ltd* (op cit), the President (with whom Gregor C agreed) held at 1378 that s.27(1)(l) and (m) and s.26(1) of the Act gives the Commission wider powers (than Rule 36 of the Rules of the Victorian Supreme Court), to amend the name of a Respondent if it were found that there was a misdescription in the name of the employer. Further that even if that proposition was not correct they held the principle in *Bridge Shipping Pty Ltd* could be applied.

12 Whether or not the Commission should make an amendment to substitute a new party outside the time prescribed by s.29(2) of the Act, is discretionary (*Rai v Dogrin Pty Ltd* per Fielding SC at 1379-1380).

13 In *The Owners of Johnston Court Strata Plan No. 5493* (op cit), the Industrial Appeal Court considered a decision made by the Industrial Magistrate to amend complaints to name the Appellant as the Respondent. The complaints were initially made against the Council of Owners of Johnston Court. Pursuant to the provisions of the *Strata Titles Act 1985* the functions of the Appellant as a company were to be performed by the council. The council had no corporate status. The Industrial Appeal Court held that the decision to amend was proper as the facts established that it was not a case of naming the wrong defendant but simply a case of getting the proper defendant's name right. At 1287 the Court held—

> "… Justices cannot substitute a new party for the defendant unless the party so substituted waives the irregularity. It is trite to say that the same rules apply in the civil procedure. This is not the case of the wrong person being charged. The only 'person' capable of being charged was the strata company and the facts disclose that the only 'person' capable of instructing solicitors was the spokesman for that company, namely the council, which exercises the company's function. The council has no separate legal corporate existence apart from the strata company. This is not a case where anyone (had they considered the matter) would have concluded that the named defendant was meant to be the individual persons who constituted the council of the corporate body. The defendant could only be the corporate body, and the only entity capable of instructing solicitors to defend the charges was the council of the corporate body."

14 Having heard the Applicant's evidence it is apparent that the Applicant is unsophisticated and unschooled in instituting legal proceedings. The Applicant has a very limited understanding of the consequences at law of properly naming her employer. Even when she produced her pay slips to the Commission in the letter dated 31 May 2002, she still maintained Mr Kilbey was her employer. In light of the fact that the Applicant did not seek any advice about instituting the claim before making the claim for unfair dismissal it is my view that I should exercise my discretion under s.27(1)(m) of the Act to change the name of the Respondent from Ted Kilbey of Berkeley Challenge Pty Ltd to Berkeley Challenge Pty Ltd. The mistake made by the Applicant was a mistake that can be characterised as a simple "error, defect or irregularity" within the meaning of s.27(1)(m) of the Act and is capable of amendment.

Applicant's Claim that she was Harshly, Oppressively or Unfairly Dismissed

15 The Applicant testified that she commenced employment on 26 December 2001, although in her application she stated that she commenced on 24 December 2001. Prior to starting work she spoke to the cleaning supervisor Ms Ingram who informed her that there was a position available as Ms Ingram's daughter, Raelene, was leaving at the end of December 2001. The Applicant was informed that she would be employed on a three month trial and if she passed the three month trial she would "be on a permanent position". In her application she stated she was employed as a casual employee for three months and then "go on permanent". It is apparent from the Applicant's pay slips that she was at all material times paid as a casual employee. However, it is conceded on behalf of the Respondent that at law her employment would be regarded as part-time. The Respondent contends the Applicant was on probation for a period of three months. The Applicant's pay slips and the

Respondent's time sheets record that she commenced employment on 31 December 2001. The Applicant however, testified that she initially worked on a trial on one day and then worked on two other days for two other employees. She said she worked one day for Raelene and one day for another employee, Tracy Green. She was paid $30 by Tracy Green for working her shift and $20 for working Raelene's shift. She said she collected $50 cash from Ms Ingram for that work. The Applicant produced in support of her evidence a copy of a "post-it note" on which she had recorded the hours worked and the payments. The note records that her first date of work was on Thursday, 27 December 2001. The note also indicates she worked from 4:00am to 6:00am on that day. On Friday, 28 December 2001 she worked from 4:00am to 6:05am and on Saturday, 29 December 2001 she worked from 4:00am to 6:15am.

16 It is common ground that the arrangement was that the Applicant would work from 4:00am to 6:00am, from Monday to Saturday, six days per week. The Respondent employed three cleaners to clean Coles in Collie. They were all engaged to work for two hours per day. However, if any of the cleaners were unable to attend work for any reason, and if a replacement could not be arranged, the other two employees had to clean the entire store which usually meant that they had to work up to an extra hour each or some tasks would not be completed.

17 The Applicant candidly stated in her evidence-in-chief that on a number of occasions she did not turn up for work. On one occasion after her nephew bumped his head she stayed up with him all night, so she did not feel like going to work. On other occasions she slept in and woke up too late to go to work. She said that she would set her alarm for 3:00am but if she did not wake up until 3:30am it would be too late for her to go to work to start at 4:00am because she was required to be there at least ten minutes before work commenced. The Applicant testified that on some occasions she telephoned and advised Ms Ingram she was unable to attend work. In cross-examination she agreed that her telephone at home was unable to be used to make outgoing calls. She could however receive incoming calls. She said on some occasions she used her daughter's mobile telephone and on other occasions she asked her daughter to go to a local telephone box just before 4:00am and to ring and say that she (the Applicant) would not be available for work. The Applicant conceded in cross-examination that Ms Ingram warned her in January or February 2002 that she needed to improve her attendance record otherwise her employment was in jeopardy. She said she then made sure her alarm clock was very close to her ear when she went to bed. The Respondent produced weekly time sheets which were prepared by Ms Ingram and by Ms Green. Those time sheets indicate that the Applicant failed to attend work on 19 January 2002, 9 February 2002, 15 February 2002, 11 March 2002 and 18 March 2002. The Applicant says she kept her own records and marked each day on the calendar of the days and times she worked. Her record indicates that she did not attend work on 12 January 2002, 2 February 2002, 11 March 2002 and 18 March 2002.

18 The Applicant testified she was advised on 25 March 2002, at approximately 8:20am that her daughter was in hospital in labour. The Applicant visited Ms Green, who at that time was acting as head cleaner as Ms Ingram was off work for six weeks following surgery. The Applicant advised Ms Green that she would be unable to attend work the following day as her daughter was in hospital in labour. On the following day her daughter had a baby and she (the Applicant) left the hospital at about 9:20am. She said Ms Green telephoned her home on a couple of occasions that day. The Applicant testified that her daughter told her Ms Green wanted to know about going in to work and if she (the Applicant) was going back into work. The Applicant grabbed the telephone off her daughter Amy, swore at Ms Green and hung up. The Applicant said that Ms Green asked her (the Applicant) about taking a few mornings off work and asked what she was going to do about her (the Applicant's) job. The Applicant said that when she heard Ms Green say this she was, "on an emotional roller coaster". The Applicant said that she hung up because she was so angry. I understand the Applicant to say that because her daughter had been in labour for about 24 hours she thought it was unfair for Ms Green to challenge her (the Applicant) about her attendance record. The Applicant said she later received a telephone call about 7:30pm that night from Mr Kilbey who told her not to bother coming into work anymore and that he had somebody else to replace her. She said that she informed him that that was unfair and that he told her that all he had to do was to give her two hours notice but if the new person did not work out then she could come back to work. The Applicant said on 27 March 2002 she rang Ms Green and apologised for speaking to her in that manner. The Applicant conceded that it was inappropriate for her to have spoken to Ms Green in the manner that she did.

19 About six weeks after the Applicant started work Ms Ingram went on leave because she was having an operation and Ms Green took over as the cleaner in charge. Ms Green's father was employed to work whilst Ms Ingram was away. The Applicant claimed on two occasions Ms Green came to work intoxicated and the Applicant was disgusted by her conduct. However, the Applicant testified she did not mind answering to Ms Green as a supervisor and she said that she actually got on well with Ms Green even though there was a "history".

20 Mr Kilbey testified that he is currently employed by Royal Perth Hospital, but whilst the Applicant was engaged to work at Coles in Collie he was employed as an area supervisor in charge of the Collie area. He said he was located in Perth and never met the Applicant in person. He said however, he spoke to the Applicant on one occasion following a telephone call from Ms Green on 26 March 2002. He said that Ms Green telephoned him between 5:00pm and 6:00pm on 26 March 2002 and informed him that she (Ms Green) had tried to contact the Applicant to find out if she would be at work on 27 March 2002 and when she spoke to the Applicant she was abused. Mr Kilbey said that Ms Green was crying and informed him that she would not go to work the next day if the Applicant was there. Mr Kilbey said he tried every half hour for a couple of hours to telephone the Applicant. He said when he called the telephone was slammed down on a number of occasions and then there was no answer for a couple of hours. He finally spoke to the Applicant about 11:00pm that night and he asked her about why she was abusive towards Ms Green. He said he does not recall what she (the Applicant) said in answer but he recalled that he informed her that if she went into work the other two (employees) would walk out so he was standing her down. Mr Kilbey said he informed the Applicant that he had not sacked her but she was simply being stood down. He said the Applicant then slammed the telephone down. Mr Kilbey did not ring the Applicant again. He said shortly after another contract area manager took over the Collie area.

21 Ms Ingram testified that she worked for Berkeley Challenge Pty Ltd as a cleaner until recently and had worked at Coles in Collie for a period of 12 years. She said she could not recall what she said to the Applicant at the initial interview. She said she would normally ask the person applying for the job to come in and try out and if they liked the job she would then tell them they could work on probation for a period of three months and at the conclusion of that period if they work to standard in that time, they would be made permanent when a permanent position became available.

22 Ms Ingram said she spoke to the Applicant about failing to attend work and informed her if she wanted a permanent position she had to be more reliable. Ms Ingram said they needed three people each day to do the job and it was very difficult to complete the work in two hours if only two people attended. She said on each occasion the Applicant did not turn up for work that no notice was given that she was not attending. When cross-examined she conceded that a couple of times she had received a telephone call from the Applicant's daughter Amy informing her (Ms Ingram) that the Applicant would not be attending work. She also conceded in cross-examination that she recalled prior to commencing with Berkeley Challenge Pty Ltd on 31 December 2001 that she (the Applicant) worked one shift for Tracy and was paid by Tracy but she could not recall if the Applicant worked a shift for Raelene. When re-examined Ms Ingram said that the Respondent was not aware of this private cash arrangement and that the Respondent was only aware that the Applicant commenced employment on 31 December 2001.

23 Ms Green testified that she is employed by the Respondent as a cleaner at Coles in Collie two years ago and was re-employed in November 2001. She said that she knew Ms Anderson through her brother and that they "got on alright" at work but they were reserved because there was some "past history". Ms Green said she became the cleaner in charge when Ms Ingram was off work. She said she did not want that responsibility but she did the job. She said whilst Ms Ingram was off sick her father was employed for a period of six weeks. She said that he did not know much about the job but things went fairly smoothly until the Applicant's daughter had a baby. On 25 March 2001 the Applicant came to her house and informed her that her daughter was in labour and that she would not be at work on 26 March 2002. She said she had no difficulty with that. In the afternoon of 26 March 2002, she rang the Applicant's home to find out whether she (the Applicant) would be attending work on the next day. She spoke to the Applicant's daughter and was informed that the Applicant was sleeping and she asked the Applicant's daughter to ask her mother (the Applicant) whether she would be coming into work the next day. She said the Applicant's daughter rang her back and informed her (Ms Green) that the Applicant would not be going to work the next day. Ms Green was not satisfied with that response so she telephoned again and asked the Applicant's daughter how long she (the Applicant) was going to be off work as they did not have anyone to relieve her (the Applicant). She said the Applicant came to the telephone, abused her (Ms Green) and hung up. Ms Green said she then telephoned Mr Kilbey and informed him that she would not work with the Applicant, that he should "sort it out" or terminate the Applicant's employment; or she (Ms Green) would resign. Ms Green said that at that time Ms Ingram had been off work for about six weeks. She spoke to Ms Ingram who agreed to attend work on 27 March 2002. When cross-examined Ms Green denied that she had ever turned up to work intoxicated. She conceded however that on one occasion she had attended work with a hangover.

Submissions

24 The Applicant contends that she was unfairly dismissed. She said she always worked hard and completed her work satisfactorily so she should have been able to continue to work and become a permanent employee. She also says she is sorry that she swore at Ms Green but that all employees swear at each other. The Applicant says that she does not wish to be re-instated and that she is seeking six months remuneration as compensation. The Applicant testified that since her employment was terminated, she has made enquiries about work. She said in August 2002 and September 2002 a Ms Smith asked her whether she would like to work selling underwear by party plan. The Applicant said she would think about it after Christmas 2002 as she has too much to do. She said it is commission only work and she can determine what hours she would work. The Applicant said she had heard that there was cleaning work available at Collie Senior High School. She said she left a message enquiring about the job about four weeks ago but she does not know whether she received a telephone call in reply. She said a bakery opened in Collie about six or eight weeks prior to the hearing. After it opened she put her name down for work. She said she has also had an opportunity to sell silverware on party plan and she is paying off a kit to do that. Further, since her employment was terminated, she has looked in the "Collie Mail" for advertisements for work each week.

25 The Respondent contends that the Applicant was not harshly, oppressively or unfairly dismissed. The Respondent says that the Applicant was employed on three months probation and that she was fully aware that she had to prove herself in that three month period. She did not do so as her attendance was not satisfactory. The Respondent says that it was important that the Applicant attend work each day and that she was aware that she was required to improve her attendance or her job was at risk. Further, it is contended on behalf of the Respondent that the Respondent was entitled to terminate the Applicant because she abused Ms Green when Ms Green was simply enquiring when the Applicant was intending to return to work. It is also contended on behalf of the Respondent that the Applicant was not dismissed that she was simply stood down.

Conclusion

26 It is my view the Applicant was summarily dismissed on 26 March 2002. The Respondent made no effort to contact the Applicant after Mr Kilbey spoke to the Applicant on that day. In any event, there is no power at common law to stand down an employee. The learned authors of Macken, McCarry and Sappideen in their 4th edition of *The Law of Employment* at page 154 state—

> "An employer has no common law right to suspend an employee without pay for misconduct even if that misconduct would justify immediate dismissal. Such a right may, however, be granted by contract, statute or award."

27 The general principles of a valid exercise of the remedy of summary dismissal were considered by Lord Evershed MR in *Laws v London Chronicle (Indicator Newspapers) Ltd* [1959] 2 All ER 285 where he observed at 287 and 289—

> "… since a contract of service is but an example of contracts in general, so that the general law of contract will be applicable, it follows that, if summary dismissal is claimed to be justifiable, the question must be whether the conduct complained of is such as to show the servant to have disregarded the essential conditions of the contract of service … I … think … that one act of disobedience or misconduct can justify dismissal only if it is of a nature which goes to show (in effect) that the servant is repudiating the contract, or one of its essential conditions; and … therefore … the disobedience must at least have the quality that it is "wilful": it does (in other words) connote a deliberate flouting of the essential contractual conditions." (Approved by the Full Court of the Federal Court of *North v Television Corporation Ltd* (1976) 11 ALR 599 at 609 per Smithers and Evatt JJ)

I accept that the Applicant was employed on a trial or on probation for a period of three months.

28 The law relating to unfair dismissal in relation to employees on contracts for probationary employment was recently reconsidered by the Full Bench of this Commission in *East v Picton Press Pty Ltd* [2001] WAIRC 02675; (2001) 81 WAIG 1367. At [38] of the President's reasons for decision, he observed principles in respect of contracts of probationary employment had been laid down by Full Benches of this Commission in *Hutchinson v Cable Sands (WA) Pty Ltd* 79 WAIG 951 (FB) and *East Kimberley Aboriginal Medical Service v ANF* 80 WAIG 3155 (FB). Further the President at [39] set out the following principles from *East Kimberley Medical Service v ANF* (op cit):

> "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)."

29 In this case the Applicant quite clearly knew that she was on trial and had to improve her attendance. It is accepted by the Respondent that the Applicant was not required to attend work on 26 March 2002 as it was appropriate that she should have been given an opportunity to be with her daughter whilst her daughter gave birth. However, I accept Ms Green's evidence that she telephoned the Applicant to ascertain when she would next be attending work. It is apparent from the evidence that Ms Green rang the Applicant's home on a number of occasions on that day to ascertain whether she would be at work on 27 March 2002. The Applicant did not attempt to contact Ms Green to advise her when she would be attending work. Further, it is apparent from the evidence that the Applicant allowed her daughter to answer the telephone on at least one occasion and when she (the Applicant) spoke to Ms Green she was abusive. In the circumstances the Respondent was entitled to terminate the Applicant's employment. Her abuse of Ms Green was unacceptable, when considered with her (the Applicant's) failure to attend work on a number of prior occasions. In my view the Respondent did not harshly, oppressively or unfairly exercise its right to dismiss the Applicant.

30 For the reasons set out above I will make an order dismissing the Applicant's claim.

2002 WAIRC 06799

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	FLORENCE EDITH ANDERSON, APPLICANT
	v.
	TED KILBEY BERKELEY CHALLENGE PTY LTD, RESPONDENT
CORAM	COMMISSIONER J H SMITH
DATE OF ORDER	TUESDAY, 22 OCTOBER 2002
FILE NO.	APPLICATION 650 OF 2002
CITATION NO.	2002 WAIRC 06799

Result	Application dismissed.
Representation	
Applicant	In person
Respondent	Ms L Gibbs (as Agent)

Order

HAVING heard the Applicant in person and Ms Gibbs 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 06766

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	NICOLE AZZALINI, APPLICANT
	v.
	PERTH INFLIGHT CATERING, RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	WEDNESDAY, 16 OCTOBER 2002
FILE NO/S.	APPLICATION 1507 OF 2002
CITATION NO.	2002 WAIRC 06766

Result	Application dismissed for want of jurisdiction
Representation	
Applicant	Ms N Azzalini on her own behalf
Respondent	Mr E Rea as agent

Reasons for Decision

1 This is an application pursuant to s 29(1)(b)(i) of the Industrial Relations Act 1979 ("the Act") by which the applicant alleges that she was unfairly dismissed by the respondent on or about 20 June 2002.

2 Given that the notice of application was filed on 3 September 2002, pursuant to the Act as amended by the Labour Relations Reform Act 2002 ("the LRRA"), the matter was listed for hearing to determine whether the referral could and if so, should be accepted out of time, pursuant to s 29(3) of the Act.

3 At the hearing of this matter, the applicant appeared in person and the respondent was represented by Mr Rea, a registered industrial agent.

Contentions

4 The applicant said that the reason that the application was not referred to the Commission no later than 28 day's after her employment terminated, was because she was unaware of the time limit prescribed by s 29(2) of the Act. The applicant submitted that she was employed by the respondent through an agency, Mission Employment, and took guidance from a person she described as her case manager. Otherwise, the applicant said she did not seek any independent legal or industrial advice, however spoke to another employee at the respondent who suggested that she might commence these proceedings.

5 The Commission raised with the applicant one significant matter. The applicant's particulars of claim, at paragraph 20, stated that the applicant was not dismissed from her position but she left her employment voluntarily by resignation on or about 20 June 2002. This was confirmed by the applicant in her submissions to the Commission during these proceedings. The applicant made various complaints in her particulars of claim against the respondent, about treatment that she allegedly suffered. The applicant said that she commenced these proceedings so that other employees may not be treated in the same way.

6 Mr Rea on behalf of the respondent, opposed the extension of time for the referral. He submitted that there was no sufficient reason for such a length of time between the date of termination of employment and the application being filed. Furthermore, Mr Rea submitted that at the time, the respondent employer had acted properly and had, since the termination of the applicant's employment, engaged another employee to occupy the applicant's former position. Additionally, given the applicant's concession that she was not dismissed but left the respondent's employment voluntarily, it was submitted that the case would have no prospect of success in any event.

7 At the conclusion of the proceedings, the Commission came to the view that if s 29(3) applied to the present application, then given the concession by the applicant that she was not dismissed, leave would not be granted to accept the application out of time and that the Commission would publish its reasons for so concluding. I set out my reasons below.

Relevant Principles

8 Section 29(3) was inserted into the Act by s 139 of the LRRA, which came into effect on 1 August 2002. Section 139(2), inserting this provision, is described as a "repeal" of s 29(2) and not an "amendment" although it has been held that a court is not restricted to the language used by the section and is entitled to go behind it: *Beaumont v Yeomans* (1934) 34 SR 562 per Jordan CJ at 569; *Bird v John Sharp & Sons Pty Ltd* (1942) 66 CLR 233.

9 Relevantly, ss 29(2) and (3) of the Act as they now are provide as follows—

> *"(2) Subject to subsection (3), a referral under subsection (1)(b)(i) is to be made not later than 28 days after the day on which the employee's employment is terminated.*
>
> *(3) The Commission may accept a referral by an employee under subsection (1)(b)(i) that is out of time if the Commission considers that it would be unfair not to do so."*

10 Whereas under the former s 29(2) the 28 day time limit for referring a matter such as the present was mandatory and unable to be extended, the Commission now has a discretion as provided in s 29(3) of the Act.

11 The first question to determine in this matter is whether the terms of ss 29(2) and (3) are open to the applicant in this case. That is, whether the provisions have prospective or retrospective operation and effect. The common law presumption is that in the absence of a clear indication to the contrary, legislation will be assumed to not operate retrospectively. In this regard, in *Maxwell v Murphy* (1957) 96 CLR 261 Dixon CJ said at 267—

> *"The general rule of the common law is that a statute changing the law ought not, unless the intention appears with reasonable certainty, to be understood as applying to facts or events that have already occurred in such a way as to confer or impose or otherwise affect rights or liabilities which the law had defined by reference to the past events."*

12 Furthermore, a distinction has been drawn between legislation that operates by way of a prior effect on past events and legislation that bases future activity on past events. In *Coleman v Shell Co of Australia Ltd* (1943) 45 SR (NSW) 27 Jordan CJ said at 31—

> *"Upon a consideration of the authorities, I think that, as regards any matter or transaction, if events have occurred prior to the passing of the Act which have brought into existence particular rights or liabilities in respect of that matter or transaction, it would be giving a retrospective operation to the Act to treat it as intended to alter those rights or liabilities, but it would not be giving it a retrospective operation to treat it as governing the future operation of the matter or transaction as regards the creation of further particular rights or liabilities."*

13 It is the case of course, that the common law presumption against retrospectivity can be rebutted by express reference in the relevant statute or by necessary implication: *Worrall v Commercial Banking Co of Sydney Ltd* (1917) 24 CLR 28 per Barton J at 32; *Zainal bin Hashim v Government of Malaysia* (1980) AC 134. There is a further accepted distinction dealing with the presumption against retrospectivity, between statutes which are procedural in character and those that confer substantive rights and obligations: *Maxwell*. Some difficulties arise however, in discerning whether a statutory provision is truly procedural or not, in that some matters of procedure may affect a vested right or interest adversely, and therefore are substantive in effect. It would seem from the cases, that legislation which at first appearance is procedural, but which in effect destroys the ability to bring a proceeding or immunity from such proceeding, will tend to be characterised as affecting substantive rights and the presumption against retrospectivity upheld: *Coleman; Maxwell*. It has been recognised however that this area is a difficult one and the distinction is one not always easy to draw: *Rodway v R* (1990) 169 CLR 515.

14 There are many cases decided by courts and tribunals dealing with this issue. It appears to involve an assessment of the particular statutory provision concerned, in context. However, for present purposes, by way of examples, an extension of time within which to bring proceedings under the Workers Compensation Act 1926 (NSW) was held to be retrospective as long as the right to make such an application had not expired under the former time limit: *Australian Iron and Steel Ltd v Hoogland* (1962) 108 CLR 471; a power to commence an appeal from a decision of an inferior court is a substantive matter and not a matter of procedure and effects substantive rights and obligations: *Worrall*.

15 It is also the case that where provisions which are prima facie procedural in nature, have the effect of reviving a cause of action that would otherwise be barred, the courts would generally construe such legislation as not being only procedural but affect substantive rights, and in the absence of a clear intention to the contrary, should not be interpreted as applying retrospectively: *Yrttiaho v Public Curator (Queensland)* (1971) 125 CLR 228 per Gibbs J at 241 and *Maxwell* per Williams J at 277 - 278. (See also *The Ydun* (1899) P 236 and *R v Chandra Dharma* (1905) 2 KB 335).

16 Turning to the characterisation of the provisions, in my opinion, whilst at first blush ss 29(2) and (3) may appear to be procedural in character, in prescribing time limits, taken in context, it is apparent that the "cause of action" in respect of an employee who is dismissed, such as the applicant, on 20 June 2002, would only exist under the repealed provision, up to and including 18 July 2002, that being 28 days after the date of termination of the employment. Thereafter, under the former provisions, the applicant would have no right of access to a remedy in the Commission in relation to an alleged unfair dismissal, if there was a dismissal. Put another way, the respondent in these proceedings, beyond 18 July 2002, under the former provisions, was immune from liability in respect of any potential unfair dismissal proceedings that may have been commenced by the applicant, after that time: *Maxwell* per Dixon CJ at 268-269.

17 Viewed in this light, and as was the conclusion in *Maxwell*, the real effect of these provisions, in the context of the repealed s 29(2) of the Act, is to create, modify or abolish substantive rights or liabilities. Section 29(1)(b)(i) of the Act, when read with s 23A, confers a right to pursue a remedy. In this case, to construe ss 29(2) and (3), as inserted, to apply to facts and circumstances occurring prior to 1 August 2002, would be to in my opinion, offend against the presumption against retrospectivity, in relation to a provision which affects substantive rights, and not merely matters of procedure.

18 Furthermore, and supporting the construction that I have adopted for present purposes, s 37(1)(a) of the Interpretation Act 1984 provides—

> *"37. (1) Where a written law repeals an enactment, the repeal does not, unless the contrary intention appears—*
>
> *(a) revive anything not in force or existing at the time at which the repeal takes effect;..."*

19 On the repeal of the former s 29(2), the applicant had lost her right or "cause of action" in terms of any unfair dismissal proceedings, because the 28 day time limit had already expired. To construe ss 29(2) and (3) to apply to the present circumstances, would in my opinion, have the effect of reviving the applicant's right to apply to commence these proceedings, in the absence of any contrary intention, and therefore would be inconsistent with this provision of the Interpretation Act 1984. Conceivably, if this were not so, an employee who was dismissed say in April 2002, would still be able to apply under s 29(3) for an extension of time, despite being months out of time under the repealed provisions. This could not have been the intention of the parliament in my opinion.

20 I note also in passing that it was held by the Full Bench, in considering a predecessor to s 29(2) introduced into the Act in December 1993, that it operated prospectively and not to dismissals occurring prior to its commencement on 1 December 1993: *Westrail v Durham* (1994) 74 WAIG 1882.

21 In cases of dismissals effected prior to 1 August 2002, there would be no hiatus created due to the combined effect of ss 35 and 37(1)(c) and (f) of the Interpretation Act 1984. That is, it seems to me, that any referral could be made within 28 days of such dismissal under s 29(1)(b)(i), as if the former s 29(2) of the Act had not been repealed.

22 In the alternative, if I am in error in concluding that these provisions are not retrospective in operation, then I turn to what I consider ought be the relevant tests to apply, in an application for an extension of time pursuant to s 29(3), as it now is.

23 I have set out the terms of s 29(3) of the Act earlier in these reasons.

24 Since the introduction of the 28 day time limit within which proceedings such as these must be commenced, there has only been one occasion in this jurisdiction where the statute contained a provision enabling the Commission to extend time by the exercise of a discretion. That provision, the former s 29(3), was primarily based upon the criteria that the dismissal was the subject of an application under the former s 170EA of the Industrial Relations Act 1988 (Cth), as it then was. The then s 29(3) of the Act was repealed by Amending Act No 3 of 1997. The present s 29(3) is in a substantially different form to the former provision.

25 Statutory provisions similar to s 29(3) exist in other State industrial jurisdictions and also in the Federal jurisdiction, in ss 170CE(7) and (7A) of the Workplace Relations Act 1996 (Cth) ("WRA"). The Australian Industrial Relations Commission and the Industrial Relations Court of Australia, have considered the present federal provisions and their predecessors, in a number of cases, as for example in *Brodie-Hanns v MTV Publishing Ltd* (1995) 67 IR 298 and in *Application by Telstra-Network Technology Group* (1997) 42 AILR 3 - 590.

26 In this State, this Commission and the Industrial Appeal Court, have established and applied relevant principles in relation to extensions of time from mandatory statutory time limitations imposed by the Act. In this respect, I refer to the well known decisions in *Tip Top Bakery v TWU* (1994) 74 WAIG 1189; *Ryan v Hazelby and Lester t/as Carnarvon Waste Disposals* (1993) 73 WAIG 1752 (both of which referred to and applied *Gallo v Dawson* (1990) 64 ALJR 458) and *Robowash Pty Ltd v Michael* (1997) 78 WAIG 2323.

27 Additionally, the Full Court of the Supreme Court in this State, in the often quoted judgement in *Esther Investments Pty Ltd v Markalinga Pty Ltd* (1989) 2 WAR 196, held that four factors needed to be considered by the court exercising a discretion to extend time including the length of the delay; the reason for the delay; whether there was an arguable case and the extent of any prejudice suffered by the respondent.

28 Having regard to the principles referred to in these cases, and considering the nature of ss 29(1)(b)(i) and 23A of the Act in my opinion, for the purposes of s 29(3) of the Act as it now is, consideration by the Commission of whether it ought extend time for the purposes of this subsection should include the following—

(a) Prima facie, time limits imposed by the Act are to be complied with and it is for an applicant to establish the circumstances such that the discretion to extend time should be exercised in his or her favour;

(b) An extension of time is not automatic and the discretion residing with the Commission to extend time is for the purpose of enabling the Commission to do justice between the parties;

(c) It is for an applicant to demonstrate that strict compliance with s 29(2) of the Act will work an injustice and be unfair in all of the circumstances;

(d) Considerations relevant to whether it would be unfair to not extend time include—

(i) the length of any delay;

(ii) the explanation for the delay;

(iii) steps taken if any, by the applicant to evidence non-acceptance of the termination of employment and that it would be contested;

(iv) the merits of the substantive application in the sense that there is a sufficiently arguable case; and

(e) Whether there would be any prejudice to the respondent in granting the application to extend time although the absence of prejudice to the respondent, without more, is not a sufficient basis of itself, to grant an application for an extension of time.

29 I apply those principles to these proceedings.

30 The overwhelming factor against granting the application in the present matter was the merits of the substantive application in the sense that there being an arguable case. As I have noted above, on the applicant's own admission, she was not dismissed from her employment but left the employment voluntarily. Therefore, there has been no dismissal to attract the jurisdiction of the Commission. In these circumstances, the applicant's case would have no prospect of success and in my opinion, it could never be said that it would be unfair not to accept an application out of time, in these circumstances.

31 Because of the overwhelming presence of this factor, it is unnecessary for me to consider any of the other factors that I have referred to above. Therefore, if s 29(3) applied to this application, I would refuse to extend time within which the referral may be made to the Commission.

2002 WAIRC 06767

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	NICOLE AZZALINI, APPLICANT
	v.
	PERTH INFLIGHT CATERING, RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	WEDNESDAY, 16 OCTOBER 2002
FILE NO/S.	APPLICATION 1507 OF 2002
CITATION NO.	2002 WAIRC 06767

Result	Application dismissed for want of jurisdiction
Representation	
Applicant	Ms N Azzalini on her own behalf
Respondent	Mr E Rea as agent

Order

HAVING heard Ms N Azzalini on her own behalf and Mr E Rea as agent on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders—

THAT the application be and is hereby dismissed for want of jurisdiction.

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

2002 WAIRC 06955

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	DAVID JOHN BLAND, APPLICANT
	v.
	STRASBURGER ENTERPRISES (PROPERTIES) PTY LTD T/A QUIX FOODSTORES, RESPONDENT
CORAM	COMMISSIONER S WOOD
DELIVERED	THURSDAY, 7 NOVEMBER 2002
FILE NO.	APPLICATION 850 OF 2002
CITATION NO.	2002 WAIRC 06955

Result	Application dismissed for want of prosecution Application for costs dismissed
Representation	
Applicant	Mr T Crossley – Solomon as agent
Respondent	Mr G McCorry as agent

Reasons for Decision

1 This is an application pursuant to section 29(1)(b)(i) of the *Industrial Relations Act 1979* ("the Act"). The matter came on for hearing on 7 November 2002 having not settled in conference. A notice of hearing was forwarded on 15 August 2002 to both parties through their agents at that time. The applicant did not attend at hearing and his agent was not able to proceed. The agent for the applicant advised at hearing that when he received the notice he forwarded it to his client. He followed up with letters to his client seeking instructions and received no response. He was aware that the applicant might not pursue his application and he had not been advised to cease acting for the applicant. As far as he was aware his warrant on file was still valid. The agent for the applicant had not scheduled himself to be present at the hearing except that the Associate to the Commission had mentioned the hearing following a conference earlier that morning which Mr Crossley-Solomon attended. There was no application for adjournment and the Commission and the respondent were not earlier advised by the agent for the applicant of any difficulties with proceeding with the hearing as notified.

2 The respondent sought orders that the application be dismissed for want of prosecution and for costs. The agent for the applicant submitted that the application should be dismissed and opposed any order for costs. The costs sought were $1,501.65 for an economy class airfare for Mr Barry King, the National Operations Manager, to travel from Melbourne for the hearing. Mr King gave evidence that he had incurred those costs on behalf of the company to attend at hearing to support his staff in Perth and to assist with paperwork. He was not to give evidence and had not been involved with the dismissal.

3 It is trite to say that it is for the applicant to pursue his application. Mr Crossley-Solomon acts for the applicant and it is clear from his submissions and the lack of attendance by the applicant that there has been little if any attention given to this application. An order will therefore issue dismissing the application for want of prosecution. Needless to say the approach to this application has been inadequate at best. The Commission and the respondent should have been notified of the circumstances of the applicant well in advance of the hearing and this would have potentially alleviated the burden, expense and inconvenience to the respondent. It may also importantly have freed a hearing date for another applicant to pursue his/her application and avoid delay.

4 The application for costs is also dismissed. The respondent quite understandably in the circumstances sought costs. The costs sought are also reasonable in terms of the amount. The respondent has incurred expenses unnecessarily due to the actions or lack of action of the applicant. In that sense the costs application falls within the principle exposed in *Denise Brailey v Mendex Pty Ltd t/a Mair and Co. Maylands* 73 WAIG 26 @ 27 of "extreme cases" which would normally warrant the awarding of costs in this jurisdiction. Costs of course are not lightly awarded in this jurisdiction. The costs sought are however not costs for a witness, they are costs for a "support" person at hearing, albeit Mr King is the National Operations Manager. In this circumstance then I would not award the costs sought and would dismiss that application.

2002 WAIRC 06957

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	DAVID JOHN BLAND, APPLICANT
	v.
	STRASBURGER ENTERPRISES (PROPERTIES) PTY LTD T/A QUIX FOODSTORES, RESPONDENT
CORAM	COMMISSIONER S WOOD
DATE OF ORDER	THURSDAY, 7 NOVEMBER 2002
FILE NO.	APPLICATION 850 OF 2002
CITATION NO.	2002 WAIRC 06957

Result	Application dismissed for want of prosecution Application for costs dismissed
Representation	
Applicant	Mr T Crossley – Solomon as agent
Respondent	Mr G McCorry as agent

Order

HAVING heard Mr T Crossley – Solomon on behalf of the applicant and having heard Mr G McCorry 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.

[L.S.]

(Sgd.) S. WOOD,
Commissioner.

2002 WAIRC 06741

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	IAN BRADY, APPLICANT
	v.
	CHALLENGER TAFE (ACN 598 183 708 73), RESPONDENT
CORAM	COMMISSIONER S WOOD
DELIVERED	FRIDAY, 11 OCTOBER 2002
FILE NO.	APPLICATION 246 OF 2002
CITATION NO.	2002 WAIRC 06741

Result	Application dismissed
Representation	
Applicant	Mr G Mohen of Counsel
Respondent	Mr A Bastow of Counsel

Reasons for Decision

1 This is an application made pursuant to s29(1)(b)(ii) of the *Industrial Relations Act 1979* ("the Act"). The applicant, Mr Ian Brady, alleges that he is due a payment of $21,348.90 for the balance of his contract, ie for the period 7/7/01 to 31/12/01. He also alleges that he is due $1,636.80 for additional accrued leave for the same period.

2 The application was filed on 11 February 2002 and came on for conference on 5 April 2002. The matter was not settled and the parties agreed that the matter could be decided on written submissions as the issue concerned an interpretation of the contract. The applicant filed submissions on 12 June 2002, the respondent filed submissions on 6 August 2002.

3 The applicant submits that he was employed by the respondent on a number of fixed term contracts as a Lecturer in the Metals area of Challenger TAFE. The "most recent contract" was entered into on 14 October 1998 and was to conclude on 31 December 2001. That contract it would seem comprised the Lecturers (Public Sector, Technical and Further Education) Certified Agreement 1996 (hereinafter referred to as the 1996 Agreement), a document of the Australian Industrial Relations Commission. At the outset I would say that I doubt that I have jurisdiction to deal with this claim. The issue of jurisdiction has not been raised by the respondent, but the claim is one of denied contractual benefits not pursuant to an award, order or agreement of the Western Australian Industrial Relations Commission. On the face of both the applicant's and respondent's submissions the 1996 Agreement, a federal certified agreement, covers the employment of the applicant and hence, in accordance with the Federal *Workplace Relations Act 1996*, a claim for denied benefit pursuant to that federal instrument would not be for this Commission. I do not say more in respect of jurisdiction, however, I will cover in more detail the application of the 1996 Agreement and subsequent agreement.

4 The applicant says that by letter dated 29 June 2001 he was advised that he had not been successful in his application for a Lecturer's position and that his services would be terminated from close of business 27 July 2001. This date does not marry with the date claimed in the application but that does not matter for the purposes of this decision.

5 The applicant submits that the terms of the 1996 Agreement and its successors do not bind him in that he was not a party to the agreement, was not involved in making the agreement, did not participate in explanatory meetings and had no knowledge of the agreement prior to accepting the fixed term contract. Alternatively, if that is wrong then by virtue of Section 14(1) of the Challenger TAFE Lecturers' Certified Agreement 2000 (hereinafter referred to as the 2000 Agreement) the applicant could be either a fixed term employee or a casual employee and the applicant in the offer of employment was engaged as a fixed term employee. The termination provisions in that Agreement have no effect according to the applicant as his existing contractual rights were not displaced, the contract offered did not have provisions for termination and he was not advised otherwise. The applicant further submits that the provisions of section 170CM of the Federal *Workplace Relations Act 1996* do not apply to him as he was a fixed term employee.

6 The respondent submits that Mr Brady was employed after a merit selection process as a Lecturer for a fixed term of three years commencing on 1 January 1999 and ending on 31 December 2001. The applicant previously had other fixed term contracts. The letter of offer dated 14 October 1998 specified the 1996 Agreement as the relevant award or agreement. That agreement prescribed that the Teachers (Public Sector Technical and Further Education) Western Australia Interim Award 1995 (hereinafter referred to as the 1995 Award) shall be read wholly in conjunction with the agreement. That award provided that persons may be appointed on a temporary basis for a fixed term and that the employment of a temporary employee may be terminated at any time by the giving of one week's notice as per clause 7(7) of the 1995 Award. On 21 December 2000, the 2000 Agreement was registered, superseded the earlier agreement and from that date prescribed the applicant's terms and conditions of employment. On 29 June 2001 the respondent terminated the applicant's employment by giving four weeks notice in accordance with Clause 20 of the 2000 Agreement. The respondent did not have the student numbers to sustain the applicant's employment.

7 In simple terms then the dispute is whether the 1996 Agreement applied to the applicant, and if so then whether by succession the 2000 Agreement applied to the applicant and hence whether the contract was a fixed term contract to end on 31 December 2001 or could be terminated by notice. The applicant says that he was not bound by the 1996 Agreement as he was not involved in making the agreement nor is he a party to it. Irrespective of whether the applicant was involved in making the certified agreement, which is irrelevant, I do not see how the applicant's submission has any merit. His submission at paragraph 9.13 refers to the 1996 Agreement as one of the "details" of the contract. Another detail of the contract, on the applicant's submission at paragraph 9.8, was "to fulfil duties as a Lecturer in accordance with the applicable award and/or agreement". Clearly the applicant was bound by the terms of the 1996 Agreement in his employment on acceptance of the contract, if not otherwise.

8 The applicant submits at paragraph 19 of his submissions that—

> "… in the absence these provisions the section in the Agreement relating to the termination of employment have no effect. The provision relating to notice periods for termination of employment would only have effect if the contract allowed for the Applicant's employment to be terminated before the expiration of the fixed term."

9 One of the terms of the 1996 Agreement at Clause 6 was that it be read in conjunction with the 1995 Award. Both the 1996 Agreement at clause 5 and the 1995 Award at clause 7(2) refer to a "temporary" employee who may be appointed for a fixed term. This is the nature of the applicant's contract. The 1996 Agreement does not have a notice provision but the 1995 Award at clause 7(7) says—

> "Subject to subclause (8), the employment of a temporary employee may be terminated at any time upon the giving of one week's notice."

10 Sub-clause 8 is not relevant for the purpose of this application. In simple terms the applicant's contract on acceptance included a provision for termination and whilst referred to as an appointment for a fixed term was terminable during the period of that term.

11 Clause 9 of the 2000 Agreement makes it clear that that agreement takes over from the 1996 Agreement and also stipulates that the Agreement should be read in conjunction with the 1995 Award.

12 Clause 4.1 of the 2000 Agreement states—

> "This agreement covers employees of the Governing Council of Challenger TAFE who are members of or are eligible to be members of the Australian Education Union, except where excluded in 4.2."

13 Clause 4.2 refers simply to those employees who choose to enter into an Australian Workplace Agreement. There is no contention that the applicant, who was employed as a Lecturer, was not eligible to be a member of the Australian Education Union. There is no contention that the applicant was either a permanent or casual employee. He was a fixed term employee. Both the coverage of the 2000 Agreement and its succession over the 1996 Agreement mean that the 2000 Agreement, in conjunction with the 1995 Award, formed the bases for the applicant's contract at time of termination.

14 Clause 16 of the 2000 Agreement states—

"16. CONTRACT

16.1 A fixed term contract lecturer may be employed for a fixed period of time of up to 5 years, at the discretion of the employer. This does not preclude the inclusion of provisions in a contract for the employer and employee to enter a new and subsequent contract for up to a further five years after the expiry of the term of the original contract.

16.2 Employees appointed on contract for a fixed term will be advised in writing of the terms of the appointment and such advice will specify the dates of commencement and termination of employment.

16.3 A fixed term contract lecturer may be employed full time (37.5 hours per week) or part time (less than 37.5 hours per week).

15 Clause 20 of the 2000 Agreement states—

"20. TERMINATION OF EMPLOYMENT

20.1 Ending Employment by Notice

20.1.1 The employer may terminate the employment of an employee by giving written notice to the employee. The employee may resign by giving written notice to the employer. Other than where an employee is terminated for misconduct or substandard performance, the amount of notice required is based on the period of continuous employment according to the following table:

Period of continuous service With the employer	*Period of notice*
Not more than 1 year	At least 1 week
More than 1 year But not more than 3 years	At least 2 weeks
More than 3 years But not more than 5 years	At least 3 weeks
Not more than 5 years	At least 4 weeks

The period of notice for ending employment is increased by one week if the employee is over 45 years old and has completed at least 2 years continuous service with the employer.

20.1.2 The employer may, instead of giving written notice, pay the employee wages equivalent to the required period of notice. An employee who fails to give the required written notice forfeits wages equivalent to the required period of notice, unless agreement is reached between the employee and the employer for a shorter period of notice than that specified.

20.2 Contract Employment

20.2.1 In the absence of any period of notice specified in the contract of service, the provisions of this clause will also apply to fixed term contract employees."

16 This notice provision on termination was applied rightly to the applicant as part of his contract. It is a more beneficial provision than the 1995 Award provision which operated from commencement of the contract.

17 I do not need to address the other ground in the applicant's submission concerning the relevance or otherwise of section 170CM of the Federal *Workplace Relations Act 1996*.

18 For all of the above reasons I would dismiss the application.

2002 WAIRC 06739

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	IAN BRADY, APPLICANT
	v.
	CHALLENGER TAFE (ACN 598 183 708 73), RESPONDENT
CORAM	COMMISSIONER S WOOD
DATE OF ORDER	FRIDAY, 11 OCTOBER 2002
FILE NO.	APPLICATION 246 OF 2002
CITATION NO.	2002 WAIRC 06739

Result	Application dismissed
Representation	
Applicant	Mr G Mohen of Counsel
Respondent	Mr A Bastow of Counsel

Order

HAVING heard Mr G Mohen of Counsel on behalf of the applicant and Mr A Bastow of Counsel on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders—

THAT the application be and is hereby dismissed.

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

2002 WAIRC 06714

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	HOI MENG (RONNIE) CHONG, APPLICANT
	v.
	BALANCE COMPUTING PTY LTD, RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	MONDAY, 23 SEPTEMBER 2002
FILE NO/S.	APPLICATION 1928 OF 2001
CITATION NO.	2002 WAIRC 06714

Result	Application upheld. Order issued
Representation	
Applicant	Mr H M Chong on his own behalf
Respondent	No appearance on behalf of the respondent

Reasons for Decision

Ex Tempore

1 This application is one brought by Chong Hoi Meng, otherwise known as Ronnie Chong, against Balance Computing Pty Ltd, in respect of which the applicant claims against the respondent contractual entitlements allegedly denied to him on termination of his employment.

2 Those entitlements comprised two months salary, in the sum of $5,416.67 in respect of each month of September and October 2001, and, secondly, the sum of $2,250.00 in respect of a pro rata entitlement to annual leave that the applicant says he was entitled to on termination of his employment. All three amounts as claimed are gross figures.

3 The applicant testified that he commenced employment with the respondent as a business development manager on 7 May 2001, in accordance with a contract of employment, the terms of which were set out in a letter dated 27 March 2001 from a Mr George Sim, described as the managing director of the respondent, on a Balance Computing letterhead, tendered as exhibit A1.

4 The terms of that employment agreement provide that the applicant was to be employed for a three month probationary period from his commencement date, which, on the evidence, came and went. He was to commence on 7 May 2001, with his standard working hours being Monday through to Friday each week 8.30 am to 5pm daily. The applicant's agreed salary was $65,000 per annum, with a superannuation contribution not relevant for the purposes of these proceedings. It was also agreed that the applicant be paid on the fifth of each month.

5 Furthermore, the contract of employment contains an entitlement to annual leave, that being four weeks, or 20 working days per annum, in respect of which, upon termination of employment, the applicant was entitled to accrued leave not taken. The letter of appointment was counter-signed by the applicant on 27 March 2001.

6 The applicant testified that he commenced employment in accordance with the terms of the letter of appointment to which I have just referred, and conducted his duties as business development manager accordingly.

7 Also tendered in evidence, as exhibit A2, were two bank statements of the applicant, evidencing payment of his salary in the months of June, July, August and September 2001, which payments, on the applicant's evidence, were paid in arrears. Those salary payments are in the amounts of $3,834.00 net, which the applicant says was a reflection of the agreed gross monthly salary. The applicant's evidence was that he worked in accordance with his contract of employment up until towards the end of September 2001, when he had some difficulties, on the evidence, contacting the respondent's principal, Mr Sim. Finally, on the evidence of the applicant, in about mid-October 2001 contact was made with Mr Sim to discuss, apparently, the future of the respondent's business.

8 By that time, the applicant testified that he had not received his salary payments for the months of September and October 2001. It was the applicant's evidence that Mr Sim informed him that the business was experiencing some difficulties. However, according to Mr Sim, the applicant was advised that he was attempting to overcome the difficulties with the business.

9 Some short time later, on or about 24 October 2001, the applicant had a meeting with Mr Sim. The applicant's evidence is that he requested Mr Sim to outline a plan for the business.

10 However, it appears that the meeting was not successful in endeavouring to establish a basis upon which the applicant could remain in employment, and it was agreed the applicant terminate his employment, effective 31 October 2001. The terms of that arrangement were reflected in a letter of 24 October 2001, tendered as exhibit A3, again from Mr Sim as managing director of Balance Computing, advising that, due to unforeseen circumstances, as it is described, the applicant's employment with the respondent would terminate on the last day of the month, that being 31 October 2001, by the giving of one week's notice.

11 The applicant's evidence was that he worked until 31 October, and upon leaving the respondent, was not paid any entitlements which he said were due to him under his contract of employment, they being in particular salary for the months of September and October 2001 and pro rata annual leave.

12 The applicant also testified that on 17 September 2001 he did take one day's annual leave, but was not paid for that day, consistent with his evidence about not being paid for September or October 2001.

13 I turn to my findings in this matter. The applicant gave evidence on his own behalf, and, indeed, was the only witness to testify in these proceedings. I accept the applicant's evidence in toto, on the basis that, in the absence of any other evidence, I am obliged to accept that evidence unless I find it to be inherently incredible, which I do not.

14 I am therefore satisfied that the applicant was employed by the respondent as a business development manager on the terms and conditions as set out in exhibit A1. Moreover, I am satisfied on all of the evidence that the applicant discharged his duties until, by agreement it seems, on or about 31 October 2001, the applicant's employment as a business development manager with the respondent came to an end.

15 I also accept on the evidence that the applicant did not receive salary for the months of September and October 2001 that he worked in accordance with his contract of employment, which entitled him to monthly salary payments of $5,416.67 gross per month, based upon an annual salary of $65,000 per annum.

16 I am also satisfied on the evidence, and I find, that the applicant received on termination of his employment no payments in respect of which he was entitled by way of contractual benefits in accordance with paragraph seven of exhibit A1, that being a pro rata entitlement to annual leave.

17 I am therefore satisfied that there is evidence before the Commission to establish the terms of the contract agreed to between the applicant and the respondent, and, secondly, that the applicant has made out his claim in respect of a denial of contractual benefits, being salary for the two months of September and October 2001 and in respect of pro rata annual leave which he was due but not paid. In respect of the latter, on the Commission's calculations, based upon an annual salary of $65,000 per annum, the applicant was employed between 7 May and 31 October 2001, that being 23 completed weeks. On the basis of a pro rata entitlement, the applicant was entitled to .385 days per year annual leave at his daily rate of $250.00 per day. That should have led to an entitlement of 8.846 days, which leads to a sum of $2,211.54 gross.

18 I therefore am persuaded, on all of the evidence, that the applicant is entitled to an order in his favour in respect of salary for the months of October and September 2001, which amounts are $5,416.67 gross, and for pro rata annual leave due but not paid in the sum of $2,211.54 gross, leading to a total entitlement of $13,004.88 gross, which sum will be payable within seven days of the date of the Commission's order.

19 I so order.

2002 WAIRC 06751

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	HOI MENG (RONNIE) CHONG, APPLICANT
	v.
	BALANCE COMPUTING PTY LTD, RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	MONDAY, 14 OCTOBER 2002
FILE NO/S.	APPLICATION 1928 OF 2001
CITATION NO.	2002 WAIRC 06751

Result	Application upheld. Order issued.
Representation	
Applicant	Mr H M Chong on his own behalf
Respondent	No appearance on behalf of the Respondent

Order

HAVING heard Mr H M Chong on his own behalf and there being no appearance on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act 1979, hereby orders –

THAT the respondent pay to the applicant contractual benefits in respect of unpaid salary and pro rata annual leave in the sum of $10,833.34 (gross) and $2,211.54 (gross), respectively, within 7 days.

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

2002 WAIRC 06926

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	JOHN ALAN COCHRANE, APPLICANT
	v.
	WA CONSOLIDATED POWER LIMITED, RESPONDENT
CORAM	COMMISSIONER J F GREGOR
DATE	MONDAY, 4 NOVEMBER 2002
FILE NO.	APPLICATION 791 OF 2002
CITATION NO.	2002 WAIRC 06926

Result	Compensation awarded
Representation	
Applicant	Mr D. Moss appeared for the Applicant
Respondent	No appearance

Reasons for Decision

(Given ex tempore as edited by the Commissioner)

1 This is an application by John Alan Cochrane (the Applicant) for contractual benefits he says are due to him under a contract of employment made between him and WA Power Consolidators Pty Ltd on 14th May 2000. The name of the Respondent at the time the contract was made was WA Consolidated Power Ltd but is no contest that the name of the Respondent for the purposes of these proceedings is WA Consolidated Power Limited (the Respondent).

2 The history of the relationship has been set out in a Notice to Admit which the Applicant has attested is a true and correct record of events. The Respondent has submitted a response to the Notice to Admit and it is clear from that response that the major contentions set out in the Notice are not disputed.

3 In summary, the situation is that the contract was made on 14th May 2000. It was to last for a period of 2 years. This is set out in the interpretation clause of the document. It interprets "term" as being "the term which is set out in clause 3 of the contract" which is before the Commission as Exhibit 1. Clause 3(a) provides: The agreement and the relationship constituted shall commence on the Commencement Date which date is the date I have mentioned previously and shall continue until 14th May 2002 subject to the provisions for early termination contained in the agreement."

4 Those provisions of termination relate to the exercise of options under the contract for continuation and provide for the contract to be terminated in any of the circumstances set out in clause 11, "Termination". Those, in brief, are upon the death of the Applicant, or his incapacity for a period in excess of 14 days. Whether the Applicant is guilty of gross misconduct or neglect; whether he is declared by a court or appropriate body incapable of managing his affairs, or any criminal offence; whether he is guilty of any act or conduct calculated to, or in fact cause, significant damage to the business; termination by mutual agreement or by the employer on the grounds of liquidation, deregistration and/or the winding up of the company, or failure of the employee to honour the terms of the agreement.

5 The Respondent has not appeared in this matter. The Commission had received no submissions that the termination of a contract has come about for any of the reasons that are set out in clause 11 of the agreement. There is some hint, but no more than a hint that the relationship needed to come to an end because of the financial position of the company. Paragraph 15 of the Notice to Admit reports a meeting on 26th September 2001, when the Applicant met with Mr Creasy, who apparently was a Principal of the Respondent, to report the business and economic situation of the company and to review the objectives set. This was against a background of there being difficulties with finance. At that time Mr Creasy indicated liquidation was possible. However nothing that has occurred after, at least according to the Notice to Admit, to indicate that a liquidation had taken place or was going to take place. Therefore I find that the only reason which might apply to the viability of the contract under clause 11, that is liquidation, has not occurred at this point of time and therefore more likely than not the contract would have continued to operate for its term apart from the interruption to it by there being no further duties available for the Applicant after 26th September 2001.

6 Insofar as its term is concerned this is a contract of the nature examined by the Full Bench in *Perth Finishing College v Watts (1989)* 69 WAIG 2307. It is a fixed term contract and in accordance with the ratio in *Perth Finishing College* the Commission is able to give effect to the term of that contract by ordering that the benefits to be paid under the contract will be paid as if the contract had run full term.

7 The contract provides that the remuneration would be set at $150,000.00 per annum in the first year of service and $155,000.00 per annum in the second year of service, that amount to be inclusive of statutory superannuation. The evidence before the Commission and that contained in Exhibit 2 attached to the Notice to Admit is that the salary was reduced to $125,000.00. I take that $125,000.00 to be in substitution of the money amount set out in clause 8.1 of the contract and the balance of the clause continues to have effect.

8 The Applicant also claims that he has further entitlements under the contract in particular those set out in clause 9 "Leave and other Entitlements". By that clause, the Applicant was entitled to 20 working days annual leave at a time or times approved by the Respondent provided that at the expiration of any of service, any outstanding accrued leave would be paid in full. It provided too for payment of the unexhausted portion of sick leave calculated on the basis of 10 days per annum accruing annually.

9 On termination of employment, it provided for a pay out of 50% of all unused sick leave and 100 per cent of unused long service leave. In respect of this last claim Mr Moss, who appeared for the Applicant, does not proceed with a claim for unused long service leave; he does proceed with the claim for 50% of unused sick leave. The evidence before the Commission is that there was no sick leave taken during the period but there was 4 days annual leave taken.

10 The Commission finds that the applicant is entitled to the payments which are set out in clause 9 of the contract that is, annual leave accruing at the rate of 20 days per year less any leave taken and 50% of unused sick leave. In respect of unused sick leave there has been an accruement of 27 days on a salary based on 30 days per month in the sum of $9375.00. Insofar as annual leave is concerned the entitlement for the period worked of 15.4 months was 25.7 days of which 4 days were taken leaving an entitlement of 21.7 days in the sum of $10,417.00. I just return to the calculation of $9375.00. That in fact was for unpaid salary for the month of September.

11 I now turn to unused sick leave. The accrual period was the 15th May 2000 to 27th September 2001 which creates an entitlement of 13 days. It is admitted 2 days were taken. The contract entitlement calculates at $2644.00.

12 When the Commission is dealing with contracts of this nature it is required to apply *Simons v Business Computers International Pty Ltd (1985)* 65 WAIG 2039 (but also see the detailed exposition on the concepts to be applied set out by His Honour the President in *Perth Finishing College* (supra) commencing at page 2313). The Commission is to act judicially, it is to determine the entitlements extant under the contract and if those entitlements have not been paid, issue an order to give effect to those entitlements.

13 The Commission proceeded to hear this matter in the absence of the Respondent. Prior to the hearing the Commission had sent a Notice of Hearing to the Respondent on 27th August 2002. The Applicant's advocate had also given notice to the Respondent that the hearing was listed. On the day of the hearing my Associate searched the precincts of the Court for the Respondent and there was no appearance. She then rang the Respondent and spoke to a Mr Tieleman who told her there would be no appearance by the Respondent at these proceedings.

14 In those circumstances the Commission exercising powers vested in it by s.27(1)(d) of the Act decided to proceed to hear the case in the absence of the Respondent having concluded that it has waived its right to appear and be heard on the matter by its failure to appear and its confirmation that it had no intention to appear that confirmation being given to the Commission on 21st October 2002 by the statement of Mr Tieleman to my Associate.

15 The Commission will conclude these proceedings with an order in favour of the Applicant that he be paid moneys to which he is entitled under the contract, being for unpaid salary for the month of September 2001 - $9375.00. For unpaid annual leave a sum of $10,417.00; for unused sick leave in accordance with the contract $2644.00 and in addition the applicant will be paid the value for the balance of the term of the contract calculated from the end of September 2001 in the sum of $78,125.00. An order in the form of minutes for the sum of $100,561.00 in favour of the Applicant will now issue.

16 The Commission notes that this application was filed on 9th May 2002. It was first heard by way of conference on 22nd July 2002. The Labour Relations Reform Act 2002 in s.140 dealing with transitional provisions for s.29AA allows the matter to be dealt with under the terms of the Act prior to the enactment of s.29AA.

2002 WAIRC 06952

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	JOHN ALAN COCHRANE, APPLICANT
	v.
	WA CONSOLIDATED POWER LIMITED, RESPONDENT
CORAM	COMMISSIONER J F GREGOR
DATE	WEDNESDAY, 6 NOVEMBER 2002
FILE NO.	APPLICATION 791 OF 2002
CITATION NO.	2002 WAIRC 06952

Result Compensation awarded

Order

HAVING heard Mr D. Moss on behalf of the Applicant and there being no appearance on behalf of the Respondent, the Commission pursuant to the powers conferred on it under the *Industrial Relations Act, 1979,* hereby orders:

THAT WA Consolidated Power Limited pay Mr John Alan Cochrane the sum of $100,561.00 within fourteen days of the date hereof.

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

2002 WAIRC 06841

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	PAULA CORRIERI, APPLICANT
	v.
	NADEEN COX ELLA EXPRESS, RESPONDENT
CORAM	COMMISSIONER S WOOD
DELIVERED	FRIDAY, 25 OCTOBER 2002
FILE NO.	APPLICATION 787 OF 2002
CITATION NO.	2002 WAIRC 06841

Result	Application dismissed
Representation	
Applicant	Ms P Corrieri
Respondent	Mr G Cox

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 Paula Corrieri, was employed as a beauty therapist in the Joondalup salon of the respondent, which traded as Ella Express. The applicant commenced employment on 8 April 2002. On Saturday, 27 April 2002 she was approached by the manageress of the salon, Ms Emma Stirling and advised that her services were being terminated. She was then ushered out of the salon. Ms Corrieri was later paid one week's notice in lieu. Ms Corrieri claims that her dismissal was unfair as there was no valid reason given, there was no warning, and no reference provided. She claims the manner of dismissal was both patronising and humiliating. She was concerned that she may have been discriminated against due to her hearing aid. The applicant claims that she was both stressed by the termination and lost confidence as a result. She claims compensation for the unfairness of the dismissal.

2 Ms Corrieri's employment contract [Exhibit PJC1] includes provision for payment of one week in lieu of notice during the first year of employment. She was engaged on an initial 3 month trial period of probation. The contract says "During the trial period either party may serve notice on the other to terminate your employment giving the minimum required notice". The evidence is that the respondent complied with these provisions in the contract.

3 Ms Corrieri's evidence is that she was employed by Mrs Nadine Cox, a proprietor of the business, in a full time position. She was employed after 3 interviews, 2 trade tests and one day's trial work without pay. Ms Corrieri is a qualified beauty therapist and displayed her certificate of qualification at hearing. On Saturday, 27 April 2002 she was asked to stay behind after work. Ms Stirling told her that she was not suitable for the salon. Ms Corrieri asked why and was not provided with a valid reason. She was then ushered out the door. She says she asked Ms Stirling 3 times for a reason and no reason was given. She says at no time was she counselled about her work and there were no complaints about her work. She was not shown how to do beauty treatments or given training. She was an experienced beauty therapist and rates her performance highly during her time at the salon.

4 Under cross-examination she says that Ms Stirling did advise her about what to say on the telephone. She says she was not counselled about her performance or about the time taken to do tasks. She was not aware of any customer complaint about being kept waiting for 20 minutes. There was no problem with her waxing treatments and nor was she counselled for using too much product. She does not believe there were any problems with her treatments and denies that they caused burns to customers. On the contrary she says she was told by the manager how well she was doing and how happy the manager was to have her there. On termination she was told that while she was a good therapist, the salon was too busy for her. She denies that she was told that she would be better suited to a smaller salon. As she was a qualified beauty therapist she does not believe that she should have received training at the salon other than maybe on products and up to date techniques. Ms Corrieri complains that her separation certificate [Exhibit PJC2] indicated that the reason for her termination was due to her unsuitability for this type of work. Ms Corrieri also complains that she had 3 months to fulfil under her probationary employment.

5 Ms Corrieri says that she has sought employment and has received Centrelink payments. She commenced casual employment approximately 2 months prior to the hearing and is working 15 hours per week at the rate of $15 per hour.

6 Ms Stirling gave evidence for the respondent. She has been the manageress of the Joondalup salon since February 2002 and prior to that was employed by the respondent as a casual beauty therapist since November 2001. The salon has 10 staff and is a very busy salon. This was explained to the applicant when she commenced. Ms Stirling says that the applicant was counselled about her excessive use of wax strips on two occasions. She says the applicant responded with an "I know" attitude. The applicant was told how to answer telephones and was required to help out with cleaning as were other staff. Her efforts in this area were not adequate. Ms Stirling says that Ms Corrieri kept a regular client waiting for 20 minutes, which caused the client to be upset and she has not returned to the salon.

7 Ms Stirling says she did not elaborate on the reasons for Ms Corrieri's termination at the time of termination because she did not believe that it would be constructive. She had other complaints from customers regarding burning from the applicant's treatments. The applicant was spoken to about her work. Ms Stirling decided after discussion with the owners, Mr and Mrs Cox, that the time it would take to bring Ms Corrieri up to speed with the salon's requirements would be too great. This is particularly so as the salon was a busy salon. Ms Stirling told the applicant at the time of her dismissal that she had some mixed feedback about her performance but did not give details. Ms Stirling says she tried to encourage Ms Corrieri to go to a smaller salon where she may be able to cope better. Under cross-examination by the Commission Ms Stirling says that the decision to terminate Ms Corrieri's services was made on Thursday night. It was decided in conjunction with Mr and Mrs Cox that Ms Corrieri would be advised on Saturday after work as there was a full book of customers.

8 The respondent submits that the dismissal was not unfair due to the salon being a busy salon and the applicant not being of the required standard for the salon. The respondent does not challenge the applicant's qualifications however, says there was not much time in the salon to provide support to people and staff should already be familiar with the techniques. The respondent says there are a lot of employment opportunities in the beauty therapist arena and does not understand why the applicant has not been able to secure further work.

9 Having seen Ms Stirling and Ms Corrieri give evidence, I would favour the evidence of Ms Stirling. The difference between the parties is that the respondent says there were difficulties with Ms Corrieri's performance and Ms Corrieri was made aware of these. The respondent says that Ms Corrieri was not to the standard required for the Joondalup salon. Ms Corrieri in turn rates her performance as 9½ out of 10 and was clearly offended by any challenge to her qualifications and experience as a beauty therapist. She says there were no complaints about her work. On the evidence it is common that Ms Corrieri was spoken to about the use of wax strips, albeit Ms Corrieri has a different view of the conversation, and I think it is probable she was spoken to about other matters in the salon. I find also that she was advised of complaints by customers.

10 The applicant's view of her abilities are in stark contrast to that of the respondent. The respondent does not say that the applicant is a poor beauty therapist or unqualified. The respondent says that the applicants' work was not up to the standard they required, particularly in a busy salon. The applicant says she was not told about this and Ms Stirling for the respondent says that Ms Corrieri was advised, and her attitude was one of 'I know'. My impression on viewing Ms Corrieri giving evidence is that this explanation is likely to be accurate.

11 It is evident from the contract that the applicant was on probation and that during the term of probation notice could be given by either party. Probation is a period of trial appointment which is in effect part of the selection process whereby both the employee and employer are deciding whether to continue the employment relationship. In this instance the employer decided the employment relationship would not work out in the long term and terminated that arrangement after 3 weeks. The employment relationship was terminated with a reason, that being that Ms Corrieri's work was not to the standard required by the respondent for that salon. In that sense I do not find the dismissal to be substantively unfair. In *Undercliffe Nursing Home –v- Federated Miscellaneous Workers' Union of Australia, Hospital, Service and Miscellaneous, WA Branch* 65 WAIG 385 the test to be applied is outlined clearly by Kennedy J at page 387. It is as follows:

> "The following principle, stated in In *re* Barrett and Women's Hospital, Crown Street (1947) A.R. 565, at pp. 566-567 was cited with approval by Walsh J. in North West County Council v. Dunn (1971) 126 C.L.R. 247 at p. 262—
>
> > It is not the province of the Commission, in the exercise of the jurisdiction conferred on it by the Industrial Arbitration Act, to take over the functions of the employer in relation to the selection and retention of employees, and it will intervene only when its intervention is necessary to protect an employee against an unjust or unfair exercise of the employer's right of dismissal, a right which is as fundamental in the relationship of employer and employee as is the right of an employee to leave his employment.
>
> As Walsh J. went on to stress at p. 263, it is not a question as to the parties' respective legal right, but a question as to 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. He accepted, citing McKeon J. in Western Suburbs District Ambulance Committee v. Tipping (1957) A.R. 273, at p. 280, that a proper test is to ask the question: "Has there been or has there not been oppression, injustice or unfair dealing on the part of the employer towards the employee?"

12 I do consider the dismissal to be procedurally unfair in that inadequate discussion was undertaken with Ms Corrieri at the time of dismissal. Ms Stirling's evidence was in fact that she was seeking to be kind, but a more adequate discussion would have

left the applicant with a clearer position of why she was being terminated. The decision in *Shire of Esperance –v- Peter Maxwell Mouritz* 71 WAIG 891 @ 899 states—

> " the mere fact that the employee did not have a proper opportunity to explain or has not been warned of the possibility of termination does not automatically entitle the applicant to a remedy. No injustice will result if the employee could be justifiably dismissed."

13 In my view the respondent had reason to terminate Ms Corrieri's employment and it is not for the Commission, in these circumstances, to substitute its view. On balance I do not consider the dismissal of Ms Corrieri to be unfair and accordingly I would dismiss the application.

2002 WAIRC 06842

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	PAULA CORRIERI, APPLICANT
	v.
	NADEEN COX ELLA EXPRESS, RESPONDENT
CORAM	COMMISSIONER S WOOD
DATE OF ORDER	FRIDAY, 25 OCTOBER 2002
FILE NO.	APPLICATION 787 OF 2002
CITATION NO.	2002 WAIRC 06842

Result	Application dismissed
Representation	
Applicant	Ms P Corrieri
Respondent	Mr G Cox

Order

HAVING heard Ms P Corrieri on her own behalf and Mr G Cox 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. WOOD,
Commissioner.

2002 WAIRC 06966

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	BRUCE GAVIN DYER, APPLICANT
	v.
	ILUKA RESOURCES LIMITED, RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	TUESDAY, 12 NOVEMBER 2002
FILE NO/S.	APPLICATION 1073 OF 2002
CITATION NO.	2002 WAIRC 06966

Result	Jurisdiction found
Representation	
Applicant	Mr M Llewellyn (as agent)
Respondent	Mr R Kelly (of counsel)

Reasons for Decision

1 This file was referred to the Commission under s.7G and s.29(1)(b)(i) of the *Industrial Relations Act, 1979* ("the Act"). Bruce Gavin Dyer ("the applicant") alleges he was unfairly dismissed by Iluka Resources Limited ("the respondent") on 27 May 2002. The respondent claims there was no unfair termination. The Commission was asked and agreed to determine a preliminary issue going to the Commission's jurisdiction to entertain the claim based upon the respondent's contention that the applicant had applied to the Commission to determine this matter under s.7F of the Act.

2 The Australian Workers Union, West Australian Branch, Industrial Union of Workers ("the union") acting as the applicant's agent in relation to this matter, lodged the application in the Commission on 12 June 2002. It was common ground between the parties that an agreement registered pursuant to the Workplace Agreements Act 1993 ("the agreement") applied to the applicant on the date that he was terminated. The agreement allows for the referral of an unfair dismissal claim to the Commission under s.7G of the Act. Subsequent to this application being lodged s.7G of the Act was repealed by s.111(4) of the Labour Relations Reform Act 2002 ("the LRRA") but remains in force under the transitional provisions outlined in s.112 of the LRRA.

3 The applicant lodged this application in the Commission using a Form 1 Notice of Referral required to be used under the Industrial Relations (Workplace Agreements) Regulations 1995 ("the WPA Regulations"). This form is normally used when

lodging a referral to the Commission in relation to a question or dispute concerning a registered workplace agreement under s.7F of the Act.

Submissions in relation to Jurisdiction

4 The respondent argues that there is no jurisdiction for the Commission to hear this matter. As the notice of referral filed in relation to this matter was filed on a form used in relation to an application under s.7F of the Act, the applicant cannot now argue that the application is to determine a claim for unfair dismissal. The respondent argues that once a matter is referred under s.7F of the Act the Commission has no other function than to make a determination as to the meaning or effect of the agreement and the Commission has no power to exercise any general powers under the Act in respect of industrial matters. In an application made under s.7F of the Act the Commission only has powers pursuant to s.7F(5) of the Act and that power excludes the Commission exercising any other powers under the Act.

5 The respondent argues that there can be no hearing or determination under s.7F of the Act as the agreement ceased to apply to the parties prior to the application being made.

6 The respondent submits that the application was technically incompetent. It was argued that as the application was lodged under s.7F of the Act the Commission does not have jurisdiction or power to deal with the application as there is no power for the Commission either under the Act or the regulations to convert the application made under s.7F of the Act to an application made under s.7G of the Act. In exercising its powers under s.7F of the Act the Commission's powers as an arbitrator is specifically limited. The Commission has no discretion to overcome any deficiency in the application. It was argued that the defect in the applicant's notice of referral is irremediable. It was argued that the applicant's agent knew or ought to have known the correct form to bring an unfair dismissal application before the Commission. Further, no explanation had been given by the applicant or its agent as to why the incorrect form was used.

7 The respondent argues that if it is found that the Commission has power to convert the referral to an application under s.7G of the Act, the Commission is required to exercise its discretion in relation to accepting an amendment to the original application. The onus is on the applicant to demonstrate that an amendment of this nature should occur. The respondent submits that in the circumstances the Commission should exercise its discretion under s.27 of the Act against the applicant as there is a responsibility on the applicant and his agent to make an application correctly. No evidence was given by the applicant or the applicant's agent in support of an application to amend. Further, no reason was provided for the basis of the union's misunderstanding in relation to the form used.

8 The applicant confirmed that the Form 1 lodged in the Commission in relation to the applicant's unfair dismissal claim was the form normally used for a referral in relation to a question or dispute concerning a workplace agreement under s.7F of the Act. Following the application being filed, it was indicated to the applicant's agent that the incorrect form had been used to lodge the applicant's unfair dismissal claim. The union was informed that a Form 1 as detailed in the Industrial Relations Commission Regulations 1985 ("the regulations") should have been used for lodging a matter of this nature.

9 A copy of the applicant's application is reproduced below, formal parts omitted.

> "To: Iluka Resource Limited Level 10 553 Hay Street Perth WA 6000 (Postal Address GPO Box U1988 Perth WA 6845) .....
>
> (names and addresses for service of all parties to the workplace agreement other than applicants – attach schedule if insufficient space)
>
> Take notice that . Bruce Gavin Dyer C/- Australian Workers Union West Australian Branch Industrial Union of Workers, PO Box 8122 Perth BC 6849.....
>
> (names and addresses for service of applicant/s – attach schedule if insufficient space)
>
> has/have this day referred to the Commission for determination a question or dispute that has arisen between the parties to a workplace agreement about the meaning or effect of the agreement.
>
> The workplace agreement is no. 00/36.029 of 2000
>
> (insert number of workplace agreement allocated by the Commissioner of Workplace Agreements)
>
> The question to which an answer is required
>
> OR the dispute which requires determination
>
> is as follows **The unfair dismissal of the applicant in relation to an alleged breach of the company email policy**.....
>
> The provision/s of the workplace agreement under which the question or dispute has arisen is/are as follows—
>
> .....
>
> The facts giving rise to the referral are as follows – **The applicant was called into see the respondents supervisor at which time he was informed that he had passed on/sent Emails that offended the respondents email policy. He was also questioned as to if he recalled being informed of the policy. An issue that the applicant cannot specifically recall and was not shown all be it the respondent claimed that he had signed a form to say that he attended. That while the respondent had received no complaints the emails still offended the company policy. Initially the applicant did not believe that the matter was serious until he asked if his position was in jeopardy at which time the respondent informed him that he may be terminated.**
>
> The parties request that Commissioner.....
>
> (insert name of Commissioner if the parties have agreed) makes the determination in this matter.
>
> SIGNED
>
> Signature of the applicant
>
> or applicant's agent.
>
> NB: Attach to this form a copy of the workplace agreement and, if separate, a copy of the written agreement of the parties to refer this matter to the Commission."

10 Once the issue of the incorrect form was raised with the union, the union wrote to the Chief Commissioner on 1 July 2002 indicating that the incorrect form had been used to lodge the applicant's unfair dismissal claim. The union understood that a form as detailed in the WPA Regulations had to be used in relation to a matter of this nature. The union sought to amend the form to be an application pursuant to s.7G of the Act. A copy of the Union's letter is as follows, formal parts omitted—

> "The above matter was filed using a Form 1 that was specifically designed for matters that arise under Section 7F of the Industrial Relations Act 1979. This matter should have been filed under Section 7G of the Industrial Relations Act 1979.

The application as you will see clearly sets out that the dispute is the Allegation of an unfair dismissal of Mr Dyer from his employment.

As such we would seek to have the application corrected by way of deletion on the reference to Section 7F on the form and the reference to "Notice of referral in relation to the meaning or effect of a workplace agreement".

We were of the belief that Unfair dismissals needed to be filed using this form for persons under a Workplace Agreement however that would not appear to be the case.

Contact in this matter is Michael Llewellyn 041 990 7032 or 08 922 11 686."

11 On 1 July 2002 the union wrote to the respondent's representative pointing out that an error had occurred in relation to the form that was used when lodging the applicant's claim for unfair dismissal. The letter confirmed that the matter was clearly an unfair dismissal application and not a referral under s.7F of the Act. The letter referred to the making of an application to have this deficiency rectified.

12 The union argued that it moved quickly to correct the defect in relation to the form used as soon it became aware of it. The union wrote to the Chief Commissioner on 1 July 2002 seeking to amend the form that was used to lodge the application. The union argues that the original application is clearly an application pursuant to s.7G and thus s.29(1)(b)(i) of the Act, even though the form refers to a referral under s.7F of the Act. On this basis the Commission's powers under s.26 and s.27 of the Act can be used to amend this application to make it an application under s.7G of the Act. The applicant argues that in relation to s.27(1)(l) of the Act the Commission has power to amend any proceeding and s.27(1)(m) of the Act allows for the Commission to correct any error, defect or irregularity whether in substance or in form.

13 For those reasons the applicant argues that the Commission has jurisdiction to hear and determine this matter and that the notification lodged to the Chief Commissioner gives the Commission power to amend the applicant's claim to be an application under s.29(1)(b)(i) of the Act.

Conclusions

14 The issue to be determined by the Commission is whether the notice of application, filed using a form in relation to s.7F of the Act, was sufficient to attract the Commission's jurisdiction in relation to an unfair dismissal claim under s.7G and s.29 of the Act.

15 Section7G of the Act provided as follows—

"7G. Referral of claim of unfair dismissal

(1) where

(a) a person who was a party to a workplace agreement as an employee claims to have been harshly, oppressively or unfairly dismissed from employment in breach of the provision implied in the agreement by section 18 of the *Workplace Agreements Act 1993*; and

(b) the workplace agreement provides for referral of such claims to the Commission under this section,

the person dismissed may, within the time allowed by section 29(2), refer the claim to the commission for determination.

(2) The Commission is to enquire into and deal with any claim referred under subsection (1) as if it were an industrial matter referred to it under section 29(1)(b)(i).

(*Section 7G inserted by No.15 of 1993 s.5*.)

(7G. *Repealed by No. 20 of 2002 s.111(4)*.)."

16 Section 7G subsection (2) states that the Commission is to enquire into and deal with any claim referred under subsection (1) of the Act as if it were an industrial matter referred to it under s.29(1)(b)(i) of the Act. If there was no s.7G then the Commission has no jurisdiction to deal with a claim by an employee covered by a workplace agreement because the employee is not an employee for the purposes of the Act.

17 In this case the applicant has filed a claim using a form in relation to s.7F of the Act which the applicant argued it sought to be amended to have been filed under s.7G of the Act. The applicant argues the Commission is able to deal which such a claim because the terms of s.7G specifically provide for the Commission to deal with the application as if it were an industrial matter lodged under s.29(1)(b)(i). Thus, the Commission's powers under s.26 and s.27 of the Act apply.

18 It is my view that the original referral lodged by the applicant is clear in identifying that the referral was in relation to an unfair termination, even though a Form 1 normally used in relation to s.7F of the Act was used. Registry understood the application to relate to an unfair dismissal claim as it alerted the Union that the incorrect form had been used subsequent to the application being filed. Any confusion in relation to the nature of the application was clarified in correspondence from the union to the Chief Commissioner soon after the original application was lodged. This letter to the Chief Commissioner requested an alteration to the original form to delete reference to s.7F of the Act and reference to a question or dispute concerning a workplace agreement. On the same day the union wrote this letter to the Chief Commissioner the respondent was informed that the deficiency in the original application was being rectified.

19 On the basis that the application was clearly in relation to the applicant's unfair termination at the outset, I am of the opinion that the application should be regarded as an application lodged pursuant to s.7G of the Act. Even though the incorrect form was used, in my view this does not make the application invalid. In the circumstances it is my view that it is appropriate to accept the application as an application under s.7G of the Act.

20 I have formed this view on the basis that the nature of the application was clear to the respondent at the outset and was filed within the required time frame. Further, the union offered an explanation for the incorrect form being used, and moved quickly to rectify the defect in its application once it was brought to the union's attention. In my view there is no prejudice to the respondent given these circumstances. I am satisfied that it is appropriate to accept the application as an application pursuant to s.7G of the Act to enable the applicant's unfair dismissal claim to be dealt with as intended by the parties to the agreement.

21 In my view it is not necessary to formally amend the application to be an application under s.7G of the Act as I have already accepted that the applicant has filed this claim under s.7G of the Act.

22 However, if it was necessary to amend the application to be an application under s.7G of the Act I would exercise the powers available to the Commission in favour of the applicant to be an application under s7G. Once an application is lodged under s.7G of the Act the Commission is to treat the claim as if it were an industrial matter referred under s.29(1)(b)(i) of the Act. It follows that the Commission's powers under s.27 of the Act then apply to this application. Under s.27(1)(l) and (m) I would

use my discretion to amend the application to be an application under s.7G given that the applicant's claim is clearly one of harsh, oppressive and unfair termination and it was filed within the period required. Further, it is my view that there is no prejudice to the respondent in making the amendment.

23 On this basis I find there is jurisdiction for the Commission to deal with this application.

2002 WAIRC 06967

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
PARTIES	BRUCE GAVIN DYER, APPLICANT
	v.
	ILUKA RESOURCES LIMITED, RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE OF ORDER	TUESDAY, 12 NOVEMBER 2002
FILE NO/S.	APPLICATION 1073 OF 2002
CITATION NO.	2002 WAIRC 06967

Result	Jurisdiction found

Order

HAVING HEARD Mr M Llewellyn on behalf of the applicant and Mr R Kelly (of counsel) on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act, 1979,* hereby—

DECLARES THAT the matter referred to the Commission is a matter that the Commission has jurisdiction to hear and determine.

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

2002 WAIRC 06906

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
PARTIES	QUINN SEAN FALLENS, APPLICANT
	v.
	GEMSTONE EXPLORATIONS PTY LTD, RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	MONDAY, 4 NOVEMBER 2002
FILE NO.	APPLICATION 712 OF 2002
CITATION NO.	2002 WAIRC 06906

Result	Application for contractual benefits allowed
Representation	
Applicant	Mr Q Fallen on his own behalf
Respondent	No appearance.

Reasons for Decision

1 This is an application by Mr Quinn Sean Fallens ("the applicant") pursuant to s.29(1)(b)(ii) of the *Industrial Relations Act, 1979* ("the Act"). The applicant alleges he is owed contractual entitlements pursuant to his contract of employment with Gemstone Exploration Pty Ltd ("the respondent").

2 The application was filed on 26 April 2002 and a Declaration of Service was filed on 3 May 2002. As no Notice of Answer and Counter Proposal was lodged by the respondent Registry contacted the respondent's Principal, Mr Max Reid. On 12 June 2002 Registry faxed a copy of the application to the respondent and asked the respondent to file a Notice of Answer and Counter Proposal. The respondent did not file a Notice of Answer and Counter Proposal.

3 A conference in relation to this matter was held on Thursday, 1 August 2002. There was no appearance at the conference on behalf of the respondent. The Commission contacted Mr Reid in Coober Pedy and he participated in the conference by teleconference. As no settlement was reached at conference the applicant requested the matter be referred for hearing and it was agreed by the parties that the hearing date would be Friday, 27 September 2002.

4 When the matter came on for hearing on 27 September 2002 there was no appearance by the respondent. The Commission contacted Mr Reid who confirmed that he had received the Notice of Hearing for 27 September 2002 and he confirmed that he would not be in attendance at the hearing. Given that the respondent was given adequate notice of the hearing (the notice was sent to the respondent on 2 August 2002) and given that the respondent had agreed to the hearing taking place on 27 September 2002, the Commission, pursuant to s.27(d) of the Act, proceeded to hear the matter.

5 The applicant gave evidence on his own behalf. The applicant commenced employment with the respondent in June 2001 as an assistant on a drilling rig. He worked ten hours per day, seven days per week and had approximately three days off every four weeks. The respondent supplied board and lodging for the applicant whilst he undertook this work.

6 In September 2001 the respondent commenced operating a sand plant in Carnarvon. The applicant was moved to this location to operate a loader and a dump truck. The applicant's evidence was that he was employed on this job from 6.00am to 6.00pm, seven days a week.

7 In December 2001 the respondent transferred the applicant to Perth to work at the respondent's warehouse in Wangara. The applicant's duties at the warehouse included fork lift driving, loading trucks and making deliveries. The applicant worked from 8.00am to 4.00pm five days per week. He was required to work an occasional Saturday.

8 It was the applicant's evidence that during the period that he worked with the respondent from June 2001 through to 22 March 2002 he took three weeks' unpaid leave in September 2001 when his family moved to Western Australia from Queensland. Other than that he had worked with the respondent on a continuous, full-time and regular basis.

9 Towards the end of March 2002 the respondent reduced the applicant's hours of work. The applicant was informed that the respondent was looking at new ventures to pursue. On 22 March 2002 the applicant was approached by a Chubb Security Guard whilst working at the respondent's warehouse in Wangara. The Guard handed a letter of termination to the applicant (Exhibit A1). The letter was signed by Max and Edna Reid, Principals of the respondent. The letter was addressed to the respondent's staff in Perth, one of whom was the applicant. The letter informed the applicant that his services were being terminated that day due to lack of business and that he would be paid two weeks' pay and full entitlements as a result of this termination. The applicant contacted Mr Reid seeking payment for these two weeks of pay and other entitlements owing, but no monies were paid to the applicant.

10 The applicant was paid $15.00 per hour whilst he was employed by the respondent. Prior to his termination the applicant was working 37.5 hours per week. The applicant did not receive and was not paid annual leave and annual leave loading whilst he was employed by the respondent. The applicant gave evidence that these were entitlements due to him under his contract of employment with the respondent.

Credibility

11 I have no reason to doubt the evidence given by the applicant. He gave his evidence in a clear, honest and forthright manner and I accept his evidence in total.

Issues

12 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.

Findings and Conclusions

13 On the evidence given by the applicant I make the following findings.

14 I find the applicant worked continuously for the respondent as a full-time employee from June 2001 to 22 March 2002 except for an unpaid break of three weeks in September 2001. The applicant was terminated on 22 March 2002 in a summary fashion due to the respondent making the applicant redundant.

15 I find that the applicant was owed two weeks' pay in lieu of notice pursuant to his contract of employment. This is confirmed by Exhibit A1. I accept that the applicant has an entitlement to annual leave and annual leave loading under his contract of employment. The applicant stated that this is what he understood his contract of employment to be with the respondent and I accept the applicant's evidence in this regard. In any event the entitlement to annual leave is implied into the applicant's contract of employment pursuant to the Minimum Conditions of Employment Act 1993 (the MCEA) (*BGC (Australia) Pty Ltd v Phippard* (2002) 82 WAIG 2013). This entitlement is quantified under the MCEA to be four weeks per year of service.

16 I am satisfied that the applicant has established that the respondent owes him two weeks' pay in lieu of notice, plus pro rata annual leave and annual leave loading entitlements. On that basis I will issue an Order for those amounts to be paid based on the applicant earning $562.50 per week. Two week's pay in lieu of notice amounts to $1125, pro rata annual leave amounts to $1687.50 and annual leave loading amounts to $295.31.

17 An order for these amounts will now issue.

2002 WAIRC 06963

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	QUINN SEAN FALLENS, APPLICANT
	v.
	GEMSTONE EXPORATION PTY LTD, RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE OF ORDER	MONDAY, 11 NOVEMBER 2002
FILE NO/S.	APPLICATION 712 OF 2002
CITATION NO.	2002 WAIRC 06963

Result Application for contractual benefits allowed

Order

HAVING HEARD Mr Q Fallens 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 DELARES THAT Quinn Sean Fallens was denied benefits under his contract of employment.

2 ORDERS the respondent to pay Quinn Sean Fallens $3107.81 gross within seven (7) days of the date of this order.

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

[L.S.]

2002 WAIRC 06843

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	GLORIA JEAN FORSYTH, APPLICANT
	v.
	MR & MRS RAY & KYLIE MARTIN, RESPONDENT
CORAM	COMMISSIONER S WOOD
DELIVERED	FRIDAY, 25 OCTOBER 2002
FILE NO.	APPLICATION 806 OF 2002
CITATION NO.	2002 WAIRC 06843

Result	Applicant dismissed unfairly; compensation awarded
Representation	
Applicant	Ms G Forsyth
Respondent	Mrs K Martin

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 Gloria Forsyth, was employed by the respondent, Mr & Mrs Martin, who operate in partnership the Bremer Bay Caravan Park. Ms Forsyth was employed from 25 January 2002 to 26 April 2002 as a cleaner. Her duties included cleaning the shop, ablution blocks, units and onsite vans. The applicant says she was employed for approximately 20 hours per week and at the rate of $10 per hour. She says she was employed on a permanent part time basis. The respondent contends that the applicant was employed on 24 January 2002 in a casual part time capacity. No argument concerning casual employment was pressed at hearing.

2 Ms Forsyth's evidence is that she was initially interviewed by Mrs Martin and commenced work on the same day. She commenced work each day at 8am and worked for 3 to 5 hours until the job was finished. She says she worked this pattern regularly until 27 March 2002 at which stage she was then rostered to take the weekend off. The suggestion being there was some decrease in business. There was no written contract at the commencement of her employment and she says she was not told what she would be paid until early February 2002 when she got her first pay. At that time she says Mrs Martin told her she would be paid $10 an hour and would be paid in cash and by cheque. She was paid each fortnight. She was required to enter her hours each day in the wages book [Exhibit GJF1] and she recorded which days she worked during her period of employment [Exhibit GJF 3]. Ms Forsyth says she wanted to be paid some money in cash for taxation purposes, as she was on a pension. She denies that initially she was offered work only for 3 months, that is until winter when the peak season ended.

3 Ms Forsyth says that on 15 April 2002 she spoke to Mrs Martin who indicated that she was a good worker and wanted to keep her on. She says Mrs Martin offered her work for 3 mornings a week until the time the caravan park became busy again. That arrangement was agreed. The applicant wanted to have Friday to Monday off to fit in with the course she was undertaking in Albany. This new working arrangement was to commence after the school holidays. As part of her conditions of employment she says she was also told by Mrs Martin that she was required to spend $20 to $30 each week in the caravan park shop.

4 Ms Forsyth gave evidence that she was a good worker and had no difficulties during her employment with Mr and Mrs Martin, with two exceptions She says she was upset by a sign posted in the kitchen which read, "There will be no attitude in this business, you'll be fined $10 a day and remember who pays the wages". However, her real concern related to a fellow worker, Ms Cheryl Lee. She had originally completed her cleaning rounds with Mrs Charmaine Martin. In the latter part of her employment she completed her cleaning rounds with Ms Cheryl Lee. She says she was harassed by Ms Lee who refused to co-operate with the work and was so poor in her cleaning that Ms Forsyth became concerned about the standard of cleaning from a public health perspective. She reported her concerns to a local nurse.

5 On 26 April 2002 she says she was approached by Mrs June Windsor who indicated that she needed to talk to her after her cleaning rounds. She says Ms Lee was very quiet that day. When they arrived back in the office she could not find the wages book in the usual spot. Mrs Windsor advised her that she did not need to sign off, her services were to be terminated. She tried speaking in her own defence but was not allowed. Ms Lee was allowed to speak and laughed at Ms Forsyth. Ms Forsyth also had to hand the key over and was asked to leave.

6 Ms Forsyth said that she has been harassed by Ms Lee since she was dismissed. Ms Forsyth's evidence is that Ms Lee is still working for the respondent doing cleaning; she has seen her drive the van and remove buckets from the back of the van.

7 Ms Forsyth has been unemployed since her termination and has sought work locally. She seeks compensation for the loss of work offered to her, ie 3 days per week.

8 Mrs Kylie Martin gave evidence that she employed Ms Forsyth in mid-January for the peak season as Mrs Rogers, a resident in the caravan park, had hurt her back and could not clean. She advised Ms Forsyth she would be paid $10 per hour and denies that there was any requirement to purchase goods from the shop. Ms Forsyth was on a pension and wanted to be paid in cash. She says that Ms Forsyth was to be employed only for the holidays. Ms Forsyth was a very good worker. At times Mrs Martin asked her if she wanted the day off as she was concerned about an injury to her back. Mrs Martin says that on each occasion Ms Forsyth said, "I just want to work". Mrs Martin accepts the days and hours worked as per [Exhibits GJF1 and GJF3].

9 At the time of Ms Forsyth's dismissal, Mr and Mrs Martin had left the caravan park in the care of Frank and June Windsor. Mr and Mrs Martin were in Perth on holidays. Mrs Windsor rang her about problems between Ms Forsyth and Ms Lee. Mrs Martin said she had left the issue with Mrs Windsor to sort out as she was on holidays. Mrs Martin admits that the dismissal was handled in a poor manner. She says however that the dismissal had to occur simply as there was no further work for Ms Forsyth. She says that her husband and she had completed their accounts during the month of April and, although on or about 15 April they had offered Ms Forsyth work for 3 days per week during the quieter months, they could no longer afford to do so. She says by the end of April it was clear that their takings were very low and she could not fulfil her promise to Ms Forsyth.

10 Mrs Martin says the sign in the kitchen which is part of their own home was directed towards her daughter, Sharon, who was also employed in the business. At that time she was experiencing difficulties with her daughter. Mrs Martin denies that she has employed anyone else to do the cleaning since Ms Forsyth's dismissal. She says the cleaning is done by her husband and herself, her husband's brother and his wife. Ms Lee does work in the office on the computer. Mrs Martin says that Ms Lee has on occasion driven the van for Mrs Charmaine Martin as she does not have a licence.

11 The evidence concerning what eventuated between the parties following the termination is not relevant for my findings.

12 It is clear from the evidence that Ms Forsyth experienced conflict at work with Ms Cheryl Lee. They did not get along and Ms Forsyth was so concerned about Ms Lee's standard of cleaning that she raised the issue with a registered nurse concerning public health breaches. Ms Forsyth complains these concerns were not taken up or investigated by anyone at the caravan park.

13 Mrs Martin does not challenge that the dismissal was handled badly. She apologises for the way in which the dismissal was handled and says that Ms Forsyth was not paid notice at the time. In respect of the concerns regarding public health, she says they were not an issue for the registered nurse and denies that the ablution blocks were in a substandard state. She maintains that her husband and she had to renege on the undertaking to Ms Forsyth as the takings in the business were low and the busy season was coming to an end. It is clear also that Ms Forsyth was a good worker. The dismissal occurred suddenly and in the presence of others and was humiliating for Ms Forsyth. Ms Forsyth was not paid notice at the time of termination.

14 The three substantive issues in evidence which Ms Forsyth and Mrs Martin disagree on are whether Ms Forsyth was initially offered work only for 3 months; whether Ms Forsyth had to spend an amount of money in the shop; and whether there was continuing work. I would favour Mrs Martin's evidence.

15 The first point is of no great account as Mrs Martin agrees that she offered Ms Forsyth continuing employment in mid-April. However, there would seem to be no need to offer continuing employment if Ms Forsyth already had continuing employment. Ms Forsyth says that Ms Lee is still cleaning at the caravan park. However, she has not been able to verify this other than she says that she has seen Ms Lee drive a van and remove buckets from the back of the van. She expressed considerable distress at the actions of Ms Lee which she says were designed to taunt her or harass her. She says Ms Lee continues to carry a sign in the window of her car that says "working". This she believes is designed to suggest that Ms Lee has taken Ms Forsyth's job. I am confident on hearing the evidence that Mrs Martin's version of events is more reliable than Ms Forsyth's.

16 Mrs Martin was not present at the dismissal and does not challenge the evidence given by Ms Forsyth on that point. She instead says that the dismissal was handled badly and apologises for it. Mrs Martin freely concedes the majority of issues raised by Ms Forsyth. I am also confident on hearing the evidence that Ms Forsyth's judgment is clouded by the emotions generated by her ill feeling towards Ms Lee justifiable or otherwise. I accept the evidence of Mrs Martin that cleaning requirements are currently being performed by her husband and herself, her husband's brother and his wife. Equally I am convinced by Mrs Martin's evidence that Ms Lee is not performing cleaning duties; she works in the office and has driven the van on occasion. I accept this evidence. Mrs Martin says that there is no requirement for additional cleaning staff as the caravan park is experiencing the quiet period of their season. I accept this evidence also. The alternative view would be that there continues to be a need for staff, as per the earlier offer to Ms Forsyth of 3 days employment per week, and that due to the difficulties which arose between Ms Forsyth and Ms Lee this proposal was reneged upon. On balance I do not consider this to be the most probable explanation.

17 As the decision of the Industrial Appeal Court in *Undercliffe Nursing Home –v- Federated Miscellaneous Workers' Union of Australia, Hospital, Service and Miscellaneous, WA Branch* 65 WAIG 385 @ 386 makes clear—

> "…..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."

It is clear in all the circumstances that the dismissal of Ms Forsyth was unfair. This was effectively admitted in evidence by Mrs Martin. The termination was effected in the presence of other staff and was humiliating for Ms Forsyth. The dismissal was effected without warning and without reason being given and there was no payment of notice.

18 I find that reinstatement is impracticable due to the absence of a continuing job. I do not consider that Ms Forsyth's employment would have continued for much longer *Ramsay Bogunovich –v- Bayside Western Australia Pty Ltd* 79 WAIG 8. I am convinced that Ms Forsyth's employment was to end due to the absence of business in the caravan park. It is clear that she is deservedly aggrieved by the manner in which she was dismissed. She had earlier expected continued employment of 3 days per week. This promise could not be fulfilled. Instead she was dismissed instantly and in front of Ms Lee which was humiliating. I consider that Ms Forsyth's employment would have continued for not more than one week. Mr and Mrs Martin were due to return to the caravan park. Mrs Martin's evidence is that her husband and she, in conjunction with her husband's brother and his wife, now perform the cleaning.

19 Ms Forsyth's termination should also have been on notice. Although her pattern of work changed she performed work regularly and on a set roster each day. She was not a casual employee and the respondent does not press this issue. Ms Forsyth is entitled in my view to payment of one week of notice in accordance with section 170CM of the Federal *Workplace Relations Act 1996* and she is entitled to a further week, courtesy of her being over 45 years of age. Therefore three weeks of wages, in the circumstances, is the amount she should receive, as her employment would have come to an end due to the end of the peak season. In light of [Exhibit GJF1] it appears that Ms Forsyth worked on average 15 hours per week in the later stages of her employment. At her rate of pay her total payment of three weeks would amount to a sum of $450 and this is the amount of compensation I would order be paid to Ms Forsyth by the respondent.

2002 WAIRC 06924

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	GLORIA JEAN FORSYTH, APPLICANT
	v.
	MR & MRS RAY & KYLIE MARTIN, RESPONDENT
CORAM	COMMISSIONER S WOOD
DATE OF ORDER	MONDAY, 4 NOVEMBER 2002
FILE NO.	APPLICATION 806 OF 2002
CITATION NO.	2002 WAIRC 06924

Result	Applicant dismissed unfairly; compensation awarded
Representation	
Applicant	Ms G Forsyth
Respondent	Mrs K Martin

Order

HAVING heard Ms G Forsyth on her own behalf and Mrs K Martin for the respondent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby—

(1) DECLARES that the applicant, Gloria Jean Forsyth, was unfairly dismissed by the respondent on the 26th day of April 2002;

(2) DECLARES that reinstatement is impracticable;

(3) ORDERS that the respondent do hereby pay, as and by way of compensation, the amount of $450.00 to Gloria Jean Forsyth.

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

2002 WAIRC 06828

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ROBERT GALLOTTI, APPLICANT
	v.
	ARGYLE DIAMOND MINES PTY LTD TRADING AS ARGYLE DIAMONDS, RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	THURSDAY, 24 OCTOBER 2002
FILE NO/S.	APPLICATION 1455 OF 2001
CITATION NO.	2002 WAIRC 06828

Result	Application dismissed
Representation	
Applicant	Mr M Richardson as agent
Respondent	Mr S Ellis of counsel

Reasons for Decision

1. By this application pursuant to ss 29(1)(b)(i) and (ii) of the Industrial Relations Act 1979 ("the Act") the applicant claims he was harshly, oppressively and unfairly dismissed and denied certain contractual benefits by the respondent. The applicant seeks reinstatement and an order for loss of the remuneration in the unfair dismissal claim. In the contractual benefits claim, seeks six months salary in lieu of notice is claimed and additionally, a claim described as "lost salary and benefits from the date of dismissal to the date of reinstatement at the rate of $55,000 per annum".

2. The respondent denies the applicant's claims and moreover, denies that the applicant was dismissed, in order to attract the jurisdiction of the Commission to entertain the applicant's unfair dismissal claim.

3. Given that the respondent raised as a threshold question whether there was a dismissal as a matter of fact and law, and given that is a necessary pre-requisite to determining at least the unfair dismissal claim, I turn to a consideration of that matter in the first instance. Of course, whether or not there was a "dismissal", for the purposes of the Act and the Commission's jurisdiction, is not determinative of the applicant's claim for contractual entitlements. I will deal with that matter later in these reasons.

Was there a Dismissal?

4. The facts relevant to this particular issue are essentially these. The applicant commenced employment with the respondent on or about 28 June 1999 as an Information Technology Systems Officer ("ITSO"). The applicant was engaged on what was described as a temporary employment basis, from 28 June 1999 to 31 December 1999. The contract of employment was to expire at the end of that period, unless a new contract was entered into. During the course of that contract, and despite its nominated term, either party could terminate the contract of employment during the period specified, by the giving of one months notice. Given the significance of the terms of the appointment, both for the purposes of the preliminary issue and indeed also the contractual benefits claim, the applicant's initial letter of appointment dated 10 June 1999, formal parts omitted, is set out in full as follows—

"We are pleased to confirm our offer of temporary employment for the position of IT Systems Officer at Argyle Diamonds effective 28 June 1999 until 31 December 1999. Your employment with Argyle will cease at the expiry of this period, unless a new contract is entered into.

Your Remuneration & Conditions

Salary	*Your base salary will be $42,000 per annum.*
Duties	*You will perform such duties and exercise such powers in connection with the business of the Company as the Management of the company shall from time to time require.*
Hours of work	*Your hours of work will nominally consist of 36.25 hours per week. However, this may vary from time to time to meet operational requirements of your position or by agreement between you and your Manager.*
Commute Allowance	*We will pay you a commute allowance to compensate for the time you spend on site, which may increase or decrease depending on the commute roster that you work. Each commute allowance reflects the particular requirements of that commute roster, including the time you are required to work and the period of duty, payment of public holidays, travelling time and late arrival payments, and where appropriate shift work.*

	The commute allowance will also take into account the market rates payable for similar commute rosters that apply to remote sites in the mining industry in Western Australia.
Living Away From Home Allowance	*While you are living away from home we will pay you a Living Away From Home Allowance to compensate you for the number of nights spent on site as per your roster. This allowance is currently tax free.* *This allowance compensates you for all the disabilities associated with living and working at Argyle, including isolation, heat, dust, humidity, tropical environment and the lack of normal amenities found in a town or city dwelling.*
Method of Payment	*Your salary will be paid on a monthly basis, on the working day immediately prior to the 20th of each month, directly to a Bank Account of your choice.*
Location	*You will be based in the Perth office or other Argyle Business location as required for this position.*
Your Welfare at work	
Safety	*For the safety of yourself and your peers you are required to adhere to all safety requirements.*
Fair Treatment System	*There may be times when you will disagree with decisions that we have made.* *We respect your freedom to challenge decisions and query the way that we do things. To help us resolve differences we are required to follow the Fair Treatment System as documented in the Human Resources Policies and Procedures.*
Licences	*In performing your role we require you to be in possession of an appropriate current certificate or license when operating or driving company equipment.*
Smoking	*We support a smoke-free workplace policy that designates a number of work areas as non smoking. You are required to observe restrictions on smoking in these areas.*
Staff Benefits	
Annual Leave	*In addition to recognised public holidays granted each year, an entitlement of twenty (20) days annual leave is established after completion of each year of continuous employment with Argyle.* *Your annual leave conditions are outlined in the Annual Leave Human Resource policy. In accordance with this you are encouraged to take a minimum of one week's leave with respect of each year's entitlement. The balance may be accumulated for a maximum of two years.*
Sick Leave	*You are able to take sick leave on any occasion that you are sick or injured in accordance with the Human Resource policy. A doctor's certificate or other evidence of illness may be required. To plan for cover in your absence, we require you to inform us as soon as possible if you are unable to attend work.*
Superannuation	*We will pay superannuation contributions as required under the Superannuation Guarantee Legislation into a Company nominated Preserved Superannuation Fund on your behalf. This is currently equivalent to 7% of your gross salary.*
Your Commitment to Argyle	
Vision	*We expect you to join with your peers in making Argyle a successful diamond business with a world reputation for delivering value to our customers and generating superior returns to our shareholders. Together we can crate our future success by continuously improving our efficiency and skills. By doing better today we will create opportunities for tomorrow.*
Training	*To ensure the optimum use of resources throughout the Operation we expect you to participate fully in the training and development program that we will plan with you. By participation you will be able to develop and enhance your skills and through application of these skills you will be able to add value to the resource.*
Security Conditions	*Argyle's product is small and valuable. To protect our resources there are specific security conditions relating to employment with Argyle. These conditions are attached to this offer (Appendix A).*
Company Rules & Regulations	*It is a condition of employment that you will not divulge any information regarding Argyle's affairs without authority. Argyle is entitled to know and benefit from the results of all your work. The company is also entitled to take out any letters Patent relating to your work.* *Argyle's Standard Conditions of Appointment is annexed hereto and marked Appendix B.*

Tenure	*We require you to give one month's notice of your intention to leave Argyle. Similarly, we will give you one month's notice if we intend to terminate your employment before the expiry date in this contract.* *In the event of serious misconduct, we will terminate your employment with Argyle immediately without notice.*
Conditions	*Your conditions of employment are documented in the Human Resources Policies and Procedures. These Conditions of Employment are subject to change to meet the changing needs of the business and environment. Any changes that are to be made will be undertaken after a reasonable period of notification and consultation with you.*

We look forward to your contribution as we achieve Argyle's mission of maximising the returns to our shareholders by creating an environment where everyone accepts accountability for, and willingly contributes to safely achieving much higher productivity at much lower cost.

Please indicate your acceptance of the position and the employment conditions by signing the duplicate letter and returning to Human Resource Services by 18 June 1999."

5. It is common ground that subsequently the applicant and the respondent entered into further contracts in identical terms, save for the commencement and expiry dates. A bundle of such contracts were tendered as exhibit A9. The respective dates of the subsequent contracts were 27 July 1999 to 31 March 2000; 1 April 2000 to 30 September 2000; 1 October 2000 to 31 March 2001; 1 April 2001 to 30 June 2001; and 1 July 2001 to 31 July 2001.

6. The applicant testified that he responded to an advertisement placed by the respondent in early June 1999 for a position of Help Desk Support, which the applicant understood to be for an information technology specialist to deal with queries and assist persons within an organisation with computing related problems. The applicant was interviewed by a consultant and as a result of a further interview with the respondent, including the respondent's manager in this area, Mr Walsh, accepted an offer of employment.

7. The applicant testified that he commenced employment and shortly prior to the expiry of the second contract due to complete on 31 March 2000, he commenced looking for alternative employment. The applicant said that not long after this, he was approached by Mr Walsh and was queried as to why he was seeking other employment. The applicant testified that he was doing so because his contract was coming to and end and he needed to look for other work. It was the applicant's evidence that Mr Walsh said to him words to the effect that "the position was permanent and the contracts were only a formality". I pause to observe that it was common ground that the reason for the overlapping dates in the first and second contracts, was for the purposes of ensuring continuity of employment over the "year 2000" computing phenomenon, causing consternation worldwide at about that time.

8. The applicant testified that for all intents and purposes, his employment with the applicant was continuous, despite the existence of the series of contracts referred to above. He testified that for the purposes of annual leave, annual leave accruals were not paid to him at the end of each contract period but accrued on a continuous basis. The applicant said he took annual leave as if he was in continuous employment. It was also the applicant's evidence in cross-examination, that there was not any discussion with Mr Walsh at the time of the ending of each contract. The applicant testified that some of his contracts were put in his "in-tray" at the office.

9. As a consequence of a performance review meeting in March 2001, the applicant was informed by Mr Walsh that his contract was going to be renewed for a further three months only. The applicant was also aware that the contracts of two other ITSO's were going to be renewed for a period of three months only, from 1 April 2001. The applicant testified that he told Mr Walsh that he was hoping for an extension for six months. The applicant said he was informed by Mr Walsh that the shorter period would take his contract through to the beginning of July, when new shift arrangements would be introduced. The applicant said he thought initially that this made some sense but testified that he still thought he would not get his contract renewed at the end of the three month period. The applicant testified in cross-examination, that he was aware that his employment would not continue, if his staff contract was not renewed. This particular contract was for the period 1 April to 30 June 2001.

10. The applicant gave considerable evidence about his performance reviews and another incident, involving another employee Mr Bath, in which it was alleged that Mr Walsh assaulted Mr Bath, another ITSO, which event was said to be witnessed by the applicant. I do not propose to deal with the detail of these matters, as they are not relevant to the disposition of the preliminary issue.

11. On or about 3 June 2001, it came to the attention of the applicant, that the respondent was seeking to appoint another computing employee in the position of Support Officer. This was apparently a position for a period of six months. The applicant took the view that the position description fitted that of the ITSO position. The applicant testified that he obtained the advertisement for this position, at his home e-mail account, in relation to which he had established certain specified search criteria. This had apparently occurred on other occasions, during the course of the applicant's employment with the respondent.

12. The next relevant event occurred on or about 13 June 2001. A discussion took place on the applicant's evidence, between he and Mr Walsh. The applicant said Mr Walsh invited him into his office and told him that his contract would not be renewed, or words to that effect. The applicant told Mr Walsh that he thought his contract would be renewed for a period of six months and that he considered he had addressed the performance issues raised with him earlier. The applicant's evidence was Mr Walsh told him that there was a breakdown in communication between them and referred to various other incidents that had occurred in the past. At the conclusion of this meeting, the applicant testified Mr Walsh told him that as the respondent was supposed to give him four weeks notice and as there was only two weeks left remaining on the then contract, he would give the applicant a further six weeks, taking the contract to 31 July 2001.

13. A copy of the final contract, dated 13 June 2001 and signed by the applicant on 18 June 2001, was put to the applicant in cross-examination. The applicant accepted that the document put to him had been read and understood by him at the time and he accepted the terms set out therein. The applicant also accepted as a proposition put to him, that by the terms of the contract dated 1 July 2001, that constituted an agreement that he entered into, for his employment to come to an end on 31 July 2001.

14. Prior to entering into this final agreement, the applicant testified that he obtained advice from a registered industrial agent, indeed the same registered industrial agent that represented him in these proceedings. After consulting with those

advisers, the applicant entered into the final agreement as I have mentioned, by his signature on 18 June 2001. Some time later, on or about 25 June 2001, the applicant wrote to Mr Walsh a letter in the following terms, formal parts omitted—

> *"I refer to our discussion on Wednesday 13 June 2001 at approximately 8.30am regarding your new offer of one month's employment for the period 1st July to 31st July 2001.*
>
> *During the course of our discussion you advised that the above mentioned contract would not be renewed on its expiration and consequently I should treat the period 1 July 2001 to 31 July 2001 as four weeks notice of termination.*
>
> *Please confirm in writing, that I have been given notice of termination and your reason for terminating my employment.*
>
> *Your prompt response in this matter will be greatly appreciated."*

15. On or about 3 July 2001, a conversation took place between the applicant and Mr Walsh. Mr Walsh had received the applicant's letter, which was annexure RG8 to exhibit A2, the applicant's main witness statement. Mr Walsh was curious as to the content of this letter, and told the applicant his employment was not being terminated as he was being offered a separate contract. The applicant was not being given notice of termination of employment and the contracts he was employed under, made no reference to any further employment. The applicant also testified that Mr Walsh told him that he was not receiving a further contract because the ITSO position had changed and the applicant was no longer suitable.

16. As a consequence of these events, the applicant invoked the respondent's Fair Treatment procedure, which is an internal review mechanism accessible by employees. The thrust of the applicant's evidence about this process was his contention that the real reason for not having his contract renewed was because he witnessed the event involving Mr Walsh and Mr Bath. One of the issues raised by the applicant, which he testified was suggested to him by the respondent's human resources department, was to seek permanency of employment rather than being appointed on a staff contract basis. It should also be observed, that the applicant's completion of the Fair Treatment system documents, contained at annexure RG 10 to exhibit A2, described the issue he had with the respondent as being the "non-renewal of his contract". The outcome that he sought from the process was a "permanent position (not staff contract)".

17. The applicant also gave evidence about his involvement in an investigation concerning the incident between Mr Bath and Mr Walsh. Mr Bath had made a formal complaint about Mr Walsh's conduct, and referred to the applicant being in the vicinity at the time of the incident. As a result, a person from the respondent's human resources department contacted the applicant to speak with him about the matter. Prior to this, the applicant said Mr Bath had contacted him to let him know that he may receive such a telephone call. The applicant's evidence was that he told Mr Bath that as he was on a staff contract he did not want to get involved and what he meant by this, was that he would not have his contract renewed if he gave a statement damaging to Mr Walsh. Similar sentiments were expressed by the applicant to the respondent's human resources officer when he spoke to her about the incident.

18. There was also evidence from the applicant in cross-examination concerning his dealings with one of the respondent's human resources advisers, Ms Taylor. This arose in the context of the fair treatment process, in relation to which, Ms Taylor was to take notes of the various meetings. The evidence was that the applicant on several occasions asked Ms Taylor whether she was a contract employee or not. The applicant admitted asking Ms Taylor these questions, because of his belief that if she was on a staff contract, she may be influenced to take inaccurate notes, out of fear that her contract may not be renewed, and her employment would cease as a result. This was confirmed in Ms Taylor's evidence. The applicant further conceded in cross-examination, that he was in the same position and was aware that his employment would not continue unless his contract was renewed.

19. At the conclusion of the Fair Treatment process, the senior management of the respondent who reviewed the applicant's position concluded that the applicant was not unfairly dealt with and the respondent's decision that the applicant's employment cease at the expiration of his last agreement on 31 July 2001 stand. The applicant's employment came to an end on this day.

20. Mr Walsh holds the position of Superintendent Information Systems and Technology Operation Services with the respondent. Mr Walsh is ultimately responsible for the work of the ITSO's.

21. Mr Walsh gave evidence about the restructuring of the respondent's information technology department to introduce what was called "thin client", being a technology for delivering applications remotely. He testified that this project commenced in about October 1999 and was ultimately "rolled out" in about February 2001. The effect of this change on Mr Walsh's evidence, reduced the number of ITSO's required to service the respondent mine site at Argyle. Additionally, Mr Walsh said that the competencies for the role of ITSO'S changed, in that in particular they would be required to work unsupervised and a greater emphasis was placed on providing what he termed business solutions, rather than simply technical skills.

22. It was Mr Walsh's evidence that he regularly told the ITSO's about the introduction of these changes. He testified that the need for continued improvement in performance for ITSO's was emphasised. Mr Walsh said that he commenced counselling four ITSO's, including the applicant, who were not in his opinion, meeting their performance expectations.

23. Mr Walsh gave evidence about the initial employment of the applicant. He testified that the applicant's initial engagement was to assist with problems that the respondent was having at that time, with remote access for computing users.

24. According to Mr Walsh, the applicant had skills suitable for this position and was engaged on a six month contract. It was Mr Walsh's evidence that the introduction of "thin client" was delayed due to technical difficulties and until its introduction in January 2001, there continued to be a need to provide remote access services from his department.

25. Evidence was also given by Mr Walsh about various performance review meetings in 2000 which raised concerns about the applicant's performance and behaviour. Mr Walsh testified that with fixed term contract employees, he assessed their performance against key performance indicators and made a judgement as to whether a new contract would be offered, subject to that performance. He also said that the contract renewal process did involve negotiation of rates of salary with the applicant relative to the market, which were then recommended and approved by the respondent's general manager. Mr Walsh could not recall the last permanent ITSO position because of what he described as the state of flux in the information technology area, for example, with the possibility of outsourcing of the whole information technology function.

26. As a consequence of the various performance reviews during the year 2000, in about February or early March 2001 Mr Walsh determined that the applicant and three other ITSO's be offered three month contracts and not six month contracts because they had not performed to expectations both prior to and after the introduction of "thin client", in some cases. Mr Walsh gave evidence about how he informed the applicant of this. He testified that on 14 March 2001 he was present on the Argyle mine site and on the afternoon of that day met with the applicant and informed him that he would be offered a

three month contract with no salary increase. Mr Walsh said that at this time, he told the applicant that the "roll out" of "thin client" would take a further three months and during this time, his performance would be further assessed. A further meeting took place on or about 26 March 2001 to discuss the applicant's performance. At that meeting Mr Walsh affirmed the three month contract being offered was because performance had not met expectations.

27. In early June 2001, in order to determine staffing requirements for ITSO's after the introduction of "thin client", Mr Walsh requested team leaders in the department to undertake a forced ranking exercise, to rate the performance and suitability of the ITSO staff. From this process, which was primarily generated by the team leaders and not Mr Walsh, the applicant was at the lower end of the ranking process, in the respondent's view. It was Mr Walsh's evidence, that the general view of the team leaders was that the applicant should not be retained in the future.

28. Subsequently, on 13 June 2001, Mr Walsh met with the applicant. He advised the applicant that the respondent would offer him a renewal of his contract for a further period of one month after which there would be no further contracts offered. Mr Walsh testified that the reasoning behind this was that as he had only at that time been able to meet with the applicant, because he had been previously overseas, he felt it would be fairer to give the applicant more time to make other arrangements, in light of the respondent not extending his employment further. Mr Walsh described the offer as a one month extension of his contract to 31 July 2001. It was Mr Walsh's evidence that he also explained to the applicant that he had not demonstrated the required improvement in his performance in the areas of his ability to work without supervision; his ability to work as an effective member of a team; and his lack of customer focus. In his evidence, Mr Walsh denied a number of the assertions of the applicant, including that Mr Walsh laughed during this meeting, referred to a breakdown in communications and that the applicant commented that he thought his contract would be renewed for six months and he had improved his performance. Furthermore and in particular, Mr Walsh denied previously ever having said to the applicant that he regarded him as permanently employed and that the contracts entered into were merely a formality.

29. Mr Walsh also gave evidence about the letter received from the applicant dated 25 June 2001, referred to above. He testified that during the meeting on 3 July, he confirmed with the applicant that he had not been dismissed and that he was only offering a one month contract for the reasons he had previously stated to the applicant. Mr Walsh denied a number of assertions about this meeting, contained in the applicant's witness statement.

30. In particular, Mr Walsh in his evidence strenuously denied that his decision to not offer any further ongoing contracts for the applicant, related in any way to the incident involving Mr Bath.

Contentions

31. The agent for the applicant, Mr Richardson, in very lengthy written submissions of some 232 pages, raised a number of contentions. I will only deal with those contentions relevant for the purposes of determining the preliminary issue. Those contentions however, also went to the merits of the matter as to whether the applicant was unfairly dismissed, and additionally, extensive written submissions were made to the effect that the decision of the Industrial Appeal Court in *City of Geraldton v Cooling* (2000) 80 WAIG 275, which held that the Commission has no power to make an order for lost remuneration in an unfair dismissal case, was wrong. I should add in this regard, that the agent for the applicant recognised that the Commission as presently constituted was bound by the decision in *Cooling*, but submitted that the Commission should, but for that decision, express the view that an order of remuneration lost in an unfair dismissal case, is within power.

32. For the purposes of the issue of jurisdiction, the applicant's agent made a number of submissions. It was said that on the evidence, there was in reality an ongoing employment relationship between the applicant and the respondent and indeed, a continuous contract of employment, despite the offer and acceptance of separate contracts of employment. In this regard, reliance was placed by the applicant on a number of decisions of the Industrial Relations Court of Australia arising under the Commonwealth legislation, and several decisions of the Australian Industrial Relations Commission. In particular, reliance was placed on *D'lima v Board of Management, Princess Margaret Hospital for Children* (1995) 64 IR 19.

33. In *D'lima*, the Court held that an employee engaged over the period June 1993 to December 1994 on "rolling" monthly short term contracts, was in reality continuously employed over that period and the short term contracts were for administrative convenience and did not detract from the continuous employment. The significance of this matter being for the purposes of that case, was the then regulation 30B(1)(a) of the Industrial Relations Regulations, which excluded from the unfair dismissal provisions of the Commonwealth legislation, an employee engaged under a contract of employment for a specified period of time.

34. Reference was made to a number of other decisions of the IRCA including *Strecker v Metropolitan Cemeteries Board* (1995) 64 IR 109; *Fisher v Edith Cowan University* (1996) 70 IR 206; *Fisher v Edith Cowan University* (No 2) (1997) 72 IR 464; *Cooper v Darwin Rugby League Inc* (1994) 57 IR 238 and *Anderson v Umbakumba Community Council* (1994) 56 IR 102. The thrust of the applicant's submissions in this regard was that the staff contracts entered into between the applicant and the respondent did not truly reflect the relationship between the parties, which was in truth and substance, a single ongoing contract of employment. It was submitted that the staff contracts between the applicant and the respondent were no more than a device to enable the respondent to exercise control over such employees and to enable it to evade obligations such as redundancy payments and unfair dismissal remedies.

35. The applicant next submitted that he should have been entitled to benefits of permanent employment, by reason of incorporation of the respondent's human resources policies into the contract of employment between the applicant and the respondent. As the Commission understood the submissions, this was founded on the proposition that the reference to "conditions", in the contracts, the first of which is set out above in these reasons, expressly incorporates by reference, the content of the respondent's human resources policies and procedures. As the submission went, because one of those policies dealing with recruitment and selection, tendered as exhibit A13, referred to "permanent conditions" applying where a role was ongoing, given the circumstances of this matter, the applicant ought to have been afforded permanent conditions as a term of his contract of employment with the respondent. In this connection, reliance was placed by the applicant on *Gunton v London Borough of Richmond upon Thames* (1980) 3 All ER 577.

36. In *Gunton*, the Court of Appeal held that the dismissal of a local government employee was wrongful at law because the employer failed to follow a procedure specified by regulation in relation to dismissals arising from breaches of discipline. The employee's contract of employment, by way of letter of appointment, contained a provision that said that the employment would be subject to any regulations made by the employer from time to time. The plaintiff in that case was awarded damages for the defendant's repudiation of the contract, in dismissing the employee without following the prescribed procedure.

37. The applicant's submissions were therefore, that as reference was made to permanent, contract or casual engagements in the human resources policies, and permanent conditions were contemplated where a role is ongoing, it followed that the applicant had a contractual entitlement to permanent staff benefits. This therefore meant, as the Commission understood the submissions, that the employment of the applicant was ongoing and permanent, and the respondent, in not continuing the applicant's employment beyond 31 July 2001, dismissed the applicant.

38. As to the meaning of "dismissal" for the purposes of s 29(1)(b)(i) of the Act, the agent for the applicant submitted that the relevant act of "dismissal" for the purposes of enlivening jurisdiction in this Commission is the act of giving notice and not the expiry of notice and termination of the contract of employment. In this regard, reference was made to a number of decisions of the IRCA, the South Australian Industrial Relations Commission, the Federal Court and decisions of this Commission, including the Industrial Appeal Court. To the extent that the Full Bench of this Commission in *CMETSWU v Robe River* (1994) 74 WAIG 851, concluded that a dismissal is not complete when notice is given until the notice expires, that matter was said to be wrongly decided. It was also submitted that this was the case with respect to another decision of the Full Bench, in *Alexander v Kirkham* (2001) 81 WAIG 3017. In both of those cases, the Full Bench concluded that a "dismissal" is the termination of a contract of employment, and not the giving of notice.

39. The significance of this proposition, as the applicant's submissions went, was that on the evidence, at the meeting between Mr Walsh and the applicant on 13 June 2001, when he advised the applicant that his contract of employment due to expire on 30 June 2001 would be extended for one month to 31 July 2001, this constituted a "dismissal", as this constituted notice that the employment relationship was going to be terminated. Additionally, the applicant submitted that by reason of the incorporation of the human resources policies as to termination of employment, into the applicant's contract of employment, the "dismissal" was also wrongful, it not complying with those requirements.

40. Counsel for the respondent Mr Ellis, made a number of submissions both written and oral. As to the question as whether the applicant was "dismissed", counsel referred to and relied upon the observations of Bleby J in *Advertiser Newspapers Pty Ltd v Industrial Relations Commission of South Australia and Another* (1999) 90 IR 211 at 216, to the effect that where there is a voluntary abandonment of employment or where a contract of employment terminates by agreement or effluxion of time, there is no dismissal. Reference was also made to a decision of the Full Bench of this Commission in *State School Teachers Union of Western Australia (Inc) v Chairman Hedland College Council* (1987) 67 WAIG 1118 at 1120.

41. The respondent's submission in this regard was that the terms of the final contract of employment for 1 July 2001 to 31 July 2001, as contained in exhibit A 9, were plain and unambiguous in its terms, and clearly provided that the contract would terminate by effluxion of time on 31 July 2001, and this was stated in the opening words in the agreement itself. The submission further was that the applicant, in executing this agreement, acknowledged he had "read and accepted the terms and conditions of the contract at that time", as his own evidence made clear.

42. Counsel submitted that there was no basis for the Commission to conclude that the terms of the written instrument do not reflect the real agreement between the parties or otherwise were a sham arrangement. The respondent distinguished the circumstances present in this matter, from those before the Federal Court in *D'lima*. It was further said that in any event, regardless of the final agreement entered into, that the existence of "back-to-back" contracts does not of itself, without more, mean that at the conclusion of the final contract, there is a "dismissal*: Fisher*; *Fisher* (No 2).

43. Counsel for the respondent said that in the circumstances of this case, there is no warrant from departing from the plain language of the agreement freely entered into by the applicant.

44. The respondent also submitted that on the evidence, which was largely uncontested on this point, the applicant well knew the terms of the arrangement he was finally entering into with the respondent, through Mr Walsh. The applicant, according to the submissions of the respondent, was well aware that on 31 July 2001 his employment would come to an end with the respondent and this was consistently reflected in the evidence from the applicant himself.

45. As to the issue as to whether the respondent's human resources policies were incorporated into the applicant's contract of employment, which ever contract that may have been, this suggestion was refuted by the respondent. Counsel submitted that the human resources policies did not form part of the contract of employment between the applicant and the respondent. It was submitted that the relevant provision contained in the letters of appointment for the applicant, dealing with these policies, did not purport to impose any legal obligation on either parties but was informative. The respondent compared and contrasted this provision with clauses dealing with "Company rules and regulations", which suggested that these conditions were binding on an employee. In this regard, reference was made to *Riverwood International Australia v McCormick* (2000) 177 ALR 193. The respondent's submission was that taken as a whole, the language used in the human resources policies was informative and acted as a guide for management in dealing with human resources issues.

46. Further and in any event, the counsel for the respondent submitted that even if the human resources policies did have contractual effect, then the terms of the letter of appointment, being the primary contractual document, would prevail to the extent of any inconsistency, in particular in relation to the end date of the applicant's employment: *Glynn v Margetson & Co* (1993) AC 351 at 358. It was also submitted that the termination of employment provisions of the human resources policies did not apply where a contract came to an end by effluxion of time.

47. As to the relevance of contracts prior to 1 July 2001, which the respondent said were not relevant, it was submitted that there was evidence that there were clear negotiations between the parties prior to the expiry of each contract as to remuneration and duties.

48. The respondent also submitted that whether or not the applicant took annual leave during the terms of his various engagements, was not determinative and in any event, it was the final arrangement ending on 31 July 2001, that determined the applicant's employment. The submission also was that concepts of "fixed term contract" and contracts for "a specified period of time" were not relevant for the purposes of determining the present matter, given the terms of the Act.

Consideration

49. To the extent that findings of fact are necessary to determine this preliminary issue, there was some conflict on the evidence between that given by the applicant and in particular, Mr Walsh. Where there was such a conflict, I have no hesitation in preferring the evidence of the respondent. I found aspects of the applicant's evidence to be quite unsatisfactory. In particular, I have grave reservations about the evidence given by the applicant concerning his practice of taking and amending file notes, many of which were annexed to his various affidavits filed in these proceedings. It was apparent to the Commission, that on several occasions at least, the applicant adopted the practice of making amendments to file notes, well and truly after relevant events described in them, tailored to suit his circumstances. Furthermore, I have real doubts about aspects of the applicant's evidence, when he was questioned by counsel for the respondent, about these matters.

50. Accordingly, I am satisfied on the evidence and I find that the applicant was engaged under a series of contracts of employment for nominated specified periods of time. It is trite to observe however, that whilst the contracts of employment nominated a commencement and end date, given that by an express term, each of the contracts could be terminated by one months notice on each side, they were clearly not fixed term contracts, in the strict sense: *BBC v Ioannou* (1975) 1 QB 781.

51. I also accept on the evidence that whilst the contracts were "back-to-back" as it were, I accept Mr Walsh's evidence that the contracts were not simply administrative convenience tools, left in the applicant's "in-tray" as the applicant suggested that they were, from time to time. I am satisfied on the evidence that there was consideration of the terms and conditions of subsequent contractual arrangements, prior to the expiry of each specified period and there was discussion with the applicant, and indeed, others on such arrangements, about their on-going terms. I expressly reject the applicant's assertion in his evidence, to the effect that Mr Walsh described the applicant's employment as "permanent" and the contracts "a mere formality".

52. I am also satisfied that in discussions between Mr Walsh and the applicant, leading to the second last agreement commencing 1 April 2001, it was made plain to the applicant that his on-going employment with the respondent was being renewed for a period of three months only, and the applicant well understood this. I accept that the applicant was told the reasons why this was so, and he accepted it on this basis.

53. As to the events which occurred on or about 13 June 2001, I am satisfied and I find, that a meeting took place between Mr Walsh and the applicant, at which the applicant was informed that his employment would be continued for one month only from 1 July to 31 July 2001, and would thereafter cease. I am satisfied on the evidence that it was on this basis that the applicant accepted the offer from the respondent, evidenced by the terms of the contract document contained in exhibit A9, for his employment to come to an end on and from that date. I also accept and find that the applicant was well aware of this, as evidenced by his subsequent dealings with representatives of the respondent, concerning a range of matters including the Fair Treatment review process; inquiries undertaken into the incident with Mr Bath and the applicant's own evidence as to his understanding about the effect of the final agreement he entered into with the respondent.

54. I also find that Mr Walsh did tell the applicant during the course of the meeting on 13 June, that the applicant's employment contract would be extended for a further one month only. Furthermore, I find that the reason for this was as stated by Mr Walsh, in his evidence.

55. I now turn to the law on this issue. For the purposes of s 29(1)(b)(i) of the Act, an applicant must be "dismissed". There is no definition in the Act as to the meaning of dismissal, and one therefore considers the common law in this jurisdiction as to its meaning.

56. In *Metropolitan (Perth) Passenger Transport Trust v Gersdorf* (1981) 61 WAIG 611, the Industrial Appeal Court, in the context of considering whether there was an inconsistency between the terms of a federal award and the State legislation for the purposes of s 109 of the Commonwealth Constitution, commented on the meaning of "dismissal". Smith J, in dealing with this matter, observed at 616—

> *"The meaning attributed by the Shorter Oxford Dictionary to the verb "dismissed" is "to send away or remove from office, employment, or position.*
>
> *Speaking of the meaning of the word "dismissal" in Auckland Transport Board v Nunes (1952) NZLR 412 Fair J said at P410:*
>
> > *"The word "dismissal" may be used in a sense of a peremptory or arbitrary dismissal or a dismissal after due notice or payment under the terms of the contract of employment."*
>
> *Being qualified as the verb "dismissed" is in the context in which it appears in s 29(2)(a) by the adverb "unfairly" it seems to me that the subsection is designed to apply to all dismissals, whether wrongful or lawful at common law."*

57. These observations have been referred to and applied extensively in this jurisdiction by the Commission constituted both as the Full Bench and members of the Commission sitting alone.

58. In my opinion, the meaning of "dismissed", in its ordinary and natural sense, is to be applied for the purposes of an unfair dismissal claim in this jurisdiction. This also appears to have been the position in New South Wales and also in South Australia: *Smith v Director-General of School Education* (1993) 31 NSWLR 349 at 365; 51 IR 204 at 219; *Advertiser Newspapers* per Bleby J at 215 - 216.

59. Furthermore, it has been consistently held by the Full Bench of the Commission, that the giving of notice by an employer does not, by that Act alone, constitute a "dismissal", but is part of the process, completed when termination of the employment occurs, contrary to the submissions of the agent for the applicant. In *CMETSU*, the Full Bench, in considering the meaning of "dismissal" referred to *Gersdorf* and the passage I have referred to above and continued at 858 as follows—

> *"That demonstrates what is, we think, quite obvious. A dismissal occurs in a case where notice is given when the whole event of giving notice, of time expiring, and the notice upon that expiry of time taking effect, occurs. Giving notice does not effect a dismissal contemporaneous with the giving of notice, unless it is a summary dismissal. A decision to give notice is not a dismissal, but part only of the process."*

60. Some support for the applicant's view that the act of giving notice constitutes a "dismissal", was sought to be obtained from a decision of the Full Court of the Supreme Court of South Australia *Gribbles Pathology (Vic) Pty Ltd v Allan* (1992) 42 IR 245. In particular, some reliance was placed upon observations of Olsson J at 248 - 249, that the act of "dismissal" is different to and may precede the time at which a "dismissal takes effect", as those terms were used in the then s 31 of the Industrial Relations Act 1972 (SA). It is of note however, that Olsson J's comments were obiter, and additionally, he did not express any concluded view, in the absence of full argument before the court.

61. In *Fryar v Systems Services* (1995) 60 IR 68, Wilcox CJ and Beazley J, expressed the strong view, at 84, that the approach to s 31 of the South Australia legislation, taken by Bray CJ in *R v Industrial Court (SA)*; *Ex parte General Motors - Holden Pty Ltd* (1975) 10 SASR 582, that "dismissal" means when it takes effect, was correct, although recognising the argument to the contrary.

62. Moreover, it is important to also observe, that the terms of the statute then under consideration, is different to the terms of s 29(1)(b)(i) of the Act and caution must always be exercised when reviewing authorities from other jurisdictions, dealing with different statutory provisions. In particular, the Act in this State refers to "unfairly dismissed from his employment", in the past tense, and not "dismisses", in the present tense, as that phrase was used in the South Australia legislation. In my opinion, adopting the ordinary and natural meaning of that phrase, it clearly conveys the meaning that the employee is, to refer to the Shorter Oxford dictionary definition, "sent away" from his or her employment. Whilst interesting legal

questions arise as to the distinction between termination of the employment relationship and the contract of employment, which is not necessary to deal with in this case, clearly in my opinion, it is the former that is referred to when regard is had to the whole tenor of s 29(1)(b)(i) of the Act in this State.

63. I therefore reject the applicant's submissions in this regard.

64. Therefore, I also reject that submission of the applicant, that even if the conversation between Mr Walsh and the applicant on 13 June 2001 could be characterised as notice of termination of employment, which I do not consider it was, then that would have the effect of constituting a dismissal of the applicant.

65. In my opinion, the proper character of the events that unfolded on 13 June 2001 is as follows. The contract of employment for three months would come to an end on its expiry. Given the timing of the discussion, the respondent offered, and on the uncontradicted evidence of the applicant himself, he accepted an arrangement to give him one further month's employment from the expiry of the second last contract on 30 June 2001.

66. I unreservedly reject the applicant's attempt to characterise the discussion between Mr Walsh, and the applicant, as a dismissal, in order to ground jurisdiction for the purposes of his unfair dismissal claim. In that regard, I have substantial reservations about the applicant's evidence, and his conduct at that time, to attempt to portray what occurred as a dismissal by the respondent, when in my opinion, and on his own evidence, he was well aware that he entered into an agreement with the respondent from 1 July 2001, for a period of employment that would come to an end, either by agreement, or the effluxion of time, on 31 July 2001, which is precisely what happened on the evidence. In particular, annexure RG08 to exhibit A2, the applicant's letter of 25 June 2001 to Mr Walsh, that I have referred to above, is, in the light of all of the evidence, at best an attempted gloss on the events.

67. In summary, as to the events between 13 June 2001 and 31 July 2001, and more particularly from 1 July 2001, I am of the opinion that the applicant's employment, by express agreement between him and the respondent, came to an end in accordance with its own agreed terms, on the final day of the applicant's employment, that being 31 July 2001. There being a termination of the employment by agreement, alternatively by effluxion of time, there was no "dismissal" for the purposes of the Act, at that time, or indeed on 13 June 2001, as the applicant contended, to ground jurisdiction in this matter.

68. Whilst it is therefore unnecessary for me to consider the effect of the previous contractual arrangements entered into prior to 1 July 2001, in my opinion, the circumstances present in these proceedings, stand in stark contrast to those before the IRCA in for example, *D'lima*. I am not persuaded to any extent, in the present context, that the contractual arrangements between the applicant and the respondent were in any way a form of sham transaction that did not represent the true arrangement between the parties. In particular, in this case, the employment terminated when it did, as a consequence of the agreement reached between the applicant and the respondent, much like the case that occurred in *Fisher*.

69. In any event, considerable caution must be exercised in applying authorities dealing with different legislative provisions. In particular, I refer to the decisions relied on by the applicant arising under the federal unfair dismissal provisions. In the case of the federal legislation, the relevant provisions were and are, to an extent, underpinned by the ILO Termination of Employment Convention and the Termination of Employment Recommendation 1982 and the meanings adopted in the legislation as to "termination of employment", being that as used in the ILO instruments. This was certainly the case in the authorities relied upon by the applicant. Indeed, this was a point recognised by Bleby J in *Adelaide Advertisers* at 228-229, when comparing the federal and South Australian legislation.

70. As to the incorporation argument advanced by the applicant, even if the respondent's human resources policies were incorporated into the applicant's contract of employment, which in my opinion it is strongly arguable they were not, they would not in my view, have the effect contended by the applicant. I do not consider that the terms of the policy dealing with "Termination of Employment With or Without Notice", had any application to the applicant's circumstances. I do not consider that a provision such as this has any application to circumstances where employment comes to an end by agreement or by the effluxion of time. Read in terms of the ordinary and natural meaning of the words used in the policy, it clearly applies in my opinion, to termination of the employment of an employee by the respondent for cause, whilst an employment contract is extant. The language of the "general purpose" part of the policy, taken in the context of the remainder, makes this clear in my view.

71. Furthermore, as to the argument, as I apprehended it, that the respondent in some way committed a breach of the applicant's contract by not employing him on a permanent basis, this proposition is in my opinion, misconceived. Firstly, it is difficult to see how such an alleged contractual obligation could ever arise prior to the engagement of an employee. Secondly, even if it could be concluded that the terms of the policies were incorporated into the applicant's contract of employment, I do not read that part of it dealing with the basis of the engagement of employees as being or as being intended to have contractual effect. The language and tenor of the relevant provisions is couched in terms of guidance notes to management as to the suggested approach to employment, depending on the type of role contemplated.

72. Thirdly, even if the terms of this part of the policy had contractual effect as contended by the applicant, in my opinion, such a provision must be read in the context of the entire agreement between the parties, not just some of it. In particular, the final letter of engagement makes it plain that the parties turned their mind to the date upon which the employment was going to come to an end, reached an agreement to this effect and that was the uncontradicted evidence. The immediate terms of the contract of employment as to term were spelt out unambiguously and to the extent that they could be said to conflict with the policies as to term, they would prevail in my view: *Glynn and Others v Margetson & Co and Others* (1893) AC 351 per Lord Herschell at 354-355 and Lord Halsbury at 358.

73. I do not therefore consider that the applicant's contractual claims, as they appeared to be advanced, have any merit.

74. It is unnecessary for me and I do not express any view on the other submissions of the applicant, including those going to the decision of the Industrial Appeal Court in *Cooling*.

75. For all of the foregoing reasons, the application is dismissed.

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2002 WAIRC 06829

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ROBERT GALLOTTI, APPLICANT
	v.
	ARGYLE DIAMOND MINES PTY LTD TRADING AS ARGYLE DIAMONDS, RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	THURSDAY, 24 OCTOBER 2002
FILE NO/S.	APPLICATION 1455 OF 2001
CITATION NO.	2002 WAIRC 06829

Result	Application dismissed
Representation	
Applicant	Mr M Richardson as agent
Respondent	Mr S Ellis of counsel

Order

HAVING heard Mr M Richardson as agent on behalf of the applicant and Mr S Ellis of counsel on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders—

THAT the application be and is hereby dismissed.

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

2002 WAIRC 06885

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	JACQUELINE CAROL HOLM, APPLICANT
	v.
	SHIRE OF GIN GIN, RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	WEDNESDAY, 16 OCTOBER 2002
FILE NO/S.	APPLICATION 834 OF 2002
CITATION NO.	2002 WAIRC 06885

Result	Application dismissed
Representation	
Applicant	Mr R Clohessy as agent
Respondent	Mr M Richardson as agent

Reasons for Decision

(Extempore)

1 Presently before the Commission is an application pursuant to s 27(1)(a) of the Industrial Relations Act 1979 ("the Act"), which application seeks the dismissal of the substantive proceedings in this matter. The substantive application is an application by Jacqueline Carol Holm against the Shire of Gin Gin that she was harshly, oppressively and unfairly dismissed from her employment as a principal planner on or about 30 April 2001.

2 The present application was filed on 13 September 2002. The grounds in support of the application for dismissal pursuant to s 27(1)(a) of the Act are, in short, that there are currently on foot concurrent proceedings in the Australian Industrial Relations Commission ("the AIRC") by which the applicant alleges that her dismissal was harsh, unjust or unreasonable. There is no suggestion in submissions before the Commission in this application, that any alternative relief is being sought in the federal proceedings, and indeed, there was no alternative relief being sought in the substantive application in this jurisdiction.

3 Both applications were apparently commenced on or about 16 May 2002. There was some suggestion in submissions that the application in the AIRC was filed some time shortly prior to the application in this jurisdiction, but on the same day.

4 The Commission was informed by the industrial agents representing the parties that the proceedings in the AIRC have progressed beyond the conciliation stage and the Commission was informed that there are proceedings to take place before a member of the AIRC at some point in the near future, it seems, as to jurisdiction.

5 In relation to that matter, the point of jurisdiction taken in the proceedings in the AIRC as the Commission was informed, relates to whether or not the applicant was dismissed. I note from the notice of answer and counter proposal and it is common ground, indeed, in these proceedings, that the very same issue is taken in relation to the Commission's jurisdiction to entertain the present substantive application, that is, whether the applicant was dismissed to enliven the jurisdiction of this Commission. That is, it appears to the Commission that the issue to be determined is the same in these proceedings and in the proceedings in the AIRC.

6 I turn to the relevant principles in relation to applications such as these. The Full Bench of this Commission in the matter of *Fitzpatrick v Baulderstone Clough Joint Venture* (1999) 79 WAIG 2310 dealt with an appeal from a member of this Commission who dismissed an application pursuant to s 27(1)(a) of the Act in circumstances not dissimilar to those before me in this application. Perhaps the distinguishing point to be drawn, however, is that in the proceedings in issue before the Full Bench it was a matter of record that there was no jurisdictional point taken in proceedings before the AIRC.

7 In that matter both sets of proceedings, both in this Commission, and in the AIRC, involved an unfair dismissal application and the same relief was sought as is the case in these proceedings. The Full Bench dismissed the appeal. The Full Bench, including as a member the Commission as presently constituted, took the view that the Commissioner at first instance did not err in the exercise of his discretion to dismiss the matter before him at that time.

8 I adhere to the views that I expressed in that matter at 2312 in relation to the application of the relevant principles for the purposes of these proceedings.

9 In the instant case, whilst a point of jurisdiction has been raised in the application in the AIRC, it is the same question that is being raised in these proceedings, that is, whether the applicant was dismissed or whether the employment contract came to an end by effluxion of time. In other words, the proceedings before this Commission and the proceedings before the AIRC are identical in character in that they arise out of the same set of facts, the same circumstances, and indeed, the same question has been raised before both tribunals.

10 Whilst the industrial agent for the applicant referred the Commission to s 29AA of the Act as it now is, introduced by the Labour Relations Reform Act 2002, without expressing any concluded view on the application of that particular provision, the applicant would need to persuade the Commission that s 29AA is retrospective in operation. In my view, even if it could be said that s 29AA is retrospective, in particular, subsection (2), that subsection appears to be directed to matters other than those presently before the Commission and I do not read that provision as precluding the application of the principles to which I have referred, in particular as established by the Full Bench in *Fitzpatrick*.

11 I do note also that the industrial agent for the applicant raised the prospect in submissions before the Commission of the withdrawal of the present substantive application on the basis that the respondent not oppose any attempt to reinstate the applicant's claim at a later date. Such an undertaking was not forthcoming from the agent for the respondent and that therefore being the case the applicant did not pursue that matter.

12 I should also note that the applicant sought to adjourn these proceedings in view of those before the AIRC.

13 In my opinion, the principles dealt with in *Fitzpatrick* by the Full Bench apply with equal force to these proceedings. There is no jurisdictional point taken in the federal proceedings that is peculiar to the federal legislation. I am not persuaded that having regard to those principles, and ss 26(1)(a) and (c) of the Act, that the Commission should not exercise its powers pursuant to section 27(1)(a) to dismiss the application.

14 In my view such an order should issue and therefore the substantive application is dismissed pursuant to s 27(1)(a) of the Act.

2002 WAIRC 06890

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	JACQUELINE CAROL HOLM, APPLICANT
	v.
	SHIRE OF GINGIN, RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE OF ORDER	THURSDAY, 31 OCTOBER 2002
FILE NO/S.	APPLICATION 834 OF 2002
CITATION NO.	2002 WAIRC 06890

Result	Application dismissed.
Representation	
Applicant	Mr R Clohessy as agent
Respondent	Mr M Richardson as agent

Order

HAVING heard Mr R Clohessy as agent on behalf of the applicant and Mr M Richardson as agent on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders—

THAT the application be and is hereby dismissed.

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

2002 WAIRC 06779

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	DEBORAH CARON DAY LARKIN, APPLICANT
	v.
	BORAL CONSTRUCTION MATERIALS GROUP LIMITED, RESPONDENT
CORAM	COMMISSIONER J H SMITH
DELIVERED	FRIDAY, 18 OCTOBER 2002
FILE NO.	APPLICATION 290 OF 2002
CITATION NO.	2002 WAIRC 06779

Result	Application that the Applicant was harshly, oppressively and unfairly dismissed and owed award and contractual benefits dismissed.
Representation	
Applicant	Mr M Richardson (as Agent)
Respondent	Mr D Jones (as Agent)

Reasons for Decision

1 Deborah Caron Day Larkin ("the Applicant") made an application under s.29(1)(b)(i) and (ii) of the *Industrial Relations Act 1979* ("the Act") claiming that she was summarily dismissed by Boral Resources (WA) Ltd ("the Respondent") on 22 January 2002. The Applicant claims that on 21 January 2002 she commenced work for the Respondent on a fixed term contract of employment as a temporary, full-time employee for five days from 21 to 25 January 2002 inclusive. The Applicant says her employment was governed by the Clerks (Commercial, Social and Professional Services) Award No 14 of 1972 ("the Award").

2 It is common ground that the Applicant was dismissed because the Applicant refused to undertake drug and alcohol testing. The Applicant contends that the Respondent had no right to coerce or demand that the Applicant take a drug or alcohol test as it was never a condition of her employment that she be required to undertake random drug and alcohol tests.

3 The Applicant says that she was engaged for a series of fixed term contracts by the Respondent to carry out accounts and clerical work from 1 October 1998 until her employment was terminated.

4 The Applicant seeks the following remedies in respect to her claim that she was harshly, oppressively or unfairly dismissed—

(a) An order pursuant to s.23A(1)(a) that the Respondent pay to the Applicant the amounts to which she is entitled to be paid under the Award in respect of accrued annual leave, sick leave and public holidays where these amounts are greater than the amounts to which she was entitled under the *Minimum Conditions of Employment Act* 1993. The Applicant contends that there are amounts that she was entitled to be paid under the Award in relation to a number of fixed term contracts. The first of which commenced on 1 October 1998. The basis of the Applicant's claim for amounts to which she is entitled under the Award is that she claims at law she was engaged on each occasion as a temporary full-time employee for a specified period or a specified task, but she was paid as a casual employee. As she was paid as a casual employee she was not paid accrued annual leave, sick leave or for public holidays;

(b) In the alternative to (a), the Applicant seeks an order pursuant to s.23A(1)(a) that the Respondent pay to the Applicant the amounts that she is entitled to be paid under the *Minimum Conditions of Employment Act* in respect of accrued annual leave, sick leave and public holidays;

(c) An order pursuant to s.23A(1)(a) that the Respondent pay to the Applicant the amount to which she is entitled in respect of superannuation contributions;

(d) An order pursuant to s.23A(1)(ba) that the Respondent pay to the Applicant compensation for loss caused by the dismissal, being the loss of the opportunity to be employed by the Respondent on future contracts of temporary full-time employment; and

(e) An order pursuant to s.23A(1)(ba) that the Respondent pay to the Applicant compensation for injury caused by the dismissal.

5 The Applicant's principal contention is that she was employed by the Award. It is conceded that if the Commission determines that the Award applies that there are no amounts outstanding under the *Minimum Conditions of Employment Act*.

6 The Applicant also claims under s.29(1)(b)(ii) that she is owed a benefit to which she is entitled under her contract of employment (not being a benefit under an award or order), namely that the Respondent failed to pay her remuneration for the three days from 23 to 25 January 2002.

Name of the Respondent

7 Prior to the hearing of this matter Mr Jones on behalf of the Respondent advised the Commission that the Applicant was employed by Boral Resources (WA) Limited from the 1 October 1998 until 30 June 1999 and by Boral Construction Materials Group Limited from 1 July 1999 to 22 January 2002. At the commencement of proceedings the Applicant tendered pay slips received by her when she was engaged on each occasion. Those payslips indicate that from pay periods ending 29 June 2001 the Applicant was employed by Boral Resources (WA) Limited. The Respondent however, produced evidence that since June 1999 the Applicant has been employed under a number of separate contracts by Boral Construction Materials Group Limited. After hearing the evidence the Respondent conceded and the Applicant sought an amendment to the name of the Respondent to amend the name of the Respondent from Boral Resources (WA) Limited to Boral Construction Materials Group Limited as the evidence met the criteria set out to amend the name of the Defendant in *Rai v Dogrin Pty Ltd* (2000) 80 WAIG 1375 and *Bridge Shipping Pty Limited v Grand Shipping SA & Another* (1991) 173 CLR 231. Accordingly the Commission advised the parties that it would amend the name of the Respondent. In light of the Applicant's evidence that her full name is Deborah Caron Day Larkin the Commission will also make an order to amend the name of the Applicant.

The Applicant's Evidence

8 Mrs Rona Day, the Applicant's mother, testified that she was employed as the credit manager for Boral Resources (WA) Pty Ltd until she retired in December 1999. Mrs Day testified that she engaged the Applicant to carry out temporary work in 1998 after she (Mrs Day) broke her leg. At that time Mrs Day's second in charge was on holidays in Tasmania. Mrs Day said she contacted the Applicant because she had previously worked for Bell Brothers (who had owned Boral Resources (WA) Pty Ltd) and she had a sound background in clerical and office procedures. It was not until the Applicant had worked for several days that Mrs Day made arrangements to pay the Applicant a rate of pay "that was acceptable to both parties". She said it was agreed that the Applicant be paid $18 or $19 per hour and an amount for travelling allowance as the Applicant resides in Dowerin. Mrs Day initially engaged the Applicant for three weeks. Mrs Day subsequently arranged for the Applicant to relieve other staff on a number of occasions. She said that they never discussed terms of employment again. Mrs Day said that other than the rate of pay and travelling allowance, no other terms of engagement were discussed with the Applicant. When cross-examined Mrs Day conceded that she wrote on the Applicant's pay record "Starting Advice" that the Applicant was engaged as a "senior relief credit officer" and was employed on a casual basis.

9 The Applicant testified that when her mother first contacted her to work for the Respondent as "temporary relief" she advised her mother that she could not start work on the following Monday or Tuesday because of family commitments. She agreed to commence work on the following Wednesday. The Applicant says that initially it was agreed that she was to be paid $18 or $19 per hour but when she was engaged to work on a second occasion she entered into an agreement with her mother (on

behalf of the Respondent) that she would be paid $19 per hour. From that time on each occasion the Applicant was engaged (until February 2001), she was paid a flat rate of $19 per hour for each hour worked. She gave uncontradicted evidence that she never discussed being paid for public holidays or for sick leave. The Applicant however conceded that until the filing of this application she had never made a claim for payment of public holidays, sick leave or accrued annual leave. Her rate of pay remained the same until she entered into a contract to commence work on 21 February 2001. She said that on that occasion she agreed to work for Boral Asphalt and she entered into an arrangement with Mr Stuart Taylor, with whom she negotiated the contract that she would be paid $21 per hour because she would be carrying out relief work whereby there would be no one available to show her what to do. From that time onwards, each time the Applicant was engaged to work for the Respondent she was paid a flat rate of $21 per hour for each hour worked together with the travel allowance payment.

10 Exhibits 10 and 14 record that the Applicant was engaged to work for the Respondent on approximately 18 separate occasions between 1 October 1998 and 11 January 2002. She was engaged to relieve employees who were ill or when employees went on annual leave. She was also engaged to carry out specific tasks, such as reconcile outstanding Boral contracting accounts, to review accounts and update account files. For a period she was engaged as emergency relief Asphalt invoicing clerk. On one occasion in June 2001 when the Asphalt invoicing clerk was terminated, she was engaged as a temporary replacement whilst the Respondent recruited another Asphalt invoicing clerk to replace the employee whose employment had been terminated. After that period of time the Applicant was engaged to do relief work while the Asphalt invoicing clerk was on leave. During that period of time the Applicant discovered that the previous Asphalt invoicing clerk (who had been terminated), had made a number of errors in her work. It appeared that a number of invoices could have been missed which could have resulted in a number of accounts not being rendered to creditors of the Asphalt division of Boral Construction Materials Group Ltd. When the Applicant was engaged on each contract sometimes she was engaged to work in the Belmont office, on other occasions she was engaged to work in the Asphalt division in Welshpool. The longest task completed by the Applicant was when she was engaged to do an audit and reconcile account files. For that particular task it was agreed that she would work two weeks on and two weeks off. However the Applicant sometimes varied that to suit her needs so that she did not always enter into a contract to work that particular pattern of work. Within that period of time she also did relief work in other areas so that she did not always return to that task of audit and reconciliation of account files at the expiration a each two week period of time. At the end of each "two week period" she was told when to report to work again for another "two week period" to progress the audit and reconciliation task.

The Applicant's Evidence about the Drug and Alcohol Testing Policy

11 The Applicant was engaged to work as the Asphalt invoicing clerk whilst the person who held that position was on annual leave from 26 November 2001 until 11 January 2002. However, during that period she also did some work assisting the credit manager with spreadsheets. On Thursday, 20 December 2001 she was informed late in the afternoon that she was required to attend a meeting at 7:30am on 21 December 2001. The Applicant said the meeting was scheduled for 7:30am but she was a bit late getting to work as her son was ill. She said when she arrived at the main office in Welshpool she was stopped by one of the sub-contractors, Bruno, in the car park. She said that Bruno asked her a number of questions about his last payment so she did not attend the meeting until about 8:00am. The meeting was conducted by Ralph Hayes, the Respondent's occupational health and safety officer and when she arrived Mr Hayes was discussing urine testing and the ways in which males can fake test results. She initially testified that there were about 50 men present in the meeting and she was the only female. She later said there were about 30 or 40 men present. She testified that she did not pay 100% attention to what Mr Hayes was saying because she was thinking about what Bruno had told her. Consequently she said she only recalled some information about drug and urine testing. She said she is not embarrassed very easily but she felt uncomfortable about the content of the talk and being in a room full of men. She conceded she was not receptive to what was being said. A copy of a question and answer sheet about the Boral Construction Materials (WA) Drugs and Alcohol Policy and Procedures questionnaire completed by the Applicant was tendered in these proceedings. The Applicant says that she does not dispute that she filled the form in and signed it on 21 December 2001 but she could not remember filling it in. The question and answer form completed by the Applicant stated as follows—

"1. Both the employer and the employee have a responsibility to eliminate from the workplace the hazards associated with personnel affected by drugs and alcohol

☑ true

☐ false

2. This Drug and Alcohol Policy and procedures applies to

☐ employees

☐ contactors and sub-contractors

☐ visitors

☑ all of the above

3. This Drug and Alcohol Policy and procedures does not apply to medicine ordered for an employee by his/her doctor which may affect his/her ability to carry out his/her work

☑ true

☐ false

4. If an employee needs to take prescription drugs ordered by his/her doctor which may affect his/her ability to work he/she must

☐ not take them on work days

☑ advise his/her manager / supervisor who may need to provide alternate duties for the time the medication is taken

☐ hope that it will be OK as long as he/she takes them as the doctor ordered

5. An employee who has to stop work because of the positive test result, and may not return to work until a negative test result is provided may use

☐ RDO

☐ Unpaid leave up to 3 months

☐ Accrued annual leave

☑ All of the above

6. After a positive test result the employee may not return to work until evidence of a negative test result is provided. The cost of this test is met by
   - ☐ Boral Construction Materials (WA)
   - ☑ The individual concerned
   - ☐ The test is free
7. The Employee Assistance Program (EAP) is in place to provide Appropriate counselling and support for employees when required
   - ☑ true
   - ☐ false
8. When an employee has a positive test result he/she will be
   - ☐ Sent to his/her accommodation by suitable transport
   - ☐ Given a formal written warning
   - ☐ Offered counselling through the Company's EAP
   - ☑ All of the above
9. If an employee refuses to take a test he/she will be
   - ☑ counselled and encouraged to take the test
   - ☐ treated as a positive test result
   - ☐ stood down without pay
   - ☑ all of the above
10. The possession, unauthorised consumption, distribution or sale of alcohol or drugs on any Boral Construction Materials (WA) site is strictly prohibited
    - ☑ true
    - ☐ false
11. Drug and Alcohol testing of employees can be
    - ☐ as part of the pre-employment process
    - ☐ on a random basis
    - ☐ following a major accident or incident
    - ☐ on a voluntary basis
    - ☑ all of the above
12. Any employee providing a second positive test within 12 months will be counselled and may be terminated
    - ☑ true
    - ☐ false"

The Applicant's Evidence in Relation to Events that Led to her Termination

12 The Applicant says that on 16 or 17 January 2002 she was contacted by Ms Caroline Truesdale on behalf of Mr Graham Hine, the Asphalt Division Accountant, and advised by Ms Truesdale that Mr Hine had obtained approval from management to employ her for a week to go through all of the invoices that were completed by the clerk that had been dismissed in the previous year, to see whether there were any invoices that had been missed. The Applicant said that she was promised at least one week's work but it was indicated to her that it could be longer. In cross-examination it was put to her that it was not Ms Truesdale who contacted her (the Applicant) but it was Ms Vicki Watkinson. The Applicant said that she recalled having a conversation with Ms Watkinson but she denied that she discussed with Ms Watkinson that the task may be able to be completed in less than a week.

13 The Applicant commenced work on 21 January 2002 to check invoices that had been completed between March and June 2001. The Applicant had some shoulder problems for a couple of weeks and taken some medication before she left home on the morning of 22 January 2002. She said she parked her car in the car park and took some more medication because she did not think she was going to be "driving anymore". She went into the office and found that there was a big group of men around the front operations door. She thought that was unusual at that time of the morning as most of the men are normally off site on work crews. She was told that a drug and alcohol test was taking place. She said she watched a person carry a bottle of urine into the office that she (the Applicant) had been using. She went to speak to Mr Hine but she was unable to speak to him as he was on the telephone. She said she was informed by others that they all had to do a breath test and have a urine test taken. The Applicant said she became very upset because she did not wish to give a sample of urine that would be carried through the office surrounded by men. She said she went outside the building and spoke to one of the operations managers, Mr O'Neill, who was complaining about the indignity of the testing procedure. She said she burst into tears and cried on Mr O'Neill's shoulder for five to ten minutes. She then went inside the office to see Mr Hine. He was still on the telephone. One of the ladies from the testing agency, Mayne Nickless, (who operates Western Diagnostic Laboratories), asked her to come into the office. The woman asked her name and started to speak to her about whether she was taking any medication. The Applicant said that she informed the woman that she wanted to speak to her boss because she was concerned about what was happening and the way the testing was being carried out. She said the woman informed her that everyone had to be tested and that he (her supervisor) will tell her that, and no matter how she felt she still had to provide the samples. The Applicant said that she informed the woman that she was not going to do anything until she had spoken to her boss. The woman informed her that that was alright but she would wait for the Applicant to come back. The Applicant then spoke to Mr Hine. She testified that she told Mr Hine that it was fine for all of the men to have a bottle of yellow water carried around. The Applicant said in her evidence that she had just started her period that morning and she did not want to be embarrassed by having a container containing red fluid carried through the office. The Applicant however did not say in her evidence that she informed Mr Hine of this fact. She said that Mr Hine told her to just disappear and come back tomorrow. The Applicant said she told him, "Well, they have already got my name on the list and they are waiting for me to come back." Mr Hine said he would telephone Ms Zoe Hewitt-Dutton who is an occupational health, safety and welfare officer, but Ms Hewitt-Dutton was unavailable. Mr Hine left a message on Ms Hewitt-Dutton's voice mail. The Applicant reminded Mr Hine that it had been agreed that she could leave the office at 12:00 o'clock to go to a doctor's appointment at King Edward Memorial Hospital. Mr Hine informed her that she could leave and that he would get Ms Hewitt-Dutton to call her (the Applicant) at home. The Applicant said that she went to

her appointment at King Edward Memorial Hospital then went home to her parents' house. She said she continually tried to telephone Ms Hewitt-Dutton that afternoon and that she finally spoke to her at about 5:30pm. She said Ms Hewitt-Dutton informed her that the policy was now in place and that as she (the Applicant) had refused to do a test and had left the premises, the onus was on her. She said that Ms Hewitt-Dutton informed her that if she wanted to return to work she was to present herself at 8:30am the following morning at Western Diagnostic Laboratories where she (the Applicant) could undertake a test. The Applicant said she was stunned and flabbergasted. She informed Ms Hewitt-Dutton she was not prepared to undertake the test and Ms Hewitt-Dutton told her that if she was not prepared to undertake a test she could not return to work. The Applicant asked Ms Hewitt-Dutton for a copy of the Drug and Alcohol Policy. On 23 January 2002 the Applicant sent to Mr Hine by email a copy of her timesheet for the hours that she had worked on Monday and Tuesday. In that email she stated—

"Graham,

I am submitting a time sheet for the hours that I worked on Monday & Tuesday.

I am extremely distressed and emotionally devastated by the events of yesterday.

My association with Boral is of long standing and my professional reputation is one of being able to handle any accounting task set in front of me, I believe that my willingness and ability handle a large variety of tasks and staff relief positions as and when required has always been to Boral's advantage.

As I mentioned in our phone conversation I have taken legal advice regarding my termination for refusal to take a drug and alcohol test. My reasons for this refusal being that my husband is vehemently opposed to my taking any tests, as it is an adverse reflection on my good character and I feel that the company is accusing me of committing a crime without just cause.

My legal advice has been that a verbal contract exists between myself and Boral and that as I had been contacted to do at least a weeks work, if Boral wishes to terminate me then I am being unfairly dismissed and I am entitled to at the very least a full weeks pay.

I am eagerly awaiting a response from a Company Representative to discuss this matter."

14 Mr Glenn Brooks, the Respondent's administrator, replied to the Applicant's email on 25 January 2002 as follows—

"Debbie,

Thank you for your e-mail of 23 January, 2002 regarding your position on Drug and Alcohol testing.

I wish to remind you of the terms of the Boral Drug and Alcohol Policy which, together with other Boral policies, forms part of your Conditions of Employment.

I also remind you of your attendance at the Drug and Alcohol Training session of December 21, 2001. At that training you acknowledged understanding of the policy, and specifically, the implications of refusal to undertake a test.

I confirm that your refusal will be treated as a positive test. Under the policy, the following applies—

"If the test is positive the employee is to remain off work and off pay (or take annual leave or RDOs owing) until they can submit proof of a further pathology test with substance levels below the prescribed level. The cost of this test is to be met by the employee and must be performed by an accredited laboratory."

In your case, as your employment is casual and for a specific task, you must provide this proof within seven days of this letter, otherwise the offer of casual employment is withdrawn.

Debbie, I also remind you that, under the terms of the policy, casual employment elsewhere within Boral Construction materials, is conditional on a satisfactory Drug and Alcohol test."

15 When the Applicant was cross-examined, she conceded that when she spoke to Mr Hine that he informed her that, "I think you have got to take the test" but she said he agreed he would speak to Ms Hewitt-Dutton. She also testified that she informed her (Ms Hewitt-Dutton) that Mr Hine had specifically given her instructions to leave the premises. When asked why she did not take the test she said in cross-examination that her reason was moral one and that when she was talking to Ms Hewitt-Dutton that she did not feel that she was being spoken to properly about the matter and that Ms Hewitt-Dutton was not in a receptive mood. She also conceded she had informed Mr Hine that it was her husband's opinion that she should not take the tests. When asked if she had not had her period on the day in question whether she would have refused to take the test, the Applicant replied that she did not know whether she would have participated in the testing or not. However, she conceded in cross-examination that after she undertook the training course on 21 December 2001, that what she had heard at the meeting was not very clear and, in the back of her mind, if she was faced with it (the testing procedure) she would "question it at the time".

The Respondent's Evidence

16 Ms Victoria Watkinson testified that she is employed as an accounts assistant by the Respondent. She said she has held that position for approximately 13 months and that in late January 2002, Mr Hines asked her to arrange for the Applicant to come in to the office to go through some invoicing files to see whether any invoices had been missed. She said that she telephoned the Applicant and informed her that the task could take a week, two weeks or two or three days.

17 Mr Ralph Hayes testified that he is the Respondent's safety manager. Ms Hewitt-Dutton reported to him as the safety coordinator. He said Boral Contracting had had an informal drug and alcohol policy in place for about 10 or 12 years as it was involved in the mining industry. He testified that the Respondent's drug and alcohol policy was formally introduced across the Boral businesses nationally in 2001. He testified that the ACTU was consulted at a national level and in Western Australia the Transport Workers' Union and the Australian Workers' Union were consulted about the policy. He said a decision was made to introduce the drug and alcohol policy across all work sites because there are a number of employees who work in Boral Concrete, Boral Asphalt and Boral Transport who visit client's sites which required employees of the Respondent to have drug and alcohol clearances. He also said that there was a Department of Transport code of practice in relation to fatigue management which required companies to have a management program for drug and alcohol for drivers of commercial trucks. When the policy was introduced in Western Australia in 2001, part of the introduction of the policy was to inform all employees of the Respondent about the policy and the procedures for testing. Prior to random testing of employees commencing all employees underwent a training program. That program was delivered by him.

18 Mr Hayes testified that he recalled conducting a drug and alcohol policy training program which the Applicant attended. He testified he recalled that she arrived shortly after he commenced speaking. He said he had a clear recollection that he noticed her there very early in the program. He estimated that she arrived after he had been speaking for about four minutes as he recalled that he had just completed speaking about the objectives of the policy when he looked around the room and saw that she was present. Mr Hayes said that he could not have covered half of the course before he saw the Applicant as it was his practice to speak about the objectives at the beginning of the program. He said there were 13 people who attended the training program on that day and the Applicant was the only female in the room. At the conclusion of the presentation about the drug and alcohol policy he handed to everyone, including the Applicant, a question and answer sheet. He gave the Applicant and the

others time to read each question and answer the questions. He then went through each of the questions and answers with the group to check whether each of the people attending the program had correctly answered the questions. He said at the conclusion of the program there was no indication by the Applicant that she had not understood the policy. It was suggested to Mr Hayes in cross-examination that a person of average intelligence who had been in the work force for awhile may be able to correctly answer most of the questions whether they had attended the training session or not. Mr Hayes said that would be unlikely as he had tested the question and answer sheet in that way, prior to introducing the sheet as part of the training program. He said when he had given it to people to complete who had not attended training on the policy, the vast majority of questions were not answered correctly.

19 In cross-examination Mr Hayes conceded that no problems with abuse of drug and alcohol by Boral's clerical staff had arisen. He said however that the reason for applying the policy to every employee of Boral (as opposed to only employees who are perceived to be at a risk of serious incident or accident under the influence of drugs or alcohol), is that there was enough survey material that indicated that drug and alcohol problems do not occur just with "machine operators".

20 Mr Nondas Firios, the Respondent's human resource manager for Western Australia, South Australia and Northern Territory, testified that the reason why the drug and alcohol policy was adopted and made applicable to all employees, including clerical employees was because the Respondent wanted the policy to be consistent. Accordingly a decision was made to require everyone from managers downwards to adhere to the policy. Mr Firios said that he thought there would be difficulty with the credibility of the policy if there was one rule for one group of employees and another rule for others. He also said that on some occasions white collar or clerical employees could from time to time be exposed to operating situations and exposed to the same risks as other employees if they visited particular sites. He also said that the Respondent decided a "universal policy" would be fairer and simpler to administer.

21 Mr Firios said the policy was developed at a national level by the Respondent's director of occupational health and safety, Dr Maggie Golding. He said the Australian Standards for drug and alcohol testing were applied throughout the policy.

22 Mr Firios also testified that the people in the field who work for Boral Asphalt take the bitumen product (which is manufactured at the Welshpool plant), deliver that product to road locations and lay the product on road surfaces. He said they are also engaged in spray seal work which is a method of sealing roads by laying a coat of bitumen and a coat of stone and rolling the surface to form a road grade surface.

23 Mr Allan Richardson testified that he is employed by Western Diagnostic Pathology which is a division of Mayne Nickless. He is employed as the manager of the alcohol and drug services. He said his company has been engaged to conduct drug and alcohol tests on behalf of the Respondent and that on 22 January 2002 his company conducted drug and alcohol tests at the Asphalt Division. Mr Richardson said that two collectors employed by Mayne Nickless inspect the toilet facilities to ensure that they are adequate for testing such as ensuring that hot water sources are inactivated, that cleaning products are removed and there is only one entrance and exit from the toilet facility. He said that the normal procedure is that once testing commences, one collector takes details from the person being tested. The person being tested is sent with a labelled, empty urine jar to the toilet where the second collector is located close by or inside the toilet facility. He said the collection supervisor then escorts the person back from the toilet with the urine sample and at all times the urine sample is required to be obscured from view by being placed inside a paper bag or wrapped in a tissue. Mr Richardson however, conceded that he could not attest whether the procedures were adhered to on the day in question as he was not present when the testing took place on 22 January 2002.

24 Mr Graham Hine testified that he was employed by the Asphalt Division of the Respondent for approximately nine months as the accountant. He recently left the Respondent's employment to work in his own business. He said that the Applicant was engaged from time to time when they needed assistance to catch up with extra work or to relieve staff. On the last occasion on which she was engaged it had been ascertained that invoices had been missed and he thought it was appropriate to check previous invoicing. He said he asked Ms Watkinson to telephone the Applicant and ask if she (the Applicant) was available to come in for up to one week's work to carry out this task.

25 Mr Hine said on 22 January 2002 he came to work and found that a random drug test was being conducted. He said the Applicant approached him about 10:30am or 11:00am. She said she informed him that she would not be able to undertake a drug test because she had been taking some medication which would skew the results or cause some problems with the samples. He said that he was not sure how to approach her refusal because he had not anticipated anyone would refuse to undertake the test. He said he tried to ring Ms Hewitt-Dutton but he was unable to contact her so he left a message on her answering system. He then spoke to the Applicant again and he tried to reassure her that there would not be any problems with her taking medication. He said the Applicant informed him that the main issue was that her husband did not want her to do the test. She said he (her husband) had informed her that she was to refuse to take the test as "the marriage is more important than having a problem with a drug test". Mr Hine said he told the Applicant to make herself scarce around the office until he could contact Ms Hewitt-Dutton. He said however, he informed her that she did have to do the drug test but he did not know what the implications of refusing to take the test were. Mr Hine said that he had forgotten that the Applicant had an appointment at King Edward Memorial Hospital until she reminded him. He told her to go to her appointment and not come back to work until he (Mr Hine) or Ms Hewitt-Dutton had contacted her to let her know what the outcome was. He said he did not know what the outcome would be and he understood the importance to her to attend her doctor's appointment and that he knew she would have to do the test and it was a question of whether she could do it at the office that day or whether they could arrange some other place for her to do the test.

Nature of Engagement – Whether Applicant Engaged as a Casual Employee or Engaged for a Fixed Term or for a Fixed Task

26 At common law 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).

27 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)."

28 At the conclusion of the hearing it was conceded on behalf of the Respondent that the terms of the Award applied to the Applicant whilst she was engaged to work in the Asphalt Division. Clause 25 of the Award provides—

> "(1) A casual employee shall mean an employee engaged and paid as such, and whose employment may be terminated by the giving of one hour's notice on either side, or the payment or forfeiture, as the case may be, of one hour's pay.
>
> (2) (a) A casual clerk may be employed at an hourly rate for a lesser period than four weeks and shall be paid while so employed, twenty-five percent in addition to the Base Rate and Supplementary Payment prescribed by this award with a minimum engagement of four hours: Provided that, notwithstanding anything contained in this subclause, the basis and terms of employment of a casual clerk may be varied by agreement in writing between the employer and the Union.
>
> (b) The duration of the casual engagement may be extended to thirteen weeks in the event that the employee is engaged to cover for another employee who is absent on account of long service leave, annual leave, sick leave, injury compensable under the Workers Compensation and Assistance Act, or an authorised period of unpaid leave.
>
> (3) Subject to any agreement between the employer and the employee to the contrary, subclause (5) of Clause 7. - Hours, shall not apply to casual employees.
>
> (4) Notwithstanding the provisions of this clause the basis and terms of employment of casual clerks may be varied in any particular case by agreement in writing between the employer and the Union."

29 It is my view that the Applicant would be regarded at common law to be a casual employee. It is also clear from the evidence given by the Applicant and Mrs Day that the Applicant was engaged and paid as a casual employee within the meaning of Clause 25 of the Award. Further, but for the application of the provisions of the *Minimum Conditions of Employment Act* it is my view that the Applicant would be regarded as a casual employee under Clause 25 of the Award. In the first sentence of Clause 25(1) of the Award a casual employee is defined to mean: "A casual employee shall mean an employee engaged and paid as such, and whose employment may be terminated by the giving of one hour's notice … ." The meaning of a casual employee in Clause 25(1) is simply that a casual employee is an employee engaged and paid as such. In my view the words that follow "as such", should be read disjunctively. The words that follow provide the conditions under which a casual employee may be terminated. Further, Clause 25(2) and (3) of the Award provide additional conditions of engagement of a casual employee. If these provisions are not complied with, the consequences are that an employer would be in breach of those conditions.

30 Section 3(1) of the *Minimum Conditions of Employment Act* defines a casual employee to mean—

> "An employee who is employed on the basis that –
>
> (a) the employment is casual; and
>
> (b) there is not entitlement to paid leave,
>
> and who is informed of those conditions of employment before he or she is engaged."

31 It is argued on behalf of the Applicant that the Applicant was not a "casual employee" for the purposes of the *Minimum Conditions of Employment Act*. The consequences of this argument is that if she was not a "casual employee" for the purposes of that Act, because the minimum conditions are implied into awards through the operation of the *Minimum Conditions of Employment Act,* at law she cannot be regarded a casual employee for the purposes of accrual of annual leave, sick leave and payment of public holidays.

32 In this matter the Applicant gave uncontradicted evidence that the fact that she was engaged as a casual employee was not discussed with her. However, it is apparent from her evidence that she had a clear understanding that she would only be paid for each hour that she worked. It is also clear from her evidence that she was not informed that she had no entitlement to paid leave. Accordingly it is my view that the Applicant at law cannot be regarded as a casual employee for the purposes of the provisions of the *Minimum Conditions of Employment Act*. However, for the reasons set out below it is my view that there are no Award or entitlements outstanding under the *Minimum Conditions of Employment Act* which could be said to be an amount to which the Applicant is entitled to, on the claim of harsh, oppressive or unfair dismissal within the meaning of s.23A of the Act.

Was the Applicant Harshly, Oppressively or Unfairly Dismissed

33 It is argued that the Applicant was summarily terminated. If that is the case then the onus is on the Applicant to demonstrate the dismissal was unfair on the balance of probabilities. However, there is an evidential onus upon the employer to prove that summary dismissal is justified (*Newmont Australia Ltd v The Australian Workers' Union, West Australian Branch, Industrial Union of Workers* (1988) 68 WAIG 677 at 679).

34 It is argued on behalf of the Applicant that it was unfair to apply the drug and alcohol policy to the Applicant. To determine whether the Applicant was harshly, oppressively or unfairly dismissed in part turns upon the question of whether the drug and alcohol policy was a term and condition of the Applicant's employment. Having heard the Applicant's evidence and having carefully examined the questionnaire completed by the Applicant at the conclusion of the training on the drug and alcohol policy, it is my view that it is apparent from the answers ticked on that questionnaire that the Applicant had a clear understanding in December 2001 that if confronted with a random drug and alcohol test she would be required to undertake such a test and that the consequences of refusing to take a test would be that she would be treated as if she had returned a positive test under the terms of the policy. I do not accept her evidence that she can recall very little about what was said at that meeting. It is apparent from the answers she ticked, including the alteration to question 9 that she knew at the time that she filled in the questionnaire that if she refused to take a test that she would be stood down from her employment. I prefer the evidence given by Mr Hine and Mr Hayes to the evidence given by the Applicant where their evidence departs. The Applicant's recollection of the training meeting was vague. Further her evidence about why she refused to undertake the test was contradictory.

35 At the time that the Applicant was engaged to work on 21 January 2002, the terms of her engagement were not discussed with her. The question then arises whether because of the training she received on 21 December 2001, the conduct of the parties would lead to the inference that the terms and conditions of the policy were implied into her contract of employment. In *BP Refinery (Westernport) Pty Ltd v. Hastings Shire Council* (1977) 52 ALJR 20, in a passage adopted with approval in *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales* (1982) 149 CLR 337, the majority of the High Court summarised the conditions necessary to ground the implication of a term in a contract as follows—

> "(1) it must be reasonable and equitable;
>
> (2) it must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it;

(3) it must be so obvious that 'it goes without saying';

(4) it must be capable of clear expression;

(5) it must not contradict any express term of the contract."

36 In *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410 at 422 Brennan CJ, Dawson and Toohey JJ observed that Deane J observed in *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41 at 121 that—

> "… the criteria in *BP Refinery (Westernport) Pty Ltd v Shire of Hastings* have been applied in this Court are cases in which there was a formal contract, complete on its face. He pointed out that a rigid approach should be avoided in cases, such as the present, where there is no formal contract. In those cases the actual terms of the contract must first be inferred before any question of implication arises. That is to say, it is necessary to arrive at some conclusion as to the actual intention of the parties before considering any presumed or imputed intention. And the test to be then applied was in a later case formulated by Deane J in these terms (*Hawkins v Clayton* (1988) 164 CLR 539 at 573)—
>
> > 'The most that can be said consistently with the need for some degree of flexibility is that, in a case where it is apparent that the parties have not attempted to spell out the full terms of their contact, a court should imply a term by reference to the imputed intention of the parties if, but only if, it can be seen that the implication of the particular term is necessary for the reasonable or effective operation of a contract of that nature in the circumstances of the case. That general statement of principle is subject to the qualification that a term may be implied in a contract by established mercantile usage or professional practice or by a past course of dealing between the parties.' "

37 In my view the first issue to be considered is whether it is reasonable and equitable for the drug and alcohol policy to apply to persons employed in clerical classifications engaged by the Respondent. In my view, it is reasonable and equitable for the Respondent to apply the policy to all of its employees. It is a recognised principle in industrial law that employers have responsibility to take steps to provide safe work places. Part of those steps is to ensure in industries where a substantial number of employees are exposed to work that can be hazardous that they have such drug and alcohol policies in place. Uncontradicted evidence was given that some clerical employees are required to visit mining sites. The reason why I have concluded that it would be equitable and reasonable to apply the policy to all employees is because it would be difficult for the Respondent to determine with absolute certainty in advance who of its administrative and clerical employees would never be exposed to hazardous work. It is apparent that some of the Respondent's operational work was physically located at the Asphalt Division premises where the Applicant was employed. When random testing policies are imposed they should not discriminate between one group of employees and another. This Commission has considered and found appropriate similar policies in a number of decisions of this Commission (see *BHP Iron Ore Pty Ltd v Construction, Mining, Energy, Timberyards, Sawmills and Woodworkers Union of Australia – Western Australian Branch* (1998) 78 WAIG 2593, *Australian Railways Union of Workers, West Australian Branch and Others v Western Australian Government Railways Commission* (1999) 79 WAIG 1215 and *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers – Western Australian Branch v Argyle Diamond Mines Pty Limited* [2000] WAIRC 01494; (2000) 81 WAIG 324). The Applicant was clearly informed about the terms of the policy prior to agreeing to commence work on 21 January 2002. Further, she testified that at the time she attended the training she determined that she would, if faced with a requirement to participate in testing, dispute that the policy should be applied to her. By attending the course, filling in the questionnaire, by not stating her intention to challenge the application of the policy at that meeting and by accepting an offer to commence work on 21 January 2002, the Applicant's conduct was such that it can be inferred that the policy was a condition of her employment contract that commenced on 21 January 2002.

38 The question then to be considered by the Commission is whether the legal right of the Respondent to dismiss the Applicant for breach of a policy has been exercised so harshly or oppressively against the employee as to amount to an abuse of that right (*Ronald David Miles, Norma Shirley Miles, Lee Gavin Miles and Rose and 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 ("the *Undercliffe case*")).

39 The *Undercliffe case* concerned a breach of a hospital rule that staff should order their meals by a certain time each day by placing their name on a board provided for the purpose. The main reason for the rule was to have effective control over the distribution of food for a variety of sensible and realistic administrative requirements. The factual circumstances of the *Undercliffe case* were that a nursing assistant requested the cook to put some meat aside for her on a plate for a sandwich. The request was made after the time had passed for putting her name on the board. The cook put the meat aside as requested. The nursing assistant did not put her name on the board although she said in evidence that she intended to do so when she picked up the meat at her lunch break. The Industrial Appeal Court held that it was important that there was no suggestion that the nursing assistant and the cook intended to avoid payment. The Industrial Appeal Court found that although the rule was not trivial, the circumstances of the breach of the rule were trivial so as to amount to an abuse by the employer of its right to dismiss.

40 In this case it is argued on behalf of the Applicant that the requirement of the Applicant to undertake a drug test on the day in question was unreasonable. Firstly it is argued that she was given insufficient training and counselling in relation to her obligations under the policy. Secondly it is argued that the manner of the test on the day in question was unreasonable because of the fact that the urine samples were being carried openly throughout the office without being covered was particularly degrading to her. Thirdly it is argued that she should have been given a proper opportunity to explain her reasons for not taking a test and this should have been discussed with her in a proper and non-confrontational manner that gave her an opportunity to explain her objections to the concept of random drug and alcohol testing.

41 I do not accept the submission made on behalf of the Applicant that she received insufficient training when she attended the training program in December 2001. Although there is a dispute about when she arrived at that training program it is apparent from her answers to the questionnaire that she was there for a sufficient length of time to comprehend and understand her obligations under the policy because of the answers she gave. The Applicant, for her own reasons, says that she did not listen carefully to what was being said. She is obviously an intelligent person. In my view, the employer by ensuring that the Applicant completed the questionnaire in a manner that indicated that she understood the policy provided sufficient training by respect of obligations created in the policy. As to whether she should have been offered counselling when she refused the test, it is apparent from the circumstances set out above that the Applicant was allowed to leave the premises to attend her doctor for an examination and was later offered a test at a private laboratory on the following day. She refused to undertake that test and her reasons for doing so were because of the objection made by her husband. Even in the hearing before the Commission the Applicant, after having had an opportunity to read the policy, was unable to advise the Commission that she would have participated in the testing. Although the Applicant says she had her period on the day in question, it is apparent that she did not raise this with Mr Hine or any other person. Although one could understand why she did not raise that with Mr Hine, she did not raise it with the female staff of Mayne Nickless.

42 It was conceded on behalf of the Applicant that the breach of the Respondent's policy by the Applicant was not trivial. In the circumstances I am of the view that the Respondent has not abused its right to dismiss the Applicant. Although it is argued by the Applicant that she was dismissed on 22 January 2002, I do not accept that the dismissal by the Respondent was of summary nature because the Applicant was informed that she had seven days to undertake a pathology test. In the email to the Applicant dated 25 January 2002, she was informed that she was required to take a test within seven days of the letter otherwise her casual employment would be withdrawn. The effect of that action at law was to suspend the Applicant until 1 February 2002. During that time she could have taken the test. In the circumstances I am of the view that the Applicant's termination was not summary. The Applicant was accorded procedural fairness. She sent an email on 23 January 2002 to Mr Hine in which she made it plain that she did not intend to undertake a drug or alcohol test yet the Respondent still gave her the opportunity to reconsider her position and to undertake the tests. Whilst counselling was not offered by the Respondent in light of the strength of her refusal set out in her email sent on 23 January 2002, I am not persuaded that counselling would have produced a different outcome. In all the circumstances I am of the view that the termination by the Respondent was not harsh, oppressive or unfair.

Whether the Applicant is Entitled to Payment of any Amount Pursuant to s.23A(1)(a) of the Act

43 At the time the Applicant filed her application s.23A(1)(a) provided—

> "On a claim of harsh, oppressive or unfair dismissal, the Commission may—
>
> (a) Order the payment to the claimant of any amount to which the claimant is entitled;"

44 At the time of hearing the Applicant's claim s.23A(1)(a) of the Act had been repealed by s.137(1) of the *Labour Relations Reform Act* 2002. Section 137(1) of the *Labour Relations Reform Act* came into force on 1 August 2002. Section 137(2) of the *Labour Relations Reform Act* however provides—

> "(2) Notwithstanding subsection (1), section 23A of the *Industrial Relations Act 1979* as in force immediately before the coming into operation of this section continues to operate in respect of any claim made under that section before the coming into operation of this section."

45 In any event, the position at common law is that where an amendment to a law that would be otherwise regarded as procedural can be said to affect rights a presumption against retrospectivity is raised. The general rule of common law which applies to determine whether an enactment should be given such an operation was formulated by Dixon CJ in *Maxwell v Murphy* (1957) 96 CLR 261 at 267 as follows—

> "The general rule of the common law is that a statute changing the law ought not, unless the intention appears with reasonable certainty, to be understood as applying to facts or events that have already occurred in such a way as to confer or impose or otherwise affect rights or liabilities which the law had defined by reference to the past events. But, given rights and liabilities fixed by reference to past facts, matters or events, the law appointing or regulating the manner in which they are to be enforced or their enjoyment is to be secured by judicial remedy is not within the application of such a presumption. Changes made in practice and procedure are applied to proceedings to enforce rights and liabilities, or for that matter to vindicate an immunity or privilege, notwithstanding that before the change in the law was made the accrual or establishment of the rights, liabilities, immunity or privilege was complete and rested on events or transactions that were otherwise past and closed."

46 The position at common law is reflected in s.37(1)(c) and (f) of the *Interpretation Act 1984*. Section 37(1)(c) and (f) of the *Interpretation Act* provides—

> "(1)Where a written law repeals an enactment, the repeal does not, unless the contrary intention appears —
>
> (c) affect any right, interest, title, power or privilege created, acquired, accrued, established or exercisable or any status or capacity existing prior to the repeal;
>
> (f) affect any investigation, legal proceeding or remedy in respect of any such right, interest, title, power, privilege, status, capacity, duty, obligation, liability, burden of proof, penalty or forfeiture,
>
> and any such investigation, legal proceeding or remedy may be instituted, continued, or enforced, and any such penalty or forfeiture may be imposed and enforced as if the repealing written law had not been passed or made."

47 It follows therefore that for the purposes of this application that s.23A(1)(a) of the Act is operative. It is conceded on behalf of the Applicant in relation to the contract of employment that commenced on 22 January 2002 that there are no amounts outstanding that are due and payable to the Applicant within the meaning of s.23A(1)(a). It is argued however, on behalf of the Applicant that the Commission has power under s.23A(1)(a) to make orders in relation to amounts which may be due and payable to the Applicant in respect of past contracts. However, it is my view that s.23A(1)(a) only empowers the Commission to make an order in respect of a matter out of which the claim of harsh, oppressive or unfair dismissal arises. Pursuant to s.23(3)(h) of the Act (prior to its repeal and its replacement by a similar provision), s.23(3)(h) provided—

> "The Commission in the exercise of the jurisdiction conferred on it by this Part shall not—
>
> (h) on a claim of harsh, oppressive or unfair dismissal make any order except an order that is authorized by section 23A."

The claims in relation to previous contracts made on behalf of the Applicant do not arise out of the claim for harsh, oppressive or unfair dismissal.

48 For the reasons set out above I will make an order dismissing the application.

2002 WAIRC 06780

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	DEBBIE LARKIN, APPLICANT
	v.
	BORAL RESOURCES (WA) LTD, RESPONDENT
CORAM	COMMISSIONER J H SMITH
DATE OF ORDER	FRIDAY, 18 OCTOBER 2002
FILE NO.	APPLICATION 290 OF 2002
CITATION NO.	2002 WAIRC 06780

Result	Order made to amend the name of the Applicant and the name of the Respondent.
Representation	
Applicant	Mr M Richardson (as Agent)
Respondent	Mr D Jones (as Agent)

Order

Having heard Mr Richardson on behalf of the Applicant and Mr Jones 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 Applicant be amended to Deborah Caron Day Larkin; and

THAT the name of the Respondent be amended to Boral Construction Materials Group Limited.

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

2002 WAIRC 06781

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
PARTIES	DEBORAH CARON DAY LARKIN, APPLICANT
	v.
	BORAL CONSTRUCTION MATERIALS GROUP LIMITED, RESPONDENT
CORAM	COMMISSIONER J H SMITH
DATE OF ORDER	FRIDAY, 18 OCTOBER 2002
FILE NO.	APPLICATION 290 OF 2002
CITATION NO.	2002 WAIRC 06781

Result	Application that the Applicant was harshly, oppressively and unfairly dismissed and owed award and contractual benefits dismissed.
Representation	
Applicant	Mr M Richardson (as Agent)
Respondent	Mr D Jones (as Agent)

Order

HAVING heard Mr Richardson on behalf of the Applicant and Mr Jones 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 06886

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
PARTIES	PAUL MARVIN LYNCH, APPLICANT
	v.
	FRATELLA PTY LTD, RESPONDENT
CORAM	COMMISSIONER J H SMITH
DELIVERED	WEDNESDAY, 30 OCTOBER 2002
FILE NO.	APPLICATION 2287 OF 2001
CITATION NO.	2002 WAIRC 06886

Result	Applicant's claim dismissed.
Representation	
Applicant	Mr T C Crossley (as Agent)
Respondent	Mr S G Scott (as Counsel)

Reasons for Decision

1 Paul Marvin Lynch ("the Applicant") made an application under s.29(1)(b)(i) of the *Industrial Relations Act 1979* ("the Act") on 20 December 2001 claiming that he was harshly, oppressively and unfairly dismissed by Fratella Pty Ltd ("the Respondent") on 5 December 2001.

2 The Respondent trades as Melville Motors. The Applicant was employed as the Respondent's accountant. Whilst employed by the Respondent he was responsible for all facets of accounting of the Respondent's business up to trial balance. He was also responsible for implementing new legislation affecting the motor car business and operation of the computer system. He directly supervised seven staff out of 110 people employed by the Respondent. The Applicant was responsible for administering a very high gross turnover. Every day or every second day the Applicant was required to compile payments and make electronic transfers to a finance company between $50,000 and $1.3 million per day.

3 The Applicant's employment was terminated on 5 December 2001 after the Applicant paid the assistant accountant, Ms Sally O'Meara, overtime which was not claimed by her. The Applicant concedes that Ms O'Meara had not made a claim for extra time but says that she should have been paid as she worked extra time. Alternatively, it is argued on behalf of the Applicant that if it was wrong for him to make the payment that this was a minor error on his behalf which did not justify the Respondent's decision to summarily dismiss him.

Circumstances of the Payments of Overtime

4 It is not in dispute that the Applicant was authorised to make payments for overtime for persons working in the administration department. It was part of his duties to check the payroll data prepared by the pay clerk, Ms Patricia Negroponte, each week. He usually found some errors and discrepancies. On some occasions he would make the adjustments by inputting changed data into the computer but usually he manually noted the adjustments to be made on the payroll printout and gave the printout to Ms Negroponte to input. He said if he inputted the data, Ms Negroponte may not be aware of the adjustments that he (the Applicant) made. Prior to the payroll cheque being drawn each week a payroll summary was provided to Mr Richard Bennett, the Respondent's dealer principal, for him to check.

5 It is common ground that overtime payments were processed by Ms Negroponte at the end of each week after Ms Negroponte had spoken to each of the employees in the administration department. After speaking to each employee, Ms Negroponte would fill out a single timesheet for the department. She recorded on the timesheet whether each employee attended work that week and whether they worked any overtime. Prior to Ms Negroponte making payments of overtime the Applicant, as the manager of the administration department certified the timesheet as correct by signing the sheet.

6 Timesheets and the "pay history edit hours enquiry" from the Respondent's computer were produced for Ms O'Meara for the following periods—

(a) 1/11/01 – 7/11/01

(b) 8/11/01 – 14/11/01

(c) 22/11/01 – 28/11/01

(d) 29/11/01 – 5/12/01

Those records record—

- For the pay period 1/11/01 – 7/11/01 the timesheet records that Ms O'Meara worked a total 8 hours of overtime, 5 hours to be paid at time and a half and 3 hours to be paid at double time. The computer pay history records that Ms O'Meara was paid 7.5 hours at time and a half and 3 hours at double time.
- In the pay period 8/11/01 – 14/11/01 the timesheet records that Ms O'Meara worked 1.75 hours overtime to be paid at time and a half and her pay history records that she was paid for 4.25 hours of overtime at time and a half.
- In the pay period 22/11/01 – 28/11/01 the timesheet records that Ms O'Meara did not work any hours of overtime in that week yet the pay history shows Ms O'Meara was paid 2 hours overtime at time and a half.
- In the pay period 29/11/01 – 5/12/01 the timesheet records that Ms O'Meara worked 2 hours of overtime to be paid at time and a half and her pay history records that she was paid 4 hours of overtime at time and a half.

Applicant's Evidence about the Decision to Pay Ms O'Meara Additional Payments of Overtime

7 The Applicant commenced work on 18 October 1999. He said he worked approximately 55 hours over five and a half days per week. He said he had the authority to hire and fire staff. His evidence however, did not support his contention that he had the authority to do so without approval of others in the Respondent's organisation. He said he engaged Ms O'Meara as an assistant accountant sometime in the year 2000. The Respondent's dealer principal, Mr Bennett, was away at that particular time so he spoke to the company accountant, Mr Mark Zanetti, about engaging her. After Mr Zanetti participated in an interview with Ms O'Meara he (Mr Zanetti) agreed that Ms O'Meara should be employed.

8 It is common ground that the Applicant had the authority to approve payments of overtime. In evidence in chief he testified that in the week before he was terminated (in the pay period 22/11/01 to 28/11/01), he checked the payroll printout and checked the weekly timesheet. He observed that the weekly timesheet did not record that Ms O'Meara had worked two or three hours of overtime during that week. He said he knew she had worked the extra hours and he wanted to reward her so he paid her two hours overtime by directly altering the payroll payments. When asked was there any reason why he thought Ms O'Meara had not claimed this overtime, the Applicant said that he thought it was because she was due for a salary review, she was already getting paid very well and she was too proud to put in a claim. When cross-examined the Applicant said that he informed Ms O'Meara that he had noticed how hard she had been working and he was going to reward her by paying her an extra two hours overtime. He conceded in cross-examination that he had made extra payments of overtime to Ms O'Meara on four occasions. When further cross-examined he conceded that the payments were for "a bit of overtime and a bit of a bonus". When asked to specify the proportions he said they were about 50:50. When re-examined, the Applicant said that the proportions were probably 75% or 80% for working overtime and the remaining proportion were paid as bonuses.

9 Before the pays were sent to the bank for the pay period ending 28 November 2001, the Applicant said that Ms Negroponte came to him and said she had spoken to Ms O'Meara who said that this overtime was paid by you. The Applicant said that he told Ms Negroponte that he had done so, but he did not want to tell her (Ms Negroponte) about it because if he told her, everyone else in the office would know about it and would "want a slice of the action". When cross-examined he said he did not want everyone in the office to know about the payments of overtime as they were all complaining that they were underpaid. The Applicant conceded in cross-examination that making the payments of overtime was "stupid". However, he did not concede that he thought what he had done was wrong; he simply said he thought it was a "stupid act" to put his job in jeopardy.

10 The Applicant said that about a year before these events occurred he had rewarded Ms O'Meara by paying her a bonus of $250 because Ms O'Meara had relieved him (the Applicant) whilst he was on holidays. However, prior to making the payment he spoke to Mr Bennett and Mr Bennett had told him to offer her a dinner voucher or $250. Even though the Applicant conceded that only the dealer principal can authorise pay increases he maintained in his evidence that bonuses to employees could be authorised by a manager.

11 Mr Gary Hughes was called to give evidence on behalf of the Applicant. He was employed by the Respondent as service manager when the Applicant was the accountant. Mr Hughes testified that each week he prepared a weekly timesheet for all employees employed in the service department. Each week he noted on the timesheet the hours of overtime worked by employees. He also calculated and noted on the timesheet all bonus payments. Mr Hughes said that he only noted hours of overtime on the timesheets by having regard to each employee's "time clock" record or where he was satisfied an employee

had been called back to work after he or she had clocked off. He conceded that he calculated bonus payments in accordance with the bonus structure approved by Mr Bennett. Mr Hughes however said that he had discretion to authorise a bonus payment where an employee was very close to achieving the bonus target and the circumstances of the failure to achieve the target justified the payment of a bonus such as the completion of a warranty job.

Applicant's Evidence about Conversations he had with Mr Bennett about a Pay Rise for Ms O'Meara

12 The Applicant approached Mr Bennett because Ms O'Meara had asked him for a pay increase. The Applicant said about three weeks before his employment was terminated he spoke to Mr Bennett and advised him (Mr Bennett) that Ms O'Meara deserved a pay rise because she had worked hard and they had the best audit year on record with Holden. The Applicant testified that Mr Bennett informed him that he did not think Ms O'Meara deserved a pay rise but to put a proposal together. The Applicant said that Mr Bennett swore and made a comment to the effect that if she (Ms O'Meara) did not like the decision she could leave. The Applicant was unable to speak to Mr Bennett for about three weeks as he (Mr Bennett) was very busy. The Applicant prepared a proposal for review of Ms O'Meara's salary and was about to take the proposal to Mr Bennett on 5 December 2001 when he heard his name called out over the public address system to attend Mr Bennett's office.

13 When the Applicant attended Mr Bennett's office, Mr Bennett asked him about the $50 payment of overtime made to Ms O'Meara on 28 November 2001. The Applicant said he informed Mr Bennett that Ms O'Meara worked extra hours and he had rewarded her for the hours she had worked. Mr Bennett told him he was not authorised to do that and informed him that he was going to give him (the Applicant) a second warning that might verge on gross misconduct. The Applicant said he thought at the time he could not see how he could receive a second warning as he had not received a first warning. Mr Bennett told him he wished to consider his decision. About half an hour later the Respondent's general manager, Mr Serinda Agnihotri, came into the Applicant's office and said to him, "You know Richard does not like these things. Do you want to leave, save yourself a bit of embarrassment?" The Applicant said he informed Mr Agnihotri that he did not think he had done anything wrong and asked why he should leave for such a small misdemeanour. The Applicant said that Mr Agnihotri informed him that he would, "Go in and bat for him (the Applicant)."

14 At about 2:00pm on 5 December 2001 the Applicant was asked again to attend Mr Bennett's office. Mr Agnihotri was present. He said Mr Bennett informed him that he had thought about the matter, that he could not trust him anymore and he was terminating him (the Applicant) for gross misconduct. He also said Mr Bennett told him he had two ways he could leave. The first was that he (Mr Bennett) could call the police and have him charged and escorted off the premises. Alternatively, he (the Applicant) could pack up and leave quietly. The Applicant said he took the second option and left.

15 The Applicant testified that he had been counselled on a previous occasion about authorising the drawing of a duplicate cheque to a creditor after the first cheque had been misappropriated by a third party.

The Respondent's Evidence about Conversations Relating to a Pay Rise and Payments of Overtime to Ms O'Meara

16 Ms O'Meara testified that she has been employed by the Respondent as an assistant accountant since August 2000. Mr Lynch was her manager. In August 2001, she spoke to the Applicant about a pay rise. She said the Applicant informed her he would ask Mr Bennett to increase her pay but that Mr Bennett was unlikely to consider doing so until another three months had expired. She said the Applicant later informed her that Mr Bennett did not seem to think that "she was worth any more money". In October or November 2001, a position as a secretary in the Fleet Department became available and she was interested in applying for that position. She had a further conversation with the Applicant about that time about a pay rise and he informed her he hoped that in about four week's time he would have an answer from Mr Bennett and that in the mean time he would "top up her pay" by paying her for a few extra hours of work. She said she understood that he intended to pay her for hours of time that she had not worked. She said she was shocked, but she told the Applicant that the arrangement "was alright". She said she felt uncomfortable but she went along with it because the Applicant was her immediate superior. She received additional payments on four occasions as set out in paragraph six of these reasons. When cross-examined she strongly maintained that she had not worked the additional hours that she had been paid for by the Applicant and said that if she had worked the additional hours she would have reported those hours to Ms Negroponte as overtime.

17 Ms Patricia Negroponte testified that she is employed by the Respondent as the payroll clerk. Ms Negroponte testified that at the end of each week she spoke to each employee and ascertained from each of them if they had worked any overtime. She then calculated and inputted into the computer all payments of overtime. Once the payroll was prepared she printed the data and gave it to the Applicant to check. Once the run was checked by the Applicant, a copy of the final printout was provided to Mr Bennett.

18 Sometime after the week ending 28 November 2001, Ms Negroponte was preparing superannuation payments which caused her to review the payroll data for the week ending 28 November 2001. She noticed the payment made to Ms O'Meara for overtime. She said she thought she must have made the payment by mistake because Ms O'Meara had advised her at the end of that week that she had not worked any overtime and she (Ms Negroponte) made a joke about having a "slack week". Ms Negroponte approached Ms O'Meara and told her that she had made a mistake by paying her someone else's overtime. Ms O'Meara informed her that no mistake had been made, that the Applicant had made the payment. Ms Negroponte then spoke to the Applicant. The Applicant confirmed that he inputted the overtime as an extra payment and told her that "the fewer people know about it the better".

19 Mr Richard Bennett is the dealer principal of Melville Motors. He testified that an accountant is one of the most important persons employed in the car industry because the car industry works on approximately one to one and a half percent of turnover as profit so that if the "figures" are not correct you can go broke very quickly. He said accountants in the car industry are hard to come by and that since the Applicant's termination he has been unable to find a suitably qualified accountant to replace the Applicant.

20 Mr Bennett said he did not authorise anyone to approve any pay increases without first obtaining his approval. In relation to bonuses, he said he has approved a bonus structure which applies to employees including salesmen and people who work in the workshop. He said however, the bonus structure guidelines are strict and are not discretionary. In particular he disputed Mr Hughes' evidence and said that if he had known of Mr Hughes' practice to authorise bonuses where an employee almost reached a target he would not have approved the payment. Mr Bennett agreed that he had approved payment of a bonus to Ms O'Meara on one occasion in the past. He said he had agreed to either pay for a meal at a restaurant or to pay her $250.

21 Mr Bennett said the Applicant approached him about paying Ms O'Meara a pay increase on three occasions. On the first occasion the Applicant also asked him about employing a temporary receptionist. Mr Bennett says he told the Applicant that he would not approve either because the company was not doing well and there would be no payment of bonuses until the company was making money. Mr Bennett said about a week and a half later the Applicant came to him again and spoke to him about a pay rise for Ms O'Meara. Mr Bennett said that he informed the Applicant that he was not granting pay rises at the moment. A couple of weeks later he said the Applicant approached him again and said, "I'm getting grief off Sally. I'd really like to give her a pay rise." Mr Bennett said he told the Applicant to manage his department and told the Applicant again that

the Company was not granting any pay rises. The Applicant indicated to him that Ms O'Meara might leave and he (Mr Bennett) used an expletive indicating that she could leave if she wished. In cross-examination, Mr Bennett conceded that he informed the Applicant that if he wanted to put a proper proposal together for a pay rise for Ms O'Meara, he (Mr Bennett), would discuss it with the Applicant.

22 Mr Bennett testified that on 5 December 2001 Ms Negroponte came to see him and informed him that the Applicant had paid Ms O'Meara for time that she had not worked. Mr Bennett said at that time he thought the topping up had only occurred on one occasion. He said after the Applicant was terminated he found out that the Applicant had made payments on "three" occasions.

23 Mr Bennett asked the Applicant to come into his office. He showed the Applicant Ms O'Meara's timesheet for the week ending 28 November 2001, and said, "The sheet tells me that Ms O'Meara has not worked any overtime but the payroll sheet tells me you have paid her $50, what have you got to say for yourself?" Mr Bennett said that the Applicant admitted that he had paid Ms O'Meara overtime that she had not worked. He said the Applicant told him he did not know why he had done something so stupid and Mr Bennett asked him (the Applicant) why he should not be dismissed. He said he informed the Applicant that he regarded his conduct as stealing as a servant and the reason why he had not contacted the police was he knew he (the Applicant) had not made the payment to benefit himself. He told the Applicant to go back to his office as he (Mr Bennett) did not want to make a rash decision. He told the Applicant at best he would get a second warning or at worst he regarded the conduct as gross misconduct. Mr Bennett then dealt with a number of other unrelated matters. He later prepared a termination letter and spoke to the Applicant in the presence of Mr Agnihotri. He said he informed the Applicant he was being terminated as he could not have an accountant that he (Mr Bennett) did not trust; in particular he told him could not have someone working for him that had consciously gone out of their way to lie. When asked why he was of the view that the Applicant had lied to him, he said that the Applicant had intentionally processed a pay which was not correct.

24 When cross-examined Mr Bennett conceded that Ms O'Meara received a pay rise after the Applicant's employment was terminated because her responsibilities increased as part of the Applicant's duties were re-allocated to her.

Submissions on Behalf of the Applicant

25 It is contended on behalf of the Applicant that he was falsely accused of stealing. The Applicant says that the payment of money to Ms O'Meara was in the nature of a reward or bonus. The Applicant says he had the authority to pay a bonus to his staff and that as he received no benefit himself, his termination by the Respondent was harsh, oppressive and unfair. It is also contended on behalf of the Applicant that the Respondent's investigation was deficient. It is also contended that when Ms O'Meara's position is examined, in particular the circumstances that she has not had to pay the money back and she has later received a pay increase, the Applicant's employment should not have been terminated by the Respondent.

26 The Respondent says that the Applicant's action of making payments for overtime when Ms O'Meara had not worked overtime constitutes stealing at law under the Criminal Code. Further that the actions in changing the computer record constitute forging and uttering. It is contended on behalf of the Respondent that the circumstances of the Applicant's breach of duty, fidelity and good faith was such as to constitute a serious repudiatory breach which entitled the Respondent to terminate the Applicant's contract of employment. The Respondent says that the conduct of the Applicant was deceptive and was in breach of a clear instruction given to him by Mr Bennett that Ms O'Meara was not to be paid a pay increase.

Conclusion

27 Having heard the evidence given by all of the witnesses in these proceedings I prefer the evidence given by Ms O'Meara, Ms Negroponte and Mr Bennett to the evidence given by the Applicant. I accept their evidence where their evidence departs from the Applicant's version of events. I did not find the Applicant to be a reliable witness. Initially the Applicant testified that Ms O'Meara had worked the hours of overtime for which he caused the additional payments to be made. However, when cross-examined he departed from this version of events and said that the payments of overtime were in part for actual time worked and in part in the nature of a reward or a bonus. In particular, I do not accept the Applicant's evidence that he had power to authorise a bonus to Ms O'Meara in the absence of any bonus structure that had been set by Mr Bennett. This contention is inconsistent with his evidence that when he previously approved a bonus of $250 the arrangement was approved by Mr Bennett. Further, I do not accept his evidence that because he was not told that he could not approve bonuses that he was entitled to assume that he had the authority to do so. It is clear from the weekly timesheets that when Ms O'Meara worked overtime, she advised Ms Negroponte and was paid for the hours she worked. Further, it is clear from the evidence that the payment, or payments, made to Ms O'Meara cannot be described as a bonus. The payments were made in a deceptive manner and disguised as payments of overtime when they constituted a pay increase. The Applicant did not have the authority to authorise a pay increase to Ms O'Meara. The Applicant's conduct was in clear breach of the direction given by Mr Bennett that no pay increase was to be given to Ms O'Meara without formal consideration by him of a proposal justifying a pay increase. Even if the payments could be said to be in the nature of a bonus, the payments were not openly paid as such, they were disguised as payments of overtime.

Legal Principles

28 The ordinary standard of proof required of a party who bears the onus in civil litigation is proof on the balance of probabilities. Where criminal conduct is alleged a Court should not lightly make a finding that, on the balance of probabilities, a party to civil litigation has been guilty of such conduct (*Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* (1992) 67 ALJR 170 per Mason CJ, Brennan, Deane and Gaudron JJ at 170-171).

29 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).

30 Where an employee is dismissed summarily the onus is on the Applicant to demonstrate the dismissal was not fair on the balance of probabilities. However, there is an evidential onus upon the employer to prove that the summary dismissal is justified (*Newmont Australia Ltd v The Australian Workers' Union, West Australian Branch, Industrial Union of Workers* (1998) 68 WAIG 677 at 679).

31 In *Bi-Lo Pty Ltd v Hooper* (1992) 53 IR 224 the Full Bench of the Industrial Commission of South Australia held—

> "An employee is entitled to both substantive and procedural fairness in respect of a dismissal. Substantive fairness will be satisfied if the grounds upon which dismissal occurs are fair grounds. Broadly speaking a dismissal will be procedurally fair if the manner or process of dismissal and the investigation leading up to the decision to dismiss is just.
>
> 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 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.

If a fact or facts come to light subsequent to the dismissal which cast a different light on the Commission of the alleged misconduct, such fact or facts will not necessarily or automatically render the dismissal harsh, unjust or unreasonable. In our view in such circumstances what will need to be considered is whether the employer, if it had acted reasonably and with all due diligence, could have ascertained those facts before the dismissal occurred.

The Commission is required to objectively assess the subjective actions and beliefs of the employer as at the time of dismissal and not at some subsequent time: see *Gregory v Philip Morris* (1998) 24 IR 397 at 413; 80 ALR 455 at 471; see also *Stearnes v Myer SA Stores* Print No 9A/1973 at 5.

Whether the employer will satisfy that objective test will depend upon the facts of each case. The gravity of the alleged offence will dictate the nature and extent of the inquiry which the employer must conduct. An employer must ensure that an employee is given as detailed particulars of the allegations against him/her as is possible, an opportunity to be heard in respect of such allegations, and a chance to bring forward any witnesses he/she may wish to answer those allegations."

32 The onus of proof rests upon the Respondent to establish that it had the right to terminate the Applicant's employment without proper notice (see *Blyth Chemicals Limited v Bushnell* (1933) 49 CLR 66 at 83). There is no rule of law that defines the degree of misconduct which would justify dismissal without notice. In *Clouston & Co Ltd v Corry* (1906) AC 122, the Privy Council at 129 stated—

"… the sufficiency of the justification depended upon the extent of misconduct. There is no fixed rule of law defining the degree of misconduct which will justify dismissal. Of course there may be misconduct in a servant which will not justify the determination of the contract of service by one of the parties to it against the will of the other. On the other hand, misconduct inconsistent with the fulfilment of the express or implied conditions of service will justify dismissal."

33 Wilful disobedience at law may constitute grounds for summary dismissal (see Macken, McCarry and Sappideen's *The Law of Employment* (4th Ed) at 197). A single act of disobedience will rarely justify summary dismissal except where disobedience has the quality that is wilful, in other words, the conduct connotes a deliberate flouting of the essential contractual conditions (see *Laws v London Chronicle (Indicator Newspapers) Ltd* [1959] 1 WLR 698 per Lord Evershed MR at 701).

34 In relation to dismissal for breaches of fidelity and good faith, Kirby J in *Concut Pty Ltd v Worrell* [2000] HCA 64; (2000) 75 ALJR 312 at [51]; 321-322 recently observed—

"3. The ordinary relationship of employer and employee at common law is one importing implied duties of loyalty, honesty, confidentiality and mutual trust. At common law:

> "[c]onduct 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. ... [T]he 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.

…

4. It is, however, only in exceptional circumstances that an ordinary employer is entitled at common law to dismiss an employee summarily. Whatever the position may be in relation to isolated acts of negligence, incompetence or unsuitability, it cannot be disputed (statute or express contractual provision aside) that acts of dishonesty or similar conduct destructive of the mutual trust between the employer and employee, once discovered, ordinarily fall within the class of conduct which, without more, authorises summary dismissal. Exceptions to this general position may exist for trivial breaches of the express or implied terms of the contract of employment. Other exceptions may arise where the breaches are ancient in time and where they may have been waived in the past, although known to the employer. judged irrelevant to the (sic) Some breaches may be (sic) duties of the particular employee and an ongoing relationship with the employer. But these exceptional cases apart, the establishment of important, relevant instances of misconduct, such as dishonesty on the part of an employee like Mr Wells, will normally afford legal justification for summary dismissal. Such a case will be classified as amounting to a relevant repudiation or renunciation by the employee of the employment contract, thus warranting summary dismissal."

35 It is clear from the evidence given by Ms Negroponte that she only raised the payment made on week ending 28 November 2001 with the Applicant. Ms Negroponte said that when she spoke to Ms O'Meara about the $50 payment of overtime that Ms O'Meara informed her (Ms Negroponte) that this was the third time that it had happened. However, she said that she did not check all of the other weekly payments until after "the matter had come to a head". It is apparent from the evidence given by Mr Bennett and by the Applicant that only one payment of overtime was discussed with the Applicant when the decision was made by Mr Bennett to terminate the Applicant's employment. It was not suggested to Ms Negroponte in cross-examination that she had informed Mr Bennett that there had been more than one unauthorised payment of overtime prior to the Applicant's employment being terminated. It is apparent by the evidence given by Mr Bennett that he did not speak to Ms O'Meara about this matter until after the Applicant's employment was terminated.

36 The employer is entitled to rely, post-dismissal, upon conduct which was not known to the employer at the time of the employee's dismissal (*Concut Pty Ltd v Worrell* (op cit)). It is argued on behalf of the Applicant that prior to the termination of employment the Respondent knew that there had been four payments of unauthorised overtime by the Applicant and not just one. It is open to argue that in light of such knowledge that the employer has condoned or has waived its right to rely upon any misconduct in relation to the other three payments. However it appears from the evidence that although Ms Negroponte knew there had been more than one payment, Ms Negroponte did not bring the other payments to the attention of Mr Bennett. In *Federal Supply and Cold Storage Co of South Africa v Angehrn* (1910) 103 LT 150 it was observed that the employer must be fully aware of all facts for condonation or waiver to arise and an employee cannot rely upon an employer's failure to make a full and complete inquiry of how gross the misconduct was.

37 Although the Applicant conceded in his evidence that payments of overtime in the absence of working overtime would be payments dishonestly made and in breach of trust, the Applicant did not accept that his actions were dishonest. Clearly the Applicant was in a position of trust. It is important that as the Respondent's accountant he was required to ensure that all financial documents created by him and under his control accurately reflected the facts. He fundamentally breached his duty of

fidelity of good faith and he breached a lawful direction given by Mr Bennett not to pay Ms O'Meara a pay rise. A person such as the Applicant was clearly in a senior management position and was required to set an impeccable example in respect of corporate administration of the Respondent's funds. Whilst Ms O'Meara was not disciplined for receiving the money, it is clear that she was a junior employee and the decision by the Applicant to make the payments to her was not requested by her. Consequently, I am not persuaded that the Respondent's treatment of her mitigated the Applicant's conduct so as to render the decision to terminate harsh, oppressive or unfair. It is my view that the Respondent has discharged its onus of proof that summary dismissal was justified. Accordingly I will make an order dismissing the Applicant's claim.

2002 WAIRC 06887

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	PAUL MARVIN LYNCH, APPLICANT
	v.
	FRATELLA PTY LTD, RESPONDENT
CORAM	COMMISSIONER J H SMITH
DATE OF ORDER	WEDNESDAY, 30 OCTOBER 2002
FILE NO.	APPLICATION 2287 OF 2001
CITATION NO.	2002 WAIRC 06887

Result	Application dismissed.
Representation	
Applicant	Mr T Crossley (as Agent)
Respondent	Mr S G Scott (of Counsel)

Order

HAVING heard the Mr Crossley on behalf of the Applicant and Mr Scott 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.

[L.S.]

(Sgd.) J. H. SMITH,
Commissioner.

2002 WAIRC 06812

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	LEEANNE MARIE MAINARD, APPLICANT
	v.
	HR CONNECT, RESPONDENT
CORAM	COMMISSIONER S WOOD
DELIVERED	WEDNESDAY, 23 OCTOBER 2002
FILE NO.	APPLICATION 450 OF 2002
CITATION NO.	2002 WAIRC 06812

Result	Application dismissed
Representation	
Applicant	Mr P Mullally as agent
Respondent	Mr JH Brits of Counsel

Reasons for Decision

1 This is an application pursuant to section 29(1)(b)(i) of the *Industrial Relations Act, 1979* ("the Act"). The applicant was employed from 17 April 2001 to 15 February 2002 as an Administrator for the respondent. The respondent's business is involved with recruitment of staff for the mining industry.

2 The unfairness alleged is that the respondent undertook a series of performance reviews in close proximity between late December 2001 and early February 2002, leading to the applicant's dismissal for poor performance. The applicant says that there was not sufficient time to improve performance, as she was on leave for part of the time, and the matters complained of in the third and final performance review, were either addressed by the applicant or not her responsibility and the substance of these complaints did not warrant dismissal.

3 The applicant obtained new employment on 3 June 2002 and hence seeks compensation from 16 February to 3 June 2002. She earned $2,314 in temporary employment. Her total claim for compensation is therefore $7,496.

4 Ms Mainard's evidence is that her duties included reception work, personal assistant to the manager, maintenance of the web site and general office duties. Her letter of appointment [Exhibit LMM1] displays the total remuneration package of $34,560 including $32,000 in salary and $2,560 in superannuation. She reported to Ms Anne Littlewood, the Manager of HR Connect. Ms Mainard completed successfully her probationary period and was confirmed in her employment [Exhibit LMM4]. Her remuneration package at that stage was increased to $36,720, being $34,000 in salary and $2,720 in superannuation [Exhibit LMM5].

5 In September 2001, Ms Mainard and Ms Littlewood had an informal meeting away from the workplace to discuss some issues that Ms Mainard wanted resolved within the office. A note was made of this meeting [Exhibit LMM6] and signed by both Ms Littlewood and Ms Mainard. The note deals with what Ms Mainard liked and did not like about her duties, and included a series of action points. The list of action points are as follows—

"AL to mention to other staff about Lea's personal items in cupboard and not to help themselves.

Also to mention to staff that Lea prefers to get things out of her desk drawer if needed, rather then people helping themselves.

Would like list of jobs that are on seek, with name of consultant next to them.

A list of Hiring Managers and HR people for each of our clients would be helpful.

List of Contractors – regularly updated would also be good.

Lea happy to undertake personality test – AL to organise."

Ms Mainard said there was never any personality test undertaken.

6 Ms Mainard says her work performance after September was fine and then just prior to Christmas 2001 she was approached by Ms Littlewood to undergo a performance review. Her impression was that all staff were undergoing a performance review at that stage. The performance review was undertaken on 21 December 2001 in the presence of Ms Mainard, Ms Wendy Bond and Ms Littlewood. Exhibit LMM7 is a record of the performance review. The review included a warning that Ms Mainard's performance needed to improve and set the date of 18 January 2002 to review progress. The agreed areas for improvement were—

"1. Not playing her part in the team – eg the way Lea is speaking to people is having a negative effect in the office. For example, Lea's perceiving that she is joking with people about cupboard doors not being closed, whereas other people are offended by it.

2. Office needs to be kept tidy – kitchen to be kept tidy, and benches wiped down boxes need to be removed from the office.

3. Office supplies need to be kept up to date (eg we shouldn't be running out of toner for our main printer like we did today).

4. Less procrastination with her jobs. An example is the defrosting of the fridge AL asked Lea to do 6 weeks ago. In the time taken with all this, the fridge could have been defrosted.

5. If a task is set, the task guidelines must be followed. (For example if a deadline cannot be met, respond to the person who set the task.)

Agreed that Lea will track her time spent for different people – eg amount of time spent on work with Anne, accounts work, etc."

7 Ms Mainard says she understood she was to be more careful in the manner in which she spoke to people in the office, she was to take steps to tidy the office, ensure office supplies were kept up to date and to be more proactive in her tasks.

8 Ms Mainard took leave between 21 December and 18 January. In effect she had approximately 2 weeks at work during that period. A further performance review was conducted on 18 January 2002. The note of that review [Exhibit LMM8B] indicates that Ms Mainard's attitude had changed in the past 2-3 days and that she was trying hard. More attention needed to be given to getting tasks done and on time. At that review Ms Mainard also handed a document to Ms Littlewood covering her responses to the 1st performance review [Exhibit LMM8A]. In that note Ms Mainard details the efforts she had made to improve her performance, accepted that there was some continuing procrastination by her in getting tasks completed and that it was evident that she was trying to improve her performance. A further review was set for 1 February 2002.

9 Ms Mainard says that following the 2nd Performance Review on 18 January 2002 she was under no apprehension as to her continuing employment. She says that approximately 2 days before the review she held a concern about her employment but after the review there were positive comments and she did not think she was at risk of being terminated. Ms Mainard says that she had taken steps to improve her performance and there were positive remarks at the 2nd performance review.

10 Ms Mainard was asked by Mr Littlewood to keep track of her time in the two weeks leading up to the 3rd Performance Review. The 3rd Performance Review is also documented and signed by Ms Mainard, Ms Bond and Ms Littlewood [Exhibit LMM9B]. Exhibit LMM9A is a record of duties and time keeping in the intervening period. This record was compiled by Ms Mainard. The performance review is as follows—

"Anne let Lea know that she can see that she has still been trying to keep the kitchen and office tidy.

As per the Performance review from the 18th of January, Lea offered that she has been trying to be more proactive with ordering stationery supplies – examples being ordering the toners and drums for all the printers and fax machine and stocktaking the envelopes and letterhead in preparation for reprints if HR Connect moves in April.

Anne acknowledged that Lea had complied with the instruction in the Performance Review of the 18th of January and had tracked her time for the two weeks prior to this meeting, achieving an 8-hour plus day every day except one (Please see attached).

Wendy and Anne both gave Lea instances of where she is not taking pressure off their jobs, they are—

1. Diners Club Account – cheque needed that day. Lea had not passed that documentation to Serene. Lea did not come back to Anne and let her know that she herself had found that information on her own desk, ie the hold-up was with Lea, not Serene.

2. Minutes of Meeting not prepared on time. They are due each Wednesday and were provided to Anne on Thursday afternoon. This was after Lea had asked both Wendy and Anne on Wednesday if they needed any help.

3. Kitchen supplies – running out of supplies just recently. Although teabags were the only thing we ran out of, Lea accepts that it is part of her responsibilities to make sure that kitchen supplies don't run out. Lea offered that she had intended a grocery shop at the beginning of February as per instructions from Anne, and that she had then purchased teabags on her own time.

4. Clough Internal Mail not being picked up. Lea acknowledged that she is responsible for collecting it each day. However, this was not done one day this week, which resulted in a contractor having a full day's delay in the preparation of his contract.

Anne mentioned that both she and Wendy are almost cracking under the pressure of their jobs and that having to double-check what Lea does for us isn't helping the situation."

11 In relation to the four items raised at the performance review of 1 February 2002, Ms Mainard says firstly that for the Diners Club account she thought that she had handed the documentation to the accountant. She found out later in the day that the documents were back on her desk and the cheque was arranged, signed and deposited that day as required. In relation to the Minutes of the Meeting, Ms Mainard says that they were eventually issued on time. In relation to kitchen supplies, Ms Mainard says that she explained at the performance review that Ms Littlewood had requested her to wait until February to do a further shop. On the morning that it was discovered there were no tea bags she went and purchased some straightaway. With respect to the Clough mail she had telephoned the mail room and there was no mail that day. All these matters were explained at the performance interview.

12 Ms Mainard was told by Ms Littlewood that both Wendy and her were very busy and under pressure. As this was Ms Mainard's third performance review her employment was to be terminated and she would work out her two weeks of notice. Ms Mainard was very upset as she did not consider that the matters raised during the interview warranted her being dismissed.

13 Ms Mainard sought other employment. [Exihibit LMM10] is a list of the jobs for which she applied. [Exhibit LMM11] is a list of her earnings prior to achieving another ongoing job on 4 June 2002. Ms Mainard says that she would be uncomfortable if Ms Littlewood were to be her manager once again and does not seek reinstatement.

14 Under cross-examination Ms Mainard says that she believed that her working relationships were good and that there was no animosity between her and Ms Littlewood. She regarded her dismissal as unfair because she believed her performance was more than adequate and there were no valid complaints about her. She denies that she was told during her July review that her manner was rude and abrupt. She says that she was advised to soften her approach as people can take things out of context. She does not recall a performance review being conducted on 12 December 2001. Ms Mainard recalls some of the matters raised by the respondent as having been discussed at some stage but does not recall a meeting on 12 December 2001.

15 Ms Mainard was required to prepare notes on the proper procedure for answering telephones and says this was to assist everyone, not because there was any problem with her telephone manner. The respondent tendered a bundle of documents concerning the telephone procedure [Exhibit R1], ie weekly staff meetings. [Exhibit R2] is an email which Ms Mainard agrees she received notifying her of the second performance review and advising her that the matter was "at disciplinary stage, with a view to potential termination".

16 Ms Littlewood gave evidence that Ms Mainard was counselled during her probationary period to soften her approach when communicating or else people would consider her to be rude. This was again raised during their luncheon discussion in September 2001. She says that Ms Mainard was given continual feedback about her performance. There were instances where clients would come into the respondent's premises and leave a curriculum vitae without being seen by a consultant. This was a responsibility of Ms Mainard and she did not act as she was instructed to do.

17 Ms Littlewood considered that Ms Mainard was reluctant to draft the telephone procedures as requested. She felt that when Ms Mainard had an interest in a job she did it well but when she was not keen on a job it was left undone or given too low a priority. If deadlines were not going to be met by Ms Mainard then according to Ms Littlewood she did not advise people of this. The problem caused was that Ms Littlewood was under pressure and felt that she had to double check jobs that Ms Mainard had done hence making her situation worse.

18 Ms Littlewood felt that she could trust Ms Mainard to complete her notice period and suggested that they advise staff that Ms Mainard had resigned. Ms Mainard agreed to this. A farewell event was held for Ms Mainard.

19 Under cross-examination Ms Littlewood advised that the decision to terminate Ms Mainard's employment was made after the meeting of 18 January 2002. The incident relating to the failure to collect mail was serious because it affected a client and prevented him from receiving a contract in time. The other complaints were more in the pattern of tasks not done for which Ms Mainard was responsible.

20 Both Ms Mainard and Ms Littlewood gave evidence in a straightforward and largely consistent manner. As indicated to the parties I do not consider the credibility of the witnesses to be a significant issue. Having said that, I have no hesitation in accepting the evidence of Ms Littlewood over that of Ms Mainard. They disagree as to whether Ms Mainard's performance was adequate and whether she was counselled. Ms Mainard says that she was never counselled, yet there is a record of the performance meetings which she signed and evidence as to other discussions about her performance. Ms Mainard was warned that her employment was in jeopardy but continued to consider that all matters raised were minor. Ms Mainard says that she signed the performance records as she felt that she was more likely to be terminated if she did not. This is at odds in my view with her evidence that her working relationship with Ms Littlewood was good, at least up to the time of the first formal performance review in December 2001.

21 There is much that is common in the evidence; albeit Ms Mainard and Ms Littlewood disagree substantially on the quality of Ms Mainard's performance. Ms Mainard's evidence is that her performance was at all times good and that the matters raised about her performance and manner were only minor and that she took steps to correct them. She admits to having procrastinated at work but responded to what was demanded of her. She says that Ms Littlewood's attitude changed toward her following the performance review, as did the attitude of some other staff. There was less respect shown towards her in the workplace.

22 The applicant complains that she responded to the requests for improved performance and that the performance reviews were conducted over a short period of time and it was as if her termination was set in concrete. There was nothing much the applicant could have done in those circumstances to avoid dismissal, it was submitted on her behalf. The matters raised in the third review were not serious matters and the applicant had explanations for these. The only one which affected an outside client and hence may be seen as more serious was not the fault of the applicant or could have been easily remedied by Ms Bond. It is the applicant's submission that there was not a clear framework for her duties and that she was answerable to everyone and hence potentially subject to the butt of complaints by everyone.

23 I have some sympathy for the view that the performance reviews were conducted over a short period of time and that Ms Mainard was on leave for part of the time. The importance of this was whether Ms Mainard had a proper opportunity to improve her performance. Weighed against this is the fact that Ms Mainard's responsibilities were not complex. She was aware of her duties on her own evidence. There was some pressure as it was a busy office and Ms Mainard had to prioritise her jobs. The difficulties experienced with Ms Mainard were not limited to the last weeks of employment. Ms Littlewood counselled Ms Mainard about her communication skills in the later part of her probationary employment. In September Ms Littlewood took Ms Mainard to lunch in an attempt to establish a better working arrangement for Ms Mainard aswell as for the other staff and herself. In that sense the performance reviews can be seen as having been instituted after some time had elapsed and in the face of continuing problems with Ms Mainard's performance. I do not consider that the respondent on balance acted in a procedurally unfair manner in dismissing Ms Mainard.

24 The central issue is of course whether Ms Mainard's performance was adequate and hence whether the respondent acted so as to abuse their right to terminate Ms Mainard's employment *Undercliffe Nursing Home –v- Federated Miscellaneous Workers'*

Union of Australia, Hospital, Service and Miscellaneous, WA Branch 65 WAIG 385. I have no doubt that Ms Mainard's performance was not adequate and that this was expressed clearly to her. On the common evidence there were discussions between Ms Mainard and Ms Littlewood about Ms Mainard's performance in July, September, December, January and February. Ms Mainard admits to some difficulties in her performance but says that she was not counselled. Clearly she was counselled and Ms Littlewood says that she counselled Ms Mainard regularly. I accept this evidence. It seems that Ms Mainard did not treat the Ms Littlewood's concerns with sufficient seriousness even after her employment was put in jeopardy and she was advised of this. Ms Littlewood's prime concerns on her evidence were that Ms Mainard did not attend to all her tasks, particularly the ones she least favoured, and consequently her work had to be checked continually hence adding to the pressure in the workplace. The difficulties covered in the performance reviews, in the context of Ms Mainard's duties, are examples of the continuing problems encountered with her work and thus cannot be dismissed as minor. In the circumstances I consider that Ms Mainard has been afforded a fair go all round and I would dismiss the application.

2002 WAIRC 06813

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	LEEANNE MARIE MAINARD, APPLICANT
	v.
	HR CONNECT, RESPONDENT
CORAM	COMMISSIONER S WOOD
DATE OF ORDER	WEDNESDAY, 23 OCTOBER 2002
FILE NO.	APPLICATION 450 OF 2002
CITATION NO.	2002 WAIRC 06813

Result	Application dismissed
Representation	
Applicant	Mr P Mullally as agent
Respondent	Mr JH Brits of Counsel

Order

HAVING heard Mr P Mullally on behalf of the applicant and Mr J Brits of counsel on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders—

THAT the application be and is hereby dismissed.

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

2002 WAIRC 06891

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ANTHONY GEOFFREY MATTHEWS, APPLICANT
	v.
	COOL OR COSY PTY LTD; CEIL COMFORT HOME INSULATION PTY LIMITED; CITIGROUP PTY LTD, RESPONDENT
CORAM	COMMISSIONER P E SCOTT
DATE	THURSDAY, 31 OCTOBER 2002
FILE NO.	APPLICATION 1502 OF 2001
CITATION NO.	2002 WAIRC 06891

Result	Application as it relates to Cool or Cosy Pty Ltd and Ceil Comfort Home Insulation Pty Limited dismissed.
Representation	
Applicant	Mr A Drake-Brockman (of Counsel)
Respondent	Ms M Saracini (of Counsel)

Reasons for Decision

1 The applicant claims that he has been unfairly dismissed and that he has been denied reasonable notice. The first two respondents oppose the claims, saying that they were not the applicant's employer. The third respondent, Citigroup Pty Ltd ("Citigroup"), is in liquidation. At the commencement of the hearing, the applicant advised the Commission that he did not intend to pursue the claim against Citigroup at that time. However, the application in respect of Citigroup was not dismissed. Citigroup was not represented at the hearing.

2 The Commission has heard evidence from the applicant; from Bruce Bowe who was the Human Resource Manager with Citigroup commencing on 27 June 2001; Peter Anthony Roberts, a director of a number of companies which trade as Cool or Cosy; Mario Di-Lallo, who with Mr Roberts, his father-in-law, commenced what he described as the Cool or Cosy business in Western Australia in 1984; and Anthony John Iezzi, also a director of a number of companies. In these Reasons, unless otherwise identified, reference to Mr Iezzi is reference to Mr Anthony (Tony) Iezzi, and not to Mr Gabrielle Iezzi, who is also a director of a number of companies which trade as Cool or Cosy.

3 Where there is conflict in the evidence, I generally prefer the evidence of Mr Di-Lallo and Mr Iezzi to that of the applicant. This is not because I found the applicant to be dishonest, but I found his evidence in examination in chief to be vague and unclear as to detail, and was only clarified in detailed cross examination. Some of his evidence was based on assumptions, and I will deal with that evidence later. My observation of him as he gave his evidence lead me to believe that it was only during the course of having things put to him that he came to an understanding about matters he had not previously understood. Further, the applicant's evidence as to the psychologist or psychiatrist he attended following the termination of his employment confirms his lack of attention to detail on important matters and his lack of understanding of some significant differences. His evidence in that regard was also vague and unhelpful to his credibility in that at one stage he gave the impression that he was receiving ongoing counselling (transcript page 73) and on another that he only saw this counsellor twice, in August 2001 (transcript page 186). He incorrectly named this person in examination in chief and corrected it in cross examination. He was unsure of whether this person was a psychologist or a psychiatrist.

4 On the other hand, I accept Mr Di-Lallo's and Mr Iezzi's evidence except in respect of Mr Di-Lallo's evidence as to the memorandum he signed on 30 July 2001.

5 The evidence of Mr Roberts was vague, however, where he has a recollection of matters, I accept his evidence. Mr Bowe's evidence was not entirely reliable, he appeared to be vague about some matters, particularly given his lack of familiarity with the business and its procedures.

The Employer's Identity

6 The first matter to be dealt with is the true identity of the applicant's employer at the time of termination of employment, in late July or early August 2001.

The Group

7 A number of companies operate in the manufacture, retail and installation of cellulose fibre insulation and trade as Cool or Cosy. At the time of the applicant's termination of employment, different companies were operating in different states, working co-operatively and using the same trading name of Cool or Cosy and using the same logo. For the sake of convenience I shall refer to those companies forming the Cool or Cosy group, without that having any inference of it being a corporate group in the usual sense.

8 The companies include Cool or Cosy Pty Ltd, the first respondent, which is said to be dormant and the evidence indicates that it has no income or expenditure (Exhibit R8); COC Pty Ltd, not a named respondent, is the company operating in Western Australia and Tasmania; Ceil Comfort Home Insulation Pty Limited ("Ceil Comfort"), a named respondent, operates in New South Wales in the domestic sector; NCI operated in New South Wales in the supply of insulation to the commercial sector; Morcanna Holdings Pty Ltd operates in South Australia; and Natural Fibre Pty Ltd operates in Queensland. Thermo-Seal Pty Ltd was another company which operated in New South Wales. There was also reference to CIS Contract Management Services Pty Ltd, but this company seems to have no association with the applicant's employment. According to Mr Di-Lallo's evidence, which I accept, Cool or Cosy Limited became COC Pty Ltd in the mid 1990s.

9 It was generally accepted that Mr Di-Lallo is or was the managing director of all of the businesses in which he was involved. I find that he was the senior management person within those businesses. Mr Mario Di-Lallo, Mr Anthony Iezzi, Mr Gabrielle Iezzi and Mr Peter Roberts are directors of a number of companies including Cool or Cosy Pty Ltd, Ceil Comfort, COC Pty Ltd, Natural Fibre Pty Ltd and Morcanna Pty Ltd. Other people were also directors of the last two named companies. Immediately prior to the termination of the applicant's employment, there were two National General Manager positions, one for domestic operations, and one for commercial operations. The applicant held the domestic position and Mr Greg Clack held the commercial position. Relevant to the circumstances surrounding the termination of the applicant's employment is that in early 2001, Mr Mike Stark, the State Manager of Western Australia had been dismissed. The evidence shows that Mr Stark challenged his dismissal and the employer defended it saying that Mr Stark had been made redundant.

10 Citigroup was described by Mr Di-Lallo as a "management company at arms length to any of the Cool or Cosy group" engaged to provide management services. Its sole director was Mr Richard Webb, who was also the company secretary of some of the companies within the group, and was also the chief financial officer of some of them. It is said by the first two respondents that at the time of the termination of the applicant's employment, the applicant was an employee of Citigroup.

11 The evidence of all witnesses, except Mr Bowe, who had only joined Citigroup in late June 2001, indicates that in 2000 and the first half of 2001, substantial activity was undertaken with a view to the formation of a consolidated Cool or Cosy company, moving towards listing on the Australian Stock Exchange by way of a public float. The activity aimed at achieving that purpose included the engagement of external consultants; the establishment of a defacto or interim board of directors for the purpose of creating and conducting a unified business; examining the benefits of the focus of the business being moved to New South Wales and generally to the eastern seaboard where the opportunities were seen as greatest; engaging accountants and lawyers to undertake the necessary due diligence process associated with fundraising, and moving the senior management personnel and the administration and accounting functions into the head office in Adelaide Terrace in Perth. In addition, and significant for the purposes of this matter, the first two respondents say that Citigroup became the employer of the executive, management, and financial and administration services employees for the group, for the purpose of bringing them together and for the purpose of recharging the costs to the companies concerned.

The Evidence and Conclusions

12 The first thing I note in respect of this issue of the identity of the employer is the applicant's lack of understanding or ignorance of company structures and corporate arrangements for one in such a senior position. Having said that, though, the multitude of companies trading under the Cool or Cosy name, the various letterheads and arrangements did not assist with the applicant's identification of his employer. However, he was represented in this matter by very experienced counsel, and proper identification of his employer should be able to be achieved in those circumstances. Part of the difficulty which has arisen for the applicant in this regard has occurred because he has made assumptions about who his employer was without having any proper understanding of such matters, and it would appear, without examining relevant documentation and the terms contained in them. The applicant's lack of understanding of who his employer was or of the names and relationships of the companies and operations is exemplified at page 65 of the transcript where he says that as at 30 July 2001, he thought that his employer was Ceil Comfort; prior to 1 October 2000, he thought that it was Ceil Comfort, and prior to that he thought that it was "Well it's - - I mean, I could say Cool or Cosy Pty Ltd, COC Pty Ltd." He was unable to differentiate between the last two, and appears to have wrongly assumed that COC Pty Ltd was the same as Cool or Cosy Pty Ltd. He says that he had very little knowledge of the detail of the different entities in the Cool or Cosy group, of their financial position or any other information. He knew of Morcanna Holdings being a South Australian operation, Natural Fibre having something to do with Queensland and he understood that Ceil Comfort was the New South Wales "or more eastern sea board operation".

13 There is no dispute that on 14 August 1995, the applicant was engaged as the "State Sales Manager – Cool or Cosy" on a total package of $40,000 inclusive of superannuation. He was able to earn sales commissions, and there was to be two weeks notice

on either side. His letter of engagement on the letterhead of COC Pty Ltd, was dated 14 August 1995, and was signed by Stephen D Griffiths whose title was State Manager (Exhibit A4 (1)).

14 I find that the applicant was initially engaged in August 1995 by COC Pty Ltd. That was the name on the letterhead on which his letter of appointment was typed (Exhibit A4 (1)). However, as will be clear from what follows, the letterhead itself is not necessarily indicative of the identity of the employer. The applicant was the Sales Manager for the state of Western Australia. The company operating in Western Australia was COC Pty Ltd.

15 According to the evidence of the applicant, and by letter dated 1 December 1995, (Exhibit A4 (2)) on the letterhead of Ceil Comfort signed by Tony Iezzi as the Managing Director, the applicant's employment as "Sales Manager with Cool or Cosy Ltd. Western Australian Branch" at a salary of $41,600 plus a bonus of 0.5 per cent of installed sales, and petrol reimbursement was confirmed. There was to be one week's notice on either side, except in the cases of "misconduct or breach of your Terms and Conditions".

16 On 13 March 1996, on the letterhead of Ceil Comfort, Tony Iezzi and Peter Roberts signing as directors, recorded the applicant's appointment as "General Manager/Sales Manager with Cool or Cosy Ltd. WA branch." He was to have a salary of $48,600 with half of one per cent of installed sales as commission and there was to be one week's notice on either side. In addition to the figure of $48,600, in hand writing is "+ SUPER AN." (Exhibit A4 (4)).

17 Reference in the letter of 1 December 1995, on the letterhead of Ceil Comfort, to his appointment as "Sales Manager with Cool or Cosy Limited Western Australian Branch" is to be taken, with the benefit of Mr Di-Lallo's evidence, as employment with COC Pty Ltd, because in the mid 1990s, Cool or Cosy Limited became COC Pty Ltd (Exhibit A4 (2)). The same applies to the letter of 13 March 1996 (Exhibit A4 (4)), on the letterhead of Ceil Comfort, which refers to his employment as General Manager/Sales Manager with Cool or Cosy Ltd. W.A. Branch.

18 In his capacity as Western Australian General Manager and later as a National General Manager, the applicant reported to Mr Di-Lallo on a daily basis, speaking at length about all matters relating to the business.

19 Exhibit A4 (3) is an undated memorandum from Mr Roberts to a person named Kiat Foo, directing that the applicant's salary be increased to $52,000 and backdated to 1 March 1997. The applicant says that this related to his appointment as General Manager/Sales Manager.

20 The applicant gave evidence that in 1997, through his company, Jalna Marketing Pty Ltd, he received a national prize for sales performance. On 21 October 1997, Richard Webb, the group's financial controller, sent a memorandum to Kiat Foo directing that a cheque be drawn on COC Pty Ltd's account to pay the applicant's company the prize money of $4,000. Mr Webb's memorandum of that date (Exhibit A4 (5)) notes that Mr Webb would contact "the other 3 states and request their contribution of $1,000 each."

21 The applicant received a pay rise to take his base salary to $78,000 per annum, or $1,500 per week from 2 February 1998.

22 By an unsigned memorandum on the letterhead of COC Pty Ltd, dated 2 October 1998 addressed to "To Whom it May Concern", Mario Di-Lallo, recorded as being Managing Director, noted that the applicant was employed "by this company" as "West Australian State Manager" (Exhibit A4 (11)). His salary was described as being $125,000 per annum gross, and noting that he also had a motor vehicle. The evidence demonstrates that this memorandum was provided for the purpose of the applicant seeking a loan. This unsigned memorandum is on the letterhead of COC Pty Ltd, being the correct letterhead, and refers to the applicant's "employment by this company" (Exhibit A4 (11)). This confirms the employer as COC Pty Ltd at that time.

23 A memorandum of 11 August 1998, to the applicant from Richard Webb dealing with the motor vehicle used by the applicant refers to COC Pty Ltd making a particular contribution to the lease payments of the car (Exhibit A4 (7)). This is also confirmed in documents dealing with the lease, which consistently refer to COC Pty Ltd or COC P/L (Exhibit A4 (11)).

24 The applicant's Group Certificates for the years 1996/97, 1997/98 and 1998/99 all record the employer as being COC Pty Ltd (Exhibits R1, R2 and R3).

25 Exhibit A4 (33) which is an AMP Superannuation Savings Trust account statement in the name of the applicant for 2001. The "Employer Name" is "Cool or Cosy Pty Ltd". There is no evidence as to who instigated this superannuation fund or why the employer is named as it is. On its face, this document indicates that the superannuation account commenced on 29 March 1996 which was when the applicant was General Manager/Sales Manager for Cool or Cosy Ltd WA Branch (according to Exhibit A4 (4)). In the circumstances, this document is of limited assistance as it merely records details as they applied in 1996, and there is no other evidence to clarify its genesis.

26 Immediately prior to 19 October 1999, the applicant had held the position of General Manager/Sales Manager of their Western Australian operation. The Western Australian operation was undertaken by COC Pty Ltd. During this time, the applicant also set up the Tasmania operation, using COC Pty Ltd accounts and processes. In setting up the Tasmanian operation, he spent a considerable amount of time in Tasmania, but still retained his Western Australian position.

27 In addition, the applicant reported to Mr Di-Lallo. Mr Di-Lallo was the Managing Director of those companies in which he was involved. This aspect is not of much assistance in determining the employer's identity.

28 According to all of the documentation and the fact that the applicant worked in or from Western Australia, and his primary responsibility was for Western Australian and Tasmania, I conclude that until at least 19 October 1999, the applicant was an employee of COC Pty Ltd, the company which operated in Western Australia and Tasmania.

29 From 19 October 1999, the applicant became General Manager for New South Wales, Western Australia and Tasmania. His appointment was announced on the letterhead of Ceil Comfort, by Mr Di-Lallo, signing as "Company Director" (Exhibit A4 (14)). The terms of the letter make no reference to who he was employed by. However, he continued to work from Western Australia, visiting other states as necessary.

30 The applicant's Group Certificate for the financial year 1999/2000 (Exhibit R4) shows the employer as Cool or Cosy Natural Insulation Pty Ltd. As I understand the evidence, there was no such company within the group. However, Cool or Cosy Natural Insulation is the trading name of COC Pty Ltd, Ceil Comfort, Natural Fibre Pty Ltd and Morcanna Holdings Pty Ltd. So that is not at all helpful.

31 The applicant received two Group Certificates for the 2000/2001 financial year. The first lists the employer as COC Pty Ltd Western Australia for the period 14 August 1995 until 27 October 2000.

32 Although the evidence is not entirely clear as to when the applicant moved to the head office in Adelaide Terrace, Perth, until that move he worked at the COC Pty Ltd premises at Garling Street, O'Connor, in Western Australia. This included at least part of the time when he was State Manager of New South Wales, Western Australia and Tasmania.

33 The applicant was appointed National General Manager of domestic operations in October 2000. He tendered Exhibit A4 (16), which he says was presented to him in a discussion with Mr Di-Lallo to review the income he had received with a view to

whether or not he would get a pay rise in his position as National General Manager in October 2000. If this document was produced by the employer as the applicant suggests, then it is noteworthy that it tends to indicate that payments to the applicant for "wages" of $93,132.00, subject to PAYE tax, were made by COC Pty Ltd. In addition, there were overriders and commissions for sales for Western Australia, Tasmania and something called "Roof". In addition, consultancy fees of $22,100.00 were allocated to or paid by Ceil Comfort. The document indicates that Thermo-Seal Pty Ltd made no payments. Accordingly, this document, while being less than reliable evidence, tends to indicate that the applicant's salary up to June 2000 was paid by COC Pty Ltd, and Ceil Comfort paid a consultancy fee, and, according to the lay out of the document, this consultancy fee was paid to Jalna Marketing, not to the applicant as an employee.

34 There is clearly a good deal of conflicting evidence as to who the applicant's employer was from October 1999. The balance of that evidence favours the applicant having been employed by COC Pty Ltd from October 1999, as he had been previously, until October 2000. The 1999/2000 Group Certificate does not help one way or the other, however, the first of the 2000/2001 Group Certificates shows COC Pty Ltd as the employer. None of the Group Certificates shows Ceil Comfort as the employer. Exhibit A4 (16), the document presented to the applicant by Mr Di-Lallo to show payments to the applicant through Jalna Marketing Pty Ltd shows "wages" of $93,132.00 being paid by COC Pty Ltd. Ceil Comfort paid a consultancy fee of $22,100.00. The letter announcing the applicant's appointment is on Ceil Comfort letterhead but does not indicate who the employer was.

35 The first two respondents say that the applicant was employed by Citigroup from the end of October 2000. This was as part of the bringing together of the various companies and the establishment of a single operation. As noted earlier, the applicant was appointed National General Manager for domestic operations around this time. In any event, the applicant says that he was to receive a pay rise on account of his new position, in that the figure of $156,919.88 set out in Exhibit A4 (16) referred to above, was to be rounded up to $160,000.

36 The applicant says that in early October 2000, he received an Employment Declaration form stating that he was employed by Citigroup. He was concerned about this and says that he asked Mr Di-Lallo why this was and Mr Di-Lallo said "who do you think your pay should come from" … "it must come from Citigroup as an easy means for us to distribute your wages …" The applicant said that he asked "but I still work for Cool or Cosy, don't I?" to which Mr Di-Lallo is said to have replied "yes". The applicant says that he then asked for an employment form to substantiate who he was working for and he was told "we are working on it now".

37 The applicant says that as a result of that conversation he believes he was employed by Ceil Comfort but that for administrative reasons he would be paid through Citigroup and they would distribute the costs.

38 The applicant and Mr Di-Lallo agree that as a result of the applicant's appointment as National General Manager domestic operations, the applicant received from Mr Di-Lallo a document confirming that appointment. There are at least 2 versions of the document, one at Exhibit A4 (17), and the other is included in a document within Exhibits A4 (18) and (19). The difference between them is that the second document cites a commencement date for the appointment of 1 October 2000, whereas the other contains no date. The witnesses agree though, that where the memorandum notes that "the terms and conditions are outlined in the following pages", that those pages were not the documents headed "Contract of Employment" contained at Exhibits A4 (18) and (19). The terms and conditions attached to Exhibit A4 (17) are not before the Commission, apparently none of the parties has a copy.

39 As to Citigroup, the applicant understood Mr Webb to be in charge of the accounting staff at head office. He thought that Citigroup was the employer of the accounting staff at head office including a number of accountants, accountant assistants, and reception. He did not see himself as being part of Citigroup. However, when he had spoken to Mr Di-Lallo about documentation indicating that he may be employed by Citigroup, he believed that the money was coming through Citigroup, otherwise he had no other knowledge of Citigroup's operations. He was asked to sign an Employment Declaration with Citigroup recorded as being his employer and he did so. He says that he signed this because a matter of one to two days after he had queried with Mr Di-Lallo why he was being paid through Citigroup he understood the explanation Mr Di-Lallo gave him and he accepted that his pay would be going through Citigroup for the company's purposes. The first two respondents say that Citigroup was not merely a mechanism for recharging payments but had the genuine function of bringing the separate companies together, and to facilitate the float.

40 The applicant's second group certificate for the 2000/2001 financial year, for the period 1 November 2000 onwards shows the employer as "Citigroup Pty Ltd" (Exhibit R5).

41 The parties also appear to agree that the "Contract of Employment" documents, Exhibits A4 (18) and (19), were never signed. The applicant says he did not agree to their terms. Interestingly, those documents refer to Ceil Comfort engaging the applicant through Jalna Marketing, and provide a salary of $160,000. They also refer to a Key Man Insurance policy. Exhibit A4 (32) is a Payment Notice in respect of an insurance policy with Colonial. This document is addressed to "Ceil Comfort Home Insulation". The date of issue of the Payment Notice is 29 August 2001, after the termination of the applicant's employment. The applicant says that this relates to "Key Man Insurance" taken out at least a year before, making it prior to August 2000, that is, when the applicant was still employed as Western Australian State Manager, or perhaps he had become the New South Wales, Western Australian and Tasmania State Manager by then (see Exhibit A4 (11) and (14), where correspondence on the letterhead says COC Pty Ltd and Ceil Comfort refer to that). In cross examination, Mr Di-Lallo agreed to the proposition put by Mr Drake-Brockman for the applicant that "Ceil Comfort Home Insulation Pty Ltd was paying premiums for that policy … because, as national general manager employed by Ceil Comfort Home Insulation Pty Ltd, Mr Matthews was a key employee." (transcript page 365). Yet at page 353-354 of transcript, when reference was made to the Contracts of Employment at Exhibit A4 (18) and (19), Mr Di-Lallo says he cannot understand the applicant being an employee of Ceil Comfort, "it doesn't make sense", and "He lives in this state. He was employed by COC Pty Ltd prior to being employed by Citigroup. Ceil Comfort Home Insulation was never his direct employer. It doesn't make sense to me." At page 355 he denied that it was logical for the applicant to be employed by Ceil Comfort on account of any focus on the eastern sea board. He said that it had not been agreed.

42 Attached to Exhibit A4 (19), in addition to the undated memorandum to the applicant from Mr Di-Lallo confirming the applicant's appointment as National General Manager domestic operations, are unsigned documents including a memorandum to the applicant confirming his ownership of shares of "Cool or Cosy Tasmania', and referring to shares to be transferred to him for "the Sydney Domestic operations" as well as shares in "COC Roof Restoration". There is also an unsigned agreement between "COC Pty Ltd and Jalna Marketing Pty Ltd" which sets out that—

> "COC Pty Ltd will hold in trust 5% of the value of Cool or Cosy Tasmania for Jalna Marketing Pty Ltd until the Public Float occurs. At the time of the Float 5% of the shares received by Cool or Cosy Tasmania will be transferred directly to Jalna Marketing Pty Ltd, as well as 5% of any undistributed profits accumulated by Cool or Cosy Tasmania that do not go into the float."

43 As these documents relate to future share transfers, I am not satisfied that they relate to any employment relationships except, perhaps, that they relate to some reward to the applicant by COC Pty Ltd which was the owner of the Tasmanian operation, on account of the work the applicant did in setting up the Tasmanian operation when he was General Manager/Sales Manager of Western Australia, employed by COC Pty Ltd.

44 Ceil Comfort paid the Key Man Insurance policy premiums, but Mr Di-Lallo having said that it did so because the applicant was a key employee of Ceil Comfort later said that it did not make sense for the applicant to be an employee or Ceil Comfort. I accept his latter assertion for the reasons which I will later set out.

45 The Contracts of Employment citing Ceil Comfort were never signed and did not become the applicant's contract of employment.

46 The applicant's final pay slip (Exhibit A4 (29)) refers to only one of the companies in any way associated with the Cool or Cosy group being "Citigroup". There is an attachment dealing with the annual leave calculation which is of no particular assistance in this issue. There are then 4 sheets attached each headed "National Australia Bank Limited - Direct Payments File Detail Report". They appear to represent 4 payments of $1,531.77 to Jalna Marketing Pty Ltd by or on behalf of Ceil Comfort, COC Pty Ltd and Natural Fibre. The nature is not entirely clear, however, I conclude that they record the allocation of costs of the National General Manager's position to the companies running the business in New South Wales, Queensland, Western Australia and Tasmania, in accordance with the arrangement described by Mr Di-Lallo to the applicant, when the applicant queried why he was employed by Citigroup.

47 There is a letter written by Bruce Bowe dated 31 July 2001 on Cool or Cosy group letterhead. This letterhead listed at the margin of the page "The Cool or Cosy Group", followed by each of the cities Perth, Sydney, Brisbane, Adelaide and Hobart, with the name of the relevant company under each city's name. (Exhibit A4 (28)). I note that this is not on Citigroup letterhead. However, this is of no assistance or marginally indicative of employment by one of the Cool or Cosy group companies listed on the margin of that letterhead paper, which, as noted, does not include Citigroup. This document would require consideration of whether Bruce Bowe knew at the time that he wrote that letter who was the applicant's employer and was able to distinguish between various companies and their letterheads. Mr Bowe was employed approximately 3 days per week for around 5 weeks when he wrote this letter. He had received no induction. In his evidence, Mr Bowe appears to have assumed that COC Pty Ltd was Cool or Cosy Pty Ltd (transcript page 220), and he says that Mary Brown, the payroll and accounts officer who drew up the Certificate of Service attached to the letter of 31 July 2001 (Exhibit A4 (28)) had the applicant's personnel file. I find that Mr Bowe was not sufficiently familiar with the structure of the group, or of the details of the applicant's employment, to make any reliable judgment about this matter. There is no evidence as to why Ms Brown cited the employer's name as Cool or Cosy Pty Ltd in the Certificate of Service, which form part of Exhibit A4 (28).

48 It is also noteworthy that in the listing of the companies on the margin of "The Cool or Cosy Group" letterhead, there is no listing of Cool or Cosy Pty Ltd or Citigroup Pty Ltd. However, COC Pty Ltd and Ceil Comfort are listed under Perth and Sydney respectively. COC Pty Ltd is also listed under Hobart, confirming that COC Pty Ltd operated the Perth and Hobart businesses of the group.

49 Exhibit A4 (27) is a letter of 1 August 2001 also by Mr Bruce Bowe and this letter likewise is of limited value in identifying the applicant's employer because of Mr Bowe's limited expertise or experience of this matter.

50 The applicant was a member of the Qantas Frequent Flyer Programme and Exhibit A4 (12) is page one of four pages of what appears to be an internet record of the applicant's membership. This lists the applicant's position as "National General Manager" and the company name as "Cool or Cosy Pty Ltd". This is of limited assistance as there is no information as to when the applicant joined the Frequent Flyer Programme although it would appear from the title of his position noted there that this occurred after October 2000. However, it seems to be recognised by the applicant during closing submission that Cool or Cosy Pty Ltd was not the applicant's employer at the time of termination. The applicant argues only that Ceil Comfort was the employer at that time and none of the documents for the period October 2000 to 31 July 2001 supports this contention.

51 I conclude that in October 2000, when the applicant had become National General Manager for the domestic operations with the Cool or Cosy group his employer became the company which was working towards the float, and employing the senior management personnel of the group, and bringing the various state operations together, being Citigroup. Citigroup, not Ceil Comfort, was the vehicle for the float.

52 I find that the applicant's employment was based in Western Australia, not New South Wales. The Western Australian office was the head office of the group. In the latter months of his employment, the applicant spent a number of weeks in New South Wales, concentrating on rectifying a number of problems there, in the same way as he had spent time in Tasmania setting up the business in that state. His role as National General Manager had him dealing with all states in which there were domestic operations, and he continued to do so while in New South Wales. The applicant's evidence demonstrates that while he was working in New South Wales he was still undertaking his role as National General Manager and had interest in and concern for what was occurring in the other states. He received their profit and loss statements and dealt with matters as necessary, by telephone, fax or email. This position gave him some limited role in respect of South Australia and Queensland. This role was limited because the companies there were operated by directors who set those companies up, who were not Mr Di-Lallo, Mr A Iezzi, Mr G Iezzi or Mr Roberts. There was discussion between himself and Mr Di-Lallo about the applicant moving to New South Wales permanently. However, by the time of the termination of his employment, no decision had been made for him to relocate to New South Wales, and he had returned to his office in Perth. Merely because he was undertaking some work in and related to New South Wales immediately prior to the termination, does not make the New South Wales company, Ceil Comfort, his employer.

53 Mario Di-Lallo acted as and was considered by all who gave evidence to be the managing director of the group of companies, albeit that he may not have formally held that position in respect of any of the companies or the group as a whole, even if it is possible for him to formally hold such a position within the group as a whole. According to Mr Di-Lallo, he was a senior management person employed by Citigroup by the time of the termination, in July 2001, and I accept Mr Di-Lallo's evidence in that regard. The applicant reported daily and in detail to Mr Di-Lallo during the course of his employment including up to the time of the termination of his employment, except in Mr Di-Lallo's absence. In Mr Di-Lallo's absence on holiday in July 2001, the applicant reported to Mr Anthony Iezzi. The applicant argues that if he had been employed at that time by Citigroup then the employer's representative would have been Mr Webb, Citigroup's sole director. The reality appears to be, though, that Mr Di-Lallo took the senior management role within the group regardless of which company was actually concerned at the time, and I so find. I conclude that at the time of termination, the right to exercise control over the applicant was held by Mr Di-Lallo in his role as the defacto managing director of the group and as the senior management person in Citigroup. By this time all of the directors and senior managers including the applicant and the National General Manager of the commercial operation, Mr Clack, were employees of Citigroup.

54 I conclude that in his role as National General Manager, the applicant was genuinely employed by Citigroup because his role in that position included drawing the businesses together in his particular area of expertise of sales and marketing. Had he been seen to be employed by one of the state's companies, this may have been more difficult.

55 It is also argued by the applicant that the directors who met on Monday 30 July 2001, when the applicant says that his employment was terminated in a meeting with those directors, were all directors of Ceil Comfort. However, I find that they were also the directors of the various other companies. This would demonstrate that the directors who met with the applicant on Monday 30 July 2001, if they were formally meeting as directors, where also directors of COC Pty Ltd, Cool or Cosy Pty Ltd, Ceil Comfort, Natural Fibre Pty Ltd and Morcanna Pty Ltd. They were also senior management employees of Citigroup at that time. Therefore, while they might have been directors of Ceil Comfort in the course of that meeting they were also holders of other positions and other authorities.

56 Accordingly, I find that—

1. The applicant was not at the time of the termination of his employment, or at any other time, an employee of Cool or Cosy Pty Ltd. In any event, that company was dormant at the time of the termination.
2. Although the applicant spent a considerable amount of his time immediately prior to the termination in Sydney, his was a national position. Ceil Comfort was the New South Wales based company. There is no evidence, apart from the applicant's erroneous assumptions, that Ceil Comfort was the national arm of the business. If there was any such body, it was Citigroup in its role as the employer of the senior management. I find then that Ceil Comfort was not the applicant's employer.
3. The applicant was employed by COC Pty Ltd from the time of his engagement until at least around October 1999. There is no direct evidence that his employer changed until he was employed by Citigroup Pty Ltd in October 2000. He knew of this because he discussed it with Mr Di-Lallo when he was asked to complete an Employment Declaration form for taxation purposes, and he did so. He was to continue to perform work for the Cool or Cosy businesses, and he was reassured of this by Mr Di-Lallo. However, from that point until the termination of his employment, his employer was Citigroup Pty Ltd. The senior management team, the finance and administration staff were all said to be employed by Citigroup at the time of the applicant's termination. Mr Di-Lallo, to whom the applicant reported, was also an employee of Citigroup. Yet Citigroup is the only company associated with the group in which Mr Webb was the sole director and shareholder. The directors of the companies within the group trading as Cool or Cosy included Mr Di-Lallo, Mr A Iezzi, Mr G Iezzi and Mr Roberts. Mr Webb was not a director. I do not suggest that Citigroup's status as the employer was a sham. That company had a legitimate purpose and role in the anticipated, but ultimately failed, float.

57 If I am wrong and Citigroup was not genuinely the applicant's employer but was merely a tool for the allocation of costs to the various companies, then it is likely that COC Pty Ltd was the real employer at the time of dismissal, as his employer did not change in October 1999. However, the applicant did not proceed against COC Pty Ltd. In any event, I conclude that at the time of his dismissal, the applicant was not employed by either of the first two respondents.

58 The applicant's submissions indicate that the Commission is being asked to pierce the corporate veil only for the purpose of dealing with the calculation of claims for notice and other calculations relating to length of service. There is no suggestion that it ought be done for the purpose of identifying the applicant's employer, if that were necessary. There is no application to amend the name of the respondent to include COC Pty Ltd, notwithstanding that this company's identity and its possible role as the applicant's employer arose in cross examination of the applicant on the first day of hearing, 9 April 2001. Bearing in mind that the hearing of this matter was adjourned on 10 April 2001 and did not resume until 23 July 2002, and concluded on 24 July 2002, there was plenty of opportunity for such an application to be made if one were necessary. Instead, the applicant maintained steadfastly that Ceil Comfort was the employer.

59 In the circumstances, then, the application as it relates to the first and second respondents ought be dismissed. The applicant ought now indicate his intentions in respect of the third respondent.

60 Notwithstanding my conclusion regarding the identity of the employer, it may be appropriate that the merits to the claim be dealt with.

The Unfair Dismissal Claim

61 I have considered all of the evidence in this matter in reaching my conclusions. I find that the applicant returned to Perth from Sydney and attended for work on Monday 30 July 2001. Mr Di-Lallo returned from a month's holiday on the weekend prior to 30 July 2001 and also attended for work on Monday 30 July 2001. Mr Di-Lallo did not discuss with any of the members of the senior management the state of the business until that time. During his absence, progress ought to have been made towards the float of the national company. When he returned to the office, Mr Di-Lallo had a letter waiting for him from the bank from which the group was seeking to obtain further funds for the purpose of the float, indicating that further funds would not be available. The directors were being asked to provide further securities. Deloitte Touche Tohmatsu, which had been engaged to undertake the accounting due diligence, indicated that it did not wish to proceed and was ceasing that work immediately. According to Mr Di-Lallo, it had discovered that the financial footing of the business was not what it should have been, and knew this before the directors knew about it because of its role in undertaking a review of the accounts. The accounts for New South Wales showed a $1.5 million discrepancy, the business was behind in its GST obligations and it appeared that the GST cost had not been passed on to the customers. The Western Australian operation had decreased its pre-tax profit from $700,000 in the year 2000, to $51,000 in 2001. The Tasmanian business maintained some degree of stability and the commercial operations in Victoria and New South Wales combined had losses of between $300,000 and $400,000. The Queensland business was performing only slightly better than the previous year as was the South Australian business, both of which operated fairly independently.

62 While he was in New South Wales, the applicant sent a memorandum to Mr Di-Lallo dated 25 June 2001, dealing with the state of the business there (Exhibit R6). Mr Di-Lallo says in his evidence that he believed this memorandum indicated that the applicant had lost confidence in the New South Wales operation and the applicant was positioning himself to resign from the National General Manager's position.

63 Mr Di-Lallo had spoken briefly with Mr Iezzi and Mr Roberts, been introduced to the new Human Resources Manager, Mr Bowe, had obtained all the key performance indicators from the companies and digested them. Mr Di-Lallo became extremely concerned as to the future of the business. He went to see Mr Iezzi and Mr Roberts in their office for approximately 20 to 30 minutes and discussed with them briefly what could be done to rectify the situation. They discussed the defacto board and decided that it would be abolished. The external consultants cost around $7,500 per month in fees, and they were to be terminated immediately. They discussed other positions, two of which were the National General Manager positions, held by the applicant and Mr Clack. Mr Di-Lallo says that he was concerned on a number of bases including the applicant's memo of 25 June 2001 that the National General Manager position was not working out and that those positions were likely to go as well.

64 Mr Di-Lallo then went into the applicant's office and sat down with him and they exchanged pleasantries. Their evidence is consistent that the applicant commenced talking about how things were going in New South Wales and his enthusiasm for a new product, Biofax, when Mr Di-Lallo stopped him and told him that things were not good, and attempted to explain the situation to the applicant. The applicant responded that things could not be that bad but he recognised from Mr Di-Lallo's expression that there was concern for the situation and Mr Di-Lallo commented to the effect that he could lose his house. He told the applicant that the National General Manager positions were likely to go. The applicant was quite calm and they discussed that including that the applicant asked what was going to happen to him, whether he could go back into the State Manager's position in Western Australia.

65 Mr Di-Lallo invited the applicant to go into the boardroom, and called on Mr Iezzi and Mr Roberts to join them there. They then went through a number of issues of concern as to the poor state of the business, the details of the difficulties in raising the necessary capital, that the public float was not going to proceed, the banks were not prepared to lend them the necessary money, the difficulties that had been identified in their accruals and their accounting, the trading situation, and that changes were necessary. Those changes included the decision to terminate the defacto board.

66 I find that, at this point, the issue of the National General Manager positions being abolished was again discussed. The applicant again suggested that he could go back to the State Manager's position in O'Connor. Mr Iezzi responded that this could not happen because Mr Stark, the previous State Manager who had been dismissed, had made a claim to the Commission and the employer was defending that claim on the basis that that position was redundant. Mr Iezzi indicated to the applicant that in the circumstances it was not appropriate for the applicant to fill that position. There was further discussion to the effect that they would have to decide what was to happen in respect of the applicant. Mr Di-Lallo and Mr Iezzi both say that it was not their intention to terminate the applicant's employment, that they needed to see what the final outcome of the changes would be and what positions might be available for the applicant and others. They needed to seek advice to see what could be done. The applicant's own evidence as to what occurred in that meeting is that he was told "we've got to work out what position you hold". He says that he then had a shot at Mr Iezzi saying "you're happy now Tony, you've got what you want" (page 152). Mr Iezzi agrees that the applicant said this to him. Mr Iezzi is said by the applicant to have responded that "you have never had anything else but contempt for me Tony – flat out contempt for me". There was then some aggravated debate between the applicant and Mr Iezzi as to who was responsible for the budget which had not been met.

67 The applicant says that during the conversation as to what was to happen to him he said "I am big enough and ugly enough to do it for the greater cause" (transcript page 152) and "accept your decision" (transcript page 153). Mr Roberts is said to have indicated that if he had to go for a year without pay, he would do that for the cause. It is generally agreed that the applicant then asked Mr Di-Lallo to put something in writing to him to show, what the applicant says was, why he was being victimised. He says that Mr Di-Lallo responded that "I cannot, Tony, as you have done nothing wrong". I am more inclined to the view that Mr Di-Lallo indicated to the applicant that he could not put anything to him in writing at this point because they had made no particular decision about what they could offer him. However, I find that Mr Di-Lallo agreed that he would draw up something in detail and put it in writing. The applicant told them that he wanted it in writing because he would need to get his legal representatives to examine it. The applicant then left the meeting and went back to his office.

68 The applicant had been unwell in the time prior to returning to work from his trip to New South Wales. He says that in the circumstances of what had just occurred and not being completely well, he needed to take the rest of the afternoon off. He typed up a memorandum requesting to take the afternoon off and wanted Mr Di-Lallo to sign it. This seems to be a strange thing for someone in a senior management position to do, but I believe and find that it reflected the applicant's feelings that his situation was somewhat tenuous. That matter will be dealt with further in these Reasons. He went in to see Mr Di-Lallo who was still with Mr Iezzi and, I think, Mr Roberts. He asked Mr Di-Lallo to sign the document and Mr Di-Lallo, thinking that it was somewhat strange to have such a request put to him to sign, considered it for a few moments and then signed the document (Exhibit A4 (24)). The applicant left.

69 The applicant says that he did not feel that his employment was coming to an end but thought that there was something amiss - something was going on. He had never seen Mr Di-Lallo looking quite as distraught as he did. The applicant left to go home and on his way home thought that it might be appropriate to have a further discussion. He called Mr Di-Lallo on the mobile phone and it was arranged that he would return to the office, which he did, arriving no later than 12.15pm.

70 I find that what occurred was that the applicant went into Mr Di-Lallo's office and asked Mr Di-Lallo what was going on. He thought that things could not possibly be as bad as Mr Di-Lallo was portraying. He told Mr Di-Lallo that he thought that there might have been something directed at him. Mr Di-Lallo responded that that was not the case, that the business was in bad shape and he went through a number of the issues with him again. Mr Di-Lallo indicated that he might lose his house. Mr Di-Lallo then asked the applicant if he wanted to get Mr Iezzi and Mr Roberts again and there was a further discussion between the four of them. Once again, they went through the circumstances and the changes that might need to be made on account of the difficulties within the business. Mr Iezzi says that the applicant wanted to go back to the State Manager's job in O'Connor but that he told the applicant that they could not give him that job immediately. The conversation then degenerated on the basis that the applicant asked what they were going to do with him. He stated, in a very aggressive manner, to Mr Di-Lallo that they were throwing him out on the street after all of the loyalty that he had given to the company, that he had put his family out. I accept Mr Di-Lallo's and Mr Iezzi's evidence that the applicant was abusive in his manner and in his language including that he used a racist term towards them. The applicant got out of his chair and walked over to Mr Iezzi and pointed his finger in Mr Iezzi's face saying "May God give you everything you deserve - you have your god, I have my god, he'll sort this out." His attitude was hostile, aggressive and angry. He said to Mr Di-Lallo that this was the way his loyalty was being rewarded and Mr Di-Lallo responded that he had also been loyal to the applicant. I note that even in his own evidence, the applicant says that Mr Iezzi told him that "you'll find another job within this company". However, the applicant believes that what Mr Iezzi meant was that he would find another job elsewhere, when Mr Iezzi clearly said that the applicant would have another job within the business and I so find. According to the applicant, Mr Iezzi also said to him "take tomorrow off as well". The applicant then stormed out of the room, slammed the door and said, loudly enough for it to be heard in the open plan office, that they had sacked him, using foul language along the way. He then picked up his brief case, a carton of wine which belonged to him, and left.

71 I find that at this point the applicant's employment had not been terminated by the employer, nor had the employer intended to do so. The employer had instead, in a situation of crisis, attempted to discuss with the applicant, a senior manager, the extremely difficult circumstances in which the business found itself, and to consult with him about the likely effects upon him. It wanted to consider its options, obtain advice, and put some proposal to the applicant regarding his position. The applicant's position as National General Manager was to be abolished, as was Mr Clack's. It is interesting that Mr Di-Lallo's evidence demonstrates that Mr Clack's employment did not terminate for a further month, and when it did, it concluded in amicable circumstances when Mr Clack took over one of the businesses of the Cool or Cosy group.

72 As noted earlier in these Reasons in respect of the applicant's understanding of the corporate structure, I conclude that although he held the position of National General Manager with the group, the applicant's understanding of important and

perhaps complex matters such as that, was superficial. I have considered his evidence as to the process being undertake for the float and the presence of accounting staff in head office for the purposes of the due diligence process. This seems to have somewhat mystified him. His role did not involve the financial management or administration of the business but rather was a sales and operations focus. I conclude that the applicant has risen, relatively rapidly, from a limited sales management role through to a national role with a focus on a broader prospective of the business. The applicant needed the daily and detailed guidance of Mr Di-Lallo to perform that role. Both the applicant and Mr Di-Lallo say that their relationship was good, and developed into a friendship.

73 I also note that the applicant and Mr A Iezzi had some difficulties during the time that Mr Di-Lallo was on holiday in July 2001. The applicant was also unhappy that in very recent times, Mr Iezzi had been placed in charge of human resource management. The applicant was to report to Mr Iezzi in Mr Di-Lallo's absence but was unwilling to deal with Mr Iezzi in the manner in which he had dealt with Mr Di-Lallo. Mr Iezzi had been concerned at at least one of the applicant's decisions, in respect of the dismissal of a New South Wales employee, Nirmel Singh, without properly consulting other members of management. He wanted Mr Di-Lallo to issue the applicant with a formal warning upon Mr Di-Lallo's return from holidays. Although this was Mr Iezzi's intention, it appears that it had not been raised with Mr Di-Lallo upon Mr Di-Lallo's return, prior to the applicant's employment being terminated, because of the short time frame involved.

74 I also note that by memorandum dated 25 June 2001 to Mr Di-Lallo (Exhibit R6), the applicant expressed his concern as to the performance of Mr Chris Taylor, the State Manager of the New South Wales operation, and indicates that he was incapable of doing the job. The applicant appears to take some of the blame for that in that he says "I believe that if I had dug a little deeper into Chris's strengths and weaknesses, I may not have been as eager to get him into that role, but he was the available option". He goes on to say "however, he opted not to share his position, therefore placing the business, his own career and mine in jeopardy through his want for personal success". In the last paragraph of this memorandum, the applicant refers to some of the options that he had suggested for dealing with the difficulties in New South Wales and notes that he would "not make a decision on what I am going to do personally during this time but will see what unfolds in the above mentioned period. I have severely compromised myself and my career and by no means do I take that lightly".

75 I also note Mr Roberts' evidence that in July 2001, when the applicant was in Sydney and Mr Di-Lallo was on holiday, the applicant told Mr Roberts that he had reached an untenable position with Mr Di-Lallo (transcript page 227).

76 I conclude that all of these things help to explain why the applicant reacted as he did to the situation, why his reaction was to focus only on his own situation and to react so irrationally, angrily and pre-emptively. He felt insecure in his position and accordingly, when Mr Di-Lallo explained the genuine reasons for the changes being discussed on 30 July 2001, including the abolition of the National General Manager positions, he could not believe that it was not directed at him personally. He thought that what he was being told was not true and he did not believe it. So he looked for some ulterior motive, when, I conclude, there was none. He struck out with angry, verbal abuse directed at senior managers, including his immediate supervisor.

77 After the applicant departed, the other persons present in the discussion continued to discuss matters between them.

78 I conclude that what occurred next was that Mr Di-Lallo spoke to Mr Bowe, the Human Resources Manager, asking him to arrange for a memorandum to be sent to all staff informing them of what had occurred. Mr Bowe says that the memorandum was drawn up by another member of staff, Tanielle Barton, who was the applicant's personal assistant and also undertook other administrative work. That memorandum is written as being from Mr Bowe to all staff and it states—

> "Due to restructuring within the organisation the position of National General Manager is excess to our company requirements.
>
> Tony Matthews has left our employ effective 30 July 2001.
>
> Any telephone calls / enquiries to be directed to (Tenille Barton) Head Office.
>
> Regards
>
> Signed
>
> Mario Dilallo
>
> Managing Director"

(Exhibit A4 (25))

79 The memorandum went well beyond notifying all members of staff that the position of National General Manager had been abolished but went on to say that the applicant's employment with the business ended that day. Mr Di-Lallo says that the memorandum was typed up and presented to him, he only read the first sentence and signed the memorandum without noting that it referred to the termination of employment. There are a number of options as to what actually occurred in that regard. One is, as Mr Di-Lallo says, that he did not properly read the memorandum. This does not alter what it said or its effect. If Mr Di-Lallo signed it without properly reading it, then as the signatory, he still bears responsibility for it and its consequences. The second is that he did read the memorandum and, whilst it was not what he had intended, having considered what had occurred, decided at that point that, in the circumstances, it would be best if he went ahead and signed anyway, thereby indicating that a decision to terminate had been made. The other option which occurs to me is that following the applicant's departure from the final meeting, Mr Di-Lallo either alone or in discussion with others, made the decision to terminate the applicant's employment on the basis that the position of National General Manager was to be abolished, they had attempted to consult the applicant about a future position for him but concluded that in the circumstances of his attitude that the employment needed to come to an end.

80 In any event, rather than relying on the applicant's conduct, his employer relied upon the genuine redundancy of his position, and acted accordingly in bringing the employment to an end.

81 The memorandum was dispatched to all staff. That afternoon, the applicant received a telephone call from a member of staff, Mr Rick Dyball, telling him that he had received the memorandum indicating that the applicant was no longer employed.

82 I conclude that although the applicant's employment had not been terminated by the employer prior to the applicant leaving the office, the distribution of this memorandum had the effect of bringing the employment relationship to an end. The next day, Mr Bowe sent a letter to the applicant confirming that the termination was on account of redundancy of the position.

83 The question then arises as to whether or not the applicant was unfairly dismissed. The test to be applied is whether the employer has harshly or unfairly excised its lawful right to terminate the employment, whether in all the circumstances, there has been a fair go all round. (*Undercliff Nursing Home v the Federated Miscellaneous Workers Union of Australia, Hospital, Services and Miscellaneous, WA Branch* (1985) 65 WAIG 385).

84 The applicant was a member of the senior management team of the business. On the day of dismissal, the other members of the senior management were discussing the crisis situation within the business. As a professional senior manager, and given that the applicant was being advised that they would look for another position for him, the applicant's reaction was far from

professional. I conclude that in the circumstances of his abusive outburst and his racist comments in the face of that business crisis, the applicant conducted himself in an entirely inappropriate and unprofessional manner. His conduct was such as to destroy the trust, faith and goodwill necessary for senior managers to work together. It is highly unlikely that in those circumstances, particularly given his attitude to Mr Iezzi and his accusations to Mr Di-Lallo of a lack of loyalty, that an employment relationship could have continued with him being offered a senior position. I find that notwithstanding Mr Di-Lallo's denial that he intended to terminate the employment, he did so by issuing the memorandum and I conclude that he did so based on the applicant's conduct toward himself and Mr Iezzi, which effectively ended any real prospect of another position being available to the applicant. The position of National General Manager was genuinely redundant.

85 The applicant claims that he has been unfairly dismissed on account of not receiving an adequate redundancy payment (*Rogers v Leighton Contracting Pty Ltd* (79 WAIG 3551)).

86 I note two things in respect of the question of redundancy pay. The first is that the applicant received a $10,000 ex gratia payment soon after termination. The second is that had he not conducted himself in the manner he did, the applicant's employment may not have terminated. His future position within the business was to be the subject of a proposal by his employer, however, his conduct prevented that from being pursued. His employment might not have terminated at all had he discussed the matter in a professional and civilised manner, and resolved it that way. Another position within the business might reasonably have been found for him. Mr Clack's situation provides a useful counterpoint. In Mr Clack's case an amicable resolution was arrived at which resulted in Mr Clack departing and taking over one of the businesses from within the group. A myriad of alternatives arise in respect of the applicant's employment. One might have been that, with the departure of one of the National General Managers other options might have arisen for the applicant. In any event, even if following the redundancy of the National General Manager positions and the applicant possibly being offered a lesser position, this would not necessarily amount to a dismissal from employment. On the other hand, the applicant's conduct which resulted in the dismissal occurred before any alternative could be put to him, including alternatives which might have been within the terms of his contract of employment. (see *Brackenridge v Toyota Motor Corporation Australia Ltd* (1997) 142 ALR 99). The applicant's unprofessional conduct and his behaviour prevented any further discussion of that situation.

87 I find that Mr Di-Lallo's telephone conversation with the applicant two days later was not aimed at overcoming the dismissal or ensuring that 'the door was still open" in respect of the employment. I find that Mr Di-Lallo had a genuine and friendly regard for the applicant up to the point of dismissal and his discussion was more by way of a personal enquiry about the applicant's well being, and perhaps with the hope of some personal, if not business, reconciliation.

88 The applicant has not properly mitigated his loss associated with the termination of employment on account of the redundancy of his position. It was his conduct which prevented the employer providing him with an offer of an alternative position. If his conduct had been reasonable, he may or may not have suffered some loss, however, by denying his employer the opportunity for discussion and an offer of such a position, the applicant has failed to mitigate his loss.

89 Therefore, I conclude that the loss suffered by the applicant is due to his own conduct, and not to the termination. It cannot be unfair that his employer failed to pay him an adequate redundancy payment, if such is the case, when his own conduct prevented the employer offering him some alternative position, and thereby brought about the termination of employment.

90 The applicant argues that in bringing the employment to an end in the manner it did, the employer has acted unfairly. The manner or procedure of effecting a dismissal is but one of the considerations to be had in deciding whether a dismissal was unfair. (*Shire of Esperance v Mouritz* (1991) 71 WAIG 891). I conclude that the applicant's conduct was such in the final meeting of 30 July 2001, that he destroyed the professional and personal relationships which are necessary to enable senior management people to work together, particularly in a crisis, as this was.

91 Accordingly, I find that although he was dismissed, the applicant was genuinely made redundant. I am of the view that his attitude on that day may have come about as a result of a combination of his lack of understanding and comprehension of the situation, a sense that he had not performed as required in respect of the New South Wales situation, and a lack of understanding of the real crisis within the business. Instead of addressing that, he focused on his own situation ultimately to his detriment. The applicant's conduct needs to be considered in the context of his position, his experience and the circumstances. I find that he did receive a fair go, in all of the circumstances. The termination was on notice and the applicant says that he received a week's pay in lieu of notice. One week's notice was, as I note later in these Reasons, one of the alternatives as to the notice due under the contract of employment.

92 I also note the decision of His Honour, Anderson J, with whom the other members of the Industrial Appeal Court agreed, in *Dellys v Elderslie Finance Corporation* [2002] WASCA 161. Although his comments in this regard may have been obiter, they ought be given weight. His Honour said—

> "… The employer is bound at general law as a matter of implied agreement to terminate only on giving reasonable notice (Byrne v Australia Airlines Ltd (supra) at 429). It is therefore quite unlikely that the employer would regard it as obvious that, in the case of a redundancy but not otherwise, he should also make a payment called "reasonable redundancy". Neither does it appear reasonable, or equitable, that an employer should be obliged to both give reasonable notice and, as well, pay a redundancy sum. …"
>
> (Paragraph 21)

93 Accordingly, provided the applicant was paid for notice, either according to his contractual terms, or if there is no such term, according to an implied term, it would not be necessary to pay him a redundancy payment as well. In the circumstances, a lack of an adequate redundancy payment, if such is the case, did not constitute unfairness in the dismissal.

The Contractual Benefits Claim

Notice

94 The question then arises as to the contractual benefits which the applicant claims. The applicant was entitled to a period of notice. How much notice is another matter entirely. Up until his employment as General Manager, New South Wales, Western Australia and Tasmania, and excepting the first three and a half months, the applicant had contracts of employment which explicitly provided for one week's notice. From 14 August 1995, when the applicant was appointed as State Sales Manager, he was subject to two weeks notice (Exhibit A4 (1)). When his appointment was confirmed on 1 December 1995, this was reduced to one week's notice (Exhibit A4 (2)). His letter of appointment as General Manager/Sales Manager of the Western Australian branch, as of 13 March 1996 also provided one week's notice. The document at Exhibit A4 (14) noting his appointment as General Manager, New South Wales, Western Australia and Tasmania in October 1999 stated no period of notice, nor did it state any conditions different from the existing ones.

95 Exhibits A4 (17), (18) and (19) contain the undated note from Mr Di-Lallo to the applicant confirming his appointment as National General Manager of the Cool or Cosy group domestic operations. It notes that the terms and conditions were outlined in the following pages. However, the attachment was not available to be provided to the Commission. If the attachment set out conditions regarding notice then those conditions may have applied to the applicant at the time of termination of his

employment. Those conditions are not before me. However, it is likely that if notice were dealt with in that document that it was one week as in the previous contracts, or perhaps 4 weeks. I note the applicant's evidence (transcript page 140) that if he employed anyone, he would state that there was one week's notice, or up to 4 weeks notice in some instances. Mr Di-Lallo says that Citigroup's policy was for one week's notice. However, a conclusion as to what that document might have contained is impossible to draw.

96 If he was employed by COC Pty Ltd at the time of termination his contractual terms might have simply continued. If his employment had transferred to Citigroup then different conditions applied under a contract with Citigroup and they are not before me. If there were no conditions in respect of notice within the contract of employment with Citigroup, it may be appropriate to consider whether to imply a term into the contract. It would also be appropriate to consider whether to imply a term if the applicant's employment had substantially changed over the period of time since such a term was contained within his contract, such as to make the period of notice set out earlier no longer applicable (see *Quinn v Jack Chia (Australia) Ltd* [1992] 1 VR 567 (SC)). (*Port Pty Ltd v Shire of Hastings* (1977) 180 CLR 266 and *Codelfa Construction Pty Ltd v State Rail Authority of NSW* (1982) 149 CLR 337 at 346)

97 It would then be necessary to consider the appropriate tests including the applicant's length of service with the group, the applicant's status within the organisation as a whole including the size of the organisation being that at the end of 2000, there were more than 400 employees in total, in at least 5 states, and his seniority within the business (*Tarozzi v WA Italian Club (Inc)* (1991) 71 WAIG 2499).

98 In the circumstances, it is not my intention to come to any conclusion on the matter of notice in the absence of clear evidence, and given my conclusions in respect of the applicant's employer not being one of the named respondents against whom he proceeded. However, I note that as he was employed by Citigroup at that time, his contractual terms were set out in the attachment to Exhibit A4 (17), and they most likely included a notice period of either one or four weeks.

Other Benefits

99 As to the issue of the rate at which the applicant ought be paid his benefits, it is clear that those payments made to him via his business, Jalna Marketing Pty Ltd, were not on account of the applicant conducting a business genuinely separate from his employment. The income received in that manner came from his normal day-to-day work in his employment. Payments through Jalna Marketing Pty Ltd were merely a device to give him and his wife, and also his employer, some tax benefits. Accordingly, the total salary plus "consultancy fees", commissions and overriders should be included in an assessment of remuneration for notice. The benefit of a vehicle would also be an appropriate consideration as it formed part of the applicant's contract, and I find that the RAC guide to the costs of a vehicle is a fair and reasonable consideration (Exhibit A3).

100 The remaining benefits, being an expense account, a mobile phone, a lap top computer and Qantas Club Membership, claimed for inclusion were necessary for the applicant to perform his duties. They were not for him to use for his personal and private benefit. Accordingly, they should be excluded from any consideration of remuneration for the notice period.

101 Another matter which may warrant consideration in some way in respect of notice, or if he was entitled to redundancy pay, although I make no particular finding, is the ex gratia payment made to the applicant.

102 As noted earlier, the applicant ought, within 28 days advise the Commission of his intention in respect of the claim as it relates to Citigroup.

103 Order accordingly.

2002 WAIRC 06892

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ANTHONY GEOFFREY MATTHEWS, APPLICANT *v.* COOL OR COSY PTY LTD; CEIL COMFORT HOME INSULATION PTY LIMITED; CITIGROUP PTY LTD, RESPONDENT
CORAM	COMMISSIONER P E SCOTT
DATE OF ORDER	THURSDAY, 31 OCTOBER 2002
FILE NO.	APPLICATION 1502 OF 2001
CITATION NO.	2002 WAIRC 06892

Result	Application as it relates to Cool or Cosy Pty Ltd and Ceil Comfort Home Insulation Pty Limited dismissed.

Order

HAVING heard Mr A Drake-Brockman (of Counsel) on behalf of the applicant and Ms M Saracini (of Counsel) on behalf of the respondent, the Commission, pursuant to the powers conferred under the Industrial Relations Act, 1979, hereby orders—

1. THAT the application in so far as it relates to Cool or Cosy Pty Ltd and Ceil Comfort Home Insulation Pty Limited be and is hereby dismissed.
2. THAT the applicant advise the Commission of his intentions in respect of the application in so far as it relates to Citigroup Pty Ltd within 14 days of the date hereof.

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

2002 WAIRC 06916

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ANTHONY GEOFFREY MATTHEWS, APPLICANT *v.* COOL OR COSY PTY LTD; CEIL COMFORT HOME INSULATION PTY LIMITED; CITIGROUP PTY LTD, RESPONDENT
CORAM	COMMISSIONER P E SCOTT
DATE OF ORDER	MONDAY, 4 NOVEMBER 2002
FILE NO/S.	APPLICATION 1502 OF 2001
CITATION NO.	2002 WAIRC 06916

Result Correcting Order

Correcting Order

WHEREAS on the 31st day of October 2002, an order in this matter was deposited in the office of the Registrar; and

WHEREAS the said order contained an error;

NOW THEREFORE, the Commission, pursuant to the powers conferred on it under Section 27 of the Industrial Relations Act 1979 hereby orders—

THAT the following correction be made—

In Order 2. Delete "14 days" and insert "28 days".

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

2002 WAIRC 06632

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	GEORGINA MARGARET MUCCILLI, APPLICANT *v.* SUNNY BRUSHWARE SUPPLIES PTY LTD (ACN 009 177 557), RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	THURSDAY, 26 SEPTEMBER 2002
FILE NO.	APPLICATION 361 OF 2002
CITATION NO.	2002 WAIRC 06632

Result	Application alleging unfair dismissal upheld and an order issued for compensation in lieu of reinstatement and application for contractual benefits dismissed.
Representation	
Applicant	Ms H Ketley (of counsel)
Respondent	Mr J Ameduri and with him Ms T Dedic

Reasons for Decision

1 This is an application pursuant to s.29(1)(b)(i) and (ii) of the *Industrial Relations Act, 1979* ("the Act") whereby Ms Georgina Muccilli ("the applicant") claims she was unfairly dismissed from her employment with Sunny Brushware Supplies Pty Ltd (ACN 009 177 557) ("the respondent") on 1 February 2002. The applicant is also claiming benefits under her contract of employment. The respondent claims there was no unfair dismissal, and there is no benefit under the applicant's contract of employment owing to the applicant.

2 Ms Muccilli gave evidence on her own behalf. The applicant is a 52 year old mother of four, who has been profoundly deaf since the age of three. Her evidence was given through two interpreters. The applicant was employed by the respondent on 1 September 2000, after the respondent purchased Custom Industrial Brush with whom the applicant worked. Prior to working with Custom Industrial Brush the applicant was employed by the Blind Institute for many years. The applicant's main duty with the respondent and in her previous employment with Custom Industrial Brush and the Blind Institute was operating machines used for making industrial brushes and brooms. The machines she operated included a polishing machine and a roller machine which made street sweepers. Whilst working with the respondent the applicant undertook additional work associated with making brushes and brooms when the applicant was not busy on the machines or pressing wires. She also glued brushes and assisted with other general tasks on the shop floor and in the lunch room.

3 Whilst working with the respondent, the applicant stated she was supervised by Mr Christopher Clarke. He was also her supervisor when she was employed by Custom Industrial Brush. He communicated instructions and information to the applicant by writing down messages and by using a form of sign language. If there was no work on the machines which she normally worked on, she would approach Mr Clarke who would allocate her additional work. Mr Manuel De Castro also allocated her work, but the applicant found it difficult to understand him, as English was not his first language and he did not use sign language.

4 Occasionally she approached Mr Clarke and Mr De Castro seeking additional tasks to undertake, but they would be too busy to allocate her work and there would be nothing for her to do. On those occasions the applicant would look for work, such as sweeping the factory floor and cleaning out the fridge or washing up in the tea room.

5 The applicant stated that she taught Mr De Castro to undertake work on one of the machines that she operated.

6 The applicant stated that she did not like Mr Ameduri, one of the partners in the respondent's business, as she found it hard to communicate with him. However, she stated she tried to assist as much as possible with the operations of the respondent. Mr Ameduri occasionally asked the applicant to do special jobs for him such as making coffee and emptying rubbish bins, tasks she was happy to assist with.

7 The applicant was employed by the respondent at a rate of $12.39 per hour, and worked approximately 40 hours per week. The applicant commenced employment at 6.45am and finished at 4.00pm with a 30 minute break for lunch and 15 minutes for morning tea. However, she was only paid from 8.00am as she was informed by Mr Ameduri that she was not expected to commence work until 8.00am. It was conceded by the representative of the applicant during the proceedings that the applicant's contract of employment was pursuant to the terms and conditions of the Brushmakers' Award No 30 of 1959 ("the Award").

8 Throughout her employment with the respondent the applicant stated that there were no complaints about her work, and no warnings were given to her. The applicant was operating on the basis that she was doing a good job, and undertaking work as normal at all times.

9 There was no communication with the applicant at any stage in respect to the respondent's business being restructured.

10 In December 2001 the applicant requested four weeks' annual leave, but was given three weeks.

11 The applicant took annual leave between 21 December 2001 and 16 January 2002. When the applicant returned to work on the 17 January 2002 she worked on one of the machines she usually worked on for half an hour, and then there was no further work for her to do. At the time Mr De Castro was working on the machine on which the applicant normally worked. The applicant approached Mr Clarke who gave her some extra work, and she also occupied herself sweeping around the machines. The next day the applicant worked on one of the machines she normally operated. At the end of the day on 18 January 2002, Mr Ameduri asked the applicant to have a meeting with him. The applicant's husband had arrived to pick her up, and he was asked to be involved in the meeting. At the meeting the applicant was told that she would be working for two more weeks, and was given a letter terminating her employment effective 1 February 2002 (Exhibit A5). The termination letter stated she was terminated as a result of the respondent restructuring its operations in order to streamline procedures and productivity.

12 The applicant was very distressed when she was told of this restructure, but she understood that she had been terminated. The applicant worked out the two weeks' notice which she was given. There were no further discussions about her position or her future with the respondent. The applicant did not receive any additional payments from the respondent apart from her normal wages paid up to the date of termination.

13 It was put to the applicant that the respondent claimed she refused to bend and cut wire. The applicant conceded that she did not like to bend and cut wire, however, she was not aware the respondent had problems with her refusing to undertake this work except for one occasion when she indicated that the work was too boring to undertake. The applicant also conceded that on a particular machine, which she had recently commenced operating, from time to time needles broke when she was operating that machine. The applicant was not told the respondent was unhappy about these broken needles. No warnings were given with respect to this, and she claimed that other employees had also broken needles whilst working on this machine.

14 The applicant was asked about a meeting which was held towards the end of 2001 in relation to a restructure of the respondent's business. The applicant recalled attending a meeting at this time but she did not know what was happening at the meeting as no one signed for her, and thus she was unaware of the issues discussed at this meeting. The applicant was unaware that the main machine she was operating was unprofitable for the respondent.

15 The applicant stated that she has been unable to obtain alternative employment since being dismissed. She has sought work, but she stated that it is very difficult to find employment at her age, and given that she is deaf.

16 The dismissal has had a dramatic impact on the applicant. As a result of the dismissal, the applicant has become nervous and worried. The applicant was very upset to have been told that she was not a good worker. She has not slept well since the dismissal and there has been tension at home as a result of her termination. The applicant's self esteem has dramatically declined. Two weeks prior to the hearing she was diagnosed by her Doctor as having high blood pressure.

17 The applicant would have been happy to have had long term employment with the respondent until she retired, sometime after turning 55 years of age. It was the applicant's view that the relationship with the respondent had broken down to such an extent that she was unable to return to work with the respondent.

18 Under cross examination the applicant confirmed that she was not aware that Mr De Castro asked to be taught how to operate the machine she normally worked on because she was going on annual leave. The applicant confirmed that from time to time Mr De Castro asked the applicant to undertake work. The applicant also stated she was not aware that she was only entitled to three weeks' annual leave when she took leave over the Christmas break. The applicant confirmed that she did not understand what was happening on the day that she was given notice of her termination, and this led to her being distressed. The applicant stated that she did not want to bend and count wire when asked to do so, because she understood that she would have to do that for the whole day and that this repetitive work would hurt her shoulders. The applicant stated that she did not refuse to do alternative duties, including gluing of brushes. When asked why the applicant did not approach the respondent about what occurred at the meeting at the end of 2001, the applicant stated that it was difficult to do this if she is unaware of the nature and importance of the meeting.

19 Mr Clarke gave evidence for the applicant. He currently works as an industrial brush maker and machinist with the respondent. Mr Clarke commenced employment with the respondent on 1 September 2000, at the same time as the applicant. Mr Clarke has known the applicant for 18 years and has worked as her supervisor during that time. When the brush making business was sold to the respondent Mr Clarke and the applicant were both employed by the respondent because of their experience on the industrial brush and broom making machines.

20 It was Mr Clarke's evidence that he allocated work to the applicant. He was the main communicator with the applicant and used basic sign language or wrote messages in order to communicate with her. Mr Clarke stated whilst the applicant was on leave in December and January 2002 he was called into a meeting with Mr Ameduri and his wife. At the meeting he was told that the applicant was going to be made redundant. Mr Clarke stated that he communicated this to the applicant when she came back from leave but he did not believe the applicant fully understood the ramifications of what she was being told. He could not recall if he had written a note of what was happening to give to the applicant. Mr Clarke informed Mr Ameduri that he should arrange for an interpreter to be available for the applicant so she could understand what was happening in relation to her employment, but that did not happen. In relation to restructuring meetings, Mr Clarke stated that there were a number of staff meetings held to discuss making the respondent's business more productive.

21 Mr Clarke confirmed that as far as he was aware there had been no complaints about the applicant's work, and that she was a very good worker on the machines on which she worked. If there was no work available the applicant would tidy up, and this included sweeping and washing up in the lunch room. Mr Clarke had only become aware of complaints in respect to the

applicant's performance since she left the respondent. Whilst working with the applicant Mr Clarke did not witness Mr De Castro or Mr Abimosleh complaining about the applicant's work performance.

22 Mr Clarke was aware that some needles had been broken by the applicant whilst working on a particular machine, but he also stated that other employees, including himself, had broken needles. Mr Clarke was not aware that the applicant had ever refused to do work that she was asked to do and in his view the applicant always appeared to be busy.

23 Under cross examination Mr Clarke confirmed that bending wire was not a hard or difficult task. He conceded that occasionally he may have been too busy to give his full attention to requests by the applicant for additional work, and sometimes the applicant had to wait for him to allocate work. Mr Clarke confirmed that he signed information for the applicant in relation to work matters and in general the applicant understood what was occurring at the workplace. If the applicant did not understand, information would be written down for her. He was not aware if the applicant fully understood when he told her she was to be made redundant when she returned from annual leave in January 2002.

24 Mr De Castro gave evidence for the respondent. He works on industrial machines and has been employed by the respondent for three years. Mr De Castro worked alongside the applicant, but not on a day to day basis. Mr De Castro confirmed that the applicant taught him how to change blades on one of the machines. It was his evidence that whilst the applicant worked effectively on the machines she regularly operated, she did not do any other work when she finished working on these machines. He had to regularly remind the applicant to cut wire but the applicant did not want to do this work because he understood she regarded the job as being dirty. Mr De Castro complained to the applicant on a few occasions about her not doing any work apart from work on the machines. Mr De Castro maintains he told the applicant that Mr Ameduri was aware that she was not doing anything when she was not operating the machines.

25 Under cross examination Mr De Castro confirmed that he communicated with the applicant by speaking to her and using gestures as he could not write English or use sign language. When he told the applicant to bend wire and she refused to, he confirmed the applicant then swept the shop floor. He also stated that a lot of his time was spent away from the brush making section, and that on some days he worked outside all day. He confirmed he was not the applicant's supervisor. He stated that Mr Clarke was the person who mainly communicated with the applicant as he worked all the time with her.

26 Mr Ameduri gave evidence. He is in charge of the respondent's operations in partnership with his wife. Mr Ameduri confirmed the applicant asked for annual leave towards the end of 2001, and he granted it to her even though in his view she was not entitled to it.

27 In September 2001, Mr Ameduri undertook a review of his business operations. He spoke with Mr Clarke and indicated to him that productivity needed to be increased in the brush making section or prices would have to go up, and that the period between September and December 2001 was to be a review period. As a result of profits declining during this period, the respondent decided to stop making industrial brushes, mainly manufactured by the applicant, on a temporary basis. This was to occur even though Mr. Ameduri had no complaints about the applicant's performance on the main industrial machine on which she worked, prior to September 2001. This meant that the applicant had to undertake alternative work.

28 It was Mr Ameduri's evidence that as a result of his decision to stop making some industrial brushes on a temporary basis, the applicant's duties changed to include filling brushes and helping out in the brush section as required. Once the decision was made not to use the main machine that the applicant operated, it was Mr Ameduri's view that the applicant refused to undertake additional work. Mr Ameduri claims he spoke to Mr Clarke about problems with the applicant's refusal to undertake work. He stated that business would suffer if the applicant continued to be employed however, other jobs were available for the applicant to undertake if she was prepared to work. It was Mr Ameduri's view that because the applicant refused to undertake alternative duties, this led to complaints from other staff members. Also, Mr Ameduri was aware that the applicant had broken some needles of one of the machines, and these breakages were costly to the respondent.

29 At the meeting held on 18 January 2002 between Mr Ameduri, the applicant and her husband, Mr Ameduri confirmed that the applicant was informed that there was no longer work available for her to remain working with the respondent. However, Mr Ameduri stated that the reference to the respondent restructuring the workplace in the applicant's letter of termination was not true (Exhibit A5). He claimed he did not state the real reasons the applicant was being terminated because this would hurt her feelings and she would be distressed. Mr Ameduri stated that the applicant was chosen for termination because she would not work with some of the other employees, she was not doing her normal work and was not making money for the respondent. He stated that the applicant would still have a job if she could be bothered undertaking alternative additional work in the brush section. Mr Ameduri confirmed another reason why the applicant was terminated instead of Mr Clarke was because Mr Clarke knew how to do all of the relevant tasks including taking phone calls and pricing the product (Transcript Page 84).

30 Mr. Ameduri confirmed that there could be a job in the future for the applicant if the main machine she was operating was reinstituted.

31 Mr Ameduri stated that he did not speak to the applicant in relation to her poor performance as this was the job of other supervisors who worked alongside the applicant. Mr Ameduri confirmed that he had never given the applicant any warnings as this was not his job and he had asked others to undertake this task. Mr Abimosleh was one of the applicant's supervisors and it was his job to indicate to the applicant if there were any problems with her performance. Mr Ameduri understood that the applicant had been given warnings by Mr Abimosleh in relation to her work. When Mr Ameduri questioned Mr Abimosleh and Mr De Castro about problems with the applicant not undertaking work, he was told the applicant's response was that the job was too boring.

32 Mr Ameduri stated that Mr Clarke was not the applicant's supervisor.

33 Under cross examination Mr Ameduri confirmed that it was his role to hire and terminate staff and that Mr Clarke, Mr De Castro and Mr Abimosleh had no responsibilities in relation to this issue.

34 Mr Ameduri believed he had a reasonable relationship with the applicant.

35 Mr Ameduri re-iterated that the main machine that the applicant worked on was unproductive and was thus shut down from September 2001. Thus, the applicant was expected to undertake alternative duties and was retrained to undertake work on a different machine.

36 Mr Ameduri stated that at a meeting held in December 2001 which both the applicant and Mr Clarke attended, he indicated that one employee was going to be terminated. Mr Ameduri also agreed Mr Clarke raised with him that an interpreter should be brought in to assist the applicant to understand the events of the meeting and the situation in relation to her employment. Mr Ameduri claimed that he could not justify the expenditure on an interpreter, thus an interpreter was not brought in. Mr Ameduri stated the applicant should have raised any issue with him if there was a problem understanding what the meeting was about. Mr Ameduri also confirmed he was unaware if Mr Clarke had fully explained to the applicant Mr Ameduri's decision to terminate the applicant.

37 Mr Ameduri confirmed there was no written documentation about the applicant's change of duties as a result of closing down one machine, also no revised duty statement was issued to the applicant. Mr Ameduri claimed that in a general sense the applicant's duties had not changed, as it was everyone's role to contribute throughout the working day whether they were working on machines or not.

38 Mr Ameduri confirmed that the applicant's work performance declined after September 2001. He claimed that a warning letter had been drawn up in December 2001, however he could not recall if this was put to the applicant. This letter, dated 12 December 2002, gave a two week grace period for the applicant to improve her performance (Exhibit A9).

39 Mr Ameduri confirmed that 22 needles had been purchased since September 2001 to replace ones that were broken on a particular machine.

40 Mr Abimosleh gave evidence. Mr Abimosleh has been employed by the respondent for three years. He is a supervisor in the industrial brush section, and his role is to oversee the work of other employees as well as work on brush machines. He also ensures that work is carried out in a satisfactory manner. Mr Abimosleh stated that the applicant was doing nothing on a frequent basis and took extended breaks. It was also claimed by him that the applicant swept excessively, that is every half hour. Mr Abimosleh allocated the applicant duties on a regular basis, but the applicant said they were boring. It was Mr Abimosleh's evidence that he told the applicant that Mr Ameduri was not happy with her work performance and that if she did not improve she would be 'finished' with the respondent.

41 Mr Abimosleh claimed that Mr Clarke was not the supervisor of the applicant and that he would not be aware of what duties the applicant was undertaking. Under cross-examination he also claimed that Mr Clarke was not the main person at the workplace who communicated with the applicant.

42 Mr Abimosleh stated that after September 2001 the applicant was working unsatisfactorily. He claims warnings were given on a daily basis to the applicant and thus, in his view, she was aware that her job was in jeopardy. He claimed the applicant fully understood the warnings, even though none of these were written. Mr Abimosleh confirmed under cross-examination that he was not able to communicate with the applicant using sign language. It was unclear to Mr Abimosleh how many needles had been broken by the applicant, but it was at least five. He stated that Mr Clarke also broke needles. Mr Abimosleh confirmed he not only worked in the brush manufacturing area, but he also worked in the despatch and delivery sections.

Submissions

43 It was the applicant's submission that the applicant had been unfairly terminated. The applicant had been treated unfairly on two grounds. First, as the applicant has a disability it was necessary to treat her differently to other workers. The respondent was required to accommodate within reason, the applicant's disability when dealing with her in day to day matters relating to her employment. The applicant argued that in relation to the applicant's contract of employment with the respondent this accommodation did not take place. Second, in relation to the respondent's obligations in respect to equity and fairness, she was not treated appropriately in relation to her dismissal given her disability.

44 It was submitted there was no issue with respect to the applicant's performance at work. The applicant was not made aware that there were different work requirements expected of her from September 2001, nor was she aware at any stage that her employment was in jeopardy. If there was any issue with respect to work performance, the applicant was not given any opportunity to respond. In effecting the applicant's termination there was a failure by the respondent to take into account the applicant's unblemished work record, and if there were performance issues with the applicant there were other options apart from termination. On this basis, the termination was unfair.

45 On the question of a denied contractual benefit the applicant maintains that her hourly rate of pay was reduced unilaterally during her employment with the respondent and the difference between her normal hourly rate of pay and the reduced rate of pay was sought. Additionally, it was claimed that the applicant was not paid for the full amount of hours worked in each week. The applicant also argued that she had not been given sufficient notice of termination.

46 The respondent maintains that it has a right to restructure its business, and on the basis that the applicant was not performing within the context of this restructure, it was appropriate to terminate her. The respondent argues that the applicant must have known that her job was in jeopardy. If the applicant did not understand what was going on she should have asked, as it was up to her to clarify any issues she did not understand. It was the respondent's contention that the applicant had been warned about her employment and a proper process had been followed. As she did not improve her work performance and as she was given every opportunity to improve it was appropriate for the respondent to terminate the applicant. Thus, there was no unfair dismissal.

47 The respondent claims that the applicant's rate of pay had not varied since she commenced employment with the respondent, thus no payments were due to the applicant. Further, the applicant was paid for the hours she was expected to work, notwithstanding the fact she may have been at the respondent's premises earlier than her normal start time. The applicant was given and paid an appropriate amount of notice on termination. Thus, no amounts were due to the applicant pursuant to her contract of employment.

Credit

48 I carefully observed the witnesses and listened closely to the evidence. Where there is conflict in the evidence, I accept the evidence of the applicant and Mr Clarke in preference to the evidence given on behalf of the respondent, where the evidence conflicts.

49 The applicant gave her evidence clearly, directly and consistently, notwithstanding that her evidence was given through interpreters. She was also unshaken during cross-examination. Mr Clarke gave evidence in a considered, clear and forthright manner. As a current employee of the respondent he did so against his own interests as some of his evidence was at odds with the evidence of the respondent.

50 I do not have the same confidence in the evidence given by the three witnesses for the respondent. I believe the evidence of each of the respondent's witnesses was concocted to suit the propositions being advanced by the respondent that the applicant was performing her job poorly and that she was warned that her job was in jeopardy. In particular, I find that Mr Ameduri's evidence was self-serving and deliberately manufactured to support his contention that the applicant was working inefficiently and had been warned that her ongoing employment was in jeopardy. In my view, an example of his contradictory and self-serving evidence is clear when one looks at the warning letter, addressed to the applicant and signed by Mr Ameduri (Exhibit A9). It was dated 12 December 2001, but not signed by the applicant. Mr Ameduri could not remember if it had been shown to the applicant and the applicant stated emphatically that she had never seen this letter. In any event, according to the warning letter, the applicant was supposed to improve her performance during a period where in part, she was on annual leave. Further, the applicant was given notice of her termination the day after she returned from annual leave, thus having little if any opportunity to improve her performance prior to termination if indeed her performance was an issue. This leads me to the conclusion that this letter was not drawn up on the day stated on the letter. This letter did not surface, nor was any reference

made to it, until discovery of documents took place between the parties and the respondent provided a copy of the letter to the applicant prior to the hearing. On this basis, it is my view that the letter was manufactured to support the case of the respondent, and was never put to the applicant whilst she was employed by the respondent. Further, this letter contradicts Mr Ameduri's evidence that it was not his role to give warnings to employees as he left this task to his supervisors (Transcript page 89a). Mr Ameduri also stated that none of his employees had ever been "told off" (Transcript page 93) which is contrary to the contents of the warning letter (Exhibit A9).

51 I treat the evidence of Mr Abimosleh and Mr De Castro with some caution. Both employees gave evidence which was contradictory and implausible in the circumstances. For example, Mr Abimosleh claimed that he gave the applicant warnings on a daily basis (Transcript Page 131) and that the applicant fully understood the warnings. Not only do I find it difficult to accept that the applicant was given warnings on a daily basis (Mr Abimosleh also worked in the despatch and delivery sections), he confirmed under cross-examination that he could not use sign language, and that he did not give written warnings to the applicant. Thus, I find it difficult to accept that warnings were given to the applicant as stated by Mr Abimosleh. Even if warnings were given to the applicant as stated by Mr Abimosleh, it is unlikely that the applicant would have been aware that the warnings were indicators of her job being in jeopardy given the language barriers between Mr Abimosleh and the applicant.

52 I also find it difficult to believe that the applicant swept as often as Mr Abimosleh claimed. If this was the case little if any work would have been done on the machines, which was the applicant's main duty.

53 Mr Abimosleh's evidence contradicted that of Mr De Castro's. Mr De Castro stated that the applicant did not undertake any additional work when she had finished working on the machines apart from sweeping up on a few occasions. On the other hand Mr Abimosleh stated that the applicant swept incessantly when not working on the machines.

54 Mr Abimosleh claimed that Mr Clarke was not the main communicator with the applicant. I find this hard to believe as Mr Clarke was the only one at the workplace who was able to use sign language, and he had worked closely with the applicant for approximately 18 years. Further, Mr Abimosleh's assertion contradicted that of Mr De Castro in relation to this matter.

55 Given these concerns about the respondent's evidence where the evidence given on behalf of the applicant conflicts with that given on behalf of the respondent I prefer the evidence of the applicant and Mr Clarke.

Issues and Conclusions

56 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 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.

Findings

57 Given my views on witness credit I make the following findings.

58 I find that the applicant was employed as an industrial brush machinist with the respondent from 1 September 2000 to 1 February 2002.

59 I find that the applicant's job duties changed in September 2001 when the respondent decided to stop making certain brushes, the manufacture of which formed the main role of the applicant's duties with the respondent. I find that in relation to this change of duty, the applicant was not provided with a revised duty statement nor was she told that her job requirements had changed at that time, even though I find there was a substantial change to the applicant's duties.

60 I find that when the respondent decided to stop working on the main machines that the applicant operated, the applicant was not given sufficient training to work in other areas, nor was it made clear to the applicant that her job duties had altered substantially and that a range of alternative duties had to be undertaken by her.

61 I find that the applicant broke some needles on the new machine she operated after September 2001 when the applicant's job duties changed, but at no stage was the applicant warned that the breaking of the needles would impact on her job security.

62 I find that Mr Clarke was the main person with whom the applicant communicated at work. He allocated her work along with Mr De Castro and Mr Abimosleh. He had no problems with the quality of the applicant's work and the way in which she undertook her duties. I accept his and the applicant's evidence that the applicant always undertook work to the best of her ability and sought out alternative work from Mr Clarke and others at the workplace when the applicant's jobs on the machines ran out. Given my views on witness credit, I do not accept the contentions of the witnesses for the respondent, when they stated that the applicant refused to undertake additional work as necessary. I accept that there was one incident in relation to the applicant refusing to bend wire to which the applicant admitted. In relation to this incident I accept and I find that the applicant refused to undertake the work on this occasion because she did not believe she was physically capable of undertaking that work for a whole day.

63 I find that on 18 January 2002 the applicant was notified by letter that her employment was to be terminated effective from 1 February 2002 (Exhibit A5). This letter of termination refers to the respondent undergoing re-structuring as the reason for the applicant's termination. Mr Ameduri stated that the real reason for the applicant's termination was due to lack of commitment by the applicant in relation to her performance at work and disobeying instructions to undertake work. He did not tell the applicant this on termination as he did not want to hurt her feelings. I believe the respondent manufactured the applicant's poor performance to justify the applicant's termination. In my view, the respondent wanted to reduce the number of employees at the workplace in order to cut costs, and the applicant was chosen as she was the least flexible employee. My view on this is confirmed by Mr Ameduri's evidence that he chose to retain Mr Clarke over the applicant because Mr Clarke could undertake a wider range of tasks than the applicant such as liaising with clients over prices. (Transcript page 84).

64 I find that there was not a valid reason for the applicant's termination as in my view the applicant fulfilled the requirements of her job efficiently and conscientiously. I find that the applicant undertook the duties she was required to do and sought out and did additional work when she was not busy on the machines.

65 Even if there was a valid reason to terminate the applicant, which in my view there was not, I find the applicant was denied procedural fairness in relation to her termination. In effecting the termination I find that the respondent did not take appropriate steps in order to communicate concerns about the applicant's performance and that her job was in jeopardy. I find that despite

being recommended to have an interpreter to assist the applicant in helping her understand what was happening with respect to her employment, the employer declined to do so for financial reasons. There is an onus on the employer to ensure that employees fully understand what is happening in relation to their employment, particularly if their employment is in jeopardy. When an employee has a disability this onus and responsibility must be discharged appropriate with that disability. I find the respondent made insufficient efforts in this instance in order to ensure the applicant knew what was going on when dealing with her change of duties and her termination, and the applicant was not treated with the appropriate care and reasonableness that is necessary for a person with the applicant's disability. It is not onerous to have an interpreter present to discuss events leading to an employee's possible termination when an employee is profoundly deaf. Mr Ameduri was advised by Mr Clarke to obtain the assistance of an interpreter when it became clear that the applicant may be losing her job. As the person who mainly communicated with the applicant Mr Clarke was well placed to give this advice. Mr Ameduri chose to ignore this advice on financial grounds. In my view this omission was a clear breach of the respondent's duty of care in relation to the employment of the applicant.

66 Further, when an employee is deaf it is not sufficient for the respondent to argue that the applicant should have taken the initiative to seek clarification if she was unaware of what was happening at meetings called by the respondent.

67 The responsibility of communicating substantial changes to job duty statements and raising performance issues in relation to an employee clearly rests on an employer. Given the applicant's disability the respondent should have confirmed in writing the applicant's changed duties in September 2001 when a decision was made by the respondent to stop using the main machine on which the applicant worked. Also, any concerns about the applicant's performance at work should have been communicated to her in writing given her disability. This did not occur.

68 I find that the applicant was unaware that her employment was in jeopardy until receiving a notice of termination at a meeting on 18 January 2002. Prior to her termination I find that no warnings were given to the applicant, she was not aware her job was in jeopardy, nor was it made clear to the applicant that her contract of employment would be terminated if her performance did not improve.

69 Prior to 18 January 2002, when the applicant was terminated, I find the applicant was not given any opportunity to canvass alternatives to termination.

70 Applying the relevant legal tests and given these findings, in my view, the applicant was terminated unfairly, both substantively and procedurally.

Reinstatement

71 Reinstatement was not sought, and given what has occurred with respect to the applicant's employment with the respondent, in my view reinstatement is not practicable.

72 I am satisfied on the evidence that the working relationship between the applicant and the respondent has broken down. On the evidence, I am satisfied the applicant took reasonable steps to mitigate her loss. I accept that given the applicant's age and disability, it is very difficult for her to obtain alternative employment.

73 Given re-instatement is impracticable I 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.

74 I find that the applicant would have had ongoing employment with the respondent if she had not been terminated in the way in which she was. In my view, the applicant worked loyally for the respondent, and if she was given proper opportunities and sufficient and appropriate feedback and training, she could have expected to remain working with the respondent for some years. Further, the evidence of Mr Ameduri was clear that there was sufficient work for the applicant to undertake if she remained working with the respondent.

75 Having regard to all the circumstances of the case I conclude that the applicant would have expected to have had long term ongoing employment with the respondent for some years if she had not been unfairly terminated. In the circumstances I find the applicant would have worked with the respondent at least until the age of 55, a period of three years.

76 In my view, the applicant has also suffered injury as a result of the unfair termination. I find the dismissal has had a devastating impact on the applicant. She has suffered illness due to the termination and pressure has been put on family relationships. In the circumstances it is reasonable that a sum of $2,000 for injury be awarded.

77 The applicant should be compensated for her loss to the fullest extent possible subject to the cap in s.23A(8) of the Act.

78 The sums I have identified as being lost total more than the equivalent of six months' remuneration. I will order the respondent to pay the applicant $12,246 (26 weeks wages, based on $471 per week) as compensation for the loss suffered by the dismissal.

79 The applicant is seeking an additional payment of notice under her contract of employment as part of this application. An employee is entitled to reasonable notice or an amount in wages equal to the value of that reasonable notice, where notice is not specified in the contract of employment.

80 It was conceded by counsel for the applicant that the terms of the award forms the basis of the applicant's contract of employment and it was common ground that the applicant and the respondent are bound by the scope of the award. Pursuant to the award, Clause 11 (1) states that the contract of service is weekly, terminable by one week's notice on either side given on any day or by the payment by the employer or forfeiture by the worker of one week's pay.

81 The award prescribes one week's pay as being sufficient to terminate the contract of service, and given that the applicant was given two week's notice I am satisfied that in this circumstance sufficient notice has been paid to the applicant. The applicant was employed by the respondent for less than two years. I have taken into account this length of service of the applicant with the respondent in arriving at this conclusion. Therefore, I decline to make an order for payment of any additional notice.

82 On the issue of underpayment of wages I also decline to make an order for any back pay which it is claimed is owed to the applicant due to a shortfall in the rate of pay that the applicant was supposed to be receiving, taking into account the hours worked by the applicant. It was confirmed that the applicant's contract of employment was pursuant to the terms and conditions of the award, and as the scope of this award applies to the applicant and the respondent in my view the applicant's claim constitutes an award enforcement matter which the Commission does not have jurisdiction to deal with. A claim made under s.29(1)(b)(ii) can only be a claim for a benefit under a contract of employment not being a benefit under an award or Order. Pursuant to s.83(1) of the Act an application for enforcement of an award or industrial agreement shall not be made otherwise than to an Industrial Magistrate's Court. In *Crewe and Sons Pty Ltd v Amalgamated Metal Workers and Shipwrights Union of Western Australia* (1989) 69 WAIG 2623 at 2626 the President observed that it was established in *Mt Newman Mining Co Pty Ltd v TWU* (1984) 64 WAIG 1075 (for the reasons expressed in *Minister for Works and Water Resources v AMWSU* (1983) 63 WAIG 1389) the Commission does not have any jurisdiction to hear and determine matters which are essentially for enforcement and recovery of wages under an award.

83 An Order for compensation will now issue.

2002 WAIRC 06735

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	GEORGINA MARGARET MUCCILLI, APPLICANT
	v.
	SUNNY BRUSHWARE SUPPLIES PTY LTD (ACN 009 177 557), RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE OF ORDER	FRIDAY, 11 OCTOBER 2002
FILE NO/S.	APPLICATION 361 OF 2002
CITATION NO.	2002 WAIRC 06735

Result Application alleging unfair dismissal upheld and an order issued for compensation in lieu of reinstatement and application for contractual benefits dismissed.

Order

HAVING HEARD Ms H Ketley (of counsel) on behalf of the applicant and Mr J Ameduri and with him Ms T Dedic 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 Georgina Margaret Muccilli by the respondent was unfair and that reinstatement is impracticable;

2 ORDERS the respondent to pay Georgina Margaret Muccilli compensation in the sum of $12,246.00 within 21 days of the date of this order.

3 ORDERS that the application for contractual benefits be and is hereby dismissed.

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

2002 WAIRC 06762

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	JOHN PASS, APPLICANT
	v.
	COUNCIL OF THE SOUTH EAST METROPOLITAN COLLEGE OF TAFE, RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	THURSDAY, 17 OCTOBER 2002
FILE NO.	APPLICATION 611 OF 2002
CITATION NO.	2002 WAIRC 06762

Result	Application alleging unfair dismissal dismissed.
Representation	
Applicant	Mr R Grigoroff (as agent)
Respondent	Mr D Matthews (of counsel)

Reasons for Decision

1 This is an application by John Pass ("the applicant") pursuant to s.29(1)(b)(i) of the *Industrial Relations Act, 1979* ("the Act"). The applicant alleges he was unfairly dismissed by the Council of the South East Metropolitan College of TAFE ("the respondent") on 17 March 2002. The respondent claims there was no unfair dismissal, as the applicant was summarily terminated for gross misconduct.

2 John Pass gave evidence on his own behalf. Mr Pass has been employed by the respondent since 1974. Some time in 2001, the respondent appointed him as a Principal Lecturer, Food Technology and Hospitality. His duties as Principal Lecturer included skills assessment of students at the Bentley TAFE Campus ("the College") as well as monitoring the delivery of the respondent's programmes.

3 The applicant maintains that for a period of approximately six years up until the year 2001 the respondent gave him permission to undertake external employment in addition to his normal duties. He stated that approval to undertake external work was not unusual as other TAFE lecturers have been, and continue to be, involved in undertaking similar outside employment. The applicant maintained that the outside employment he was involved in included assessment of students who were not eligible to enrol in TAFE. The applicant tabled a number of documents confirming the process whereby students can seek to have their skills assessed and accredited by a Registered Training Organisation ("RTO") (Exhibits A3, A4, A5, A6, A7, and A8). These documents clarify the national guidelines in relation to skills recognition and accreditation and specify which organisations are empowered to operate in this area. The applicant maintained that the respondent did not operate as an RTO in the area in which he undertook external work.

4 Acting on behalf of his family business Catering Co-ordinates the applicant signed a contract to undertake work with Australian Labour Market Services ("ALMS") from November 2000. Proceeds from this work were to be paid to Catering Co-ordinates. ALMS is a registered RTO (Exhibit R12). Under this contract the applicant assessed students seeking to have their skills recognised, many for migration purposes. It was the applicant's view that the respondent was not authorised or able to undertake this work pursuant to national guidelines as the persons assessed by the applicant could not enrol in TAFE and be issued with a relevant certificate. Thus the applicant believed there was no conflict of interest in him undertaking outside employment as an assessor with ALMS.

5 The applicant conceded that he assessed one student named Mr Domingo Sayoco. He was unaware that Mr Sayoco was enrolled in a course with the respondent when he undertook this assessment. In any event the applicant still maintained that when he undertook the assessment of Mr Sayoco he would not have been eligible to enrol as a TAFE student in the particular course that he was assessed in, therefore there was no conflict of interest in him assessing Mr Sayoco. The applicant gave evidence that he had assessed 26 people in the years 2001 and 2002 outside of his normal duties and that he had been remunerated for this work. It was his understanding that none of these students were eligible to be assessed by the respondent.

6 The applicant stated that approval for him to undertake outside work was due to expire in April 2001. Accordingly he sought approval from the respondent to undertake external work in 2001/2002, however this approval was not granted.

7 The respondent wrote to the applicant on 27 March 2001 in relation to his request to undertake outside employment (formal parts omitted):

> "Thankyou for your recent application to undertake employment with Catering Co-ordinates.
>
> I regret to advise you that your application to work for Catering Co-ordinates has not been approved. The provision of training for vocational skills for migrants is a direct conflict of interest with the provision of training programs by the College.
>
> As you have already commenced employment with them you will need to make immediate arrangements to terminate that employment. Should you require any further information please contact Ms Margaret Beaman on 9267 7167."
>
> (Exhibit R11)

8 The applicant maintained that it was unfair of the respondent to decline his application to undertake external work as there was no conflict of interest in him undertaking assessments with ALMS. The applicant raised the matter of the respondent's rejection for him to undertake outside work with his supervisor Ms Margaret Beaman. He claimed she stated that as he was earning sufficient income from his role as a Principal Lecturer she did not believe it was appropriate for him to undertake external work. The applicant confirmed that Ms Beaman also prevented him from undertaking outside work with an organisation called WestOne. This involved producing curriculum documents, publishing books and making television programmes in relation to food technology and hospitality. These activities had been instigated by the respondent and had taken place for some years.

9 In July 2001 the respondent's Managing Director Mr Gale sent the applicant a letter outlining alleged breaches of discipline with respect to the applicant's conduct (Exhibit R1). The letter outlined four acts of misconduct the applicant is alleged to have committed. Mr Gale indicated that these actions may amount to a contravention of the Public Sector Management Act 1994, the respondent's Code of Conduct and the Western Australian Public Sector Code of Ethics.

10 The allegations were as follows (formal parts omitted)—

> "It is alleged that you may have committed breaches of discipline, namely acts of misconduct in that you may have—
>
> 1. Undertaken outside employment without college approval.
> 2. Participated in outside activities which could be deemed to be fair and reasonable business for the college and which could be seen to be a conflict of interest. Specifically you privately undertook paid workplace assessments that could have been undertaken as part of college business.
> 3. Utilised college equipment/systems. Specifically, in supporting your outside activities, utilised your computer contrary to the College User Policy.
> 4. It appears because of your position in the college that you may have misled members of the public in to believing that services you have offered in a private capacity were sponsored by or related to the college.
>
> These actions may also amount to—
>
> - contravention of Public Sector Management Act 1994, specifically subsections 9(a)(ii), 9(a)iii) and 9(b);
> - contravention of the South East Metropolitan College of TAFE Code of Conduct specifically Sections relating to—
>
> Fees, Rewards and Gratuities
> Conflict of Interest
> Outside/Private Employment
> Use of College Resources for Private Activities
>
> - contravention of the Public Sector Code of Ethics.
>
> Contravention of one or any of the above may constitute a breach of discipline."
>
> (Exhibit R1).

11 The letter stated that in accordance with the respondent's discipline policy a number of options were open to the respondent depending on what was found to have occurred and on that basis the applicant was asked to provide a written explanation in relation to the allegations within ten working days of receiving the letter. The applicant was told to attend an appointment, date and time to be negotiated, to discuss these issues and was invited to have a representative with him at that appointment. The letter also required the applicant to cease his involvement with any external business and provide proof of such action within 14 days of the date of the letter.

12 In response, the applicant requested further details about the allegations in relation to the use of his computer and misleading the public. A letter in response was sent by Mr Gale on 10 August 2001 documenting the requested information and extending the deadline for the applicant to respond to 20 August 2001 (Exhibit R3).

13 The applicant responded to Mr Gale on 20 August 2001 (Exhibit R4). It was a detailed response whereby the applicant stated that he was undertaking external work that had been approved by the respondent for the previous seven years. As the applicant believed the work was outside the scope of work capable of being undertaken by the respondent, he had the view that it was unfair that approval was now being withheld for him to undertake external assessments.

14 With respect to the allegation that the applicant had participated in outside activities that were in conflict with the operations of the respondent the applicant maintained that he was assessing students who were not permanent residents who he understood were not able to either be enrolled with or assessed by the respondent. Further, he understood the respondent was not authorised to issue these students with a qualification. He acknowledged that when conducting a skills assessment of Mr Sayoco he was unaware at the time that Mr Sayoco had been enrolled in the respondent's Certificate 111 Course in Commercial Cookery. The applicant apologised for this, but in his view this was a mistake which amounted to a lack of judgement with respect to only one student. He assured Mr Gale that it would not occur again.

15 On the issue of using College equipment contrary to the College user policy, this issue was not pursued by the respondent in this hearing, so no comment is necessary in relation to that matter.

16 With respect to misleading members of the public into believing that the services offered by the applicant are sponsored by or related to the respondent the applicant stated that on one occasion he used his TAFE College business card when undertaking private work. The applicant again made an error of judgement which had occurred only once and was due to him running out of his private business cards. He conceded that he wore his TAFE College cooking jacket with the College logo on it when undertaking external assessments but he did not believe that this would necessarily give his clients the view that he was working on behalf of the respondent.

17 In view of Mr Gale's requirement that the applicant cease undertaking external work the applicant sent a memorandum to Mr Gale on 20 August 2000 stating that he had ceased his involvement with external businesses and the particulars in regard to his family's registered business had been altered accordingly. Copies of these changes, lodged with the Ministry of Fair Trading on 20 August 2001, were sent by covering letter to Mr Gale (formal parts omitted)—

> "Dear Mr Gale,
>
> Please find attached the proof of my ceasing involvement of external business.
>
> The Statement of change in certain particulars in regard to my registered business was lodged with the Ministry of Fair Trading on 20th August.
>
> I do not work for any other organisation for payment or gratuity."

(Exhibit R13)

18 Mr Gale responded to the applicant on 27 August 2001 stating that after carefully considering the applicant's response to his letter of 30 July 2001 he believed there were reasonable grounds for a formal investigation to be conducted into these matters, with the exception of the applicant's use of College equipment/systems (Exhibit R5). Accordingly, Mr Gale appointed Mr Peter Burgess to conduct an investigation. It was indicated in this letter that action could be taken against the respondent as a result of this investigation.

19 Subsequent to the investigation occurring and a report being prepared, Mr Robert Stratton, the respondent's Acting Managing Director, wrote to the applicant on 12 March 2002 stating that on the basis of the breadth and depth of the report he had received in relation to the allegations concerning the applicant and having accepted the findings as representing an accurate account of the investigation, he formed the view that the applicant had committed serious breaches of discipline and was guilty of misconduct (Exhibit R6).

20 Mr Stratton determined that the actions of the applicant constituted grounds for the respondent to terminate the applicant's contract of employment. The applicant was given notice that he could respond on the basis of whether or not Mr Stratton should proceed with that course of action. The applicant was given five working days to reply.

21 On 18 March 2002 the applicant provided a response to each of the allegations (Exhibit R7). The applicant stated that he took issue with the way in which the report had been compiled and with a number of statements which were contained within the report. He believed the report was biased and as witness statements were not given to him as part of his copy of the report, he was being denied natural justice and was unable to make a proper response to the report's findings.

22 Mr Gale wrote back to the applicant on 19 March 2002 noting the applicant's response. Mr Gale stated that he had considered the applicant's comments and arrived at the view that he was satisfied that the respondent should proceed with the applicant's termination. The letter confirmed the summary termination of the applicant's contract of employment effective from the close of business 19 March 2002 (Exhibit R8).

23 The applicant conceded that he undertook 26 assessments between April and November 2001 even though the respondent did not give him permission to undertake this work and he was expressly told by Mr Gale to stop undertaking this external employment. The applicant stated that after he wrote to Mr Gale in August 2001 giving an undertaking that he would not do external work (Exhibit R13), he continued undertaking outside assessments as early as four days after he wrote that memorandum. The applicant stated there were mitigating circumstances for undertaking this outside work as he did not believe that there was any conflict of interest with him completing this work. There was no issue with continuing work with WestOne because Ms Beaman had cancelled the contracts with that organisation. The applicant agreed that he did not challenge Mr Gale's March 2001 decision disallowing him to undertake external work even though he stated that it crossed his mind to put in a protest about the decision. He drafted a letter of complaint but it was not sent off and he did not take the complaint any further than that.

24 It was put to the applicant that ALMS competes with the respondent for clients. This was conceded by the applicant, however the applicant maintained he only assessed people that the respondent was not eligible to assess and accredit.

25 It was the applicant's view that apart from Mr Sayoco, of the 26 applicants he assessed between April and November 2001 none were eligible to enrol as a student of the respondent or to be assessed by the respondent. The applicant also claimed that given the lengthy time frame that the respondent had taken to investigate his behaviour and given the lack of resolution to this matter, he believed he had a right to continue undertaking external work. The applicant claimed another reason for undertaking external work was because the respondent was denying him access to overtime.

26 Since termination the applicant has earned approximately $700 per month. He has been unable to seek alternative employment apart from the work he is currently undertaking, because of medical problems.

27 Margaret Beaman gave evidence for the respondent. She is employed by the respondent as Director of Programmes and has held that position since 1994. She has worked within the TAFE system since 1964. As Director of Programmes Ms Beaman is responsible to ensure that programmes at Thornlie, Bentley and Carlisle TAFE Colleges are appropriately delivered. She also has the role of supervising the respondent's Principal Lecturers.

28 Ms Beaman became the applicant's supervisor on 1 July 2000. At that time Ms Beaman was aware the applicant was undertaking work for external organisations. When the applicant applied for approval to undertake external work in 2001 she recommended that approval not be given (Exhibit R10). It was Ms Beaman's view that it was inappropriate for the applicant to remain involved with WestOne and to undertake external skills assessments as these roles were capable of being undertaken by the respondent. In her view there was potential for a direct conflict of interest with the activities undertaken by the respondent if the applicant undertook these assessments. Even though approval had been granted by the respondent for the applicant to undertake this external work in the past this was the first time this issue had arisen with Ms Beaman. She had only recently been appointed to the position of being the applicant's supervisor which involved her dealing with the applicant's request in 2001 to seek permission to undertake external work.

29 Ms Beaman gave evidence that it was brought to the respondent's attention that the applicant was continuing to undertake external assessments when the issue involving Mr Sayoco arose. Mr Sayoco had paid to undertake Certificates III and IV of a

Diploma in Hospitality with the respondent and sought a refund for Certificate IV, subsequent to the applicant undertaking a Certificate IV skills' assessment of him. This led to the respondent conducting an investigation in August 2001 on a range of issues in relation to the applicant.

30 Ms Beaman stated that it was her view that the external work the applicant was undertaking could be and is undertaken by the respondent. It was Ms Beaman's view that the respondent can provide the range of services that ALMS undertakes, however, a higher fee would be charged for these services. As an RTO the respondent has the relevant requirements and accreditation to issue statements of attainment and the respondent was also accredited to assess prior learning. It was Ms Beaman's understanding that these activities formed part of the work the applicant undertook with ALMS.

31 Under cross-examination Ms Beaman confirmed that students can be assessed by the respondent on a fee for service basis and the range of certification can be from Certificate I to Certificate IV. In her view, anyone can apply for skills recognition at TAFE as long as they pay the appropriate fee. Ms Beaman stated that with respect to skills recognition there were two categories of persons who can apply for recognition. One category is fee for service and those students can receive a statement of attainment from TAFE without the respondent enrolling them as a student. The other category is the public funding avenue, which covers residents and other students who are deemed eligible to join the TAFE system. The respondent is funded by Government for the hours that these people attend classes.

32 Robert Allan Stratton gave evidence for the respondent. He is the respondent's Director of Operations and acts as the respondent's Managing Director from time to time when Mr Gale is absent. Mr Stratton was directly involved in the disciplinary matters in relation to the applicant when he was the respondent's Acting Managing Director in early 2002. Mr Stratton reviewed the Burgess report that was completed on the allegations in relation to the applicant (Exhibit A11). He stated that he believed there was sufficient evidence contained in the report to satisfy him that the allegations of misconduct in relation to the applicant outlined in Mr Gale's letter of July 2001 (Exhibit R1) were made out. He also believed that the applicant had been given a sufficient and appropriate opportunity to respond to the report.

33 In relation to the first allegation that the applicant undertook unauthorised external work subsequent to being directed not to by the respondent, Mr Stratton stated that this was conceded by the applicant. With respect to a conflict of interest between the external work undertaken by the applicant and the capacity of the respondent to undertake this work, Mr Stratton maintained that under the Vocation Education and Training Act TAFE is able to undertake a range of assessments and this includes assessing people who are not enrolled by the respondent. However he stated that TAFE does not normally encourage this service as the costs would be high for these assessments to be undertaken. Mr Stratton confirmed that the respondent is a competitor of ALMS.

34 In relation to the allegation that the applicant wore the respondent's uniform when undertaking external assessments, the applicant conceded that he had worn the respondent's uniform in these circumstances. In Mr Stratton's view he should not have done so. Under cross-examination Mr Stratton stated in respect to the applicant wearing the College's jacket when undertaking external assessments, that even though it may not have misled the public that the applicant was working on behalf of the respondent in each instance, he maintained the view that the College's uniform should not have been worn by the applicant when undertaking external work.

35 Even though Mr Stratton was aware that the applicant was given permission in the past to undertake external work, the applicant's refusal to desist from undertaking external work when the respondent told him not to do so amounted to gross misconduct.

36 On the issue of witness statements incorporated into the Burgess report not being provided to the applicant, Mr Stratton stated that it was his belief the information contained in the witness statements were not integral to the respondent's final decision in relation to this matter. Further, he could not recall the applicant requesting copies of these statements.

Submissions

37 The applicant submitted that the enquiry into the alleged misconduct by the applicant was not conducted properly. Further, the report that was written in relation to the allegations should not have been relied on by the respondent as the information contained in the report was flawed and witness statements that the report was based on were not given to the applicant.

38 In relation to undertaking external work the applicant continued to undertake these activities as he had previously been given authority to do so. As the applicant had the view that there was no conflict of interest in undertaking those external activities, this should have been taken into account when assessing the applicant's behaviour in relation to this matter.

39 The respondent states that in a summary termination of this nature the breach must be a significant breach going to the root of the contract of employment. In this particular instance the respondent states there was no unfair termination and the case was not marginal. The respondent was faced with no alternative but to summarily terminate the applicant's contract of employment given the behaviour of the applicant.

40 The report into the applicant's behaviour confirmed that he had misconducted himself and on that basis the decision to terminate the applicant was justified. The report was specific and encapsulated a full and comprehensive investigation of the relevant issues in relation to the applicant's behaviour.

41 The South East Metropolitan College of TAFE Discipline Policy outlines the respondent's disciplinary procedures and processes (Exhibit R17). The respondent maintained that these procedures and processes were followed in their entirety. The applicant was afforded procedural fairness in relation to the investigation into his conduct as he was given a reasonable opportunity to respond at all steps of the investigation.

42 On the issue of the witness statements not being given to the applicant it was the respondent's view that the statements were précised in the report into the applicant's conduct. On this basis the respondent argued that this was not a significant issue.

43 With respect to the merit of the case, the respondent maintains that the applicant defied the respondent by continuing to undertake outside work after permission for him to do so was withdrawn. Under s.102 of the *Public Sector Management Act* 1994 ("PSMA"), there is an obligation, fundamental to the contract of employment, that unless permission is granted by an employer to undertake external employment then this employment shall not be undertaken. The applicant had an opportunity to formally protest at the respondent's refusal to grant him the ability to undertake external employment, but he chose not to do so. He chose to deliberately ignore and defy the respondent by continuing to undertake external employment when expressly told not to do so, and after undertaking not to do so. The respondent argues that the external employment which the applicant undertook constitutes a potential or real conflict of interest with the work that the respondent undertakes. Additionally, the applicant held himself out to be working for the respondent when he was undertaking external work, by wearing the respondent's uniform when conducting external assessments. Also the applicant used one of the College's business cards when seeking out private business opportunities.

44 The behaviour of the applicant in relation to all of these matters constituted gross misconduct on the part of the applicant. The applicant breached his duty of fidelity to his employer, thus it was appropriate for the respondent to summarily terminate the applicant.

Credibility

45 In my view all witnesses gave their evidence in an honest, clear and forthright manner and to the best of their knowledge and recollection. In relation to the allegation that the applicant had a conflict of interest when undertaking work with ALMS, I prefer the evidence of Ms Beaman and Mr Stratton. I do so because their evidence was consistent in relation to this issue and the weight of evidence falls in their favour. Even though the applicant tendered a number of documents in support of his contention that there was no conflict of interest when undertaking external work it was not clear to me from reading these documents that this was indeed the case.

Findings and Conclusions

46 The question of 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."

47 On the facts as I find them I am satisfied, at least on balance, the respondent has demonstrated that the applicant was guilty of gross misconduct justifying summary dismissal. Further, I am satisfied that the applicant was treated fairly because he was given an opportunity to defend himself against the allegations relied upon to effect the termination. He 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).

48 I find that the applicant was an employee of the respondent from 1974 to 19 March 2002 and that some time in 2001 he was appointed to a senior position with the respondent as a Principal Lecturer, Food Technology and Hospitality.

49 I find that for approximately six years prior to 2001 the applicant received permission from the respondent to undertake external employment with Catering Co-ordinates. This included work involving assessment of people who required having their skills recognised and certified, and working for WestOne.

50 I find that on behalf of Catering Co-ordinates the applicant entered into a contract with ALMS in November 2000 in order to undertake external work.

51 I find the applicant undertook external work for WestOne until approval to undertake this work was withdrawn by the respondent in March 2001.

52 I find that in March 2001, the applicant requested the respondent's permission to continue undertaking external work however the respondent refused his application. This was confirmed by letter dated 27 March 2001 which stated that the applicant's application to undertake external employment had been rejected and that immediate arrangements should be made for the applicant to terminate that employment (Exhibit R11).

53 It was common ground, and I find, that the applicant continued to undertake approximately 26 external student assessments subsequent to being directed by Mr Gale in March 2001 not to do so. I find these assessments took place subsequent to the applicant giving undertakings that he would not do so (Exhibit R13).

54 I find that due to a complaint by Mr Sayoco, a student of the respondent, the respondent became aware in mid 2001 that the applicant was continuing to assess students under an arrangement outside of the TAFE system contrary to a direction given by the respondent. I find that it was on this basis that the respondent initiated an investigation and a number of issues were raised in relation to the applicant's behaviour. This investigation reviewed whether or not the applicant had committed acts of misconduct in relation to his contract of employment in that he had undertaken outside employment without College approval, he participated in activities which could be deemed to constitute a conflict of interest in relation to the work undertaken by the respondent and that he had used his position in the College to mislead members of the public into believing that the external services that he was offering were in fact related to the College. I find the respondent gave the applicant the opportunity to respond to these allegations and provided additional information with respect to them when requested to do so by the applicant. As a result of the respondent not being satisfied with the response from the applicant, I find that a formal investigation was initiated.

55 A formal investigation was undertaken by Mr Burgess and presented to the respondent. Upon receipt of the comprehensive report into the allegations concerning the applicant I find that Mr Stratton, who was then the respondent's Acting Manager Director, wrote to the applicant on 12 March 2002 stating that he had formed the view on the basis of the breadth and depth of the report and having accepted the findings of the report as representing an accurate account of what had occurred in relation to the applicant's external work, that the applicant had committed serious breaches of discipline and misconduct.

56 The applicant was asked to respond to Mr Stratton. I find that the applicant provided a response to Mr Stratton stating that he was not happy with the way the report had been compiled. He took issue with some of the substance of the report and complained about not being able to review witness statements which formed the basis for part of the report's findings.

57 Notwithstanding this response I find the respondent summarily terminated the applicant's employment on 19 March 2002.

58 I find it was appropriate for the respondent to summarily terminate the applicant's contract of employment. Section 102 of the PSMA provides that permission must be granted to an employee to undertake external employment. In March 2001 the applicant was refused permission by the respondent to undertake external employment. I find that in the months subsequent to March 2001 the applicant displayed total disregard to the direction given by the respondent to cease external employment. Not only did he disregard that directive, the applicant gave an undertaking to the respondent that he would not continue undertaking external work, but within four days of giving this undertaking to the respondent he continued to undertake external assessments. This only came to light when a complaint was received from Mr Sayoco.

59 The applicant had a view that he did not believe there was a conflict of interest in him undertaking external work, and therefore he had a right to undertake external work. It was open to the applicant to appeal this decision but he chose not to follow relevant appeal and dispute settlement procedures to dispute Mr Gale's decision not to allow him to undertake external work.

60 In my view, and I find, given the applicant's refusal to obey a lawful instruction from his employer to desist from undertaking external work, and given the applicant was a senior employee of the respondent who should have been aware of the ramifications of such behaviour, the applicant's actions in relation to undertaking external work when expressly told not to do so constitutes gross misconduct, sufficient to warrant summary termination.

61 On the issue of whether or not there was a conflict of interest between the external work undertaken by the applicant in relation to the contract with ALMS and the work the respondent undertook I find that the respondent discharged the onus on it to demonstrate that there was a conflict of interest. I find the evidence of both Mr Stratton and Ms Beaman demonstrates that the respondent had the ability and capacity to undertake all, if not a substantial part of the work that the applicant was undertaking with ALMS. Even if I am wrong in making this finding, it is my view that the misconduct of the applicant in relation to continuing to undertake external work subsequent to being expressly directed not to do so by the respondent would constitute behaviour on its own sufficient to warrant summary termination.

62 I find that the applicant inappropriately used his TAFE business card on one occasion however I accept the applicant's evidence that this only occurred once due to him running out of his private business cards. Accordingly, I do not find this behaviour significant in relation to the termination of the applicant's contract of employment.

63 I believe it was inappropriate for the applicant to wear clothing containing the College's insignia when undertaking external assessments. When the applicant undertook these assessments inferences could be drawn by the public that it was under the sanction of the respondent and that he was working on behalf of the respondent when he was not. Thus, I find this issue appropriate to have been taken into account by the respondent when assessing the conduct of the applicant in relation to effecting his termination.

64 I find the applicant was dealt with in a procedurally fair manner in relation to the investigation concerning his conduct. At each stage of the disciplinary proceedings it was made clear to the applicant what was being alleged against him. He was given opportunities to respond at all stages of the investigation. I accept the submissions of the respondent that the lack of provision of witness statements in relation to the formal report undertaken by the respondent in relation to this matter did not constitute unfairness to the applicant. I accept that the report summarised the nature of the evidence given by these witnesses and that the applicant was not disadvantaged by not having the witness statements provided to him.

65 I find that the applicant behaved in a manner sufficient to amount to a fundamental breach of his contract of employment and that the respondent's investigation in relation to this matter was conducted in a procedurally fair manner. I find that the applicant was given 'a fair go all round'. Applying the relevant legal authorities, I find that it was appropriate in all of the circumstances for the respondent to summarily terminate the applicant's contract of employment.

66 On this basis the application will be dismissed.

2002 WAIRC 06761

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	JOHN PASS, APPLICANT
	v.
	COUNCIL OF THE SOUTH EAST METROPOLITAN COLLEGE OF TAFE, RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE OF ORDER	THURSDAY, 17 OCTOBER 2002
FILE NO/S.	APPLICATION 611 OF 2002
CITATION NO.	2002 WAIRC 06761

Result Application alleging unfair dismissal dismissed.

Order

HAVING HEARD Mr R Grigoroff (as agent) on behalf of the applicant and Mr D Matthews (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. L. HARRISON,
[L.S.] Commissioner.

2002 WAIRC 06788

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	JOHN ANTHONY RESIC, APPLICANT
	v.
	MADONNAS CAFE RESTAURANT, RESPONDENT
CORAM	COMMISSIONER S WOOD
DELIVERED	MONDAY, 21 OCTOBER 2002
FILE NO.	APPLICATION 583 OF 2002
CITATION NO.	2002 WAIRC 06788

Result	Application dismissed in the public interest
Representation	
Applicant	Mr J Resic
Respondent	No appearance

Reasons for Decision

1 This is an application made pursuant to section 29(1)(b)(ii) of the *Industrial Relations Act, 1979* ("the Act") and lodged in the Commission on 8 April 2002. The matter came on for conference on 29 May 2002 at the conclusion of which the matter was settled. Following the conference the Commission wrote to the applicant to ascertain progress with the settlement. The applicant did not respond to correspondence from the Commission of 20 June 2002 and 8 July 2002 and the matter was listed for a show cause hearing on 23 August 2002.

2 The applicant attended at the show cause hearing and advised that the matter had not been resolved as he had not received a letter from the respondent in regards to his apprenticeship. This was a term of the settlement. All other terms had been met. The Commission advised the applicant that it would contact the respondent to ascertain the status of the letter. The Commission also advised the applicant that failure to respond to correspondence from the Commission could lead to the matter being dismissed.

3 The Commission contacted the respondent on 23 August 2002. On 26 August 2002 Ms O'Shea for the respondent advised that the respondent had sent the required letter to the Apprenticeship board and faxed to the Commission a copy of the same letter dated 31 May 2002.

4 On 27 August 2002 the Commission wrote again to the applicant enclosing a copy of the letter received from the respondent along with a notice of discontinuance requesting the applicant to complete and return it by close of business 13 September 2002. The Commission advised the applicant that if he had any queries to contact the Commission on 9420 4472. There was no response to this letter.

5 The Commission again wrote to the applicant on 17 September 2002 in the following terms—

> "I refer to the abovementioned matter and correspondence from the Commission dated 27 August 2002, seeking advice about your intentions with the application, to which there has been no response.
>
> Please advise the Commission, in writing, of your intentions with the matter by close of business Tuesday, 1 October 2002. If the Commission does not hear from you by this date, the Commission will list the matter for a show cause hearing, at which time the application may be dismissed."

6 There was no response to this letter and the matter was again listed for a show cause hearing on 17 October 2002. The applicant attended the show cause hearing and advised the Commission that he had the letter sought in settlement but that he required a date specified in the letter for his termination.

7 I am satisfied that the applicant has in his possession all that was required and agreed in settlement. In that sense the respondent promptly complied with all the terms of settlement. The applicant has continued to ignore correspondence of the Commission, with the exception of notices of hearing. I do not consider the applicant's approach to his application to be either adequate or helpful. In all the circumstances I would dismiss the application in the public interest pursuant to my powers under section 27(1)(a)(ii) of the Act.

2002 WAIRC 06790

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
PARTIES	JOHN ANTHONY RESIC, APPLICANT
	v.
	MADONNAS CAFE RESTAURANT, RESPONDENT
CORAM	COMMISSIONER S WOOD
DATE OF ORDER	MONDAY, 21 OCTOBER 2002
FILE NO.	APPLICATION 583 OF 2002
CITATION NO.	2002 WAIRC 06790

Result	Application dismissed in the public interest
Representation	
Applicant	Mr J Resic
Respondent	No appearance

Order

HAVING heard Mr J Resic on his own behalf and there being no appearance by the respondent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders—

(1) THAT further proceedings are not necessary or desirable in the public interest;

(2) THAT having regard to section 27(1)(a) of the Act the matter be and is hereby dismissed.

(Sgd.) S. WOOD,
Commissioner.

[L.S.]

2002 WAIRC 06810

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	TIMOTHY EDOUARD JAMES SEMERDJIAN, APPLICANT
	v.
	ELITE SECURITY SERVICES (WA) PTY LTD, RESPONDENT
CORAM	COMMISSIONER J H SMITH
DELIVERED	TUESDAY, 22 OCTOBER 2002
FILE NO.	APPLICATION 2151 OF 2001
CITATION NO.	2002 WAIRC 06810

Result	Orders made that the Respondent pay the Applicant $1,258.64 as contractual benefits.
Representation	
Applicant	In person
Respondent	No appearance

Reasons for Decision

1 Timothy Edouard James Semerdjian ("the Applicant") made an application under s.29(1)(b)(ii) of the *Industrial Relations Act 1979* ("the Act"). The Applicant claims he is owed benefits to which he is entitled under a contract of employment, not being a benefit under an award or order. When this matter proceeded to hearing on 21 October 2002, the Applicant sought to pursue only part of his claim under s.29(1)(b)(ii) of the Act, namely a sum of money for fuel expenses and telephone expenses.

2 At the hearing there was not appearance on behalf of Elite Security Services (WA) Pty Ltd ("the Respondent"). Mrs Kathryn Hope Edwards, Associate to Commissioner Smith, gave evidence that the Respondent had been served with a Notice of Hearing by sending the notice by post on 10 October 2002.

3 The Applicant testified that he was employed by the Respondent from 18 January 2001 until 19 May 2001 as a projects director. The Respondent's business was security and crowd control, VIP escort and personal protection. The Applicant testified that it was part of his duties to train staff and to follow up leads for new business. In carrying out his duties he was required to travel to venues at which the Respondent provided its services. The Applicant says it was agreed by the Respondent that he would be reimbursed for telephone calls that he made in the course of his employment and it was agreed he would be paid fuel expenses. The Applicant said Mr Ganesh Krishnan, the Respondent's managing director agreed to this arrangement. A company extract tendered into evidence created in the records of the Department of Consumer and Employment Protection Government of Western Australia shows the name of the Respondent is Elite Security Services (WA) Pty Ltd and that Mr Krishnan was the secretary and director of the Respondent between 26 November 2001 and 7 January 2002.

4 The Commission file records that a s.32 conciliation conference was held by the Commission on 18 September 2002. In a letter dated 18 September 2002, from Ms Robyn Meldrum, Chamber Liaison Officer to Commissioner Smith, to the Applicant and the Respondent, it is recorded that Mr Krishnan appeared on behalf of the Respondent and advised the Applicant and the Commission that the Respondent was prepared to pay the Applicant's work related telephone expenses and fuel expenses.

5 The Applicant produced account summary records for a mobile telephone account provided by New Tel Limited for the period covering the Applicant's employment. The account is in the name of the Applicant's wife, Diane Semerdjian. The Applicant testified that the mobile telephone used by him was in his wife's name. The Applicant testified that he claims the amounts set out in the summaries for long distance mobile calls. He said that all long distance calls were made by him in the course of his employment. He said he also made some local calls but he does not make a claim for payment for those calls.

6 After reviewing the telephone records I am satisfied that the amounts for long distance/fixed to mobile for the period from 20 January 2001 until 17 May 2001 are due and owing to the Applicant pursuant to his contract of employment. These amounts are as follows—

	$97.07
	$89.14
	$336.17
	$236.26
TOTAL:	$758.64

7 The Applicant testified that he also claims an amount of $500 as reimbursement for fuel purchased by him for the vehicle he used in the course of his employment. The Applicant said that he spent approximately $55 to $60 per week on fuel for his vehicle. He said that he used the vehicle for his own personal use for about 30% of the time and the remaining time was for work purposes. I accept his evidence that he spent at least $55 per week for fuel. If a deduction from this amount is made by 30% being $16.50, I am satisfied that the Applicant spent an average of about $38.50 per week on fuel for work related travel for the 17 weeks of his employment. Accordingly, I am satisfied that the Applicant's claim for $500.00 for fuel expenses is made out.

8 For the reasons set out above I will make an order that the Respondent is to pay the Applicant a sum of $1,258.64.

2002 WAIRC 06866

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	TIM EDOUARD JAMES SEMERDJIAN, APPLICANT
	v.
	ELITE SECURITY SERVICES, RESPONDENT
CORAM	COMMISSIONER J H SMITH
DATE OF ORDER	MONDAY, 28 OCTOBER 2002
FILE NO.	APPLICATION 2151 OF 2001
CITATION NO.	2002 WAIRC 06866

Result	Order made to amend the name of the Applicant and the name of the Respondent.
Representation	
Applicant	In person
Respondent	No appearance

Order

Having heard the Applicant 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 name of the Applicant be amended to Timothy Edouard James Semerdjian; and

THAT the name of the Respondent be amended to Elite Security Services (WA) Pty Ltd.

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

2002 WAIRC 06867

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	TIMOTHY EDOUARD JAMES SEMERDJIAN, APPLICANT
	v.
	ELITE SECURITY SERVICES (WA) PTY LTD, RESPONDENT
CORAM	COMMISSIONER J H SMITH
DATE OF ORDER	MONDAY, 28 OCTOBER 2002
FILE NO.	APPLICATION 2151 OF 2001
CITATION NO.	2002 WAIRC 06867

Result	Order made that the Respondent pay the Applicant $1,258.64 as contractual benefits within seven days of the date of this order.
Representation	
Applicant	In person
Respondent	No appearance

Order

HAVING heard the Applicant in person 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—

(1) THAT the Respondent pay the Applicant $1,258.64 within seven days of the date of this Order; and

(2) THAT this matter be, and is hereby dismissed.

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

2002 WAIRC 06851

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	BRENDAN K H SMITH, APPLICANT
	v.
	SOLAR EVAP AUSTRALIA PTY. LTD, RESPONDENT
CORAM	COMMISSIONER S WOOD
DELIVERED	FRIDAY, 25 OCTOBER 2002
FILE NO.	APPLICATION 696 OF 2002
CITATION NO.	2002 WAIRC 06851

Result	Applicant dismissed unfairly; compensation awarded Contractual benefits claim dismissed
Representation	
Applicant	Mr R Grigoroff as agent
Respondent	Mr A Healy

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, Mr Brendan Smith claims that on 28 March 2002 he was advised by his employer, Mr Alwyn Healy, that his services were no longer required. He says the reason given was that Solar Evap Australia Pty Ltd, of which Mr Healy was a director, could not get air conditioners from the supplying firm. He claims 6 months salary in compensation (ie $30,000) and vehicle leasing and insurance payments of $18,500 and $2,227.50 respectively.

2 Mr Healy on behalf of the respondent filed an answer in the Commission on 14 May 2002. The notice of answer and counterproposal says in part as follows—

> "1. Solar Evap (Aust) Pty Ltd commenced trading on 21/1/02.
>
> 2. Brendan Keith Hamilton Smith was never employed by Solar Evap (Aust) Pty Ltd. No record of employment exists."

3 The matter came on for conference on 5 June 2002. The matter could not be settled and was referred to hearing. The matter came on for hearing on 2 August 2002 at which time the respondent did not attend. The matter was adjourned and brought on for hearing again on 6 September 2002. The respondent advised the Commission just prior to hearing that he needed to attend in the Federal Court that morning as he faced a matter to do with the winding up of the company. The application was adjourned and again listed for hearing on 15 October 2002. The respondent at the time advised that the company was still trading.

4 It is clear that Mr Smith agreed to a contract with Mr Healy to commence with the company, which traded as Air World, in September 2000. He was to be the Sales Manager. Exhibit BS1 outlines the terms of the contract. Mr Smith accepted the terms, commenced work and started to submit invoices [an example being Exhibit BS2] to the respondent in the name of a company called The Divorce Group Pty Ltd. This was Mr Smith's own company.

5 The contract with Air World (the actual company being Healy Airconditioning Pty Ltd) provided for a salary package of $60,000 plus 8% superannuation. It was clear that the contract also provided for vehicle lease and vehicle insurance payments and these were part of the $60,000 package. In other words, the total package was $60,000 plus superannuation and the vehicle lease and insurance payments were subsumed within that amount and not separate. This matter I consider was conceded on behalf of the applicant in closing submissions. In any event it is clear on the face of the contract and there was no separate evidence presented as to the vehicle lease and insurance payments. The application for denied contractual benefits must therefore fall away and be dismissed. I turn then to the allegation of unfair dismissal.

6 The basic contention of the respondent is that Mr Smith was never an employee of Air World due to the arrangement entered into being one of a contractor. When Air World ceased trading, Mr Healy says that Mr Smith was never offered employment with Solar Evap Australia Pty Ltd. In that sense Mr Smith, in Mr Healy's view, is not an employee of the named respondent and hence the Commission is without jurisdiction to deal with the application. Mr Healy's view is that Mr Smith was never an employee because he chose not to be as he chose to be paid via his own company. The bulk of the evidence submitted from both parties revolves around these points.

7 The applicant says he was employed by Healy Airconditioning Pty Ltd in September 2000 and he agreed to invoice the company on a fortnightly basis. Mr Smith was to pay his own tax and he always received the same amount of remuneration. His duties were to supervise telemarketers and sales people and his work was overseen by Mr Healy. He supervised staff and handled customer complaints and worked from an office supplied by Mr Healy. He sold products for the companies Solar Airconditioning and Air World. The company Air World was liquidated and he continued to sell product for Solar Airconditioning. His payments were initially made by cheque by Air World. This changed to Solar Airconditioning and then to Solar Evap Australia Pty Ltd, however, at all times the payments remained the same. On 28 March 2002 Mr Smith thought something was happening with the company. He telephoned Mr Healy and was advised to come into the office and see him. Mr Healy then terminated Mr Smith's services advising him that, as he could not obtain air conditioners and hence make sales, Mr Smith was to be made redundant. Mr Smith says he has applied for work since his termination but has only managed to earn $2000.

8 Mr John Hemphill gave evidence on behalf of the applicant. He says he was employed by Healy Airconditioning and then later employed by Solar Evap Australia Pty Ltd for a short period. He commenced employment in May 2001 and after Healy Airconditioning was liquidated he was employed as a commission only sales representative for Solar Evap Australia Pty Ltd on 21 January 2002. He resigned on 31 January 2002. He never signed any employment agreement with Solar Evap Australia Pty Ltd but was told by Mr Healy that there would be no change and he continued to work as usual. At all times Mr Healy was in control of the companies that Mr Hemphill worked for.

9 Under cross-examination Mr Hemphill says that he was advised by the administrator that all employees of Healy Airconditioning services were to be terminated on 21 January 2002. He did not complete an employment declaration or taxation form for Solar Evap Australia Pty Ltd. He believed that Healy Airconditioning and Solar Evap Australia Pty Ltd were the same.

10 Mr Healy gave evidence that he is the director of Solar Evap Australia Pty Ltd. He has been a director of that company for the last 2½ years. He says he offered Mr Smith a $60,000 package as per [Exhibit BS1]. He says he offered Mr Smith two choices, that is whether to operate as an employee or operate as a private company. The package was the same irrespective of the choice Mr Smith made. He says Mr Smith chose to operate as a private company. The respondent arranged the lease on the vehicle. He says the company Healy Airconditioning Pty Ltd, of which he was the director and which traded as Air World, got into difficulty and he called in an administrator who terminated all employees on 21 January 2002. Mr Healy told all employees that they were offered new employment with Solar Evap Australia Pty Ltd which previously had not traded despite having been registered in July 2000. He says Mr Smith was not offered employment with Solar Evap Australia Pty Ltd. Under cross-examination Mr Healy says that Mr Smith managed the sales staff and was provided with an office by Healy Airconditioning. Mr Smith was paid fortnightly and he reported to Mr Healy. Mr Healy says the duties Mr Smith once did were taken over by himself or not done following Mr Smith's departure. Mr Smith's services were terminated as he was no longer required due to the lack of airconditioning supplies.

11 In essence this is a straightforward matter. It is clear on the evidence that Mr Smith was employed originally by Healy Airconditioning Pty Ltd trading as Air World. It is clear that his package was $60,000 per annum with superannuation of 8%. He invoiced Healy Airconditioning Pty Ltd each fortnight in the name of The Divorce Group Pty Ltd. The respondent says as Mr Smith chose this arrangement he was not an employee. The respondent then says that once Healy Airconditioning Pty Ltd ceased to trade, that Mr Smith was not employed by Solar Evap Australia Pty Ltd. The evidence of the applicant unchallenged is that he continued to work under similar arrangement for the respondent until his termination on 28 March 2002. The evidence of Mr Smith unchallenged is that he was paid on a fortnightly basis following the liquidation of Healy Airconditioning Pty Ltd by Solar Airconditioning and then Solar Evap Australia Pty Ltd. The evidence of Mr Healy which I accept and which is largely unchallenged by either Mr Smith or Mr Hemphill was that he could not get airconditioning stock and had to terminate Mr Smith's services. The duties Mr Smith previously undertook were taken over by himself. He, in effect, made Mr Smith redundant.

12 The applicant argues that by transmission of business Mr Smith became an employee of Solar Evap Australia Pty Ltd. He refers to the decision of Beech C in *Yvonne Lorraine Hawkins and DE & FW Treen T/A Exchange Hotel – Pinjarra* 72 WAIG 1414. I say nothing about this submission as I do not consider it necessary. The evidence is clear and unchallenged that between late January and late March 2002 Mr Smith worked for Solar Evap Australia Pty Ltd. The fact that he was not offered in Mr Healy's mind, a contract with Solar Evap Australia Pty Ltd is not relevant. Mr Smith continued to work on exactly the

same terms he had worked with Healy Airconditioning Pty Ltd. This is not disputed by Mr Healy. Instead Mr Healy contends that Mr Smith was never at anytime an employee. He was a contractor and his services were dispensed with as a contractor. However, in my view, if Mr Smith was an employee with Healy Airconditioning Pty Ltd, he was similarly an employee with Solar Evap Australia Pty Ltd. Both parties agreed to Mr Smith continuing to work on the same terms but with Solar Evap Australia Pty Ltd.

13 The respondent says Mr Smith was not offered a contract with Solar Evap Australia Pty Ltd but this is based on his view that Mr Smith was never an employee of Healy Airconditioning Pty Ltd. He does not say that Mr Smith did not continue to work for companies under his control and he says that Healy Airconditioning Pty Ltd was put in the hands of an administrator on 21 January 2002 and all employees were terminated at that time. The key issue is whether Mr Smith was in fact and in law an employee. Clearly he was.

14 The decision of the Full Bench in *Western Australian Builders' Labourers, Painters and Plasterers Union of Workers v RB Exclusive Pools Pty Ltd trading as Florida Exclusive Pools* 77 WAIG 4, upon which the applicant relies, sets out a number of criteria for the citing whether the nature of the relationship is one of employee or contractor. The Full Bench in that decision quotes the following—

> "In Australian Mutual Provident Society v Allan and Another (1978) 52 ALJR 407 at 409 (PC) the Privy Council affirmed what Lord Denning MR said in Massey v Crown Life Insurance Co [1978] 2 All ER 576 at 579 (CA):-
>
> > "... if the true relationship of the parties is that of master and servant under a contract of service, the parties cannot alter the truth of that relationship by putting a different label on it. ... On the other hand, if their relationship is ambiguous and is capable of being one or the other, then the parties can remove that ambiguity, by the very agreement itself which they make with one another."
>
> "The essence of a contract of service is the supply of the work and skill of a man" (see Humberstone v Northern Timber Mills [1949] 79 CLR 389 at 404 (HC) per Dixon J). Next, a relevant question, in this appeal, was referred to by Dixon J in that same case, at page 404 where His Honour said:-
>
> > "The question is not whether in practice the work was in fact done subject to a direction and control exercised by an actual supervision or whether an actual supervision was possible but whether ultimate authority over the man in the performance of his work resided in the employer so that he was subject to the latter's order and directions."
>
> That authority sets out the control test and the emphasis is on whether there rested in the employer "ultimate authority" over Mr Bon in the performance of his work.
>
> The existence of control is significant. However, while it is significant, it is not the sole criterion by which to gauge whether a relationship is one of employment. The approach is to regard control merely as one of a number of indicia which must be considered in the determination of that question (see Stevens v Brodribb Sawmilling Co Pty Ltd [1985-1986] 160 CLR 16 at 24 (HC) per Mason J):-
>
> > "Other relevant matters include, but are not limited to, the mode of remuneration, the provision and maintenance of equipment, the obligation to work, the hours of work and provision for holidays, the deduction of income tax and the delegation of work by the putative employee.""

15 There is no doubt that the ultimate authority in the relationship was Mr Healy and that Mr Healy supervised the performance of Mr Smith, provided the equipment necessary to enable Mr Smith to do his job and that Mr Smith was under the order and direction of Mr Healy at all times. Simply because Mr Smith chose, on Mr Healy's evidence, to be paid via a company does not somehow make the arrangement one of contractor. See also Full Bench decision in *United Construction Pty Ltd v John Birighitti* 82 WAIG 2409.

16 The next question is, as Mr Smith was an employee of the named respondent, ie Solar Evap Australia Pty Ltd, was he dismissed unfairly. It is clear from Mr Smith's evidence that the companies traded by Mr Healy experienced a number of difficulties. Mr Smith says he was concerned something was happening and hence rang Mr Healy. Mr Healy asked Mr Smith to come in and then effectively made Mr Smith redundant. The redundancy on Mr Healy's evidence was due to his lack of being able to access stock. It is clear that Mr Smith's duties were taken over by Mr Healy due to the change in circumstance. I find that Mr Smith was made redundant on 28 March 2002. The evidence on behalf of the applicant about the unfairness of this redundancy is limited. It would appear that the unfairness lies in the suddenness of the termination. I am not convinced on the evidence that there was any alternative other than to make Mr Smith redundant. I am not convinced on the evidence that Mr Smith was not advised, as soon as it was practical to do so, that his services were no longer required. The applicant has not proven some substantive or procedural unfairness in this regard. Mr Smith was made redundant as his position was no longer required and it would appear that he knew the company was in difficulty. In that sense reinstatement to the position is impracticable.

17 It is clear from the evidence that Mr Healy's approach to this termination was guided by his view that Mr Smith was not an employee as he had, in his view, elected not to be one. There was no provision of payment for notice to Mr Smith on his termination. Mr Healy says that if he should have paid notice it would have been 2 weeks. I should also say that there is no provision for redundancy in the contract. Mr Smith worked for the company for the named respondent for a matter of 2 months. He worked in total for Mr Healy for approximately a year and a half. Section 170CM of the Workplace Relations Act 1996 provides a period of notice of 2 weeks for employment of between 1 and 3 years. The agent for the applicant concedes if notice were to be paid it would be two weeks. He makes no argument in respect of any greater period of notice. In all the circumstances I would find the dismissal of Mr Smith to be unfair due to the absence of notice. I would award Mr Smith a payment of 2 weeks notice to be calculated on the package of $60,000 per annum plus 8% superannuation. That is an annual figure of $64,800 which translated to two weeks means a total of $2,492.31. I would award that amount to Mr Smith.

2002 WAIRC 06925

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	BRENDAN K H SMITH, APPLICANT
	v.
	SOLAR EVAP AUSTRALIA PTY. LTD, RESPONDENT
CORAM	COMMISSIONER S WOOD
DATE OF ORDER	MONDAY, 4 NOVEMBER 2002
FILE NO.	APPLICATION 696 OF 2002
CITATION NO.	2002 WAIRC 06925

Result	Applicant dismissed unfairly; compensation awarded Contractual benefits claim dismissed
Representation	
Applicant	Mr R Grigoroff as agent
Respondent	Mr A Healy

Order

HAVING heard Mr R Grigoroff on behalf of the applicant and Mr A Healy for the respondent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby-

(1) DECLARES that the applicant, Brendan Smith, was unfairly dismissed by the respondent on the 28th 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 $2,492.31 to Brendan Smith.

(4) ORDERS that the claim for denied contractual benefits be dismissed.

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

2002 WAIRC 06864

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	RABIKAH WHITE, APPLICANT *v.* MOTOR TRADE ASSOCIATION, RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	MONDAY, 28 OCTOBER 2002
FILE NO/S.	APPLICATION 414 OF 2002
CITATION NO.	2002 WAIRC 06864

Result	Application dismissed
Representation	
Applicant	Mrs R White
Respondent	Mr P Fitzpatrick

Reasons for Decision

1 The applicant in this matter claims that she was unfairly dismissed from her position as an executive officer with the respondent, on or about 19 February 2002. She brings these proceedings pursuant to s 29(1)(b)(i) of the Industrial Relations Act 1979 ("the Act").

2 The respondent objected to and opposed the applicant's claim.

3 The applicant appeared in person. The respondent was represented by its executive director, Mr Fitzpatrick.

4 The facts are relatively straightforward and are as follows. The applicant commenced employment with the respondent as an executive officer, so titled, however it was common ground that the predominant if not sole responsibility of the position, was as a minute taker at the respondent's various industry sub-group meetings. The applicant was employed pursuant to terms and conditions set out in a letter of appointment dated 17 January 2002, which letter was tendered as exhibit A1. The letter of appointment provided that the applicant's engagement be "casual part time". The applicant was paid $20 per hour for all hours worked. The applicant was not entitled to annual, sick, long service leave and public holidays, given her designation as "casual part time". The applicant's hours to be worked would vary, depending upon the schedule of meetings that the applicant was required to attend to take minutes. There existed a schedule of such meetings arranged in advance however, it was also common ground that that schedule was subject to change by reason of cancellation of meetings at relatively short notice.

5 The letter of appointment provided that either party to the agreement may terminate the employment on one weeks notice. The applicant was also subject to a probationary period on and from 4 February 2002 to 29 April 2002, during which period again, either party could terminate the employment on one weeks notice. The commencement date was specified as 4 February 2002 however it was common ground that the applicant actually started work the following week commencing 11 February 2002. The applicant gave evidence that she presented to the respondent as an experienced minute secretary and referred to previous experience in an educational position. The applicant agreed that she was offered and accepted the employment on a casual basis as required by the respondent, for the purposes of attending the required meetings. Although the applicant testified that she was told by Ms Berryman on behalf of the respondent that she was to receive 20 hours per week of work, this was inconsistent with clause 7 - hours of duty of exhibit A1, to which I have referred.

6 In the week commencing 4 February, it seems on the evidence, that the applicant spent some of her own time at the respondent's premises, reading minutes of previous meetings, to familiarise herself with the position.

7 During the week commencing 11 February, the applicant attended at least three meetings at which she was required to take minutes and submit those to the responsible divisional manager for his or her consideration. It appears on the evidence, that all did not go well during the course of this week. It was the applicant's evidence that she was unfamiliar with the motor vehicle trade and felt under some pressure from Ms Berryman to complete the minutes of the meetings in a short time. The applicant testified that she prepared and submitted these minutes to the responsible divisional managers. On Tuesday 19 February 2002, the applicant said she received a telephone call from Ms Berryman, who said she had "bad news". The applicant alleged Ms

Berryman told her that she had to return the dictation machine and the respondent would write her a reference. The applicant said she was not given one weeks notice and the respondent did not warn her about problems with her work. The applicant's complaint was she had insufficient opportunity to "learn the trade" as she put it in her evidence. It was the applicant's evidence that she thought her minute taking was acceptable and of a good quality and her grammar, spelling and comprehension was good.

8 Since the applicant's employment with the respondent ended, she has applied for other positions and had obtained some temporary work.

9 Copies of draft minutes taken by the applicant and given to the respondent were tendered as exhibits R1, and R3 respectively. When taken through these documents, the applicant conceded there were numerous spelling mistakes and parts of the minutes did not make sense. The applicant testified that when preparing these documents, she did not use "spell check" available in word processing, and did not check any tape recordings to confirm the content of the meetings.

10 Ms Berryman testified that at the applicant's interview, the respondent outlined the schedule of prospective meetings and that the applicant's hours would be variable sometimes up to 20 hours, and the position was casual in that the applicant would be only paid for hours worked.

11 Ms Berryman said that the applicant presented to her as a person qualified and capable to take minutes and was adamant she could do the job. Ms Berryman strongly denied the applicant's evidence that the applicant was under any pressure to prepare and return the minutes to the respondent as she said. Ms Berryman testified that normally minute secretaries are given about a week to prepare and return the draft minutes from a meeting.

12 On receipt of the draft minutes, Ms Berryman forwarded them to the divisional managers concerned, Ms Simons and Mr Marsland. Ms Berryman testified that the draft minutes concerned were not up to standard and the divisional managers came to see her and said that the arrangement was totally unworkable. Both Ms Simons and Mr Marsland testified that when they received the draft minutes from the meetings at which minutes were taken by the applicant, they did not reflect accurately what was said or resolved at the meetings and contained numerous grammatical and comprehension errors. Both of them said they had to completely re-write the minutes, which were tendered as exhibits R2 and R4 respectively. They testified that the corrected minutes bore little resemblance to those produced by the applicant. In particular, Mr Marsland said that the draft minutes he received were largely nonsensical and he spent several hours reproducing them. He testified that anyone presenting as an experienced minute taker, as the applicant did to him, should be able to come into any meeting and accurately record the discussion in context, irrespective of whether they had any particular industry experience.

13 Ms Berryman testified that on Tuesday 19 February 2002 she telephoned the applicant to request that she come in to the office for a "chat". It was Ms Berryman's evidence that the applicant replied that she could not attend the respondent's office. Ms Berryman said it was her intention to discuss the matter with the applicant as she had concluded that there was no prospect of the employment relationship continuing, given the magnitude of the problems with the applicant's work. On the basis that the applicant was not able to attend the office, Ms Berryman said that she reluctantly, had no alternative but to inform the applicant of this over the telephone. She agreed to provide a reference to the applicant and also testified that the applicant agreed that there was a problem with her work.

Conclusions

14 On all of the evidence I am satisfied on balance, that the applicant was employed on a casual basis, in that she would be required from time to time to attend the respondent to take minutes of meetings. Although there was a schedule of meetings prepared in advance, the evidence was that this was subject to change and indeed, it did change, according to the scheduling of meetings. The applicant's hours of work were variable and the applicant was only to be paid for hours worked, and not for hours she was available to work. Whilst exhibit A1 is somewhat less than clear in that reference is made to "casual part time" in the letter, taking the letter as a whole, in the context of the evidence, including the applicant's admissions in this regard, I am not persuaded the applicant was a permanent part time employee in the accepted sense. Moreover, the applicant was also subject to a probationary period of engagement.

15 I am also satisfied on the evidence and I find that at the time of the engagement the applicant represented to the respondent that she was an experienced and capable minute taker who could perform the required duties of the position with the respondent. Indeed on the applicant's evidence in these proceedings, she appeared to maintain that position. I therefore accept and find that the respondent employed the applicant on this assurance and expected accordingly, the applicant to be able to undertake the duties as required of her, as an experienced minute taker. In this case, I am satisfied that there was an implied and express representation by the applicant that she possessed the requisite skills necessary to satisfactorily perform the duties of the position on offer by the respondent: *Harmer v Cornelius* (1858) 141 ER 94.

16 I have carefully considered the oral and documentary evidence tendered in these proceedings, particularly in the form of the draft minutes submitted by the applicant to the respondent's respective divisional managers. With due respect to the applicant, those documents in my opinion, manifestly fall far short of what one would expect from an experienced minute taker. Exhibits R1 and R3 contain many basic spelling and grammatical errors. Additionally, and equally importantly, many parts of the draft minutes are simply incomprehensible.

17 The respondent submitted that the applicant was employed on a casual basis and moreover, was subject to a period of probation. It was submitted that the respondent simply had no alternative but to discontinue the employment relationship because of the very poor standard of minute taking that the applicant demonstrated during her first week of employment. The respondent's submission was there was simply no point in continuing the arrangement given the obvious lack of capacity to take proper minutes, in the respondent's view. I accept the respondent's evidence that the relevant managers who gave evidence in these proceedings, had to spend considerable time re-writing the minutes largely from memory, in order to compile an accurate record of the respective meetings. This is obviously a situation that could not be maintained. I also accept the respondent's evidence, and as a matter of common sense, that an experienced minute taker should be able to take minutes for any meeting, irrespective of industry expertise, in such a way to accurately reflect the general content of what was said in context.

18 Clearly, on any view of the evidence, the applicant's performance in this regard fell well short of what could be reasonably expected by an employer in these circumstances.

19 Whilst exhibit A1 required the respondent to give one weeks notice to terminate the employment, it would appear from Ms Berryman's evidence that this did not occur. However, in my opinion, in this case the circumstances supported the summary termination of the contract of employment: *Harmer* at 98. In this case, the circumstances were not in my opinion, on the evidence, such that there were present matters that could be remedied by further time, counselling or warning. In my view, the difficulties with the applicant's performance went fundamentally to the root of the contract of employment, relieving the respondent from further obligations under the contract. I note in any event, that clause 10 of exhibit A1, does not provide for payment in lieu of notice for forfeiture of wages. As I have already noted, the applicant was only entitled to be paid for the time actually worked by her for the respondent.

20 It is also the case that the applicant was subject to a period of probation: *Hutchinson v Cable Sands (WA) Pty Ltd* (1999) 79 WAIG 951; *East v Picton Press Pty Ltd* (2001) 81 WAIG 1367 at 1369. It is the case however, that a period of probation is not a licence to dismiss unfairly. In this case I am not persuaded that giving the applicant more time would have in any way affected the outcome. As I have already observed, the applicant, from her evidence and demeanour in these proceedings, still maintained she was a capable minute taker, in light of all of the evidence. Whilst the relevant principles as to probation, now elevated to statutory significance in s 23A of the Act as amended, are important, they do not derogate in my view, from the common law principles set out above as to express and implied warranties as to competence in the case of an employee who presents to an employer as an experienced and qualified person for employment.

21 Furthermore, it is not in all cases of the presence of procedural unfairness, will a dismissal be held to be unfair, if on review of the circumstances, it can be said that the employee could be justifiably dismissed in any event: *Shire of Esperance v Mouritz* (1990) 71 WAIG 891; *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410 at 430.

22 In all of the circumstances, I am not persuaded that the applicant has been dismissed unfairly by the respondent and accordingly, this application is dismissed.

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2002 WAIRC 06865

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	RABIKAH WHITE, APPLICANT
	v.
	MOTOR TRADE ASSOCIATION, RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	MONDAY, 28 OCTOBER 2002
FILE NO/S.	APPLICATION 414 OF 2002
CITATION NO.	2002 WAIRC 06865

Result	Application dismissed
Representation	
Applicant	Mrs R White
Respondent	Mr P Fitzpatrick

Order

HAVING heard Mrs R White on her own behalf and Mr P Fitzpatrick on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders—

THAT the application be and is hereby dismissed.

(Sgd.) S. J. KENNER,
Commissioner.

[L.S.]

SECTION 29 (1)(b)—Notation of—

Parties		Number	Commissioner	Result
Abrahams G	Peter Lloyd C/o Labtech – Essa Pty Ltd	1281/2002	WOOD C	Dismissed
Andrew A	Dampier Medical Centre Pilbara Medical Services Pty Ltd ACN 076 676 791	1187/2002	SMITH C	Discontinued
Arathoon AC	Apparel Group Pty Ltd ABN 36 155 404 826	274/2002	SMITH C	Discontinued
Archer RJ	Mr.K.Andrew- Managing Director-Rockingham Park PTY LTD- Trading as Summit Realty Myaree	1256/2002	SMITH C	Discontinued
Bastian RJ	Elite Pool Covers Pty Ltd	1452/2002	SMITH C	Discontinued
Boykett DKH	J & A Labruyere	558/2002	KENNER C	Discontinued
Bradshaw W	Wavemount Holdings Pty Ltd	748/2002	WOOD C	Discontinued
Brindley GS	Westralian Fruits Pty Ltd	698/2002	GREGOR C	Order Issued
Burt GJ	Baguley Engineering	651/2002	SMITH C	Discontinued
Byrnes BR	Architectual Heritage	1502/2002	SCOTT C	Discontinued
Cieslik DT	Brian J & Karen P White	849/2002	GREGOR C	Discontinued
Clapton TP	Nationwide Facilities Management (Spotless Services)	924/2002	WOOD C	Dismissed
Clark D	Zest Health Clubs t/a BC Body Club	1464/2002	KENNER C	Discontinued
Counsel TK	Peter Thackray Hardware Agents	1409/2002	SMITH C	Discontinued
Crosbie C	Tropical Forestry Services Ltd	1304/2002	SMITH C	Discontinued
Cuperus D	Paspaley Pearling Company Pty Ltd	2113/2001	COLEMAN CC	Dismissed

Parties		Number	Commissioner	Result
Dann D	Noongar Employment and Enterprise Development Corporation	1104/2002	SCOTT C	Discontinued
Deliu D	Cataby Holdings Pty Ltd	926/2002	KENNER C	Discontinued
Dey R	Marcos Cain Director/Secretary Wildbeat Pty Ltd Was Trading as Budda Bar Curry House Bn 09290620	1648/2002	BEECH SC	Discontinued
Driessen JL	Trevor Clapton	200/2002	COLEMAN CC	Dismissed
Dunn CJ	Norma Latchford Hall of Fame	386/2002	GREGOR C	Discontinued
Emiliani M	AJ Sands G Howe Sands Fridge Line	1346/2002	GREGOR C	Dismissed
Ennis-Bedford NJ	Grant G & Others	1397/2002	KENNER C	Discontinued
Farmer AF	Alan Ledger, Jessica King, Tim Brooke of the Rottnest Lodge Resort	296/2002	COLEMAN CC	Dismissed
Farrell M	Opposition Hair Company	1541/2002	KENNER C	Discontinued
Fisher JB	Bagby Metal Polishers	1309/2002	WOOD C	Dismissed
Gadeke C	Greta Von Berg, AlintaGas	2103/2001	KENNER C	Discontinued
Gebert RC	Welshpool Marine	903/2002	KENNER C	Discontinued
Gevaux DG	Catholic Education Office of WA	1376/2002	WOOD C	Dismissed
Gorman J	Tasocs Pty Ltd	1057/2002	WOOD C	Dismissed
Gosnell TR	FT Future Trends Pty Ltd	2004/2001	SMITH C	Discontinued
Green MA	Cityfire Holdings Pty Trading as Skaters On Ice	1484/2002	GREGOR C	Discontinued
Gibbett A	Barnden Transport	1170/2002	WOOD C	Dismissed
Grinham P	Dr Samuel Waterhouse Scargill	272/2002	GREGOR C	Discontinued
Grinham RW	Dr Sam Waterhouse Scargill	270/2002	GREGOR C	Discontinued
Grove JR	96FM Southern Cross Radio Pty Ltd	1545/2002	BEECH SC	Discontinued
Guard AJ	Westralian Fruits Pty Ltd	1182/2002	KENNER C	Discontinued
Gunning SJ	Kimberley Land Council Aboriginal Corporation	2133/2001	GREGOR C	Order Issued
Hammond FR	Velmade Products	1261/2002	BEECH SC	Discontinued
Hampton KA	Jamco Nominees Pty Ltd t/as "Jeff Mouritz Gas & Air"	215/2002	KENNER C	Discontinued
Harrold SMH	Zanetta MAJZ	1438/2002	GREGOR C	Order Issued
Hasson T	Town of Northam	1350/2002	KENNER C	Discontinued
Hewitt TD	Medical Windows Australia Pty Ltd ACN 063 1 176	890/2002	WOOD C	Dismissed
Jaber IH	Able Air / Willhart	866/2002	WOOD C	Discontinued
Johnson KJ	Allenzi	606/2002	SMITH C	Dismissed
Johnston CM	Bassendean Bowling Club (Inc)	802/2002	GREGOR C	Discontinued
Jones RE	Randwick Asset Pty Ltd T/A Pizelle	896/2002	COLEMAN CC	Dismissed
Knape V	Gary Elson	416/2002	COLEMAN CC	Dismissed
Lamont IM	AJ Baker & Sons Pty Ltd	1393/2002	KENNER C	Discontinued
Lange KM	BJ Services Company (Australia) Pty Ltd	653/2002	SMITH C	Discontinued
Larke CM	Graeme Holmes and Wal Pausin care of Dolphin Liquor Supplies	1083/2002	KENNER C	Discontinued
Lynch T	National Data Centre Pty Ltd	1500/2002	GREGOR C	Discontinued
Maton GR	Nowland Ryan Family Trust, A.C.N. 065 097 805, ABN 35 903 266 174, T/A Sanitare	1485/2002	KENNER C	Discontinued
McKenzie D	Hughes Industrial Services Pty Ltd	373/2000	GREGOR C	Discontinued
Mileham PJ	Mr David Hardie Owner of Jilarkin Pty Ltd t/as Yunderup Marine Centre	1433/2002	BEECH SC	Discontinued
Mitchell GA	Australasian Correctional Management Pty Ltd (ACN 051 130 600)	2210/2001	SMITH C	Discontinued
Mladenovic A	Victoria Park Hotel	141/2002	HARRISON C	Discontinued
Munns LM	Rogers Amcal Chemist	380/2002	SMITH C	Discontinued
Murray LK	Churches of Christ and Community Services Incorporated trading as Directlink Communications (Aust) Limited	1105/2002	SMITH C	Discontinued
Najjarine RM	Pinnacle Service Pty ACN 051 493 942	1230/2002	SMITH C	Discontinued
Otremba P	Herbert Mining & Engineering	1366/2002	KENNER C	Discontinued
Parker K	Kevron Geophysics Pty Ltd/Fugro & Others	564/2002	SMITH C	Discontinued
Pascov JM	Ogden Corporation Pty Ltd Windsor Hotel	1245/2002	COLEMAN CC	Dismissed
Paterson J	Wanneroo Sports and Social Club	1563/2002	KENNER C	Discontinued
Paton M	Elders Limited	1131/2001	GREGOR C	Discontinued

Parties		Number	Commissioner	Result
Perera SV	Challenger TAFE	1472/2002	KENNER C	Discontinued
Pierce BA	MJ & TL Preedy ABN 69930824778	889/2002	BEECH SC	Discontinued
Pollard RB	Orvad (WA) Pty Ltd	683/2002	GREGOR C	Discontinued
Psaila PV	O'Brien Glass Industries Ltd T/A O'Brien Glass	89/2002	BEECH SC	Discontinued
Quinn H	World Trend	1342/2002	HARRISON C	Order Issued
Reale A	TL Engineering	750/2002	HARRISON C	Discontinued
Reid RJ	Guildford Post Office	1293/2002	GREGOR C	Dismissed
Riksman B	Jack Keely Paige Arama Limited	801/2002	SMITH C	Discontinued
Risbey SM	Wendy Schulze Flinders Lane Physio Clinic Pty Ltd	863/2002	HARRISON C	Concluded
Robertson RR	Wets African Drilling Services (Mali) Sarl and West African Drilling Services Pty Ltd ACN:084 615 396	1493/2002	KENNER C	Discontinued
Rowe MA	Rentokil Initial Pty Ltd	1042/2002	SCOTT C	Discontinued
Scaturro R	Fox Call Pty Ltd T/as Tiles & Tubs Design Studio (ACN 100815585)	1382/2002	SMITH C	Discontinued
Shreeve WV	Blue Collar People	1461/2002	SMITH C	Discontinued
Smalley MJ	John Shepherd Mainswest Hv-Lv Pty Ltd	484/2002	SMITH C	Discontinued
Smith GP	Grace Lilian Jane/Martyn Craib Jane t/as Janes Marine Service	1323/2002	KENNER C	Discontinued
Smith PW	D.J. Moris Sheron Farm	856/2002	SCOTT C	Discontinued
Stanley I	Ricciardi Seafood and Coldstore - Madonna Gibson	1422/2002	SCOTT C	Discontinued
Stockden CA	Bed, Bath N' Table Pty Ltd	109/2002	SMITH C	Dismissed
Symons MJ	Nightlife Nominees Pty Ltd	1494/2002	GREGOR C	Discontinued
Takes C	Patricia Mahoney, Fascime Developments Pty Ltd t/a Fascime Lodge	855/2002	COLEMAN CC	Dismissed
Tarau J	Town of Northam	2204/2001	HARRISON C	Discontinued
Taylor K	Brookton/Pingelly Panthers Football Club Inc	1539/2002	KENNER C	Discontinued
Turner BS	Associated Nursery Traders Pty Ltd t/a Trees Agreen Garden Centre	54/2002	BEECH SC	Discontinued
Turner WL	Plastic Injection Company Pty Ltd	1489/2000	BEECH SC	Discontinued
Ward HG	Calcutta Pty Ltd	1412/2002	WOOD C	Dismissed
Wells MS	Pinnacle Service Pty ACN 051 493 942	1229/2002	SMITH C	Discontinued
Williams S	Driver Training and Education Pty Ltd (ACN 007 289 813) as trustee for the D,T,E,C Trusts trading as Driver Training and Education Centre	188/2002	SMITH C	Discontinued
Wingard JA	Blackwood Valley Wine Partnership	1051/2002	WOOD C	Dismissed
Wrightson TL	T.B & Associates Pty Ltd (A.C.N. 008 929 593) Trading as "12:01 East" and Anthony Ball	1143/2002	BEECH SC	Discontinued

CONFERENCES—Matters arising out of—

2002 WAIRC 06899

BREAKDOWN IN NEGOTIATIONS FOR NEW INDUSTRIAL AGREEMENT

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES THE BREWERIES AND BOTTLEYARDS EMPLOYEES' INDUSTRIAL UNION OF WORKERS OF WESTERN AUSTRALIA, APPLICANT

v.

KIRIN AUSTRALIA PTY LTD, RESPONDENT

CORAM COMMISSIONER S WOOD

DATE OF ORDER FRIDAY, 1 NOVEMBER 2002

FILE NO. C 64 OF 2000

CITATION NO. 2002 WAIRC 06899

Result Consent order

Representation

Applicant Mr R Murphy

Respondent Mr S Heathcote of Counsel

Order

WHEREAS the parties entered into a consent agreement on 9 November 2000 in matter No C 64 of 2000 entitled the Kirin Australia Enterprise Agreement 2000; and

WHEREAS the agreement stipulated an expiry date of one year from the date of the Commission's order; and

WHEREAS the parties requested and obtained subsequent orders to extend the expiry date; and

WHEREAS the parties at hearing on 1 November 2002 sought a consent order to further extend the period of operation of the agreement until 1 November 2002;

NOW THEREFORE the Commission, pursuant to the powers conferred on it under section 44(8) of the Industrial Relations Act, 1979, and by consent, hereby orders—

THAT the period of operation be extended, by consent, until 1 November 2002.

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

2002 WAIRC 06725

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	AUSTRALIAN LIQUOR, HOSPITALITY AND MISCELLANEOUS WORKERS UNION, WESTERN AUSTRALIAN BRANCH, APPLICANT
	v.
	EDUCATION DEPARTMENT OF WESTERN AUSTRALIA, RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE OF ORDER	TUESDAY, 8 OCTOBER 2002
FILE NO/S.	C 194 OF 2002
CITATION NO.	2002 WAIRC 06725

Result	Consent Order
Representation	
Applicant	Ms D MacTiernan
Respondent	Mr J Ayling

Order

WHEREAS on 12 September 2002 the applicant applied to the Commission for a conference pursuant to s 44 of the Industrial Relations Act, 1979; and

WHEREAS on 19 September 2002 the Commission convened a conference between the parties pursuant to s 44 of the Industrial Relations Act, 1979; and

WHEREAS the applicant informed the Commission that a dispute existed as to award/agreement coverage for employees of the respondent employed as Canteen Supervisors and Canteen Assistants; and

WHEREAS agreement was reached between the parties in relation to this matter and the parties requested the agreement be formalised by a consent order;

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

1. THAT without prejudice to the respective positions of the parties regarding award coverage of these employees, the Education Department of Western Australia agrees, for the purposes of determining wage rates only, to apply the terms and conditions of the Catering and Tea Attendants (Government) General Agreement as if it applied to those employees who work in school canteen facilities, while continuing to determine all other terms and conditions of employment in accordance with the Minimum Conditions of Employment Act 1993 or common law as appropriate.
2. THAT in accordance with the terms of the Catering and Tea Attendants (Government) General Agreement, for the period from the beginning of the first pay period on or after the date of this order until the 31 December 2002, the wages shall be as specified in the Education Department of Western Australia Miscellaneous Employees Enterprise Agreement 2000, and thereafter the rates shall be those specified in the General Agreement.
3. THAT for the purposes of determining the appropriate rate of pay –

those employees whose job is entitled Canteen Supervisor shall be paid at the classification rate of a Qualified Cook

those employees whose job is entitled Canteen Assistant shall be paid at the classification rate of a Kitchen Hand

4. THAT the years of service of each employee shall be taken into account when determining the appropriate wage level to be paid.
5. THAT following the respondent receiving an undertaking by the Union not to pursue any further claims for wages arrears in relation to this matter, the Department agrees to make a flat payment to each employee covered by the terms of this order in the amount of $600 for a full time employee, proportionate to their current time allocation, with effect from the beginning of the first pay period on or after the date of this order.
6. THAT by 31 October 2003 the parties shall determine the substantive and ongoing award/agreement coverage of these employees.
7. THAT the application otherwise be and is hereby dismissed.

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

2002 WAIRC 06763

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	TRANSPORT WORKERS' UNION OF AUSTRALIA, INDUSTRIAL UNION OF WORKERS, WESTERN AUSTRALIAN BRANCH, APPLICANT
	v.
	KOAST CORPORATION PTY LTD, RESPONDENT
CORAM	COMMISSIONER J H SMITH
DATE OF ORDER	TUESDAY, 16 OCTOBER 2002
FILE NO.	C 196 OF 2002
CITATION NO.	2002 WAIRC 06763

Result	Section 44 order made.
Representation	
Applicant	Mr N Hodgson & Mr M Knowles
Respondent	Mr S Chi & Mr C Chon

Order

WHEREAS on 17 September 2002, the Transport Workers' Union of Australia, Industrial Union of Workers, Western Australian Branch ("the Union") applied to the Commission for a conference pursuant to s.44 of the *Industrial Relations Act 1979* ("the Act") in relation to a number of issues including proposed termination of employment of employees employed by Koast Corporation Pty Ltd ("the Respondent") and alleged underpayment of wages to members of the Union or employees who are eligible to be members of the Union;

AND WHEREAS on 26 September 2002 the Commission convened a conference between the parties pursuant to s.44 of the Act;

AND WHEREAS on 26 September 2002, the Respondent advised the Commission that arrangements would be made by the Respondent to enable an authorised representative of the Union, Mr Michael Knowles, to visit the Respondent's workplace at Bunbury on 9 October 2002, to meet with members of the Union or employees who are eligible to be members of the Union;

AND WHEREAS on 15 October 2002, the Commission convened a further conference between the parties pursuant to s.44 of the Act;

AND WHEREAS on 15 October 2002, the Commission was informed by the Union that because of action taken by the Respondent's representatives Mr Knowles was unable to meet with members of the Union or employees who are eligible to be members of the Union on 9 October 2002;

AND WHEREAS on 15 October 2002, the Commission was informed by the Respondent that the Respondent did not take steps to prevent Mr Knowles convening a meeting;

NOW THEREFORE the Commission having regard for the public interest and the interests of the parties directly involved and to prevent any further deterioration of industrial relations in respect of the matters in question, pursuant to its powers vested in it by the Act, and in particular s.44, hereby orders that—

(1) The Respondent make arrangements for its employees who are employed as drivers and are members of the Union or employees who are eligible to be members of the Union, to be available to meet with Mr Knowles and any other authorized representative of the Union between 6:00am and 7:00am on Tuesday, 22 October 2002;

(2) The Respondent make arrangements for its employees who are employed as sorters and are members of the Union or employees who are eligible to be members of the Union, to be available to meet with Mr Knowles and any other authorised representative of the Union between 6:30am and 7:30am on Tuesday, 22 October 2002;

(3) Mr Knowles and any other authorised representative of the Union is to convene the meetings outside the Respondent's workplace, near the front gate;

(4) The Respondent advise its employees that they may meet with the Union at the times specified in paragraphs (1) and (2) of this order by placing a copy of this order on the wall of the lunch room of the Respondent's workplace at Bunbury.

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

CONFERENCES—Matters referred—

2002 WAIRC 06787

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE AUSTRALIAN WORKERS' UNION, WEST AUSTRALIAN BRANCH, INDUSTRIAL UNION OF WORKERS, APPLICANT
	v.
	BOUCKAERT PTY LTD, RESPONDENT
CORAM	COMMISSIONER J F GREGOR
DATE	MONDAY, 21 OCTOBER 2002
FILE NO.	CR 119 OF 2002
CITATION NO.	2002 WAIRC 06787

Result Application allowed in part
Representation
Applicant Mr C. Young appeared on behalf of the Union
Respondent Mr P. Brunner (of Counsel) appeared on behalf of the Respondent

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Reasons for Decision

1 On 10th June 2002 The Australian Workers Union, West Australian Branch, Industrial Union of Workers (the AWU) applied to the Commission for a conference pursuant to s.44 of the *Industrial Relations Act, 1979* (the Act) over a dispute between it and Bouckaert Pty Ltd (the Respondent) over the dismissal of two of its members, Mr Christopher Falls (Chris Falls) and Mr Douglas Maloney (Doug Maloney) who had been engaged for the seeding season on the Respondent's Grass Patch property and who had been, as a result of two separate and distinct incidents, dismissed by the Respondent.

2 A conference took place on 26th June 2002 however it was unsuccessful in resolving the dispute. The AWU requested the dispute be referred for hearing and determination under s.44 of the Act. The Commission exercised its discretion to do so and issued a Memorandum of Matters for Hearing and Determination on 10th July 2002. The Schedule of the Memorandum describes the matters for Determination as follows—

> *"The Australian Workers' Union Western Australian Branch Industrial Union of Workers alleges that two of their members, Mr Chris Falls and Mr Douglas Moloney were unfairly dismissed by GJC and IAE Bouchaert (the Respondent) and seek reinstatement or in the alternative, compensation.*
>
> *The Respondent denies the claim and seeks the claim be dismissed."*

3 The matter was listed for hearing in Esperance on 19th September 2002. The Commission was told that although the Respondent is a proprietary limited company; it is essentially a family farming business. The correct identification of the Respondent is Bouckaert Pty Ltd. The principal is Gabrielle Bouckaert (Mr Bouckaert) who has resided in the Esperance area since 1964. He is a farmer and three of his sons Wouter, Lieven and Rupert farm with him. According to Mr Bouckaert the family is close and continue to assist each other with farming activities, this is even though his son Lieven no longer resides on the Respondent's property.

4 The Respondent farms four parcels of land. They are 4,039 acres which is known as the 'Home' bordered by Belgian and Grass Patch Roads. 'Jims' being 5,100 acres bordered by Fields and Rolland Roads. 'Lomax' consisting of 3,300 acres with a frontage onto the Grass Patch Road and 'Toms' which consists of 6,900 acres with a frontage onto Grass Patch Road. It is 'Lomax' 'Home' and 'Toms' which figure in the matters before the Commission in this application. Each of these properties is spaced along the Grass Patch Road, including interposing properties they occupy in excess of 10 kilometres along the road.

5 The relationship between Messrs Maloney and Falls and the Respondent came about because it is usual practice both in the area and for the Respondent to hire what are described as casual employees for the seeding season. Normally when workers have been required to assist in farming operations the Respondent has used rural employment agencies such as PGA Personnel, Agri Staff, Rural Enterprises and Esperance Career Start.

6 In April 2002 there were advertisements placed in the Farm Weekly seeking expressions of interest from persons who may wish to work for the Respondent during the 2002 seeding season.

7 Over the past three years the Respondent has also used Pinchin Shearing Contractors (Pinchin) as a source of labour. Earlier this year when Pinchin was shearing sheep for the Respondent, Wouter Bouckaert was approached by Glenn Brown, who gave evidence in these proceedings, seeking work during the seeding season.

8 In conversations with Glenn Brown it came to pass that he knew other workers who would be interested. One of these was Chris Falls who was shearing alongside Glenn Brown. Chris Falls also offered himself to do seeding work. After this introduction Wouter Bouckaert kept in contact with Chris Falls and in due course work was offered to the two men.

9 In the meantime as a result of enquiries from Mr Bouckaert to Pinchin, arrangements were made for an offer of employment to be made to Doug Maloney for the seeding season. Doug Maloney arrived at the property on 23rd April 2002.

10 Over the next few days Doug Maloney was introduced to various duties. For instance he worked on ploughing, seeding and odd jobs.

11 The Respondent complained to Doug Maloney about his work performance after some damage to an air seeder occurred on 7th May 2002 because he turned the machine too quickly.

12 On 6th May 2002 Chris Falls turned up to commence work, it was soon thereafter that problems arose which lead to the dismissal of both Doug Maloney and Chris Falls in controversial circumstances. Part of the controversy is whether or not both the men were dismissed or whether they resigned.

13 A great deal of evidence was put before the Commission about surrounding events particularly as to the extent of damage to certain equipment however I do not need to recite all of that evidence to identify the issues that are between the parties and which require adjudication. The questions to be determined here are whether Messrs Maloney and Falls did resign and if they did not and were terminated, was the termination unfair.

14 Dealing first with Doug Maloney. Mr Maloney confirmed to the Commission that he started work on 23rd April 2002. He was to earn $15.00 per hour and work 12 hours a day. On 12th May 2002 there was an accident when he entered a truck in a 100 hectare paddock and drove it straight ahead. He was later told that a guy rope had snagged the mirror of a Landcruiser which was parked within ½ metre of the truck. The result was the door was pulled open, it came into contact with the truck and peeled a 10-12 centimetre triangle of the drivers side door skin.

15 Mr Maloney did not immediately report the matter, he left that to Glenn Brown as Mr Brown had admitted that the accident was his fault because he had left the Landcruiser parked too close to the truck.

16 It transpires that Glenn Brown told Rupert Bouckaert about the accident. Rupert reported it to his father Gabrielle (Mr Bouckaert). Doug Maloney remembers a radio call from Mr Bouckaert, in which he was asked whether he was the driver of the truck and he admitted that he was. Later in the evening he had a conversation with Mr Bouckaert who called him 'an idiot'. Doug Maloney tried to explain that the damage was not his fault. Mr Bouckaert was aggravated and angry. Mr Bouckaert told Doug Maloney that he would have to pay for the damage. Doug Maloney refused, Mr Bouckaert then told him he would pay half. Doug Maloney again declined to pay anything, Mr Bouckaert then told him to get off his property and he would stop his cheque. Doug Maloney says that Mr Bouckaert told him that he had no problem with his work, but demanded that he pay for damage to the Landcruiser or the Respondent would not pay any monies owed to him for wages. Afterwards Doug Maloney packed his gear and left. He returned to the property on the following Monday after he had been to his bank to get a clearance of his wages but found the cheque had been stopped. He has not received any money since.

17 Chris Falls gave evidence that he was engaged to start on 6th May 2002. He worked 12 hours a day between 7am and 7pm, mainly driving a 94-100 John Deere tractor. This tractor is about 5 metres wide and has a bar 4-5 metres wide when folded, attached to the bar was a Morris air seeder and behind it were its feeder bins, the combined length of the tractor, bar, seeder and bins was in excess of 20 metres.

18 According to Chris Falls he had driven large farming machinery and equipment since he was very young but this was the biggest piece of gear that he had ever driven. Prior to Friday 17th May 2002 he had driven the spread of equipment three times between the farm blocks on the open road. He did not object or ask for an escort because he needed the job and work was difficult to get around Esperance particularly at that time of the year. In any event these were back roads with very little traffic on them.

19 On 17th May 2002 it became necessary to shift the tractor and attachments. Prior to doing so Chris Falls had contacted Wouter Bouckaert on the two-way to tell him that he would be heading out. He left 'Home' block around 3:15pm, as soon as he was out on the road he attempted to contact Wouter Bouckaert because he decided he needed an escort. He says at first Wouter Bouckaert refused. Ten minutes later he again asked for an escort because he was worried that a road train had come up behind him, and a utility had to go into the bush to pass him. There was an argument between Chris Falls and Wouter Bouckaert about the legality of the transit. Later Chris Falls contacted Wouter Bouckaert again and asked for an escort, he was worried that the school bus might come along and he was unable to stop due to steep drains and the narrow road. He had been on the road for half an hour and travelled 10 kilometres when he again asked for an escort. This time Wouter Bouckaert agreed and Chris Falls was told to pull over and wait. The escort reached him about 10 minutes later.

20 According to Chris Falls when he arrived at the paddock, an argument erupted between him and Wouter Bouckaert which resulted in Mr Falls saying that he could not work under those conditions. He returned to the tractor to fetch his esky which he put it in the utility. He then told Wouter Bouckaert that he was not going to leave and he says Wouter Bouckaert agreed that was okay.

21 This time Mr Bouckaert then became involved, screaming and shouting at him. He claimed that Chris Falls was trying to tell the Bouckaert's how to run their business, Chris Falls responded to the anger in kind and he was told by Mr Bouckaert to get off the property. Chris Falls confirmed with Mr Bouckaert he was being sacked and Mr Bouckaert also declined to give him a lift to his van to get his pay. Around about this time Mr Bouckaert threw Chris Falls' esky on the ground and kicked it. Mr Bouckaert continued to yell and scream, and it appeared to Chris Falls that he wanted to fight him. According to Chris Falls he was chested about six times by Mr Bouckaert; he backed away, saying that he did not want to hit an old man.

22 Glenn Brown was in the vicinity and he told Mr Bouckaert he also could not work under those conditions and that he was going to leave with Chris Falls. Mr Bouckaert responded by telling him to remove himself from the property.

23 According to Chris Falls he told Wouter Bouckaert that the Bouckaerts should consider the situation for 24 hours and if they wanted him to come back they should ring him.

24 Mr Falls gave evidence about why he considered it would be dangerous to drive the tractor on the road, however for the purpose of these Reasons I do not need to summarise that evidence in detail. His general contention though was that Wouter Bouckaert was not listening to safety issues that were being raised. He only provided an escort vehicle when Chris Falls persisted with his request.

25 Glenn Brown who was also employed at the property at the time was called to give evidence in support of Chris Falls and Doug Maloney. He told the Commission about the incident with the truck when the Landcruiser was damaged. He said that he had stood on the side of the Landcruiser to fix the seed bin. When he had closed the door of the Landcruiser he did not realise that it had not clicked shut. The seed bin was secured to the truck with wire guy ropes and when Doug Maloney drove the truck forward the guy rope securing the seed bin caught on the mirror. The door was dragged open and a plate weld which protrudes from the side of the truck peeled a triangular hole in the outer skin of the door.

26 According to Glenn Brown, Doug Maloney was careful to drive the truck slowly. However he was unable to see the guy rope because there was no rear view mirror on the passenger side of the truck.

27 Glenn Brown had later told Rupert Bouckaert that there had been an accident with the ute and Rupert agreed to tell his father and brother.

28 Around 7pm that night when Glenn Brown was returning into the yard he was intercepted by both Wouter and Mr Bouckaert who questioned him about who was driving the truck, they were yelling and Wouter Bouckaert was using foul language. They would not listen to any explanation, later Glenn Brown was told that Doug Maloney had been sacked over the damage to the Landcruiser.

29 Mr Brown was also a witness to the incidents involving Chris Falls. He had heard chatter over the two-way radio during which Chris Falls had requested an escort and had heard Wouter Bouckaert refuse. Eventually Wouter Bouckaert contacted Glenn Brown to arrange an escort and he arranged for that to be done.

30 He was present later when Chris Falls arrived with the tractor and an argument commenced. Mr Brown heard Mr Bouckaert tell Chris Falls he was sacked and to get off the property. Mr Brown saw Mr Bouckaert throw Chris Falls' esky some 5 to 8 metres. There was much shouting and screaming by Mr Bouckaert who then approached Chris Falls and started shoving him in the chest. This he did about six times. Mr Falls continued to back away as this occurred.

31 Mr Brown thought that there would be a fight and he intervened only to calm the situation down. The result was Mr Bouckaert told him to get off the property too. Wouter Bouckaert also asked his father to settle down. Mr Bouckaert then behaved in a threatening manner in a vehicle yelling at his son Wouter to make both Mr Falls and Brown walk. In a later conversation Glenn Brown heard Chris Falls tell Wouter Bouckaert that if the Bouckaerts apologised he would come back and work but at a higher rate. No apology was given.

32 Evidence was taken from Wouter Bouckaert who had a different version of events. He related that his brother Rupert had told him about the damage to the Landcruiser but he was unaware who was responsible. Wouter Bouckaert asked Glenn Brown to tell him what happened but he would not elaborate. Eventually Glenn Brown revealed that Doug Maloney had done the damage but that he (Glenn Brown) accepted responsibility.

33 As for the incident with Chris Falls, Wouter Bouckaert related a number of problems with him early on in his employment when he specifically did not do what he was told to do. As for the incident on 17th May 2002 he had heard Chris Falls call on the two-way and ask for an escort. He had responded and asked what his location was. He then asked if all the hazard lights were on. He received no response other than Chris Falls repeating his request for an escort. Wouter Bouckaert said to Chris Falls that if there is other traffic behind him it could wait as he had as much right to be on the road. Chris Falls continued to demand an escort. Wouter Bouckaert had told him that if the situation was dangerous he was to pull to the side of the road immediately. Wouter Bouckaert then instructed for Glenn Brown to arrange an escort. By the time the escort arrived there was only two kilometres left of the journey.

34 According to Wouter Bouckaert when Chris Falls arrived at the paddock he wanted to argue about the matter. Mr Falls retrieved his esky from the tractor, placed it in a utility and yelled that he wanted his pay cheque because he knew his worker's rights. Wouter Bouckaert remembers his father picked up Mr Falls' esky and threw it off the ute. The two men faced up to each other then Chris Falls chested Mr Bouckaert. Wouter Bouckaert was concerned about his father and the threat of physical violence as it appeared to him that Chris Falls was trying to provoke a fight.

35 Wouter Bouckaert recalled that his father got into his vehicle and drove to another Landcruiser parked nearby in the paddock and removed the key from the ignition. He asked his father to allow him to sort matters out. On the way back to the home farm he was told by Glenn Brown that if Chris Falls was leaving he would go too. Wouter Bouckaert went to their quarters later to see if they had left. He was told that if an apology was given and the Respondent would pay $2 or $3 per hour more they would come back to work. Chris Falls gave Wouter Bouckaert 24 hours to think about his demand, telling Wouter that he did not need the job as he had one to go to and that he could shut the operation down.

36 Evidence was also taken from Mr Bouckaert. He has a different version of the events to that offered by both of the employees concerned. He said that in relation to the damage to the Landcruiser door his son Rupert had reported that someone had backed into it. According to Mr Bouckaert's evidence he found the Landcruiser door was 'ripped half open', he had asked Glenn Brown on a number of occasions who did the damage, eventually he said Doug Maloney had.

37 Mr Bouckaert then called Doug Maloney on the two-way and asked about the damage but he received no answer. A short time later he drove over to pick up Doug Maloney and Chris Falls to take them back to the home farm. During the trip he told Doug Maloney that he would have to pay for the damage. The response from Doug Maloney was that it was an accident and the insurance would pay. Mr Bouckaert then said that he demanded Doug Maloney pay for the necessary repairs. According to Mr Bouckaert, Doug Maloney said if that was the case he would not work anymore for the Respondent and was pulling out. He then packed his gear and left.

38 As to the incident with Chris Falls on 17th May 2002 Mr Bouckaert says that immediately Chris Falls dismounted from the tractor he yelled he wanted his pay cheque and that he knew his rights. Mr Bouckaert had ordered him out of another vehicle, he refused to get out so Mr Bouckaert took his esky and put it on the ground. Chris Falls then picked up the esky and put it back in the utility and Mr Bouckaert then placed it back on the ground. At this time Chris Falls chested him he then walked away towards the other Landcruiser, Mr Bouckaert intercepted him took the keys out of the ignition and gave them to his son Wouter, who told him to leave the matter to him to sort it out.

39 Evidence was called on behalf of the Respondent from Mr Murray Kenneth Hodges who has business dealings with the Respondent through Ampol and Caltex dealerships. He had known Mr Bouckaert for 20 years, predominantly as a customer of the fuel distributors. He knew him as a hard worker and a good business man of high integrity. He described him as a devoted family man with a close family. He has never heard him described as 'bloody crazy'. If he were he would not have been able to survive as a successful farmer. There has been much rationalisation in the agricultural industry in the area and the farmers who survived are typically well balanced sound people. He had never known Mr Bouckaert to be physically aggressive or ever heard of any physical altercation involving him. Mr Hodges found him to be of cheerful and purposeful disposition.

40 Evidence was also taken from Douglas John Slater who is a Director of Ratten & Slater Nominees Pty Ltd which company owns three trading enterprises supplying motor vehicles. Mr Slater holds many community positions and has been District Governor of Rotary, he attested that he has known Mr Bouckaert since 1965.

41 He described Mr Bouckaert as a workaholic but not in any derogatory sense. He started his farm living in a tent in the bush and he had grown it to become a farm cropping over 15,000 acres. Mr Slater attested that Mr Bouckaert had over many years been honest and hard working. He never had a cross word with him or seen him physically aggressive. From his own knowledge he doubted that Mr Bouckaert would be physically aggressive towards anyone. He had not heard of any such incident.

42 The final witness called on behalf of the Respondent was Michael Ross Hitchcock who is a farm worker employed by the Respondent and has been so since March 2001.

43 Mr Hitchcock is a fulltime worker on the Respondent's properties and gave evidence that he worked with Gabrielle, Wouter and Rupert Bourckaert. Mr Hitchcock lives on the property within walking distance of the house occupied by Gabrielle, Wouter and Rupert Bourckaert. He attested that the Bouckaerts are good people to work for. They are honest and are never aggressive. Mr Hitchcock remembered a situation when he was operating a plough which was damaged. He made a report at 2am in the morning, both Gabrielle and Wouter Bouckaert came to the site, neither were angry or aggressive. At no time had Mr Hitchcock ever seen Gabrielle or Wouter Bourckaert become aggressive or angry towards anyone. Mr Hitchcock opined that he did not think either of them would become involved in a physical altercation because they are not violent men. Mr Hitchcock said that he had no social relationship with the family except for the occasional drink. His relationship is as an employee to an employer, who he regards as a good one with whom he would stay for as long as they need him.

44 The Commission has to determine the credibility of the witnesses. In this case where there are two diametrically opposed versions of events, that determination is critical to the outcome. By arrangement the parties presented a statement of evidence in chief which was attested to by each witness and entered into the records of the Commission. The witnesses were then cross examined and re-examined. An unfortunate result of this process is that the Commission has been denied the advantage of seeing the witnesses give their evidence in chief, it has only seen them under cross examination and is therefore deprived of the opportunity to balance how they presented in the different phases of the evidentiary progress. Examination during evidence in chief which is obviously less stressful than cross examination, the opportunity to see the witnesses in both phases is all the more important in a case like this where at least one of the witnesses has English as a second language and who clearly was unable to differentiate some of the subtleties and nuances of language in the questions put to him. I will make further comments on this when I review the evidence of the witness concerned Mr Bouckaert.

45 The Commission heard Doug Maloney give his evidence. He impressed as an honest person and there is no reason why the Commission should not believe the story he presented. I have concluded that the beliefs he articulated are firmly held beliefs about the incidents and have given credibility to his evidence on that basis.

46 I do not enjoy the same comfort with the evidence of Chris Falls. There are considerable differences between his statement of evidence and the answers he gave under cross examination to Mr Brunner, of counsel, who appeared for the Respondent. He repudiated statements in his statement of evidence as being mere errors. One of those was the position of the sun when he says that one of the reasons he felt uncomfortable driving the tractor and spread of machinery on the road was the sun being in the eyes of drivers of on coming vehicles. Whereas his evidence in chief he claimed he was worried about the sun in his eyes. More particularly though, in evidence he clearly described the condition of the road and the surrounding country side as an important reason as to why he could not pull over the spread of equipment as he was instructed. He continued strongly with his contentions about the road conditions until the Commission announced that it would go and inspect the road in question which in fact it did. I will say more about the outcome of that inspection later but one could be forgiven for concluding that Chris Falls was not describing the same piece of road that was inspected by the Commission, but it was confirmed that the road seen by the Commission, was in fact the road travelled by Chris Falls in the tractor.

47 The evidence of Chris Falls generally has the appearance of being constructed to fit the outcome that he seeks to achieve. Even if that was an inadvertent action by him it still does not ameliorate the concern that the Commission feels about the truthfulness of the story that he urged upon the Commission. In the circumstances I have doubts about the weight which should be given to the evidence of Chris Falls and because of those doubts I do not rate him as a witness of high credibility.

48 The Commission heard evidence from Glenn Brown who was a witness to both of the incidents that are subject to review in this Decision. Mr Brown gave evidence relating to events concerning Doug Maloney. Mr Brown accepted responsibility for the damage done to the Landcruiser by the truck driven by Doug Maloney. I observe the Commission finds it a difficult to accept his version of how the damage was done. That is of no account in terms of deciding the unfairness or otherwise of the dismissal of both of the employees the subject of these proceedings. However it is useful in assisting the Commission to determine whether Mr Brown's evidence in a general sense ought to be regarded as reliable.

49 His version of events as to how the skin of the Landcruiser door was damaged are hard to accept. He contends that the wing mirror of the Landcruiser was snagged by a guy rope on the truck, the door was pulled opened and eventually was damaged. The evidence before the Commission is that the damage is a triangular puncture some 4 or 5 centimetres in from the edge of the door adjacent to the door handle. If the sequence of events occurred as Glenn Brown suggested it would be impossible for the damage to be in that position, however not much turns on this other than that it raises questions about the reliability of Glenn Brown's memory.

50 The major problem of Mr Brown's evidence is that it suffers from hyperbole for instance in his evidence in chief he says that Mr Bouckaert threw the esky belonging to Chris Falls of a distance between 5 and 8 metres. Other evidence from both Chris Falls and Wouter Bouckaert and indeed from Mr Bouckaet indicates that Mr Bouckaert did throw the esky but it would have been in the vicinity of 2 metres. Glenn Brown attests that Mr Bouckaert pushed Chris Falls in the chest for about 10 metres. The Commission has had the opportunity of comparing the relative physical size and age of both of the men concerned and has concluded that it is quite improbable that Mr Bouckaet, if indeed he did push Chris Falls, would be capable of pushing him that distance. Also it is clear on the evidence that the vehicle driven by Glenn Brown was not parked in the immediate vicinity of the altercation. On a reasonable analysis of the evidence it was up to 100 metres away. If he did arrive upon the scene of the altercation before Wouter Bouckaert, which is doubtful, his evidence about his role in the pacification of the combatants at the least seems to be self serving, or if not self serving at least serving in the interests of Chris Falls.

51 I say more about why that might be the case in my analysis later.

52 On behalf of the Respondent the Commission heard evidence from a number of people. Mr Murray Kenneth Hodge appeared in the role of character witness, there is nothing to give the Commission any indication that his evidence is other than truthful and it is accepted as such. The same can be said about the evidence of Douglas John Slater I accept that his impression of Mr Bouckaert is one developed over many years of dealing with him on a commercial basis. Evidence was taken from Wouter Bouckaert, I have carefully examined his statement of his evidence in chief and reviewed with care the detailed cross examination of him by Mr Young and I can see no inconsistencies between what he alleged in his evidence in chief and what came out of his cross examination, at least upon the issues which are fundamental to the determination of this matter. Upon those issues I find his evidence is evidence that ought to be given weight and in that sense is credible.

53 There was a statement of evidence entered on behalf of Mr Glenn Miller (Exhibit B10) and I do not intend to give that statement any weight as was rightly pointed out to the Commission that there was no opportunity to cross examine Mr Miller. I mention that receipt of the evidence because even though it cannot be tested it is not inconsistent with the evidence of Mr Michael Hitchcock to whose evidence I now turn.

54 Mr Hitchcock although giving evidence in this matter in a limited way is in my view an important person in terms of which of these diametrically opposed stories ought be believed on the balance of probabilities. I have considered his evidence carefully and there is no reason to conclude that he is not a witness of truth and I accept him as a credible witness.

55 The evidence of Mr Gabrielle Bouckaert cannot be put in the same category of credibility. Mr Bouckaert was combative and voluble. He appeared to be evasive until the Commission reminded the advocate for the Applicant that English was not Mr Bouckaert's first language and thereafter his answers were more straight forward and cogent than they had been before. From his demeanour in the witness box it appeared to the Commission that Mr Bouckaert was capable of angry reaction to circumstances even though that seems to be contrary to the character evidence. However I have to say the Commission concludes there is nothing in the evidence which would lead the Commission to conclude that Mr Bouckaert would descend to the raving violent behaviour that the evidence of Messrs Falls and Brown would have the Commission believe. My conclusion is that more likely than not he is capable of anger but not to the extent that is being described by Chris Falls and Glenn Brown.

56 On balance I have concluded that the story offered by the Respondent is more likely than not to be a more accurate version of events than that offered by Chris Falls and Glenn Brown.

57 I deal first with the dismissal of Douglas Maloney. The most likely turn of events involving Mr Maloney was that he did drive a vehicle which damaged a Landcruiser that someone else had left parked in a vulnerable position.

58 The news of the accident was communicated to the Respondent in as an expedient way as was available at the time. Glenn Brown undertook to Doug Maloney to tell Rupert Bouckaert, which he did. In my view there is nothing at all wrong with that as a reporting mechanism to the Respondent. After all Rupert Bouckaert was part of the family even though it appears he did not have any executive authority. Rupert Bouckaert obviously immediately passed on the information. When Mr Bouckaert found out he was angry and he told Doug Maloney that he would deduct the money for the damage from his pay. Doug Maloney quite understandably objected to that conduct. He said he would not pay anything, he was then told to leave. Mr Bouckaet would not listen to any reasonable argument about restoration of the damage to the vehicle, he told Doug Maloney, whose story I accept in this respect, that he would have to pay and that the Respondent would stop payment on his cheque. In the course of events that is what happened.

59 I accept Doug Maloney's evidence that he thought he was dismissed so he packed up his gear and left. I also accept that he went to his bank and found that his cheque had been stopped.

60 These are circumstances where it is clear that there had been unfairness in the dismissal. There has not been a fair go all round, there was not even a proper investigation of the damage that was done to the vehicle. Even if there had been and it had been found that Mr Maloney had been negligent as a matter of law the employer cannot stop payment of wages. It has other avenues to recover a debt but none of those were explored at all.

61 Mr Maloney was clearly unfairly dismissed on the authority of *Undercliffe Nursing Home v Federated Miscellaneous Workers Union (1985)* 65 WAIG 385 and orders will issue accordingly.

62 I need to consider the remedy in the circumstances. It is apparent from the evidence that the parties entered into an arrangement which in the farming industry, at least in the Esperance area, is known as a 'casual engagement'. This is an engagement which is not casual in the usually understood meaning of the term, what it means in the farming industry is to be

engaged for the seeding [harvesting] season. It is therefore casual in the sense that the person is not a permanent farm hand, it is someone who is brought into operate machinery in a key part of the year during seeding, then the same occurs later in the year during the harvest period.

63 There is not therefore the ability to order reinstatement because of the nature of the engagement, however Mr Maloney would have remained till the end of the seeding period. It seems because of weather and other reasons seeding came to a conclusion on 7th June 2002 therefore the calculation of loss for Doug Maloney will be from the time of his dismissal on 6th May till 7th June 2002. According to the evidence Doug Maloney was earning $180.00 a day, 7 days a week. The loss calculated on that basis is in the sum of $4,680.00. No submissions were made concerning injury and no award will therefore be made for that head of compensation. I now turn to consider the alleged unfair dismissal of Chris Falls.

64 The working relationship between Chris Falls and the Respondent prior to the time of his dismissal needs to be canvassed in order to put into context what happened later. It appears that Chris Falls was quite happy to go along with the way the Respondent operated it business prior to the dismissal of Doug Maloney. In fact in terms of the chronology of events the dismissal of Doug Maloney created what appears to be a watershed in the relationship. Prior to then Chris Falls, even though he was unlicensed, was prepared to operate the tractor and with its accoutrements along the public road. In fact he did so on three occasions, it did not concern him then that there may be breaches of the traffic code or transport regulations concerning the movement of the spread of equipment, nor did he raise any questions concerning the disruption or danger to other road users.

65 He says that he operated the equipment in those circumstances because he wanted to keep the job. I sense, given what happened later, that was a glib utterance and one which the Commission does not accept. For instance after the events of 17th May 2002 notwithstanding the alleged violence of Mr Bouckaert Chris Falls was prepared to negotiate a continuation of the contract for an extra $2 or $3 an hour. In other words the events were not so threatening that he thought he could not continue at all. He would continue if the money was right.

66 Mr Falls' evidence concerning the movement of the tractor on 17th May 2002 leads one to the conclusion on the balance of probabilities that he was prepared to use the transit to set up some type of confrontation. His story about the road being unsuitable to safely park up the equipment when he was asked to and the alleged threat to other users of the road are, after inspections by the Commission is quite unbelievable. In any event notwithstanding that he asked for help by way of an escort and notwithstanding that one was organised for him after initial reluctance on Wouter Bouckaert's behalf, he continued with the journey so that ultimately he almost completed it by the time that the escort arrived. It is open to conclude that he protested just a little too much about the situation he found himself in on the road. It was his responsibility when driving the vehicle to comply with the law, he should not have driven at all if the equipment was not properly marked or escorted, yet the day in question was the fourth time he would have made the transit.

67 I am inclined to think that his six reasons which he put in his evidence as difficulties in making the transit have been be product of hindsight on his behalf of what happened rather than what he really was confronted with at the time.

68 An indication of his state of mind during that event can be seen from that he brought the spread of equipment into the paddock and parked it in a position contrary to Wouter Bouckaert's instructions. He would have known that the spraying was going on in the paddock yet he opted to leave the tractor and its accoutrements in a position which would interfere with that operation.

69 It is open to conclude and I do that when Chris Falls reached the paddock he was in a state of mind that he was prepared to take on the Bouckaerts because he did not believe that they had treated Doug Maloney fairly. He was prepared to assert what he thought were his industrial rights and he dismounted from the tractor with the intention of doing so. When Wouter Bouckaert raised the question of the existence of the appropriate license that was the catalyst for Chris Falls to become angry. I think it more likely than not his anger was such that he resigned. He demanded that he be paid, he asserted that he knew his rights and he wanted to be taken off the property.

70 He then put his esky on the utility ordering that he be taken back to his own vehicle. As I have indicated earlier my analysis of the evidence I believe Mr Bouckaert was capable of becoming angry but on the evidence of Mr Hitchcock and the two character witnesses not to the extent claimed by Chris Falls and Glenn Brown. Mr Bouckaert in fact did become angry with Chris Falls, so much so that he put Chris Falls' esky on the ground. When Chris Falls placed it back in the vehicle Mr Bouckaert's anger caused him to throw the esky out. He did not on the evidence throw the esky 6 or 7 metres as alleged by Glenn Brown, who at this time, on my understanding of the evidence, had probably parked 100 metres away and if the vehicles were parked in the positions indicated to the Commission during the hearing may well have been obscured from view of these events.

71 It is open to conclude that Chris Falls and Mr Bouckaert chested up to each other, I accept that there was no physical contact. If the men did move at the time, which I doubt, it would have been no more than a few metres, certainly not 10 metres as alleged by Glenn Brown.

72 I find that as Chris Falls walked towards the other vehicle, there was some further interchanges between him and Mr Bouckaert, but in due course Messrs Falls and Brown were delivered back to the 'Home' block. I accept the evidence of Wouter Bouckaert that when he was transporting Chris Falls and Glenn Brown back to the 'Home' block that Glenn Brown said that if Chris Falls was going he was leaving as well.

73 That is not surprising because these two employees were both engaged after Wouter Bouckaert had approached Glenn Brown when Messrs Brown and Falls were working for Pinchin, in fact they were shearing side by side.

74 The evidence points to the fact that they were mates and good work mates who had worked together for some time and they knew each other not only in the workplace but outside of it.

75 I accept the story of Wouter Bouckaert that later in the evening he went back to the quarters and had a further discussion with Chris Falls. The most likely version of events is that Chris Falls indicated that he would return to work if he was paid an extra $2 to $3 an hour and if the Bouckaerts agreed to apologise. I also accept the evidence of Wouter Bouckaert that Chris Falls said he had a job to go to on Monday.

76 All of the evidence points to the real sequence of events being that Chris Falls had decided that the treatment of Doug Maloney was unfair, he did not wish to be further involved with working for the Respondent, he then became unprepared to do something that he had done on three occasions previously. He made an issue of the matter and was prepared to argue about his conduct with the Bouckaerts.

77 That argument turned into an altercation between Chris Falls and Wouter Bouckaert. More likely than not Glenn Brown did not intervene in the way he claimed, there was chest to chest argument with Mr Bouckaert, there was no physical contact and Chris Falls continued with what in effect was the resignation he had given to Wouter Bouckaert.

78 It is true that a resignation should not be accepted in the heat of the moment but later Wouter Bouckaert went to see Chris Falls to see what his position was. If Chris Falls had been a victim of the affront by Mr Bouckaert as he claimed, that would have

been the time when he should have said he wanted to continue work but he was only prepared to do so if he received a considerable increase in his hourly rate. He had the opportunity to continue, he was not prepared to continue on the same terms and conditions and he therefore his resignation stood.

79 The Commission can only deal with a claim for unfair dismissal of an employee if there has been a dismissal. It is clear in this case Chris Falls was an employee but there was no dismissal therefore the jurisdiction does not arise and the application will be dismissed for want of jurisdiction.

80 I consolidate the Decision of the Commission in this matter in the following way, orders will issue that Douglas Maloney was unfairly dismissed on the 12th May 2002 reinstatement is unavailing and he will be paid compensation in the sum of $4,680.00.

81 The application as it applies to Christopher Falls will be dismissed.

2002 WAIRC 06849

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE AUSTRALIAN WORKERS' UNION, WEST AUSTRALIAN BRANCH, INDUSTRIAL UNION OF WORKERS, APPLICANT
	v.
	BOUCKAERT PTY LTD, RESPONDENT
CORAM	COMMISSIONER J F GREGOR
DATE	FRIDAY 25 OCTOBER 2002
FILE NO.	CR 119 OF 2002
CITATION NO.	2002 WAIRC 06849

Result Application allowed in part

Order

HAVING heard Mr C Young on behalf of the Applicant and Mr P Brunner (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 Mr Douglas Maloney was unfairly dismissed by Bouckaert Pty Ltd on 12 May 2002.
2. THAT Bouckaert Pty Ltd pay Mr Douglas Maloney compensation in the sum of $4,680.00 within 14 days of the date hereof.
3. THAT the application as it applies to Mr Christopher Falls is dismissed.

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

2002 WAIRC 06902

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE AUTOMOTIVE, FOOD, METALS, ENGINEERING, PRINTING AND KINDRED INDUSTRIES UNION OF WORKERS - WESTERN AUSTRALIAN BRANCH, APPLICANT
	v.
	MIDLAND BRICK COMPANY PTY LTD, RESPONDENT
CORAM	COMMISSIONER J F GREGOR
DATE	FRIDAY, 1 NOVEMBER 2002
FILE NO.	CR 113 OF 2002
CITATION NO.	2002 WAIRC 06902

Result	Dismissed
Representation	
Applicant	Mr L. Edmonds (of Counsel) on behalf of the Union
Respondent	Mr Power (of Counsel) and with him Mr R. Curry (of Counsel) on behalf of the Respondent

Reasons for Decision

1 On 4th June 2002 The Automotive, Food, Metals, Engineering Printing and Kindred Industries Union of Workers – Western Australian Branch (the Union) applied to the Commission for an urgent compulsory conference pursuant to s.44 of the *Industrial Relations Act, 1979* (the Act) over a dispute it said existed between it and Midland Brick Company Pty Ltd (Midland Brick) over a decision to terminate the services of Mr Bernard Turner who previously had occupied the position of shop steward at Midland Brick's operations at the old Whiteman Brick Plant.

2 The Union complained that the termination of Mr Turner for reasons relating to his performance or conduct was a wholly disproportionate response to the alleged conduct.

3 The Commission conducted a conference on 13th June 2002. The conference was unsuccessful and on the motion of the Union the Commission, having concluded that the matter was an industrial dispute which had not been resolved between the parties, referred it for hearing and determination as it is empowered to do by s.44(9) of the Act.

4 The Commission described the dispute between the parties in a schedule to a Memorandum of Matters for Hearing and Determination under s.44. The schedule in its entirety is as follows—

> *"The Automotive, Food, Metals, Engineering Printing and Kindred Industries Union of Workers - Western Australian Branch (the Union) is in dispute with Midland Brick Company Pty Ltd (the Respondent) over the dismissal of Mr Bernie Turner.*
>
> *The Union claims the Respondent unfairly dismissed Mr Turner and seeks reinstatement to his former position.*
>
> *The Respondent refutes the claim and seeks the matter be dismissed."*

5 The termination of employment at the centre of the dispute occurred on 31st May 2002 on which day Vince Sarvaci, the General Manager Operations of Midland Brick, wrote a letter to Mr Turner advising him of his dismissal. A copy of the letter is incorporated hereunder—

> *"I refer to our meeting on Monday 27 May, at which you were provided an opportunity to explain your behaviour in verbally abusing and/or humiliating another employee (who at the time was present to conduct a meeting associated with safety at our workplace). Our subsequent investigations also identified an earlier incident involving you verbally abusing another employee in a Supervisory position.*
>
> *At the abovementioned meeting, your behaviour and approach demonstrated what I regard as a total lack of regret, or sincerity, regarding your actions.*
>
> *I consider your behaviour, in verbally abusing, humiliating and intimidating members of our workforce, is completely unacceptable. We consider our employees have a right to be protected from such behaviour in the workplace.*
>
> *Furthermore, given the context in which it occurred, I consider your behaviour has potentially undermined the Company's approach to operational effectiveness and its commitment to pursuing safety goals.*
>
> *At our meeting today, during which both of the above incidents were discussed, I consider your approach demonstrated a continued lack of regret, or sincerity, regarding your behaviour.*
>
> *Your behaviour is considered completely unacceptable and accordingly we have decided to terminate your employment, on the basis of pay in lieu of notice.*
>
> *You will be paid all entitlements and five (5) weeks pay in lieu of notice. In the circumstances, you are not required to work your notice period and all monies due to you will be paid into your nominated account at a bank or other financial institution by close of business on Tuesday 5 June 2002."*

6 It can be seen from the letter that it was the considered position of Midland Brick that the conduct of Mr Turner in verbally abusing, humiliating and intimidating members of the workforce was unacceptable. It was claimed the behaviour had the potential to undermine Midland Brick's approach to operational effectiveness and its commitment to pursuing safety goals and that when confronted with the effect of conduct Mr Turner had demonstrated a lack of regret and insincerity.

7 It is normal in Reasons for Decision relating to alleged unfair termination to recite the events which led to the dismissal but in this case that is unnecessary because there is a concession that Mr Turner uttered the words complained of to the two workers involved in each of the incidents on 20th April and 21st May 2002. Mr Turner has admitted that, and the evidence established little doubt that, he did abuse fellow employees Mr Cole, on 21st May 2002 and Mr Upson about one month before that.

8 It is submitted by the Union that it should be remembered that these events occurred in a highly charged industrial atmosphere. There had been a state of conflict in the workforce with the workers divided into two groups, one which was prepared to accept a change in the way that industrial conditions were regulated at the works by entering into a form of workplace agreement, in this case Australian Workplace Agreements and another group of employees who wished to continue with a collective agreement under the auspices of their Union.

9 Prior to this time there had been very little industrial conflict at Midland Brick, however the conflict between the small group of employees who wished to retain their Union negotiated enterprise bargaining agreement, the employees who did not and the management, which was encouraging people to sign the individual agreements, continued at a high level.

10 Mr Turner says it was that atmosphere, which caused him so much stress that he sought treatment through a counselling service which had been provided by Midland Brick. Mr Turner conceded that his behaviour was not appropriate. He had offered to apologise but his continued attempts to do so in a meeting conducted by the General Manager Human Resources and Engineering Mr K. Ryan on or about 27th May 2002 were rejected by Mr Ryan who continually browbeat him during the meeting.

11 During his evidence to the Commission Mr Turner said he realised that he should not have dealt with the matter in the way he did. He wanted to get back to work at Midland Brick. If it would help he would resign from the job steward position and he would focus on ensuring that the type of issues which caused him to abuse his fellow two workers would not come up again. It was conceded on his behalf that in the context of the atmosphere at the time control of the situation was carried away from Mr Turner. That he was prepared to recant his position was suggested by his advocate to be a reason why Midland Brick should not have dismissed him. Termination should have been the last resort because that termination interdicted any opportunity that Mr Turner might have had to make amends for his behaviour.

12 It is further argued that in a sense the reasons for the termination leave behind the events which were it's catalyst because the letter of termination is predicated on the basis that Mr Turner had compromised safety and that in some way he had undermined the line management. These reasons were never put to him in the meetings held prior to his termination and therefore he has not had the opportunity to either agree or disagree with them. In short he has had no chance to address Midland Brick on the issues upon which it relies to dismiss him. Therefore the dismissal lacks natural justice and it should be overturned.

13 Further it is contended that Mr Turner was denied a fair hearing by his employer because the investigation by Midland Brick was not an unbiased review of what had occurred. This was because of the concession from Mr Ryan that he and Mr Turner had a 'long history'. In short Mr Ryan was the wrong person to undertake the investigations and he should not have been involved with them.

14 The incident involving Mr Upson was not even known to Midland Brick until the meeting of 31st May 2002 when there was an allegation about an incident with him on 20th April 2002. The resulting investigation was nothing more than a witch hunt. It was done to remove from Midland Brick an employee who was a thorn in its side. Mr Ryan had encouraged the complaint knowing it would give him ammunition to use against Mr Turner.

15 I need to review some of the other evidence. The matter which first came to the attention of management occurred at the beginning of what was to be a safety meeting when a fellow employee of Mr Turner, Mr Cole, who was the nominated safety representative came into a lunch room. Mr Turner said words to the effect that Mr Cole was shit and that he would not stay in

the same room as him. Without reciting the details of what occurred it is clear that there were a number of witnesses to this event. The evidence of Mr Cole is he was left embarrassed and humiliated by it and as a result of the conduct of Mr Turner, Mr Cole was sent to Coventry by his fellow workers for at least one month.

16 The accusation that Mr Turner made against Mr Cole had no substance in fact. On the evidence before the Commission Mr Turner made no attempt to ascertain the accuracy of his claim against Mr Cole and he had incorrectly made assumptions about Mr Cole's conduct with the result that his accusations against him were false and untrue.

17 The second incident involving Mr Upson was of a similar nature to the first incident where an accusation, which was ultimately discovered to be quite wrong, was made by Mr Turner against Mr Upson who too suffered from the allegation.

18 Ultimately the two events came to the attention of Midland Brick and an investigation was undertaken by Mr Ryan together with other members of management. Mr Turner took part in the investigations and was given an opportunity to put his side of the story to the management representatives. He was allowed a workmate to sit with him as a witness during these investigations.

19 The matters to be decided in this application are not complicated, it is common ground between the parties that the abuse of other workers occurred, the question is whether the conduct of Mr Turner was such that it was open to Midland Brick to use its right to terminate the contract of employment without abusing that right. To do so it must conduct an inquiry which would allow it to reasonably inform itself as to the truth of the allegations in order to reach a proper decision as to the impact of the conduct the worker might have upon the company's operations.

20 In undertaking this enquiry an employer must give the employee a chance to be heard on the issues which are at the centre of concern. The issues here are not whether, as was urged upon the Commission by Mr Edmonds of Counsel, that there has been a compromise of safety or there is an undermining of management. The issue is whether Mr Turner did what was claimed he did and whether the result of that conduct was an intention to humiliate, embarrass and intimidate the two men that he targeted such that they were unable to perform the work they were engaged to perform. To put this another way whether there was a deleterious effect on the Company's operations which would justify it taking remedial action.

21 I have considered carefully all of the evidence before the Commission.

22 As I have mentioned at the beginning of these Reasons for Decision that the events involving abuse by Mr Turner against Mr Cole and Mr Upson occurred is not in question, what needs to be analysed is the effect of that conduct and whether the employer's approach to dealing with it leading to the dismissal of Mr Turner was such that there has not been a fair go all round (*Undercliffe Nursing Home v Federated Miscellaneous Workers Union (1985)* 65 WAIG 385).

23 Dealing first with the effects of the conduct by Mr Turner upon his workmates. Mr Cole in his evidence, which I accept, said he was humiliated and embarrassed. He went through a period where he was sent to Coventry, he was unable to perform his work as a safety representative in anything like an effective way.

24 Mr Cole was described by Mr Ryan in his evidence as a 'safety champion' I took Mr Ryan to mean by that, that prior to the event with Mr Turner, Mr Cole was an enthusiastic supporter of safety practices in the workplace. In that sense he was a safety champion because he enthusiastically urged safety upon his workmates. It is relevant to observe that in these days where safety at work is a pressing and important issue between employers and employees, the more 'safety champions' there are in an operation the better. It is in the context that Mr Cole was unable to continue with this work that led Midland Brick, fairly in my view, to conclude that the conduct of Mr Turner in respect of Mr Cole had the effect of undermining the Company's approach to operational effectiveness and its commitment to pursuing safety goals. That is the clear conclusion that can be drawn from the evidence in this case.

25 Concerning Mr Upson, Mr Turner visited upon him by calling him 'a fucking scab' the worst appellation that can be attributed to a workmate in a unionised Australian industrial relations workplace. The effect of being so labelled upon Mr Upson was dramatic. It caused, amongst other things, him to lose confidence in his ability to conduct proper performance appraisals of his fellow workers, a duty which was part of his responsibilities as a supervisor. Mr Upson found that his ability to work properly and with confidence was affected for a considerable period.

26 The conduct of Mr Turner in respect of these two workmates was careless of the impact it might have upon them. He used the power of the position which had been given to him as a shop steward by his Union in a way which clearly would not be acceptable to the Union or to any other reasonable person. The duty of a shop steward is to provide representation not to undertake a campaign against two workmates which was based upon a false premise. He accused both of them of doing things they did not do. He did not confront them with his allegations and give them a chance to explain the truth. He publicly upbraided them without any thought of the damage he might do to them by the false accusations. He could offer no other reason for embarking upon this conduct other than he had the information 'straight from the horse's mouth', yet he said nothing before the Commission which would provide any evidence at all that there was any substance in his allegations against either Mr Cole or Mr Upson.

27 In so far as Mr Upson is concerned he was unable to perform his role in the management hierarchy because of the abuse, humiliation and intimidation he had suffered.

28 It remains to be examined what an employer should do when confronted with such circumstances. It is an implied term of every employment contract that an employer has a duty to take reasonable care of an employee's safety. In addition it is also an implied term of contract that employers and employees must maintain a relationship of trust and confidence, if, for instance, an employer breaches this contractual duty by failing to prevent workplace bullying then the effected employee can sue for breach of contract and damages.

29 The English Courts have gone as far as implying a term into a contract of employment that—

> *"…[the] employer shall render reasonable support to an employee to ensure that the employee can carry out the duties of his job without harassment and disruption by fellow workers]" Waters v Commissioner of Police for the Metro Police (House of Lords 27 July 2000) citing with approval Wiggin VC v Davies [1999]* IRLR 127.

30 An employer must also be aware that if an employee is forced to resign because of workplace bullying which has not been remedied by that employer then the employer may be considered to have 'constructively' dismissed the employee and may be liable for damages for breach of contract (*Attorney General v Western Australian Prison Officers Union (1995)* 75 WAIG 3167). Of course it may also result as an unfair termination claim before a Tribunal such as this one.

31 In addition an employee may bring a tortious action against the employer for negligence if the employee was able to show that the injuries were foreseeable and ought to have been prevented.

32 Equal opportunity laws, occupational health and safety laws and the common law make the employers vicariously liable for the conduct of their employees and agents. Under these laws an employer is liable for acts of employees and if there is a breach of these laws the effect is the employer is regarded as having committed the breach. Employers may be liable even if they are unaware the conduct is occurring, a lack of knowledge being no defence (*see Aldrich, Booth and Ors (1986) EOC 92-177 and Boyle v Ishan Osden and Ors (1983) EOC 92-165*.

33 Employers are also responsible to ensure that employees do not suffer illness through psychiatric injury (see *Arnold v Midwest Radio (Supreme Court of Queensland 7th April 1998*). In *Carlisle VE Council of Shire of Kilkivan* and *Brietkreutz (Queensland District Court No. 12 of 1992 2 December 1995)* the District Court awarded the maximum amount under the Queensland Occupational Health and Safety laws of $200,000.00 for humiliation caused through bullying stating that "*in today's Australian community it is not acceptable (if it ever was) for a person in authority over another in the workplace to harass, belittle or demean that person as a method of enforcing…frustration*."

34 It is clear that an employer may be confronted with substantial legal liabilities if it does not act when it becomes aware of complaints of bullying in its workforce. Midland Brick faced with the complaints which had been made about the conduct of Mr Turner, undertook an investigation. It interviewed all of the witnesses who were necessary to establish the fact of the allegations. It is relevant to note here that the fact of the allegations was never denied by Mr Turner. He knew exactly why the investigations were occurring and he was able to answer the claims and allegations if he wanted to. It was the considered opinion of Mr Ryan and the other management representatives at the inquiries that Mr Turner had no intention at all of changing his behaviour. I accept the evidence that the purpose of the meetings was in fact to investigate and create in Mr Turner a behavioural change if that was possible. I accept Mr Turner did utter an apology, on at least four occasions. The conclusion of Mr Ryan was that all the apologies were insincere, he obviously had good grounds to reach that conclusion because Mr Munday who gave evidence for Mr Turner in these proceedings and who was Mr Turner's own witness at the inquiry said in evidence-in-chief when directly asked by Mr Turner's advocate whether the apologies were genuine or not, answered that he did not believe that they were.

35 By the time the inquiry had finished it is open to find that Midland Brick had every good reason to conclude that there had been verbal abuse, it had been humiliating and intimidating to the persons to whom it was directed, it affected their ability to do the job properly, one of them in the important area of safety, the other to lose confidence in his ability to be first line supervisor. It follows that assessment by Midland Brick that the conduct would undermine its operational effectiveness and safety goals, was open to it and a fair one to reach in the circumstances. It was also open to conclude that Mr Turner did not regret what he had done, and that there was no sincerity at all in his offers of apology.

36 It was therefore decided by Midland Brick to terminate the services of Mr Turner, he was paid all entitlements including five weeks pay in lieu of notice. There is no question of summary dismissal here, the process undertaken by Midland Brick was a thorough one.

37 I need to comment on a matter which was given some attention during the proceeding and that is a warning which had been issued to Mr Turner about his conduct in incorrectly filling in a timesheet for his claim. I am satisfied that matter was disposed of at the time by investigation and exchange of documents between the parties, it was not been relied upon to any extent in this dismissal, nor in the circumstances was there any need for Midland Brick to rely upon it.

38 Finally in his evidence Mr Turner indicated that he had suffered considerable stress because of the surrounding industrial circumstances. I accept that he did and that he received counselling under a program provided by Midland Brick. I accept that he continues to suffer stress as a result of these incidents. He told the Commission that he wished to return to Midland Brick, he would relinquish the position of shop steward and he wished, and was able, to put this matter behind him.

39 I have considered this plea. The assertion by Mr Turner that he would be able to put the matter behind him is completely at odds with the evidence of all of the employer's witnesses whose stories I have no reason to disbelieve. It is also at odds with the evidence of his own witness Mr Munday. I admit to some sympathy for the position in which Mr Turner now finds himself and it might well be that the Commission has a different opinion about whether relationship could be recreated or not with Midland Brick. However the Commission is not to be the surrogate manager of Midland Brick (*AMWU v Robe River Iron Associates (1987*) 67 WAIG 2). The Commission is required to decide the matter upon the facts which existed at the time the dismissal took place and determine whether the right to terminate the employment was executed so harshly and oppressively against the employee as to amount to an abuse of the right. The analysis above set out above does that, on the basis of that analysis there was no unfair dismissal. On the tests to be applied, the right of the employer to dismiss has not been abused when taken on balance (see *Shire of Esperance v Mouritz (1991)* 71 WAIG 891).

40 In all of the circumstances the Commission finds that the dismissal of Mr Bernard Turner was not unfair and an order dismissing the claim will be made.

2002 WAIRC 06903

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE AUTOMOTIVE, FOOD, METALS, ENGINEERING, PRINTING AND KINDRED INDUSTRIES UNION OF WORKERS - WESTERN AUSTRALIAN BRANCH, APPLICANT
	v.
	MIDLAND BRICK COMPANY PTY LTD, RESPONDENT
CORAM	COMMISSIONER J F GREGOR
DATE	FRIDAY, 1 NOVEMBER 2002
FILE NO.	CR 113 OF 2002
CITATION NO.	2002 WAIRC 06903

Result Dismissed

Order

HAVING heard Mr L. Edmonds (of Counsel) on behalf of the Applicant and Mr A. Power (of Counsel) and with him Mr R. Curry (of Counsel) on behalf of the Respondent, the Commission pursuant to the powers conferred on it under the *Industrial Relations Act, 1979,* hereby orders:

THAT the application be, and is hereby dismissed.

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

Conferences—Notation of—

PARTIES		COMMISSIONER/ NUMBER	DATES	MATTER	RESULT
Australian Workers' Union	GJC & IAE Bouchaert	GREGOR C C119/2002	28/06/2002	Alleged unfair dismissal	Referred
Australian Workers' Union	Total Earthmoving (WA) Pty Ltd	GREGOR C C189/2002	18/09/2002 7/10/2002	Dismissal for failure to sign a workplace agreement	Concluded
Australian Workers' Union	Total Marine Services Pty Ltd and Chiles Offshore International Inc	BEECH SC C178/2002	N/A	Refusal to employ	Discontinued
Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union	Midland Brick Company Pty Ltd	GREGOR C C113/2002	13/06/2002	Termination of employment	Referred
Breweries and Bottleyards Employees' Industrial Union	Kirin Australia Pty Ltd A.C.N. 009 079 645	WOOD C C187/2001	14/08/2001 24/10/2001	Period of operation of Enterprise Agreement	Concluded
Civil Service Association	Executive Director, Department of Fisheries	SCOTT C PSACR21/2002	N/A	With relation to the employer having to direct the employee to take annual leave	Dismissed
Civil Service Association	Executive Director, Department of Fisheries	SCOTT C PSAC32/2002	07/08/2002	Dispute re medication of job description forms	Concluded
Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing, and Allied Workers Union	Western Australian Specialty Alloys Pty Ltd	GREGOR C C118/2002	28/06/2002	Dispute over alleged harsh punishment of applicant union member	Concluded
Construction, Forestry, Mining & Energy Union	Ahayca Holdings Pty Ltd trading as Bull's Bricklaying Services	GREGOR C C151/2002	5/08/2002	Site allowance	Concluded
Director General, Department of Agriculture	The Civil Service Association of Western Australia Incorporated	SCOTT C PSAC39/2002	1/10/2002 4/10/2002 21/10/2002	Conversion of Entry Level Contract Officers to Permanent Status	Referred
Hospital Salaried Officers Association	Gascoyne Health Service	SCOTT C PSAC2/2001	25/06/2001 27/11/2001	N/A	Concluded
Hospital Salaried Officers Association	Metropolitan Health Service Board at Womens and Childrens Health Service, Princess Margaret Hospital	SCOTT C C184/2002	6/09/2002	Alleged refusal of leave	Concluded
Liquor, Hospitality and Miscellaneous Workers Union	Activ Foundation (Inc)	HARRISON C C58/2002	3/04/2002	Dispute over alleged failure of Respondent to comply with thier Redundancy Policy	Concluded
Liquor, Hospitality and Miscellaneous Workers Union	Blowflex Mouldings Pty Ltd	HARRISON C C50/2002	N/A	Alleged denial of promised grade promotion of applicant union members	Discontinued
Liquor, Hospitality and Miscellaneous Workers Union	Australian Leisure & Hospitality Group (ALH Group)/Como Hotel	HARRISON C C215/2002	1/11/2002	Alleged unfair dismissal	Concluded
Liquor, Hospitality and Miscellaneous Workers Union	Delron Cleaning	HARRISON C C143/2002	N/A	Alleged unfair dismissal	Concluded
Liquor, Hospitality and Miscellaneous Workers Union	Quirk Corporate Pty Ltd	HARRISON C C128/2002	N/A	Employment under terms of an award should not be refused employment	Concluded
Liquor, Hospitality and Miscellaneous Workers Union	Minister for Education	KENNER C C16/2002	14/02/2002	Termination of employment	Discontinued
Master Builders' Association	Construction, Forestry, Mining & Energy Union	GREGOR C C209/2002	N/A	Prevention of industrial disruption re lost time payment at the Whitfords City Shopping Centre extension project	Concluded
Police Union	Commissioner of Police	SCOTT C PSAC5/2002	3/04/2002 1/08/2002	Alleged dispute re terms of re-engagement of R. Davies.	Concluded
Police Union	Commissioner of Police, Western Australian Police Service	SCOTT C PSAC2/2002	11/01/2002	Alleged dispute re Departmental Policy HR 12 Secondary Employment	Concluded

PARTIES		COMMISSIONER/ NUMBER	DATES	MATTER	RESULT
Prison Officers' Union	Hon. Attorney General	BEECH SC C79/2001	30/03/2001 9/04/2001 19/04/2001 30/08/2002	Renewal of contracts	Concluded
Prison Officers' Union	Hon. Attorney General	BEECH SC C169/2002	05/09/2002	N/A	Concluded
Shop, Distributive and Allied Employees' Association	Kresta Group Limited	HARRISON C C117/2002	14/06/2002	Dispuite in regards to the timing of Annual Leave to be taken by applicant union member	Concluded

CORRECTIONS—

2002 WAIRC 06846

CHILDREN'S SERVICES CONSENT AWARD, 1984

NO. A1 OF 1985

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES TRADES AND LABOR COUNCIL OF WESTERN AUSTRALIA, CHAMBER OF COMMERCE & INDUSTRY OF WESTERN AUSTRALIA, AUSTRALIAN MINES & METALS ASSOCIATION INC

COMMISSION IN COURT SESSION

CORAM CHIEF COMMISSIONER W S COLEMAN
SENIOR COMMISSIONER A R BEECH
COMMISSIONER J F GREGOR

DATE OF ORDER FRIDAY, 25 OCTOBER 2002

FILE NO. APPLICATION 797 OF 2002

CITATION NO. 2002 WAIRC 06846

Result Correction Order

Correction Order

WHEREAS an error occurred in the Order dated 22 July 2002 issued in Application 797 of 2002, the Commission, in order to correct this error and pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders—

1. THAT the Variation Schedule in respect of the "Children's Services Consent Award, 1984 No. A1 of 1985" attached to the said Order be corrected by deleting subclause (3) of clause 22 – Wages. – and inserting the following after subclause (2) of clause 22 – Wages."—

(3) Pre-School Teachers:

(a) Salary Level	$ (Per Annum)	$ A.S.N.A.	$ TOTAL WAGE	$ (Per Week)
Step I	27105	3026.00	30131.00	577.60
Step II	28644	3026.00	31670.00	607.10
Step III	29975	3130.00	33105.00	634.60
Step IV	31201	3130.00	34331.00	658.10
Step V	32432	3130.00	35562.00	681.70
Step VI	33971	3130.00	37101.00	711.20
Step VII	35661	3130.00	38791.00	743.60
Step VIII	37044	3130.00	40174.00	770.10
Step IX	38171	3130.00	41301.00	791.70
Step X	39710	3130.00	42840.00	821.20
Step XI	41243	3130.00	44373.00	850.60

W.S. COLEMAN,
Chief Commissioner.
On behalf of the Commission in Court Session.

PROCEDURAL DIRECTIONS AND ORDERS—

2002 WAIRC 06786

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MARK STANLEY CARTER, APPLICANT
	v.
	CHANNEL 31 COMMUNITY EDUCATIONAL TELEVISION LTD, RESPONDENT
CORAM	COMMISSIONER J F GREGOR
DATE	FRIDAY, 18 OCTOBER 2002
FILE NO.	APPLICATION 299 OF 2002
CITATION NO.	2002 WAIRC 06786

Result Granted

Order Ex Parte

WHEREAS on 14th October 2002 Channel 31 Community Educational Television Ltd (the Respondent) applied for an order for Further and Better Particulars in respect of the claim made by Mark Stanley Carter (the Applicant); and

WHEREAS the Respondent seeks from the Applicant Further and Better Particulars of how each individual amount of his claim that is $21,082.90 and $11,970.00 are comprised, how the liability arises for the amount and the date on which the liability arose; and

WHEREAS the Commission has heard the matter ex parte and has decided to issue orders that Further and Better Particulars be supplied to the Respondent (the applicant) in these proceedings by Mark Stanley Carter; and

WHEREAS it now issues an order that Mark Stanley Carter provide particulars of how the sums of $21,082.90 and $11,970.00 are comprised, how the liability of each amount arose and the date which such liability arose by close of business on Monday, 21 October 2002.

NOW THEREFORE pursuant to the powers vested in it by s.27 of the Industrial Relations Act, 1979 the Commission hereby orders—

THAT Mark Stanley Carter provide by close of business on Monday, 21 October 2002 particulars of how the sums of $21,082.90 and $11,970.00 are comprised, how the liability of each amount arose and the date which such liability arose.

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

2002 WAIRC 06932

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE STATE SCHOOL TEACHERS UNION OF W.A. (INCORPORATED), APPLICANT
	v.
	DIRECTOR GENERAL OF EDUCATION, RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE OF ORDER	TUESDAY, 5 NOVEMBER 2002
FILE NO/S.	APPLICATION 382 OF 2002
CITATION NO.	2002 WAIRC 06932

Result Application dismissed

Order

WHEREAS on the 5th day of March 2002, the State School Teachers' Union of Western Australia (Inc) applied to the Commission for orders pursuant to the *Industrial Relations Act, 1979;* and

WHEREAS on the 19th day of April 2002 the Commission convened a conference for the purpose of conciliating between the parties; and

WHEREAS at the conclusion of that conference the parties sought time for further discussions; and

WHEREAS by letter dated the 14th day of May the applicant advised the Commission that the matter had settled; and

WHEREAS on the 15th day of May 2002 the applicant filed a Notice of Discontinuance in respect of the application; and

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.

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

2002 WAIRC 06679

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	KERRY ANNE HORAN, APPLICANT *v.* SOUTH WEST ABORIGINAL MEDICAL SERVICE - ABORIGINAL CORPORATION, RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	TUESDAY, 1 OCTOBER 2002
FILE NO/S.	APPLICATION 466 OF 2002
CITATION NO.	2002 WAIRC 06679

Result	Order issued
Representation	
Applicant	Mr M Devlin of counsel
Respondent	Mr R Kroon of counsel

Order

HAVING heard Mr M Devlin of counsel on behalf of the applicant and Mr R Kroon as of counsel on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders—

(1) THAT the respondent shall file and serve further and better particulars of answer by 8 October 2002.

(2) THAT the applicant shall file and serve further and better particulars of claim by 15 October 2002.

(3) THAT the respondent shall serve on the applicant copies of documents upon which it intends to rely by 22 October 2002.

(4) THAT the applicant shall serve on the respondent copies of documents upon which it intends to rely by 29 October 2002.

(5) THAT the parties give notice to one another of witnesses they intend to call no later than 7 days prior to the date of hearing.

(6) THAT the matter be listed for hearing for 2 days.

(7) THAT the parties have liberty to apply on short notice.

(Sgd.) S. J. KENNER,
Commissioner.

[L.S.]

2002 WAIRC 06965

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	KERRY ANNE HORAN, APPLICANT *v.* SOUTH WEST ABORIGINAL MEDICAL SERVICE - ABORIGINAL CORPORATION, RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	MONDAY, 11 NOVEMBER 2002
FILE NO/S.	APPLICATION 466 OF 2002
CITATION NO.	2002 WAIRC 06965

Result	Order issued
Representation	
Applicant	Mr M Devlin of counsel
Respondent	Mr J Scurria of counsel

Order

HAVING heard Mr M Devlin of counsel on behalf of the applicant and Mr J Scurria 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 subject to the execution of a deed of settlement and release in terms as agreed between the parties the respondent pay to the applicant the sum of $12,115.35 (gross) within 21 days.

(Sgd.) S. J. KENNER,
Commissioner.

[L.S.]

2002 WAIRC 06732

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	COLLEEN MARGARET PERRIMAN, APPLICANT
	v.
	HEINIKEN AUSTRALIA PTY LTD, RESPONDENT
CORAM	COMMISSIONER J H SMITH
DATE OF ORDER	THURSDAY, 10 OCTOBER 2002
FILE NO.	APPLICATION 928 OF 2002
CITATION NO.	2002 WAIRC 06732

Result	Interlocutory orders made.
Representation	
Applicant	Mr P Mullally (as Agent)
Respondent	Ms J Seif (of Counsel)

Order

HAVING heard Mr Mullally on behalf of the Applicant and Ms Seif on behalf of the Respondent the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby—

(1) ORDERS that the Applicant deliver to the Respondent's solicitors an unmodified copy of a tape and transcript of a conversation between the Applicant and Mr Guiles by close of business Monday, 14 October 2002;

(2) DECLARES that if the Applicant does not comply with order (1) of this order the Commission will list the application for the Applicant to show cause why the application should not be dismissed; and

(3) ORDERS that the Applicant pay the Respondent disbursements fixed at $34.50 within fourteen (14) days of the date of this order.

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

2002 WAIRC 06845

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	RUSSELL CRAIG SNEDDON, APPLICANT
	v.
	WILDCATS 2000 PTY LTD ACN 088 866 139 ABN 84 088 866 139, RESPONDENT
CORAM	COMMISSIONER S WOOD
DATE OF ORDER	FRIDAY, 25 OCTOBER 2002
FILE NO.	APPLICATION 1145 OF 2002
CITATION NO.	2002 WAIRC 06845

Result	Directions issued
Representation	
Applicant	Mr B Jackson of Counsel
Respondent	No appearance

Directions

The Commission, having heard Mr B Jackson of counsel on behalf of the applicant and there being no appearance on behalf of the respondent, and having determined that the following orders and directions were necessary and expedient for the just hearing and determination of the matter, it is ordered and directed that the respondent provide discovery by 4 November 2002 in relation to the following—

1. documentation in relation to the employment of the applicant including but not limited to—
    a. all copies of his employment agreement;
    b. salary reviews; and
    c. all other relevant documents
2. documentation in relation to the proposal to utilise the West Coast Eagles for the respondent's membership.
3. all documents in relation to the termination of the applicant's employment including but not limited to—
    a. all handwritten notes—
    b. all correspondence with the applicant;
    c. all emails passing between the applicant and the respondent; and
    d. all internal emails within the respondent's organisation.

4. all documentation relating to the employment of Mr Troy Georgiu by the respondent including but not limited to—
   a. the written contract of employment; and
   b. the duty statement of Mr Troy Georgiu.
5. all further documents relevant to this matter or documents that the respondent intends to rely upon at hearing.

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

PUBLIC SERVICE APPEAL BOARD—

2002 WAIRC 06396

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	PAULINE JANE BINGHAM, APPELLANT
	v.
	DIRECTOR GENERAL, DEPARTMENT OF JUSTICE , RESPONDENT
CORAM	PUBLIC SERVICE APPEAL BOARD
	SENIOR COMMISSIONER A R BEECH - CHAIRPERSON
	MR K.R. TRENT - BOARD MEMBER
	MR S.H. DUNSTAN - BOARD MEMBER
DATE	WEDNESDAY, 4 SEPTEMBER 2002
FILE NO.	PSAB 8 OF 2002
CITATION NO.	2002 WAIRC 06396

Result	Appeal against dismissal
Representation	
Appellant	Mr B. Cusack (as agent)
Respondent	Mr E. Rea (as agent)

Reasons for Decision

1 This is the unanimous decision of the Board. This is an appeal by Pauline Jane Bingham against her dismissal by the respondent on 11 April 2002. The relevant facts are as follows.

2 Ms Bingham was employed by the respondent as a Level 2 Clerical Assistant on a series of fixed term contracts as from 20 April 1998. She stated that her duties were to provide personal assistant duties to several managers and directors, and she was also totally responsible for collating, providing and processing documents that go before the Parole Board for offenders who were due for release on parole.

3 On 13 November 2001 Ms Bingham received a letter from the respondent advising that she was suspected of inappropriate use of her work computer. She was directed not to attend work but to remain contactable during normal working hours. On 21 November 2001 she received a letter from the respondent pursuant to s.81(1) of the *Public Sector Management Act 1994* advising her that it was suspected she may have committed breaches of discipline under s.80 of that Act. The letter stated that on 7 occasions between 5 October 2000 and 13 February 2001 Ms Bingham sent Department of Justice information to an e-mail account or provided the operator of that account with access to Department of Justice information (exhibit CSA 3). Ms Bingham replied to this letter within the stipulated period of 14 days.

4 On 7 December 2001 she received a letter from the respondent advising her that pursuant to s.81(2) of that Act a person had been directed to investigate whether or not she had committed a breach of discipline.

5 Ms Bingham's then fixed term contract was due to expire on 31 December 2001. On or about 20 December 2001 the respondent orally advised Ms Bingham's union that he did not intend to issue the appellant with a new contract of employment after the expiry of her existing contract.

6 Ms Bingham's union brought an application before a Public Service Arbitrator in application PSAC 23 of 2001. In the context of that application, the Department subsequently offered Ms Bingham another fixed term contract of employment to cover the remainder of the maternity leave being taken by the substantive position holder (exhibit CSA 7). This contract was for the period 2 January 2002 until 9 August 2002. The contract offered to Ms Bingham is contained in a letter to her dated 16 January 2002 (exhibit CSA 8) which was accepted by her in those terms.

7 Relevantly, Ms Bingham's appointment was made in accordance with s.64(1)(b) of the *Public Sector Management Act 1994*. The terms and conditions of her employment are governed by the *Ministry of Justice Enterprise Agreement 2000* and the *Public Service Award 1992*. The letter stated that it was Ms Bingham's responsibility to ensure that she became, and remained, familiar with the Public Sector Code of Ethics, the Department of Justice Code of Conduct and all policies, guidelines and professional standards applicable to her employment and to abide by them as part of her contract of employment. The letter states that failure to do so may result in disciplinary action being taken against her. The term of the employment was to be for a period of 7 months commencing on 2 January 2002 and expiring on 9 August 2002. The contract provided that either party may terminate the contract by giving the other one week's notice in writing, or payment by the Department of Justice of one week's pay in lieu of notice.

8 On 18 January 2002 Ms Bingham received a letter from the respondent advising her that it was suspected that she may have committed a breach of discipline relating to the use of a Department of Justice mobile telephone SIM card. It was alleged that she used the SIM card in her private mobile telephone between 31 May 2001 and 12 November 2001 to make 365 telephone

calls not connected with her employment. Ms Bingham responded to the allegation within the 14 day period required. The respondent initiated an investigation pursuant to s.81(2) of the *Public Sector Management Act 1994* into the alleged use of the mobile telephone SIM card. This was contained in a letter from the Department to Ms Bingham dated 12 February 2002 (exhibit CSA 11).

9 On 10 April 2002 the respondent wrote to Ms Bingham advising her that the investigation conducted under s.81(2) of the *Public Sector Management Act 1994* into the alleged inappropriate use of her work computer concluded that she had not committed a breach of discipline.

10 One day later, on 11 April 2002, the respondent wrote to Ms Bingham advising her that her contract of employment will be terminated as from 19 April 2002. In that letter the respondent states—

> "Dear Ms Bingham
>
> CESSATION OF EMPLOYMENT
>
> You currently have a fixed term contract of employment until 9 August 2002.
>
> I no longer have confidence in you as an employee of the Department of Justice because I have serious concerns about your honesty and trustworthiness and therefore do not consider you to be suitable for continued employment with this Department.
>
> I hereby provide you with notice that your contract of employment will be terminated as from 19 April 2002. You are not required to return to work after the completion of your annual leave on 12 April.
>
> You will be paid out the salary for the balance of your contract until 9 August 2002."

11 It is against this dismissal that Ms Bingham appeals.

12 She brings the appeal on 4 grounds as follows—

> "1. The respondent, in terminating the employment of the appellant, was acting ultra vires the *Public Sector Management Act 1994*, in that there has been no adverse finding from any disciplinary process initiated under Division 3 of Part V of that Act.
>
> 2. The decision to terminate the employment of the appellant was harsh, oppressive and unfair in that no grounds exist for which the respondent could conclude that the appellant was dishonest or untrustworthy.
>
> 3. The respondent has failed in its duty, arising under s.9 of the *Public Sector Management Act 1994*, to exercise proper consideration in its dealings with the appellant.
>
> 4. The appellant reserves the right to put forward any other ground which arises from information not currently in the possession of the appellant."

13 It is also relevant to note as a matter of fact that on 13 November 2001 Ms Bingham left the workplace and remained at home awaiting further directions. She did not return to the workplace prior to her dismissal.

14 Subsequent to the termination of Ms Bingham's employment, the Department wrote to Ms Bingham on 11 April 2002 stating that no further action would be taken in regard to the allegation of the improper use of the SIM card.

Preliminary point

15 At the commencement of the proceedings the respondent queried whether or not it was in the public interest that further proceedings be held in this appeal. The respondent stated that as at the date of the hearing of the appeal Ms Bingham's fixed term contract had ended with the passage of time. The position in which Ms Bingham had been contracted was now in the process of being filled and was said to be no longer available. The respondent had paid Ms Bingham all monies owing at the time of termination, including the salary she would have earned for the unexpired portion of the contract.

16 Further, the respondent stated that he is willing to compensate Ms Bingham for any benefits lost to her as a direct result of the early termination of her contract of employment including the issuing of an alternative letter of termination. It was submitted that given that the jurisdiction of the Public Service Appeal Board does not permit it to award compensation, and that it is not able to make declarations in the absence of making any orders, then there are no practicable remedies available. For those reasons, the respondent questioned whether it was the public interest for further proceedings to be held.

17 In reply on behalf of Ms Bingham, Mr Cusack submitted that Ms Bingham seeks an order of reinstatement and that the effluxion of time is not relevant to the power of the Board to make such an order. Rather, given that the Public Service Appeal Board is able to "adjust" the decision to terminate Ms Bingham's contract of employment, an effective order of reinstatement ought be able to be made.

18 After a brief adjournment, the Board unanimously overruled the preliminary point. Our reasons for so doing now follow. The Public Service Appeal Board is established, and its functions and jurisdiction are set out, in Part II A of the *Industrial Relations Act 1979*. The jurisdiction of the Board is contained in s.80I which provides that subject to s.52 of the *Public Sector Management Act 1994* and subsection (3) of s.80I, a Board has jurisdiction to determine an appeal by any government officer from a decision to terminate or a recommendation of the employer of that government officer that the government officer be dismissed, and to adjust all such matters as are referred to in paragraph (a), (b), (c), (d) & (e). Neither s.52 of the *Public Sector Management Act 1994* nor the paragraphs (a), (b), (c) or (d) has any relevance to the matters presently before the Board.

19 Therefore, the powers of the Board on this appeal are that it is able "to adjust all such matters as are referred to in the appeal by any government officer from a decision, determination or recommendation that the government officer be dismissed".

20 The word "adjust" has been considered by of the Industrial Appeal Court in *State Government Insurance Commission v. Johnson* (1997) 77 WAIG 2169. Anderson J, with whom Franklin J and Scott J for their own published reasons agreed, held that:

> "The power to "adjust" a decision or determination can only be a power to reform the decision in some way. In the case of a decision or determination by an employer to dismiss an employee with one month's pay in lieu of notice, the most obvious way to do that would be to reverse it. Whether there may be other ways of adjusting such a decision is perhaps an open question. It may be arguable that the power to adjust a decision of dismissal includes a power to adjust the period of notice. The issue does not arise in this case because no such adjustment was sought by the respondent. He made no claim to reform the decision in that way, that is by altering the period of notice. He made only a claim for monetary compensation on the ground that the decision of dismissal itself was unfair. Hence the Board was not asked to change the decision in any way. To give compensation to a dismissed employee is perhaps to change, and thus to adjust the rights and obligations flowing from the decision to dismiss, or to super-add a consequence to the decision to dismiss, but it is not to adjust the decision to dismiss." (*Ibid.* at 2170)

21 In the matter before us, the claim advanced on behalf of Ms Bingham is for a decision or order from the Board to adjust the termination of employment such that it be reversed. That is, an order is sought from the Board that there be no termination of Ms Bingham's employment as at 19 April 2002.

22 We consider that the Board has the power to make such an order. In the circumstances of this case, it is acknowledged that the term of Ms Bingham's fixed term contract of employment has expired. An order reversing the decision to dismiss Ms Bingham would thus not result in Ms Bingham being reinstated in employment. It would, however, result in Ms Bingham being paid all of the entitlements which she would otherwise have earned had the termination of her employment not occurred. In a practical sense, given that the respondent has already paid Ms Bingham the salary she would have earned for the duration of the contract of employment, such an order of this Board would result in Ms Bingham being paid the increment in salary which, we are told, would have fallen due during the term of her employment, being paid superannuation until the date of the expiry of the contract, with payment of the further annual leave accrued during the term of the contract, and, less practically but not less effectively, the removal of the stigma attached to the termination of her employment by the respondent's decision. For those reasons, we did not uphold the respondent's preliminary point.

Ms Bingham's evidence

23 Ms Bingham gave evidence in the appeal. Her evidence-in-chief consisted largely of the chronology of the events which occurred. In cross-examination, Ms Bingham was asked regarding her employment history prior to employment with the Department of Justice. Ms Bingham stated that she had been employed by Telstra. She conceded that when her employment ceased she had been under investigation by Telstra and had claimed in the Australian Industrial Relations Commission that she had been unfairly dismissed. Her evidence is that she had given these details to the Director, Offender Management at the time of her employment. The issue of that claim or that she had been under investigation had never been raised with her prior to it being raised in these appeal proceedings.

24 She conceded that the offer of the contract of employment from 2 January 2002 until August 2002 had been as the result of a recommendation of the Public Service Arbitrator in PSAC 23 of 2001 and it had been offered in order to allow the investigation then underway into the alleged inappropriate use of her work computer to come to its natural conclusion.

25 She also conceded that when she had sent information home via e-mail it would be fair to say that the respondent had no way of knowing who would have had access to the computer at her home. She conceded that she had access to sensitive information which required a high level of trust between her and the respondent.

The respondent's evidence

26 The respondent called evidence from Ms Withers who is the Director of Human Resources at the Department of Justice. She has held the position for five and a half years and has 10 years' experience in human resources. Her evidence is that she read and signed-off the letters which came under the signature of the Director General which had been submitted in evidence in these proceedings.

27 Her evidence is that the respondent decided he did not want to continue employing Ms Bingham for the following reasons. Firstly, Ms Bingham was the subject of two disciplinary investigations. In relation to the first investigation, relating to the alleged inappropriate use of her work computer, the Director General felt that persons other than herself would have access to the files she had sent home because she had received e-mails from her home computer whilst she was at work. The information Ms Bingham had sent home was from a database on confidential records to go to the Parole Board.

28 In relation to the second disciplinary investigation, relating to the use of the SIM card, her evidence is that it is unknown for a Level 2 employee to have a departmental mobile telephone. However, because the records concerned were with One.Tel the respondent had not been able to obtain the records at the time. Had Ms Bingham's employment not been terminated, the respondent would have continued to investigate the allegation.

29 Ms Withers also referred to two other matters. One matter was that the security access on Ms Bingham's work computer had been found to have been changed in a manner which was not the normal changing of a user password. Ms Withers' evidence is that the Department of Justice's own information technology personnel could not override it and had to call in some experts to do so.

30 The other matter to which Ms Withers referred was that the respondent found reference to Ms Bingham's previous application in the Australian Industrial Relations Commission regarding the termination of her employment by Telstra which showed she had been dismissed after 49 charges had been made against her.

31 Ms Withers' stated that the change to Ms Bingham's computer access and the level of expertise it had taken to amend it, together with what was seen by the respondent as a major release of information by Ms Bingham to the home address where he had no control over who would have access to that information, was significant. The discovery of the Telstra allegations had been relatively inadvertent.

32 Ms Withers' evidence is that in relation to the investigation regarding the use of the SIM card, there had been difficulties in the respondent proving the case against Ms Bingham including the fact that Mr Bunt (the respondent's telecommunications manager whom Ms Bingham stated issued her the SIM card in 1999; see exhibit CSA 10) would not be able to "put his hand on his bible" and say he did not issue the SIM card to Ms Bingham. Ms Withers acknowledged that she doubted that this issue had ever been put to Ms Bingham by the respondent.

33 Ms Withers also stated that one of the reasons why the respondent was not confident that Ms Bingham's home computer would be confidential was because it was known that Ms Bingham's partner is a computer engineer. Ms Withers stated that another employee who has since been convicted of fraud against the Department in an issue of misuse of departmental SIM cards resides at the same address as Ms Bingham.

34 The change to the security access was described by Ms Withers as "tampering" with Ms Bingham's work computer.

35 Ms Withers also acknowledged that the Telstra matters of which the respondent became aware had not been put to Ms Bingham at any stage.

36 Ms Withers also stated that the reason why the respondent offered Ms Bingham the further contract until August 2002 was because the respondent had been ordered to do so by the Department of Consumer and Employment Protection. Although the respondent had preferred to offer Ms Bingham a further contract only until the completion of the investigation, this option was not approved by DOCEP.

37 In response to questions from the Board, Ms Withers conceded that it would be open to conclude that the offering of a further contract until August 2002 carried with it the implication that the respondent was prepared to employ Ms Bingham until that date notwithstanding the circumstances known to it at the time.

The respondent's submissions

38 The respondent asked the Board to place no weight on the fact that the respondent had offered a further fixed term contract to Ms Bingham. Ms Bingham had been on leave at the time, no duties under the further contract were performed and it is clear from the evidence that it was offered only to settle the dispute then before the Public Service Arbitrator.

39 Mr Rea invited the Board to put itself in the position of the respondent. The Director General is in charge of a high profile department with very sensitive information. He requires a high level of trust and responsibility in Ms Bingham yet Ms Bingham lives at the same address as a former employee of the Department who himself was under a cloud. Therefore, the sending of information home by Ms Bingham was seen as being a major issue by the Director General. Mr Rea submitted that there was thus reasonable cause to believe a problem existed when e-mails were sent and returned to Ms Bingham at work from her home computer. Further, the report into the allegation of the inappropriate use of her work computer did create doubts in Ms Withers' mind. As to the use of the SIM card, it is not the norm for a Level 2 employee to have access to it.

40 The respondent submitted that the termination of Ms Bingham's contract of employment was not in breach of the *Public Sector Management Act 1994* because that Act does not expressly prohibit the termination of a contract of employment let under s.64(1)(b). It was submitted that even though there was not enough evidence to establish that Ms Bingham had breached the *Public Sector Management Act 1994*, there is enough evidence for the respondent to lose trust in Ms Bingham. Further, the respondent had endeavoured to be fair by paying out the balance of Ms Bingham's contract.

Ms Bingham's submissions

41 On behalf of Ms Bingham, Mr Cusack submitted that the powers in the *Public Sector Management Act 1994* are not unfettered. The power given to the Director General under that Act in s.29 are subject to the other sections of that Act including Part 5. The procedures prescribed in Part 5 are the procedures whereby an investigation is undertaken if there is a suspected breach of discipline.

42 Mr Cusack submitted that the respondent cannot conclude that there has been no breach of the *Public Sector Management Act 1994* and then take the same allegation that there was a breach into account in deciding to dismiss Ms Bingham. He was submitted that termination is a severe penalty yet the first investigation found that there had been no breach of the *Public Sector Management Act 1994* and the respondent decided that there would be no further action taken. In relation to the use of the SIM card, there had been no finding against Ms Bingham and the investigation had been abandoned. The respondent's decision to dismiss Ms Bingham was therefore contrary to Part 5 of the *Public Sector Management Act 1994*.

43 Further, it was submitted, the evidence clearly shows that the Director General relied on matters which were not put to Ms Bingham and this denied her natural justice.

Conclusions

44 The Board deals firstly with the submission on behalf of the respondent that he was entitled to terminate Ms Bingham's contract if he lost confidence in Ms Bingham as an employee and that he is not obliged to follow the procedures of the *Public Sector Management Act 1994* in dismissing her.

45 It should be said, to put the matter beyond doubt, that Ms Bingham was dismissed. The letter given to Ms Bingham on 11 April 2002 (exhibit CSA 14) gave notice to her that her contract of employment would terminate as from 19 April 2002. From that later date she ceased to be an employee of the respondent. Her accrual of entitlements such as annual leave ceased as from that date. The fact that the respondent chose to pay to Ms Bingham the salary she would have earned up to the completion of the contract does not, and cannot, alter this conclusion.

46 In the common law of employment an employee has a duty of fidelity and good faith towards the employer, which includes disclosure or use of information alleged to be confidential. This duty is based firmly on contract. Thus—

> "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 … 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 future conduct arises (*Blyth Chemicals v. Bushnell* (1933) 49 CLR 66)."

47 The above statement has stood the test of time and states the general principle in a manner that is quite helpful.

48 However, in relation to government employment in this State the common law of employment between employer and employee has been replaced by the *Public Sector Management Act 1994* to the extent of that Act. Whether or not the respondent was entitled to dismiss Ms Bingham as he did without regard to the *Public Sector Management Act 1994* will depend upon the terms of that Act.

49 The Act states in its long title that it is an Act—

> "To provide for the administration of the Public Sector of Western Australia and the management of the Public Service and of other public sector employment ...".

50 The Act states in s.8(2) that in matters relating to the termination of employment of an individual employee—

> "… an employing authority is not subject to any direction given, whether under any written law otherwise by the Minster of the Crown responsible for the department or organisation, but shall subject to this Act, act independently."

51 The Board concludes, therefore, that in the matter of the termination of Ms Bingham's employment by the respondent in this matter, he acts independently but subject to the *Public Sector Management Act 1994*.

52 Further, the functions and powers given to the respondent under s.29 of that Act are stated to be subject to the Act. Even assuming that there is a power in s.29 to dismiss an employee, and there is no express provision to that effect, that power is to be exercised subject to the Act.

53 Part 5 of that Act relates to substandard performance in disciplinary matters. By s.76(1) Part 5 applies to and in relation to all public service officers. Section 79 applies in circumstances where an employee's performance is seen as being substandard. That is, if the employee does not, in the performance of the functions that he or she is required to perform, attain or sustain a standard that a person may reasonably be expected to attain or sustain in the performance of those functions, subsection (3)(c) permits the termination of the employment in the public sector of that employee. However, if the employee does not admit that his or her performance is substandard for the purposes of that section then the employing authority shall, before forming the opinion that the performance of the employee is substandard for those purposes, cause an investigation to be held into whether or not the performance of the employee is substandard.

54 By Division 3 - Disciplinary Matters, and by s.80 within that Division, an employee who is negligent or careless in the performance of his or her functions commits a breach of discipline. A procedure is then to be followed as set out in s.81 to give the person a reasonable opportunity to submit an explanation to the employing authority and investigate or direct another person to investigate the suspected breach of discipline in accordance with the prescribed procedures.

55 In this case, the reason for Ms Bingham's employment being terminated is that the respondent had lost confidence in her because he had serious concerns about her honesty and trustworthiness. The reasons given for that loss of confidence are the reasons given by Ms Withers. Two of those reasons, the alleged inappropriate use of her work computer and of the SIM card, were seen by the respondent as possibly being breaches of the *Public Sector Management Act 1994* which warranted investigation. The third reason, the alteration to Ms Bingham's computer security access, appears to the Board to be a matter which would be capable of being considered a breach of discipline. We do not see the revelation to the Director General personally of Ms Bingham's previous employment termination by Telstra as capable of being considered a breach of discipline or of substandard performance because of Ms Bingham's uncontroverted evidence that she had told the Director, Offender Management about this when she was first employed.

56 Three of the four reasons, therefore, why, on the evidence of Ms Withers, the Director General lost confidence in Ms Bingham are matters which fall squarely within the circumstances by which the Director General is obliged by the *Public Sector Management Act 1994* to institute and follow certain procedures. We conclude that it is not open to the Director General to rely upon the common law position and not follow those procedures which by statute he is obliged to follow.

57 Section 79 in particular makes it plain that an employing authority may dismiss an employee whose performance is, in the opinion of that employing authority, substandard. The respondent's loss of confidence in Ms Bingham is another way of saying that her performance had been substandard. He could, and should, have proceeded against Ms Bingham in accordance with that section. The respondent could not act as he did and ignore it.

58 We turn now to consider the remainder of the submissions.

59 We turn to consider individually the four issues which constitute the reasons for Ms Bingham's dismissal. We find as follows—

60 (1) In regard to the alleged inappropriate use of her work computer, the evidence before the Board, which is largely derived from the correspondence concerning the allegation, is that Ms Bingham e-mailed files home in order to work on them. She was designing a database to improve the efficiency of document recording and tracking at work. She acknowledged that content of the files was sensitive and needed to be kept confidential. She states that "at no time was the privacy, confidentiality or security breached in any way." Ms Bingham discussed with her partner the technical issues associated with this (exhibit CSA4). The concern of the respondent was that it had no control over who had access to the e-mail address to which the files were sent. Indeed it was her partner's e-mail address to which the files were sent and he was a former employee with computer skills who had been dismissed for misconduct.

61 An investigation pursuant to s.82 of the *Public Sector Management Act 1994* found that there was no breach of discipline. Ms Bingham was told that no further action would be taken in relation to that matter.

62 On the evidence before the Board, the issue of the alleged inappropriate use of her work computer by Ms Bingham was investigated by a competent person who found there had been no breach of discipline. No other aspect relating to this issue was ever put to Ms Bingham. Accordingly, we consider it to be unfair to Ms Bingham for the respondent to then rely upon this issue as a reason for dismissing her.

63 (2) In relation to the allegation regarding the mis-use of the SIM card, the investigation which had been commenced was not completed. It is clear that an investigation was started and from this fact the Board concludes that the issue was one seen by the respondent as a discipline issue. It is, therefore, conceptually difficult for the Board to understand how in fairness the respondent could rely upon that allegation as a justification to dismiss Ms Bingham when the investigation into it had not been completed.

64 As to the allegation, although the evidence before the Board concerned whether Ms Bingham as a level 2 employee was entitled to a Department mobile telephone or SIM card that was not the issue investigated. The issue investigated was Ms Bingham's use of it for personal calls. On the evidence before the Board, the allegation is made out. Ms Bingham did use the SIM card in her own mobile telephone for personal calls. Her evidence is that the vast majority of the 365 telephone calls would have been to her partner informing him, for reasons of safety, of her leaving work to travel home or of her safe arrival at work. Whilst the Board understands that such calls may be made for reasons of safety, Ms Bingham's explanation provides no reason why she used the respondent's SIM card for that purpose. Given that Ms Bingham apparently had her own mobile telephone into which she placed the Department's SIM card, we see no reason why Ms Bingham did not restrict the use of the SIM card to work calls only and use her own mobile telephone for those personal calls.

65 (3) In relation to the third issue, described by Ms Withers as Ms Bingham tampering with her work computer's security access, the evidence of this matter before the Board is most unsatisfactory. Such evidence as there is, is the evidence of Ms Withers. When it was put to Ms Withers that it was simply Ms Bingham changing the password on her computer, Ms Withers replied: "No, I gather it was far more than that" (transcript page 58). This answer suggests Ms Withers did not have direct knowledge of the allegation and the absence of precisely what was done does not assist the respondent's case.

66 Further, this issue was not put to Ms Bingham in cross-examination. Even if the failure to do so was an oversight, the fact that the Board has not heard Ms Bingham's evidence in response to the allegation that she tampered with her work computer means that the Board is unable to place any weight upon this as an issue.

67 (4) The final issue is the revelation to the respondent personally that Ms Bingham's employment with Telstra terminated in circumstances where she was the subject of 49 charges and that she had claimed in the Australian Industrial Relations Commission that she had been unfairly dismissed. The evidence before the Board is that although this was not known to the respondent personally, Ms Bingham had given these details to the Director, Offender Management at the time of her employment with the respondent. The respondent did not call the Director, Offender Management to give evidence opposing Ms Bingham's evidence and neither was the Board asked to adjourn the proceedings to allow that person to be called. In the circumstances, it is open to the Board to conclude, and it does conclude, that the evidence of the Director, Offender Management on this particular issue is unlikely to assist the respondent's position. The respondent stated that he was not suggesting Ms Bingham had lied or had been misleading.

68 On the evidence before the Board therefore Ms Bingham did not conceal her previous dismissal from Telstra nor the circumstances which lead to it. The respondent cannot be expected to know all of the employment, and past employment details of his employees. However, Ms Bingham had provided the detail about her work history four years earlier and it would be harsh to Ms Bingham to dismiss her merely because the respondent became aware of it.

69 On behalf of the respondent, Mr Rea urged the Board to adopt a more global view of the situation. Rather than looking at each allegation individually, the Board was urged to appreciate that the respondent was faced with circumstances whereby an employee who had access to sensitive and highly confidential information, in a government department dealing with sensitive and highly confidential issues, had been the subject of one investigation into a disciplinary matter, was the subject of a second such investigation, had tampered with the security access on her work computer and had been the subject of 49 charges with her previous employer. Added to this, the respondent knew that her partner was a computer engineer who had previously been employed by the respondent and whose employment had been terminated by reasons of misconduct. Mr Rea urged upon the Board the view that in those circumstances the respondent was quite entitled to lose confidence in Ms Bingham's trustworthiness and had no alternative to terminating her employment.

70 We consider that the most that can be said is that all of the circumstances taken together might provide grounds to hold that the trust and confidence necessary between an employee in the Department of Justice and the respondent was damaged. We note, for example, that in the context of sensitive and confidential information Ms Bingham herself agreed with the suggestion that if that information was sent home by her the respondent would have no way of knowing who would have access to it. The fact that Ms Bingham did not consider that it is inappropriate to use the Department's SIM card for the frequent telephone calls she made to her partner illustrates a lack of understanding of the distinction between being given a SIM card for work purposes and using it for personal purposes. We consider that for those two reasons the respondent's trust and confidence in Ms Bingham may have been damaged.

71 While we appreciate that some change had been made to Ms Bingham's security access on her work computer, and that this warranted an explanation, the Board is unable to assess whether any concerns held by the respondent were reasonable.

72 Ground 2 is therefore not made out.

73 Ultimately, it is not open to an employer bound by the *Public Sector Management Act 1994* to simply dismiss a public service officer for acts which may call into question the trustworthiness of that public service officer. The *Public Sector Management Act 1994* provides procedures to be followed in sections 79 and 81 and the employing authority is obliged to follow the processes of that Act. Failure to follow those processes is more than just a denial of procedural fairness. It is a breach of a statute by the employing authority and that is a serious consideration. The respondent in this matter could not lawfully dismiss Ms Bingham pursuant to the notice provision in the contract of employment without having followed those procedures.

74 The Board concludes that Ms Bingham's dismissal was in breach of the *Public Sector Management Act 1994*. It also denied her procedural fairness.

75 We recognise that the respondent paid to Ms Bingham the balance of her contract when he was not obliged to do more than give Ms Bingham one week's notice. We appreciate the consideration shown to Ms Bingham by the respondent in doing do. That payment however is to be seen in its context. It is quite well established that the paying of money greater than was entitled, even one year's salary, will not render fair a dismissal that is otherwise unfair: *Gilmore v Cecil Bros* (1998) 78 WAIG 1099. Here, the payment of the balance of Ms Bingham's contract does not alter the fact that her dismissal was in breach of the procedures of the Act. The fact that the respondent paid Ms Bingham the balance of her contract is not a licence to ignore the provisions of the *Public Sector Management Act 1994*. Nor does it overcome the fact that it was in breach of the procedures of the Act.

76 Grounds 1 and 3 of the appeal are therefore made out.

77 We turn to consider how the decision to dismiss is to be adjusted. We consider that it is appropriate to adjust the dismissal by reversing it.

78 The reversal of the decision to dismiss is made in the context that Ms Bingham's fixed term contract of employment has expired. She has been paid for the balance of her contract. The reversal of the decision to dismiss is made in the context that Ms Bingham's fixed term contract of employment has expired. She has been paid for the balance of her contract. The effect of the Board's decision therefore is to require the respondent to pay to Ms Bingham payment for the annual leave which would have accrued to the date of the expiry of the contract and the superannuation which would have accrued to the date of the expiry of the contract.

79 The third matter encompassed in Ms Bingham's claim is the salary increment which Ms Bingham would have received had the dismissal not occurred. By virtue of clause 12 Annual Increments of the *Public Service Award 1992*, and as confirmed by both advocates, any increment due is subject to the respondent's satisfaction with the officer's performance, efficiency and conduct. The respondent did not concede in this appeal that the increment to which Ms Bingham would otherwise have been entitled would have been approved by the respondent. On the evidence before us, we are not confident that the increment would have been approved and accordingly we are not prepared to require its payment as part of the orders to issue.

80 The Minute of a Proposed Order to that effect now issues to the parties.

2002 WAIRC 06734

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	PAULINE JANE BINGHAM, APPLICANT
	v.
	DIRECTOR GENERAL, DEPARTMENT OF JUSTICE (FORMERLY KNOWN AS MINISTRY OF JUSTICE), RESPONDENT
CORAM	PUBLIC SERVICE APPEAL BOARD
	SENIOR COMMISSIONER A R BEECH - CHAIRPERSON
	MR K.R. TRENT - BOARD MEMBER
	MR S.H. DUNSTAN - BOARD MEMBER
DATE	FRIDAY, 11 OCTOBER 2002
FILE NO.	PSAB 8 OF 2002
CITATION NO.	2002 WAIRC 06734

Result	Appeal against dismissal upheld
Representation	
Applicant	Mr B. Cusack (as agent)
Respondent	Mr E. Rea (as agent)

Further Reasons for Decision

1 The Civil Service Association, on behalf of Ms Bingham, sought to Speak to the Minutes to submit that the order to issue should read—

> "That the decision of the Director General, Department of Justice to dismiss Pauline Jane Bingham be adjusted by reversing the decision.
>
> Given that Ms Bingham's contract of employment has now expired due to the effluxion of time, the effect of this order is to require the Director General, Department of Justice to pay to Ms Bingham—
>
> (a) payment for the annual leave which would have accrued to the date of the expiry of her contract; and
>
> (b) payment into her superannuation account of the superannuation entitlement which would have been paid on her behalf to the date of the expiry of the contract."

2 The CSA submits that the wording submitted by it is consistent with the Reasons for Decision and in particular the finding at paragraph 77.

3 The Director General, Department of Justice opposed the wording submitted. The submission made by the Director General acknowledges that the Board considered it to be appropriate to "adjust" the decision to dismiss by reversing it but does not support any alteration to the order proposed which would reverse the Director General's view that he had concerns about Ms Bingham's honesty and trustworthiness.

4 Both submissions were received in writing.

5 The order to issue is the decision of the Board. That is, the order is required to state the decision by way of formulating what the Commission intended (*Mt Newman Mining Company and Amalgamated Metal Workers and Shipwright Union of WA and Another* (1981) 61 WAIG 1043 at 1048). The decision of the Board is that the dismissal be reversed. In the context of Ms Bingham's fixed term contract of employment having expired, the reversal of the decision requires the respondent to pay to Ms Bingham payment for the annual leave which would have accrued to the date of the expiry of her contract of employment and the superannuation entitlement which would have accrued to the date of the expiry of her contract of employment. The reasons why the Board reached the decision that the decision to dismiss is to be adjusted do not form part of the order to issue. By definition, the reasons for the Board's decision are found in its Reasons for Decision.

6 To give effect to the decision of the Board that the decision to dismiss be reversed, the Director General is to pay Ms Bingham the annual leave which would have accrued to the date of the expiry of her contract and to pay into her superannuation account the superannuation entitlement which would have been paid on her behalf to the date of the expiry of her contract. For the reasons given by the Board it is to that extent only that the decision to dismiss can be reversed. Accordingly, the submission that the Minutes be altered has not been made out and an Order now issues in the terms of the Minute.

2002 WAIRC 06733

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	PAULINE JANE BINGHAM, APPELLANT
	v.
	DIRECTOR GENERAL, DEPARTMENT OF JUSTICE , RESPONDENT
CORAM	PUBLIC SERVICE APPEAL BOARD
	SENIOR COMMISSIONER A R BEECH - CHAIRPERSON
	MR K.R. TRENT - BOARD MEMBER
	MR S.H. DUNSTAN - BOARD MEMBER
DATE	FRIDAY, 11 OCTOBER 2002
FILE NO.	PSAB 8 OF 2002
CITATION NO.	2002 WAIRC 06733

Result	Appeal against dismissal upheld
Representation	
Appellant	Mr B. Cusack (as agent)
Respondent	Mr E. Rea (as agent)

Order

HAVING HEARD Mr B. Cusack (as agent) on behalf of the appellant and Mr E. Rea (as agent) on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders-

THAT the decision of the Director General, Department of Justice to dismiss Pauline Jane Bingham be adjusted by the Director General, Department of Justice paying to Ms Bingham—

(1) payment for the annual leave which would have accrued to the date of the expiry of her contract; and

(2) paying into her superannuation account the superannuation entitlement which would have been paid on her behalf to the date of the expiry of her contract.

(Sgd.) A. R. BEECH,

[L.S.]

Senior Commissioner,
Chairperson.

2002 WAIRC 06724

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED, APPELLANT
	v.
	CHIEF EXECUTIVE OFFICER, WATER AND RIVERS COMMISSION, RESPONDENT
CORAM	PUBLIC SERVICE APPEAL BOARD
	SENIOR COMMISSIONER A R BEECH - CHAIRPERSON
	MS D. ROBERTSON - BOARD MEMBER
	MS M. MARTIN - BOARD MEMBER
DATE	TUESDAY, 8 OCTOBER 2002
FILE NO.	PSAB 9 OF 2002
CITATION NO.	2002 WAIRC 06724

Result	Order for production of documents issued
Representation	
Appellant	Mr M. Amati
Respondent	Mr R. Bathurst (of counsel)

Reasons for Decision - Production of Documents

1 This is the unanimous decision of the Board. The substantive matter before the Public Service Appeal Board is an appeal by the Civil Service Association of WA Inc on behalf of its member Mr Dewan against his dismissal on 31 May 2002. This decision concerns an application dated 26 August 2002 for an Order for the discovery, production and inspection of all documents in relation to the matter before the Board. The application cited the Chief Executive Officer, Water and Rivers Commission and also the Director General, Department of Premier and Cabinet as first and second respondents.

Respondency

2 The Director General, Department of Premier and Cabinet is not a party to the appeal. Nor could he be, he not having been the employer of Mr Dewan at the time of his dismissal. Accordingly, the Director General, Department of Premier and Cabinet cannot be a party to this application.

3 It should be understood that under the *Industrial Relations Act 1979* an application for the production of documents is an interlocutory application which does not have a life of its own separate from the substantive application to which it relates. Section 27(1) makes that clear in its opening words. Therefore, the parties to an application for the production of documents must necessarily be the parties to the substantive application before the Commission. Further, there is no power in the *Industrial Relations Act 1979* to permit the Commission to make an Order for the production of documents against a person who is not a party to a matter before the Commission.

4 In the proceedings before us, the Board was informed by counsel appearing for the Director General, Department of Premier of Cabinet that he raised no opposition to producing voluntarily to the union the documents sought. Accordingly, other than for striking out the Director General, Department of Premier of Cabinet as a party to this application, the Board need take the matter no further.

Production of Documents

5 Counsel for the Chief Executive Officer, Water and Rivers Commission informed the Board that agreement was forthcoming on a substantial part of the application. The Board decided that it would be just to issue an Order in the terms agreed between the parties.

6 The union pressed for the Board to include in the Order those documents to which the respondent objected and the Board heard both parties and reserved its decision on that point. The Board's decision on that point is as follows.

7 An Order for the discovery, production and inspection of documents is not available as of right in this jurisdiction. It is only available if the Commission makes an Order under s.27(1)(o) of the Act and the Board in considering whether to make such an Order should consider what is just (*ALHMWU v. WA Hotels and Hospitality Association and Another* (1995) 75 WAIG at 1805). The purpose of discovery is to provide each party to an action with access before the hearing to the relevant documents in the hands of the other party so avoiding trial by ambush, saving costs and encouraging settlement in proper cases. What is a relevant document is answered by referring to what is in issue in the appeal.

8 In this regard, regrettably, the Notice of Appeal does not set out clearly and concisely the grounds of appeal. In that regard, the Notice of Appeal does not conform with the requirements of Regulation 45(3) that a Notice of Appeal shall clearly and concisely set out the grounds of appeal. Notwithstanding that the Notice of Appeal has attached to it a schedule of 12 type written pages, it does not state the reasons for Mr Dewan's dismissal and state precisely the grounds of appeal. It shows, regrettably, evident confusion between what is alleged as a fact and a submission regarding the alleged fact. There is also confusion regarding the nature of a ground of appeal. For example, ground 2 of the 35 grounds of appeal, or what are said to be grounds of appeal, is—

> "The respondent is a public body/agency."

9 The application before the Board permits only the briefest observation to be made however it should be quite apparent to any reader that the union cannot validly argue that one of the reasons why Mr Dewan's dismissal is unfair is because the Chief Executive Officer, Water and Rivers Commission is a public body/agency. The Chief Executive Officer is not a public body/agency even if the Water and Rivers Commission is. And even if the Water and Rivers Commission is a public body/agency, that mere fact does not reveal any reason at all why it is alleged that Mr Dewan's dismissal was wrong.

10 The Board has, upon request, been provided with the letter of dismissal dated 31 May 2002. With the assistance of that letter, the Board now understands that Mr Dewan was dismissed because the respondent believed he had committed five breaches of discipline there set out. The breaches all concern an allegation that Mr Dewan commenced private employment with Lucent Technologies during his employment without the written permission of his employing authority and that he made false declarations regarding those circumstances.

11 It must be evident therefore that the appeal brought by the union is against those reasons for dismissal. The documents that are relevant to the appeal are therefore the documents that are relevant to those five grounds and the decision to dismiss.

12 However, the union sought to persuade the Board that documents relating to Mr Dewan's transfer from the Water Authority, all file notes, minutes and documentation relating to Mr Dewan "throughout Mr Dewan's period of employment with the first respondent" and "any documentation sent to or received from any other entity by the respondent in relation to Mr Dewan" and even documentation relating to both redeployment and disciplinary matters instigated by the Water and Rivers Commission against Mr Dewan are relevant to the appeal and the Order should encompass those matters.

13 With due respect to Mr Amati's submissions, those documents are not relevant to the appeal. The breadth of order sought is oppressive. The issue before the Board on appeal will be whether or not Mr Dewan is or is not guilty of the conduct alleged. Any suggestion by or on behalf of Mr Dewan that there has been a campaign to get rid of him is not, on the information before the Board, relevant to that issue. Accordingly, the Board refuses to make an Order for the additional documents as sought.

14 In relation to the request for an Order that Mr Dewan's personal file be produced to him, the Board observes the following. The Board was informed that Mr Dewan has already been shown his personal file but he submits that a number of pages have been removed from it. The purpose of the Order sought, therefore, is to have Mr Dewan's personal file shown to him without any pages removed. However, the purpose of the present application must be borne in mind. The Board is able to make an Order for the production of documents which are relevant to the appeal and the decision to dismiss. The Board could, and in our view should, make an Order that so much of Mr Dewan's personal file as relates to the subject matter of the appeal and the decision to dismiss him be produced to him. The Board in this application does not have the power to make an Order for the production of any other documents which are not relevant to the appeal and the decision to dismiss. If Mr Dewan has concerns regarding the absence of any other documents from his personal file, that must be a matter taken up by his union separate from the appeal.

15 Finally, we observe that the union consented to pay reasonable photocopying costs and also to the Order sought being extended so that it provides for discovery by the union and Mr Dewan to the respondent. In particular, the union and Mr Dewan consented to the discovery of documents relating to Mr Dewan's employment with Lucent Technologies.

16 The Minute of a Proposed Order now issues and the parties are requested to advise the Board within 3 working days of the delivery of this decision whether or not they wish to speak to the minutes. In the event that a Speaking to the Minutes is required, the Board is likely to suggest that the parties put their submissions in writing. The parties should note that the wording in the minute does not mirror the wording in the application in every respect.

2002 WAIRC 06782

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED, APPELLANT
	v.
	CHIEF EXECUTIVE OFFICER, WATER AND RIVERS COMMISSION, RESPONDENT
CORAM	PUBLIC SERVICE APPEAL BOARD
	SENIOR COMMISSIONER A R BEECH - CHAIRPERSON
	MS D. ROBERTSON - BOARD MEMBER
	MS M. MARTIN - BOARD MEMBER
DATE	FRIDAY, 18 OCTOBER 2002
FILE NO.	PSAB 9 OF 2002
CITATION NO.	2002 WAIRC 06782

Result	Order issued.
Representation	
Appellant	Mr M. Amati
Respondent	Mr R. Bathurst (of counsel)

Further Reasons for Decision

1 This is the unanimous decision of the Board: The appellant union forwarded its submissions in writing regarding the Speaking to the Minutes. The respondent did not seek to speak to the minutes.

2 Mr Amati pointed out, quite correctly in my view, that the union's proposed Order (2)(b) was agreed to other than for the last five words and that this should be properly reflected in the Minute. In particular, Mr Amati points out that the private investigator is not mentioned within the Minute of Proposed Order whereas it was agreed to be included in the draft Order submitted by the union. The omission stems from the Chairman's understanding from the layout of the union's proposed order (2)(b) that the private investigator mentioned was a reference to Mr Trainer. It being clear now that that is not the case, then the Minute will be altered to accurately reflect the union's proposed Order (2)(b) minus the five last words.

3 The balance of the submission under the heading of "The Nature of the Appeal" raises matters which the appellant union will be able to submit to the Board in the hearing of the appeal itself. Nothing in the Board's Reasons for Decision in this matter should be taken as limiting the matters that the appellant union may rely on in the grounds of appeal. Rather, the union should derive some assistance from the preliminary observations of the Board on the material presently before it. There is therefore no reason for the appellant union to request the Board, as it has done, to reconsider its position. The scope of the appeal is set by its many grounds. The Board hopes that its comments may be of some assistance to the appellant union in the manner that it approaches the appeal so that it may assist the Board in more fully understanding the many grounds of appeal.

4 The Order now issues with paragraph (2)(a) amended in accordance with the appellant union's submission. Further, given the inevitable time between the delivery of the Minute of Proposed Order and the Order, the 14 day period initially agreed has been varied with the intention of preserving the dates of hearing but giving the parties time to effectively implement the order.

2002 WAIRC 06783

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED, APPELLANT *v.* CHIEF EXECUTIVE OFFICER, WATER AND RIVERS COMMISSION, RESPONDENT
CORAM	PUBLIC SERVICE APPEAL BOARD SENIOR COMMISSIONER A R BEECH - CHAIRPERSON MS D. ROBERTSON - BOARD MEMBER MS M. MARTIN - BOARD MEMBER
DATE	FRIDAY, 18 OCTOBER 2002
FILE NO.	PSAB 9 OF 2002
CITATION NO.	2002 WAIRC 06783

Result	Order for production of documents issued
Representation	
Appellant	Mr M. Amati
Respondent	Mr R. Bathurst (of counsel)

Order

HAVING HEARD Mr M. Amati on behalf of the applicant and Mr R. Bathurst (of counsel) on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979* hereby orders—

(1) That by 4.00pm on Monday, 28 October 2002, the Chief Executive Officer, Water and Rivers Commission is to provide to the Civil Service Association of WA Inc a sworn affidavit comprising a complete, accurate and detailed list of all of the documents in its power, possession and control in relation to Mr Dewan's dismissal.

(2) The documents referred to in the affidavit are to include, but are not limited to—

(a) All documents produced and/or considered by the first respondent in connection to the disciplinary proceedings carried out by the respondent against Mr Dewan, including but not limited to all reports - whether covertly or overtly attained, notes, date and minutes of meetings, memoranda, briefing notes or letters dealing with such disciplinary proceedings; as well as all background filed documentation provided to the private investigator, Mr Ken Trainer and Mr Damien Stewart, respectively, including the terms of their respective briefs;

(b) All of the documents in Mr Dewan's personal file relating to the subject matter of the appeal and his dismissal;

(c) The respondent's Code of Conduct, 1999.

(3) For the purpose of the Order, "documents" includes any hard copy or electronic recording of information whether typed or handwritten or otherwise.

(4) The list of documents is to contain the following information about the documents—

(a) a brief description of each and every document;

(b) creation date of each document;

(c) author of each document;

(d) to whom the document was sent/for whom it was created or who received it.

(5) The information contained within the list of documents is to appear in chronological order based on the document creation dates, and each document is to be individually numbered with document number 1 being the earliest created document.

(6) By 4.00pm on Monday, 4 November 2002 the applicant is to provide the respondent in writing the number of documents the appellant wishes to be produced for inspection.

(7) By 12.00 noon on Friday 8 November 2002 the respondent is to provide to the appellant such copies of all the documents so nominated by the appellant. The appellant will pay reasonable photocopying costs involved.

(8) By 4.00pm on Monday, 28 October 2002 the appellant and Mr Dewan are each to provide to the Chief Executive Officer, Water and Rivers Commission a sworn affidavit comprising of a complete, accurate and detailed list of all the documents in his power, possession and or control in relation to Mr Dewan's dismissal and his appeal including, but not limited to, any document relating to Mr Dewan's employment with Lucent Technologies.

(9) In all other respects, the terms of Orders (3), (4), (5), (6) and (7) shall apply to the appellant and Mr Dewan with due alteration of details.

(Sgd.) A. R. BEECH,
[L.S.] Public Service Appeal Board.

2002 WAIRC 06894

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
PARTIES	CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA (INCORPORATED), APPELLANT
	v.
	EXECUTIVE DIRECTOR, DEPARTMENT OF FISHERIES, RESPONDENT
CORAM	PUBLIC SERVICE APPEAL BOARD
	CHAIRPERSON - COMMISSIONER P E SCOTT
	BOARD MEMBER – MS D ROBERTSON
	BOARD MEMBER – MS H BRAYFORD
DATE OF ORDER	THURSDAY, 31 OCTOBER 2002
FILE NO.	PSAB 13 OF 2002
CITATION NO.	2002 WAIRC 06894

Result Appeal to the Public Service Appeal Board withdrawn by leave

Order

WHEREAS this is an appeal pursuant to section 80I the Industrial Relations Act 1979; and

WHEREAS on the 30th day of October 2002 the Appellant's representative advised by email that it would seek to discontinue the matter; and

WHEREAS on the 30th day of October 2002 the Respondent consented to the matter being withdrawn;

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 withdrawn by leave.

[L.S.]

(Sgd.) P. E. SCOTT,
Commissioner.
on behalf of the Public Service Appeal Board

2002 WAIRC 06797

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
PARTIES	MRS INEKE HARRIS, APPLICANT
	v.
	THE CHIEF EXECUTIVE OFFICER, FAMILY AND CHILDREN'S SERVICES, RESPONDENT
CORAM	PUBLIC SERVICE APPEAL BOARD
	CHAIRMAN - COMMISSIONER P E SCOTT
	BOARD MEMBER – MS D ROBERTSON
	BOARD MEMBER – MS C BARNETT
DATE OF ORDER	MONDAY, 21 OCTOBER 2002
FILE NO/S.	PSAB 8 OF 2000
CITATION NO.	2002 WAIRC 06797

Result Appeal dismissed

Order

WHEREAS on the 15th day of August 2000 the Appellant appealed to the Public Service Appeal Board ("the PSAB") pursuant to Section 80I of the Industrial Relations Act 1979; and

WHEREAS by letter dated the 1st day of October 2002, the PSAB wrote to the Appellant directing her to respond to issues regarding the appeal by the 14th day of October 2002, and that should she fail to respond the PSAB would assume that she did not wish to proceed with the appeal and an order of dismissal would issue. If she did respond the PSAB would consider the information she provided and decide whether or not to allow the appeal to proceed; and

WHEREAS the Appellant failed to respond to the letter of 1 October 2002 by the appointed date; and

WHEREAS on the 16th day of October the Appellant left a message for the PSAB's Associate, Ms Maunick, indicating that she wished to discuss the appeal, but left no contact details; and

WHEREAS the PSAB's Associate attempted to ascertain the Appellant's contact details, but was unsuccessful; and

WHEREAS by midday on the 21st day of October 2002, nothing further had been heard from the Appellant;

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

RECLASSIFICATION APPEALS—Notation of—

File Number	Appellant	Respondent	Commissioner	Decision	Finalisation Date
PSA 35 of 1999	Thomas Ratajczak	Metropolitan Health Service, Sir Charles Gairdner Hospital	Scott C	Dismissed	08/10/2002
PSA 24 of 2000	Charles Freeland Duthie	Department of Transport	Scott C.	Granted	21/10/2002
PSA 25 of 2000	David William Rowe	Department of Transport	Scott C.	Granted	21/10/2002
PSA 26 of 2000	Stephen Robert Adams	Department of Transport	Scott C.	Granted	21/10/2002
PSA 27 of 2000	Marie Ann Ledger	Department of Transport	Scott C.	Granted	21/10/2002
PSA 28 of 2000	Frederick John Hermon	Department of Transport	Scott C.	Granted	21/10/2002
PSA 29 of 2000	Robert Leonard Wakelin	Department of Transport	Scott C.	Granted	21/10/2002
PSA 2 of 2002	Peter James Shimmings	Chief Executive Officer, Disability Services Commission	Scott C.	Withdrawn by Leave	19/11/2002

INDUSTRIAL AND COMMERCIAL TRAINING ACT— Appeals dealt with—

2002 WAIRC 06759

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	STEFANO NICOTRA, APPLICANT
	v.
	L & A ELECTRICAL, RESPONDENT
CORAM	COMMISSIONER J F GREGOR
DATE	WEDNESDAY, 16 OCTOBER 2002
FILE NO.	APA 1 OF 2002
CITATION NO.	2002 WAIRC 06759

Result	Dismissed
Representation	
Applicant	Mr C. Young appeared on behalf of the Appellant
Respondent	Mr L.A. D'Adamo appeared on behalf of the Respondent

Reasons for Decision

1 This is an appeal brought by Stefano Nicotra (the Appellant) pursuant to s.37C of the Industrial Training Act 1975 (the Act) against the Decision of Mr M. Hasse Chairperson of the Apprenticeship Tribunal on 14th August 2002. That Decision refused an application for transfer of employment pursuant to s.34(2) of the Act. The Decision of the Chairperson was reduced to writing and published in a letter dated 20th August 2002 in the following terms—

> *"STEFANO NICOTRA (214655A1) HEARING DECISION 14 AUGUST 2002*
>
> *I confirm that I chaired a Hearing at 11.30am on Wednesday, 14 August 2002, for the apprentice, Stefano Nicotra and employer, L & A Electrical, convened pursuant to Section 34(2) of the Industrial Training Act 1975, which relates to transfer of employment.*
>
> *The matter regarding reduction of term was heard, and my ruling is as follows—*
>
> > *The apprentice Stefano Nicotra's application for a transfer of employment is denied. The apprentices' stated reason for seeking a transfer to gain more experience was considered insufficient, particularly in light of his admitted 'good working relationship' with his employer.*
>
> *If you require further information or advice about this matter, please contact Raelean Lawson on 9235 6121."*

2 As is required the Decision of the Chairperson was published to the parties and to the Apprenticeship and Training Support Network.

3 There is no clear statutory instruction as to the practice to be followed in appeals pursuant to s.37C however this Commission has determined many appeals since s.37C was inserted into the Act pursuant to amended Act No. 86 of 1980. Those appeals have been conducted on the basis described by Martin C. in 1983 in *Eddie Hambleton Nominees Pty Limited as Trustee for the Hooper Family Trust t/as Coastal Motor Sales v Gary Shane Hancock Apprentice and Lorna Hancock Guardian (1983)* 63 WAIG 628.

4 The essence of that Decision can be found in the following statement by Martin C. where he said—

> *"Whilst it may have been contemplated that appeals to the Commission pursuant to s.37C of the Industrial Training Act were to be by way of rehearing there is no specific power to that effect in either that Act or the Industrial Arbitration Act, and I take the view that in the absence of such specific authority that the appeal should proceed in the same manner as appeals from the Commission pursuant to s.49 of the Industrial Arbitration Act, which are heard and determined upon the evidence and matters raised in proceedings before the Commissioner whose Decision is appealed against."*

5 There has been nothing put in this proceeding which would give good reason to depart from that procedure and therefore the Commission is to conduct this appeal on the basis of the evidence on matters raised at first instance. There needs to be a record of proceedings sufficient for the purpose of an appeal and that is to be found in the 'Minutes of the s.34(2) Hearing for

Apprentice Stefano Nicotra and Employer L & A Electrical' which were signed by the Chairperson of the Apprenticeship Board as being a true and correct minute of the proceeding conducted by him on 14th August 2002.

6 During these proceedings Mr Young, who appeared for the Appellant, raised the issue of the admissibility of fresh evidence. The Commission after hearing from Mr Young did allow Mr Nicotra to give sworn evidence before the appeal. I need to give my reasons for allowing that to occur. S.49 of the *Industrial Relations Act, 1979* (IR Act) contains in s.49(4) a provision that an appeal is to be heard and determined on the evidence and matters raised in proceedings before the Commission at first instance.

7 S.37 of the Act does not contain such a statutory command. Some guidance is available though in Decisions of the Full Bench as to how the fresh evidence rule is to be treated, for instance in *Federated Clerks Union v George Moss Ltd (1990)* 70 WAIG 3040 the Full Bench said—

> "*…the fresh evidence rule is in like case. The discretion to admit fresh evidence on appeal is not specifically excluded. Further insofar as it is, in the alternative, necessary to support that view, we would point out that so far as rules might be said to be based upon the common law, (a matter not argued before us), it is at least arguable that the legislature, for reasons which we have just stated, has not expressed its intentions to depart from an existing position to preclude fresh evidence with irresistible clearness (see Potter v Minahan (1908) 7 CLR 222 at 304 per O'Connor J."*

8 I take this to mean in the absence of a statutory prohibition to the effect, fresh evidence is receivable on appeal pursuant to s.37C of the Act subject to the tests which are applied when on an appeal fresh evidence is to be sought to be introduced. These tests articulated by the Full Bench in *FCU v George Moss Pty Ltd (ibid)* are—

> *"Fresh evidence which is admissible on appeal is evidence which was not available to the Appellant at the time of the trial and which reasonable diligence and the preparation of the case could not have made available.*
>
> *Secondly the evidence must be such that it would have had an important influence on the result of the trial, and it must be credible, but not necessarily beyond controversy."*

9 The reason advanced by Mr Young for the Appellant to give evidence in these proceedings is that it was asserted by the Appellant that the Chairperson of the Apprenticeship Tribunal cut off attempts by him to put information before the Tribunal hearing. The inference is that if he had not been so restricted he would have been able to provide the Chairperson with information which would have changed the outcome of the proceeding.

10 The Commission accepted the Appellant's assertions on face value and then proceeded to hear evidence from him, I will comment upon that evidence later in these Reasons. It needs to be recorded though that the appeal is to be heard and determined upon the evidence and matters before the Chairperson of the first instance. It is an appeal against a discretionary judgement and the role of an appellant tribunal in such a matter is well settled (for an exposition of this role see *Amalgamated Metal Workers Union v Robe Rive Iron Associates (1999)* 69 WAIG 985.

11 I turn now to consider the conduct and findings of the proceedings before the Chairperson. The Chairperson specified the format of the hearing and the rules to be observed by the parties. The Appellant was invited to give his account of events, which he did. The Chairperson variously questioned the apprentice about the variety of work he was doing and of his progress at his technical studies. He also questioned the Appellant about the type of work he would get if he was able to pursue a job opportunity with his relative, that opportunity being the source of his desire for a transfer.

12 The apprentice Appellant was asked whether there were any other reasons offered by him to support the transfer and he said that there was not. The Chairperson investigated the work environment with the current employer and drew to the attention of the apprentice Appellant the intention of indentures and the apprentice's obligations under the Act.

13 The employer was asked to give his point of view. The minutes then relate the sequence of events from the employer's viewpoint. At the conclusion of the employer's evidence the Chairperson invited the apprentice Appellant to express an opinion whether the employer's position had been put fairly. The apprentice Appellant did not offer any comment.

14 The Chairperson then investigated in some detail the dispute between the parties as to the sequence of events relating to the giving of notice and concluded, as seemingly there was some confusion over the time at which the apprentice gave his notice, that notice was 'not relevant in terms of a transfer or the apprentice's right to transfer'. However the apprentice had found out soon after giving the notice he was not entitled to a transfer as a right. The apprentice was advised by Kerry Smith from Training and Support Network to return to work and he did.

15 It appears that the Chairperson concluded that the issues about notice were not fundamental to the matter before him. What was important was that the employer was saying that he was not happy to transfer the employment, with the apprentice Appellant clearly stating that it was for no reason other than him wanting commercial experience. The Chairperson accepted that the employer had the facility to provide commercial experience and that the Apprentice could have approached him and requested some broader experience. The Chairperson observed if that the employer could not provide that experience now he could in a couple of months if that was what the transfer was about.

16 The Chairperson found it was up to the employer to ensure the apprentice could gain experience in the workplace commensurate with off the job training requirements of the competency units that are studied at TAFE. The Chairperson acknowledged that because the apprentice Appellant was an adult he had the right to negotiate with his employer if he wanted to work in another area. The Chairperson observed that the apprentice Appellant seemed to be quick to negotiate with the putative new employer when he should have checked with his employer in the first instance. The Chairperson found the employer had many apprentices who had completed their studies with him and he was not inexperienced in dealing with like issues. The Chairperson then ruled that on these grounds that the request for transfer was denied, the Apprentice's stated reason to transfer to gain more commercial experience was insufficient particularly in the light of he admitted a good working relationship.

17 It was made clear in the Minutes that the Chairperson was aware of the submissions from the apprentice Appellant that he had been doing mostly domestic work, working on trucks, running mains, that he complained that on occasions no electrical tradesman worked with him only a machine operator and that he had done work outside his trade such as laying roll on lawn and putting door knobs on doors.

18 As indicated previously the Appellant was allowed to give evidence before the Commission. The burden of his evidence is set out in Exhibit C. This is essentially a resume of the evidence that was placed before the Chairperson of the Apprenticeship Tribunal. The Appellant in these proceedings said he was cut off by Mr Hasse prior to him completing the resume. He was allowed to complete the resume before the Commission as constituted. The question arises as to whether in refusing to allow the apprentice Appellant to put additional information to that is alleged that the Chairperson acted contrary to natural justice.

19 I need to examine that proposition now. Clearly the statutory function of the Apprenticeship Tribunal was to decide the application made to it by the apprentice Appellant in this proceeding to transfer his apprenticeship to a new employer. There is power to allow the transfer under s.34(2) of the Act. It is unarguable in the exercise of his authority that the Chairperson is

bound to observe the provisions of natural justice in that any decision he makes clearly affects the rights of both the apprentice and an employer.

20 There have been many expositions of the rules of natural justice but appropriate to industrial jurisdictions are the comments of the High Court in *Ludeke; Ex Parte Customs Officers Association of Australia (1985)* 59 ALJR 483. Gibbs CJ made the following observations—

> *"It is clear that notwithstanding the wide discretion and matters of procedure given to the Commission under s.40(1) of the Act, the Commission is bound to observe the rules of natural justice: R v. Commonwealth Conciliation and Arbitration Commission; ex p Angliss Group [19690 122 CKR 546 at 552; R v. Moore; ex p Victoria (197) 140 CLR 92 at 101 and 102; R v. Isaac; ex p State Electricity Commission (Vic) [1978] 140 CLR 615 at 620. that means that a person whose rights will be directly affected by an order made by the Commission must be given a full and fair opportunity to be heard before the order is made."*

21 The issue of natural justice for consideration here is that a person should have a reasonable opportunity of presenting a case. About this Dean J said in *Ludeke*—

> *"while the precise content may vary according to circumstances of the particular case, those rules will ordinarily require the Commission to extend to the parties and to others who will be directly affected by its orders an adequate opportunity of being heard."*

22 In *Board of Education v Rice [1911]* AC 179 the proposition was put in this way—

> *"A person or body determining a justiciable controversy between the parties must give each party a fair opportunity to put his own case and to contradict any statement prejudicial to his view."*

23 What it boils down to is what is fair in a given situation depends upon the circumstances these include the nature of the inquiry, the rules under which the tribunal is acting, the subject matter which is being dealt with. What the law requires in the discharge of a quasi judicial function is judicial fairness (see *Mobil Oil Australia v Commissioner of Taxation (1963)* 96 CLR at 275.

24 I have carefully examined the minutes of the proceedings, have listened to the evidence of the Appellant and to the submissions of both Mr Young and Mr G. D'Adamo the Managing Director of the employer Respondent.

25 On consideration of the evidence of the Appellant it seems to me that it could not be held that he did not have the opportunity to put the substantial matters which backed his claim for a transfer before Mr Hasse. In fact the substantial matters are all recorded in the Minutes which support the Decision of the Apprenticeship Tribunal. In questioning before the Commission some of the more bald assertions made by the Appellant in these proceedings were somewhat muted. His assertion that he was for three months a truck driver was not that at all. He was only asked to drive a truck to and from his place of work. As to his allegations about performing non trade work. On the face of it, it would seem that he was doing this work all the time however these allegations were not sustained on questioning because he admitted that was not the case at all. What had happened was that on occasions he had done non trade work.

26 The only finding that perhaps the Commission could make which is contrary to that indicated by the Chairperson's Decision is that he considered the Appellant's transfer to go more to commercial experience was insufficient particularly in the light of an admitted 'good working relationship' with the employer. The proceeding before this Commission indicates considerable antipathy between the parties. Even though it must be said the employer said he was keen for the relationship to continue.

27 There is no convincing information disclosed in the appeal together with evidence led from the apprentice for the Commission to conclude that the procedure before the Apprenticeship Tribunal was incorrect in any way, that there was insufficient consideration given to evidence or that the Tribunal acted contrary to the rules of natural justice. The Decision of the Chairperson of the Apprenticeship Tribunal was clearly open to him on the information presented to him and this Commission will not overturn that Decision.

28 The only caveat I add relates to the relationship between the parties. It may be that a continued deterioration of that relationship might give rise to proper grounds for an application for a transfer in the future. If that be the case then if the matter proceeds to the Apprenticeship Tribunal it can review any application for transfer under s.34(2) of the Act with the alleged good working relationship in mind.

2002 WAIRC 06760

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	STEFANO NICOTRA, APPLICANT
	v.
	L & A ELECTRICAL, RESPONDENT
CORAM	COMMISSIONER J F GREGOR
DATE	WEDNESDAY, 16 OCTOBER 2002
FILE NO.	APA 1 OF 2002
CITATION NO.	2002 WAIRC 06760

Result Dismissed

Order

HAVING heard Mr C. Young on behalf of the Appellant and Mr L.A. D'Adamo 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.]