

# CUMULATIVE DIGEST HEADINGS

## Denotes New Heading

- Absence Without Leave
- Act—Interpretation of
- Allowances—See also specific heading, e.g. Isolation Allowance, Industry Allowance, Meal Money—(Includes Special Rates and Provisions)
- Annual Leave—(Includes Annual Leave Loading)
- Appeal
- Apprentices and Juniors
- Awards—(Includes specified sub-headings, First Awards, New Awards, Area, Scope, Coverage, Cancellations, Award-Free, Respondency)
- Board of Reference
- Board and Lodging—(Includes Accommodation)
- Bonus—(Includes Incentive Payments)
- Breach of Acts/Award/Orders
- Capacity to Pay—Includes Inability to Pay
- Casual Work—(Includes loadings applicable to such work and nature of casual employment)
- Classification—(Includes Reclassification)
- Clothing—(Used when clothing is/is not provided and for clothing allowances)
- Common Rule—(Used in relation to Awards being or becoming Common Rule awards)
- Comparative Wage Justice—See also Nexus—(Includes Relativities)
- Compassionate Leave—(Includes Bereavement Leave)
- Compensation—See also specific heading, e.g. Redundancy, Long Service Leave—(Includes compensation for unfair dismissals)
- Conference—(Includes such matters as jurisdiction arising out of)
- Confined Space
- Consumer Price Index
- Contract of Service—(Used in relation to Section 29 (2) applications)
- Contract out of Award
- \*Costs (Matters pertaining to)
- Custom and Practice
- Dangerous Work
- Date of Operation—(Includes Retrospectivity, Prospectivity)
- Demarcation
- Dirt Money
- Disabilities
- Discrimination
- Employee—(Used in such cases as whether person is an employee or independent contractor or agent)
- Enforcement of Acts/Awards/Orders
- Entry: Right of
- \*Extension of Time
- Hours of Work
- Industrial Action—(Includes Work-to-Rule, Picketing, Stop Work Meeting, Strike, Bans, Lockouts)
- Industrial Matter
- Industry—(Used re questions of extent and meaning of specified industry)
- Industry Allowance
- Interpretation—Words and Phrases
- Intervention
- Isolation Allowance
- Jurisdiction
- Jury Service
- Leave Without Pay
- Living Away From Home Allowance
- Long Service Leave
- Managerial Prerogative
- Manning
- Maternity Leave
- Meal Breaks
- Meal Money
- Misconduct
- Mixed Functions—(Includes Higher Duties)
- Natural Justice
- Nexus
- Night and Weekend Work
- On Call—(Includes Stand by)
- Order—(Includes Cancellation of Order)
- Over Award Payment
- Overtime—(Includes Call Back, Recall)
- Part-Time
- Penalty Rates
- Piecework
- Preference—(Includes Compulsory Unionism)
- Principles (Wage Fixing)
- Procedural Matters (e.g. Standards of evidence)
- Promotion Appeals
- Public Holidays
- Public Interest
- Redundancy/Retrenchment—(Includes Severance Pay)
- Reinstatement
- Registration—See Unions
- Rest Periods—(Includes Smokos)
- Safety
- Shift Work
- Sick Leave
- Standdown
- Stay of Proceedings
- Superannuation
- Supplementary and Service Payments
- Tallies
- Technological Change
- Termination—(Includes Dismissal, Wrongful/Unfair Dismissal)
- Training
- Transfer
- Travelling—(Includes Travelling Allowance and Travelling Time)
- Unfair Discrepancy
- Unions—(Includes Direction for Observance of Rules, Registration, Rules, Enforcement of Rules, Coverage/Constitutional Coverage, Dues, Membership, Cancellations, Exemptions)
- Utilisation of Contractors
- Victimisation
- Wages—(Includes Catch-up Margins, Payment by Results, Piece Work, Minimum Wage)
- Work Value
- Worker Participation
- Workers Compensation
- Workplace Agreement

# CUMULATIVE DIGEST

MATTERS REFERRED TO IN DECISIONS OF THE INDUSTRIAL APPEAL COURT, INDUSTRIAL RELATIONS COMMISSION AND INDUSTRIAL MAGISTRATES COURT CONTAINED IN VOL. 83 PART 1, SUB PART 1-8.

NOTE: <sup>1</sup> Denotes Industrial Appeal Court Decision <sup>3</sup> Denotes Commission in Court Session Decision  
<sup>2</sup> Denotes Full Bench Decision <sup>4</sup> Denotes Decision of President

	Page
ACT - INTERPRETATION OF	
<sup>4</sup> Application for stay of operation in Matter No. 1502 of 2001 pending appeal to Full Bench - President reviewed relevant sections of the Act and applied principles and found that the application was incompetent because there cannot be a stay of operation of a decision or part thereof when it has not been appealed against - Further, President was not satisfied that there was a serious issue to be tried and no exceptional circumstances existed to justify the making of the order sought - Dismissed - Mr AG Matthews -v- Cool or Cosy Pty Ltd; Ceil Comfort Home Insulation Pty Limited; Citigroup Pty Ltd - PRES 34 of 2002 - President - SHARKEY P - 11/12/02 - Construction Trade Services .....	52
Application re unfair dismissal seeking compensation - Applicant argued that in all of the circumstances, given the lack of procedural fairness, his termination was unfair on the basis that the requirements under s.41 of the Minimum Conditions Employment Act 1993 were not met - Respondent argued there was no unfair dismissal, that the onus on the Applicant to demonstrate that he was unfairly terminated had not been made out and that there was no breach of s.41 of the MCE Act as numerous discussions were held with the Applicant, and consultation took place in order to avoid or minimise the effect of significant change on the Applicant - Commission reviewed authorities, Part 5 of the MCEA and found that Applicant was treated unfairly on the basis that he was not given sufficient notice of his termination in order to canvass alternatives, that it was also clear that the requirements of Part 5 of the MCEA in relation to attend job interviews were not met by the Respondent and given that the Applicant was afforded insufficient notice and was not given time to attend job interviews, his termination was unfair - However, given that the Applicant was paid a redundancy payment of 26 weeks' pay and five weeks' pay in lieu of notice, Commission concluded that the amount of five weeks' pay as compensation was to be offset against these payment, thus no monies were due to be paid to the Applicant - Dismissed - Mr PJ Caffery -v- Chubb Security Australia Pty Ltd t/as Chubb Protective Services - APPL 390 of 2002 - HARRISON C - 02/12/02 - Personal and Other Services.....	155
Application re unfair dismissal - Applicant argued that he was unfairly dismissed whilst a casual employee employed under a registered workplace agreement and that this application was made appropriately from the advise of Commission Registry - Respondent argued that Commission did not have the jurisdiction to hear the matter as there were no terms in the workplace agreement as required by section 7G of the Industrial Relations Act 1979 which permitted the Commission to hear the claim - Commission found that the workplace agreement did not encompass a referral of a claim for unfair dismissal as per section 7G of Industrial Relations Act and thus did not have the jurisdiction to deal with the claim - Dismissed for want of jurisdiction - Mr J Pettit -v- Mr Bradley Harris (Director) Dewson Bicton - APPL 775 of 2002 - WOOD C - 11/11/02 - Personal & Household Good Rtlg .....	166
Complaint re breach of Award - Claimant's Union sought to amend the claim by substituting the employee's name as the claimant - Industrial Magistrate reviewed various Acts and Regulations and found that there was a fundamental flaw in the claim, that there was simply no evidence, which could enable it to exercise its discretion even though it had the power to do so pursuant to Order 16 Rule 1 of the Local Court Rules 1961, therefore, the application was refused - Struck out for want of jurisdiction - AUTO, FOOD, METAL, ENGIN UNION -v- Austal Ships Pty Ltd - M 375 of 2001 - Industrial Magistrate - Cicchini IM - 18/11/02 - Machinery & Equipment Mfg.....	298
Complaints re authority of Claimant to file claim re breach of award - Respondent sought that the claims be dismissed or otherwise amended so that it comply with the Act - Further, Respondent argued that Claimant lacked standing to bring the claims and that his appointment as an inspector under s.84(2) of the Workplace Relations Act 1996 was not validly made - Claimant argued against the Respondent's submissions - Industrial Magistrate found that Respondent's arguments were baseless and unsupported by authority, that the applications brought by Respondent were misconceived, based on its erroneous interpretation of the relevant provisions and regulations - IM further found that Respondent's interlocutory applications should be dismissed and the Claimant's interlocutory applications be allowed - Upheld - Greg Logan-Scales, Department of Consumer & Employment Protection -v- Olten Pty Ltd (ACN 076 543 130) t/a MSA Security - M 248,249 of 2002 - Industrial Magistrate - Cicchini IM - 27/11/02 - Business Services .....	323
Complaints re discrimination of member organisation under section 96C of the IR Act - Complainant argued Ms Peak was a solicitor and authorised to make complaints on behalf of her client and was employed by the CFMEUW Union and that Applicant was a member of CFMEUW Union - Respondents argued that there was no case to answer on the basis that Complainant had failed to establish that they were validly made - Further, Respondents argued that there was no proof of the fact that Elisabeth Peak was authorised to make the complaints - Industrial Magistrate found that there was no case to answer by the Defendant in each instance and that the solicitor employed by the Union could not act on the instructions of the Union in bringing the complaints but must act on the instructions of Complainant - Struck out - Mr C Workman -v- CECK Pty Ltd - CP 3,4,6,7 of 2002 - Industrial Magistrate - Cicchini IM - 19/12/02 .....	324
Application re unfair dismissal - Applicant lodged an application for an extension of time in which to file application and argued that the reasons for the delay related to her pregnancy, the birth of her child, her recovery and the illness of the child - Respondent opposed the applications - Commission found that there was no power to extend time in accordance with s.29(3) of the I.R. Act, in respect of an application filed on 16 October 2002 relating to a termination of employment in May 2002 - Dismissed - Mrs RJ Alberghini -v- Dr Geoffrey Bower Isotope Imaging Hollywood Hospital - APPL 1729 of 2002 - SCOTT C - 10/01/03 - Health Services.....	326
Application re unfair dismissal and contractual entitlements - Applicant argued that she intended to lodge her application within the 28 day time frame and lodged it in the Commission within the 28 day time limit, subsequent to lodging her application she was informed by Registry that Form 1 was missing from her application and needed to be completed and returned, she received a copy of a Form 1 on 9 October 2002 and lodged Form 1 the next day - Respondent argued that Applicant was terminated on 6 September 2002 - Commission found that Applicant was not sent the correct form in the first instance and that there was a valid reason why Applicant did not comply with the required 28 day time frame for lodging her application, it was clear that as soon as Applicant received the Form 1 she filed her application promptly the next day - Application to accept Applicant's claim which was lodged out of time granted - Mrs ES Harrison -v- Emmanuel Michael Papadoulis T/A Great Australian Travel Centre - APPL 1701 of 2002 - HARRISON C - 16/01/03 - Other Services .....	333
Application re unfair dismissal - Applicant argued that he was unfairly dismissed and that the Commission was within jurisdiction to consider the acceptance of the present application out of time - Respondent denied Applicant's allegations and raised as a preliminary issue that the Commission was without jurisdiction to entertain the claim on the basis proceedings commenced after 1 August 2002 whilst termination of employment took place on 26 July 2002 and there was no ability for Commission to extend time under the IR Act - Commission found that the amendments effected by the Labour Relations Reform Act 2002 to repeal s29(2) of the Act and to enact the new ss29(2) and s29(3) were not retrospective in the sense that the datum point for the termination of the employment was 1 August 2002 and not a date earlier for the purposes of the 28 day time limit - Dismissed for want of jurisdiction - Mr K McEwan -v- Australasian Correctional Management Pty Ltd (ACN 051 130 600) - APPL 1469 of 2002 - KENNER C - 10/12/02 - Food Retailing....	360

## CUMULATIVE DIGEST—continued

	Page
ACT - INTERPRETATION OF—continued	
Conference referred re alleged refusal to allow Applicant Union official access to the Respondents' workplace - Applicant Union argued that the rights of entry for union officials became a statutory code introduced by the Labour Relations Reform Act 2002 dealing with rights of entry into premises where relevant employees work - Further, Applicant Union submitted that the Commission did not have the jurisdiction to declare the parties rights as to right of entry under the Industrial Relations Act 1979 - Respondent argued that the Act did not preclude the Commission from making an order that union officials be subject to a random drug and alcohol test prior to entering Respondent's premises and that it would be consistent with the scheme of legislation and its policy was consistent with the workplace health and safety - Commission found and declared that the Respondents did not have the right to require Mr Brett Davis, an authorised representative of the Applicant Union, in possession of the requisite authority, exercising his rights under Division 2G of the Industrial Relations Act 1979, to submit a random drug and alcohol test, as a condition of the exercise of those rights - Declaration Issued - AUTO, FOOD, METAL, ENGIN UNION -v- Transfield Services (Australia) Pty Ltd & Other - CR 71 of 2002 - KENNER C - 12/12/02 - Unions.....	376
<sup>1</sup> Appeal against Decision of Full Bench (82WAIG2409) re Long Service Leave entitlements - Question re jurisdiction - Appeal on ground that worker was an independent contractor and, whether appeal raised question of "construction and interpretation" of Long Service Leave Act, 1958 and Industrial Relations Act, 1979 - Industrial Appeal Court reviewed Acts, authorities and found that on the whole circumstances, it was open to both Industrial Magistrate and Full Bench to conclude that the relationship between employer and employee was never terminated in point of law and that it had jurisdiction to hear the appeal - Further, IAC concluded inter alia, that the Full Bench had not erred in the interpretation of the Long Service Leave Act, however, it had erred in misconstruing the nature of the power allowed to the Industrial Magistrate - Dismissed Act - United Construction Pty Ltd -v- Mr J Birighitti - IAC 11 of 2002 - Industrial Appeal Court - 27/02/03 - General Construction.....	434
Conference referred re breach of the requirements of the Public Sector Management Act 1994 - Preliminary issue re appearance by counsel - Applicant Union objected to the appearance of counsel - Respondent requested representation by counsel - Public Service Arbitrator determined that counsel may appear and be heard in relation to the claim for an order and would accommodate the appearance of counsel on that issue either orally or in writing in all other respects leave for counsel to appear was not granted - Leave for counsel to appear generally refused - Civil Service Association of Western Australia Incorporated -v- Director General, Department of Justice (Formerly known as Ministry Of Justice) - PSACR 20 of 2002 - Public Service Arbitrator - BEECH SC - 07/03/03 - Government Administration.....	503
Complaint re breach of Enterprise Bargaining Agreement - Claimant Union argued that Defendant had breached Clause 22(b) of the Agreement by failing to pay public holiday penalties - Defendant denied claim and argued inter alia, that employees were paid according to the EBA - Industrial Magistrate reviewed Acts, Agreement and found inter alia, that the application of the clause in this instance had the effect of producing an inequitable result for employees that worked on public holidays and that all employees were technically adequately compensated whether they work on the public holiday or the day in lieu thereof - Reasons for Decision Issued - The Australian Nursing Federation, Industrial Union of Workers Perth -v- Silver Chain Nursing Association Inc - CP 61,62 of 2000 - Industrial Magistrate - Cicchini IM - 23/11/00 - Health Services.....	508
Complaint re contravention of s.961 of the I.R. Act - Claimant sought order that Respondent be restrained from entering premises and from directing its members to stop work - Further, Claimant submitted that in relation to all matters before IMC falling within general jurisdiction, the Court, by virtue of regulation 49(5) of the IMC (General Jurisdiction) Regulations 2000, was not bound by the rules of evidence - Industrial Magistrate found that the Act enabled it to deal with the matter as if these proceedings were an action within the Local Court and therefore had jurisdiction - Further, IM concluded that it was not bound by rules of evidence due to the interlocutory nature of the claim, that evidence was lacking and that there remained a substantive issue and did not want to pre-empt the trial - Dismissed - Silent Vector Pty Ltd t/a Sizer Builders -v- The Construction, Forestry, Mining and Energy Union of Workers - M 388 of 2001;CP 2,3,4,5,6,7 of 2002;M 75,76,121,122,188,263 of 2002 - Industrial Magistrate - Cicchini IM - 04/09/02 - General Construction.....	525
Application re revocation of right of entry permit - Application for an adjournment dismissed on the grounds that Commission was not satisfied that the refusal of the adjournment would result in a serious injustice to one party - Applicant argued that Respondent's representative had acted improperly and as a result of that conduct, Applicant suffered loss and damage and became exposed to the risk of liquidated damages for delay in completing the project - Applicant further argued that the limits of "proper" behaviour could be ascertained from the scope of the licence to enter the premises conferred by s.49H and s.49I and that license does not permit conducting safety audits - Respondent opposed the allegations and argued inter alia, that there was a legitimate safety concern on this particular site, that its representative was at one stage exercising powers but did not act improperly in the exercise of those powers - Commission found on evidence that the Respondent's representative did not intentionally or unduly hinder the employer or employees during working time and that whilst industrial action could have been avoided, he did not act in an improper manner in the exercise of powers under Division 2G of the Act - Dismissed - Silent Vector Pty Ltd t/a Sizer Builders -v- The Construction, Forestry, Mining and Energy Union of Workers - APPL 42,63 of 2003 - BEECH SC - 25/02/03 - General Construction.....	564
Application re unfair dismissal - Applicant incorrectly lodged application in Industrial Magistrates Court and sought to remedy this - Respondent opposed the claim and argued that s.29(3) has application only in respect to dismissals effected subsequent to the enactment of enabling legislation - Commission found that there was no power for it to direct the Industrial Magistrates Court to remit the matter to this Commission as it did not have jurisdiction, despite the potential injustice to the Applicant - Dismissed - Mr J Thomson -v- St Barbara Mines Limited - APPL 1655 of 2002 - GREGOR C - 11/02/02 - Other Services.....	616
<sup>1</sup> Appeal against Decision of Full Bench (82WAIG212) re dismissed appeal in respect of an unfair dismissal claim - Appellant argued inter alia, that the Full Bench erred in law in failing to give proper consideration to and provide adequate reasons for two findings in particular, namely, that the requirements of the Minimum Conditions of Employment Act were complied with, and that the appellant waived his right to discuss the adverse effects of his redundancy at the meeting of the 18 May 2000 - Industrial Appeal Court reviewed authorities, Acts and evidence and found, inter alia, that the Appellant was entitled to succeed in his appeal in respect of his contention that Respondent employer failed to comply with his obligation to inform and discuss imposed upon the employer by s.41 of the MCE Act and that it was appropriate for the decisions made by the Commissioner and the Full Bench to be set aside and remitted to Commissioner Wood for a determination to be made as to whether the Appellant was entitled to relief having regard to the reasons of the Industrial Appeal Court - Upheld and Remitted - Mr GE Garbett -v- Midland Brick Company Pty Ltd - IAC 3 of 2002 - Industrial Appeal Court - 10/03/03 - Non-Metallic Min Product Mfg.....	893
<sup>2</sup> Appeal against Decision of Commission (82WAIG3250) re transfer of an employee - Appellant argued that the Public Service Arbitrator erred in law in declaring that Appellant's decision to exclude the employee from the Broome Regional Prison was void, that the decision was within the Public Service Arbitrator's jurisdiction, and that the Appellant should not have ceased paying employee her ordinary salary - Appellant sought that the PSA's orders (1), (2) and (6) be quashed - Full Bench reviewed authorities and found inter alia, that the decision to exclude employee from Broome Regional Prison was an "industrial matter", and the decision to declare it void was within jurisdiction for that reason - Further, Full Bench found that the Arbitrator erred in ordering the Appellant to pay the employee indefinitely into the future when there was no evidence that she would perform any service, had performed any service or was entirely willing to - Upheld and order 6 of the decision at first instance quashed - Director General, Department of Justice (Formerly known as Ministry Of Justice) -v- Civil Service Association of Western Australia Incorporated - FBA 53 of 2002 - Full Bench - SHARKEY P/SCOTT C/WOOD C - 25/03/02 - Government Administration.....	908
<sup>2</sup> Appeal against Decision of Commission (82WAIG3020) re unfair dismissal and contractual entitlements - Appellant argued that Commissioner erred in not finding that the dismissal was wrongful and erred in holding that there were implied in the Appellant's contract of employment the terms and conditions of Respondent's drug and alcohol policy - Further, Commissioner erred in not finding the Respondent's direction that Appellant undergo a random drug and alcohol test was unlawful and unreasonable and its subsequent conduct was unlawful, unreasonable and unfair and that Commissioner erred in not holding that the dismissal was harsh, oppressive or unfair - Respondent opposed the appeal - Full Bench found that Appellant's employment was governed by the Award and was harshly, oppressively or unfairly dismissed and that Commission should have found the Respondent had effected an unfair dismissal - Further, Full Bench found that the grounds were made out and that Full Bench was entitled to substitute the exercise of its discretion for that of the Commission at first instance applying the findings that should have been made - Appeal upheld and decision at first instance suspended and remitted to a Commissioner - Ms DCD Larkin -v- Boral Construction Materials Group Ltd - FBA 49 of 2002 - Full Bench - SHARKEY P/COLEMAN CC/BEECH SC - 20/03/03 - Other Mining.....	929

## CUMULATIVE DIGEST—continued

	Page
ACT - INTERPRETATION OF—continued	
Application for Orders pursuant to Section 80E of I.R. Act - Applicant Union sought discovery of documents that ought to have been made available in dealing with the ongoing disciplinary proceedings against its member and that access to the documents were necessary for the purposes of the hearing - Further, Applicant Union argued that the application to dismiss pursuant to s.27(1)(a)(ii) be dismissed as the dispute was still alive and had not been resolved - Respondent applied to the Arbitrator for the dismissal of the matter pursuant to s.27(1)(a)(ii) of the Industrial Relations Act as the dispute between the parties had been resolved by its undertaking given by the letter provided - Public Service Arbitrator issued orders for the discovery of documents to be used only for the purposes of the hearing and found that the dispute was still alive and dismissed the application for dismissal - Orders issued - Civil Service Association of Western Australia Incorporated -v- Anti-Corruption Commission - P 50 of 2002 - Public Service Arbitrator - SCOTT C - 18/03/03 - Government Administration	980
Complaint re alleged breaches of clauses 3(1)(4)(5) & 4(1) of Industrial Relations (Industrial Agents) Regulations 1997 Schedule 1 - Complainant sought an extension of time to bring proceedings before the Industrial Magistrate in his application to have Respondents deregistered as Industrial Agents pursuant to the Industrial Relations (Industrial Agents) Regulations 1997 - Further Complainant argued that Industrial Magistrate did have the powers and jurisdiction to deal with complaint, that appeal had been properly initiated pursuant to the provisions of the Industrial Magistrate's Regulations and that the Registrar's decision was in effect a determination made for the purposes of regulation 15(3)(a) - Respondents lodged an interlocutory application and sought orders that the application be dismissed or struck out on the grounds that the application was out of time, functus officio, against public interest and with insufficient merit - Further, Respondent argued that in respect of regulations 12 of the I.R. Act there was no substantial compliance - Industrial Magistrate reviewed the relevant legislation and the intention of the legislation, the jurisdiction of the Industrial Magistrate's Court and found that under the proper administration of the Acts and Regulations an Industrial Magistrate could make a determination or a decision as to whether or not the registration of an industrial agent was to be cancelled - Further, IM found that it had no power to rule or view that the Registrar in dealing with the complaint in the circumstances was an unauthorised act or a series of unauthorised acts and that it could not be said that the matter was functus officio - IM further found that under regulation 19 of the I.R. Act an Industrial Magistrate had power to cancel registration of an industrial agent and consider allegations that there had been a breach of the code of conduct an industrial agent was subject to when they were registered - Industrial Magistrate granted the parties an extension of time in respect to the application of the extension of time within which an appeal may be commenced prior to final orders - Reasons for Decision Issued - Mr JRA Acosta -v- Mr G Broderick & Other - M 200 of 2002 - Industrial Magistrate - Graeme Neil Calder - 28/03/03 - Other Services	986
Complaints re unfair dismissal - Claimants argued inter alia, that Respondent failed to give them an opportunity to defend or rebut any allegations of misconduct justifying dismissal, and sought reinstatement together with the recovery of remuneration lost - Respondent denied allegations and denied that it had failed to afford procedural fairness - Further, Respondent argued that the actions constituted gross misconduct, that the dismissal was justified and not harsh or oppressive and that Claimants were not entitled to the amounts claimed or any amounts at all - Industrial Magistrate reviewed authorities, Acts and Regulations and found that the decision to terminate resulted directly from the raising of the safety issue, that the decision was made without merit and it was harsh, oppressive and unfair - Further, IM found that the factual circumstances which reflect the actual operation of the contractual relationship demonstrated that the employment relationship was a casual one, that the continuing relationship between the Claimants and Respondent did not in law evince a continuing contract and that it was without jurisdiction to hear and determine the claims - Reasons for Decision Issued - Mr LJA Clark -v- Marine Fire & Security Pty Ltd - M 363,364 of 2001 - Industrial Magistrate - Cicchini IM - 27/03/03 - Other Business Services	1005
Appeals against the Refusal by the Registrar to register Employer Employee Agreements - Appellant argued that the Deputy Registrar was in error when she refused registration of the EEA Agreements on the grounds that the EEAs did not comply with the requirements of s.97UY(3)(a) of the Industrial Relations Act 1979 in relation to the EEAs being presented for lodgement with the Registrar more than 21 days from the date of execution by the parties - Further, Appellant argued that Registrar may only refuse to accept an EEA for registration if it was presented for lodgement after the end of the 21 day period and had not complied with the Act in relation to lodgement requirements - An application for intervention was made by Mr Bibby, a duly authorised bargaining agent appointed by the parties to represent and intervene in the appeal proceedings - No appearance from Respondent - Commission found that the parties had complied with the regulations and had met the requirements in relation to lodgement - Further, Commission found that it was erroneous to conclude that the absence of the date of execution precluded acceptance by the Registrar of the lodgement of the EEAs for registration under the Act and that the Deputy Registrar erred in refusing the registration of the EEAs - Commission upheld the appeals, set aside the refusals and remitted the matters to the Registrar with the directions as set out in the Commission's order - Order and Direction Issued - City of Melville -v- Registrar - APPL 101,103,104,105,106,107 of 2003 - KENNER C - 28/03/03 - Government Administration	1018
Application re unfair dismissal - Applicant argued that the application was lodged in the wrong jurisdiction as a result of the Commission's Registry giving him incorrect advice and incorrect forms to fill in which led to an application being filed in the Federal jurisdiction - Respondent argued that Applicant's explanation for the delay in lodging an application in the WAIRC was unacceptable and that Applicant did not make sufficient inquiries and also had the opportunity to lodge a claim in the WAIRC within the specified time - Commission found that Applicant did have advice that his initial application was lodged in the wrong jurisdiction but chose not to file an application in the WAIRC until the AIRC application was finally disposed - Further, Commission found that the onus was with Applicant to ensure that designated time frames are met - Dismissed - Mr R Turner -v- Air Liquide WA - APPL 1835 of 2002 - HARRISON C - 28/03/03 - Electricity and Gas Supply	1059
<sup>2</sup> Appeal against Decision of Commission (unreported) re unfair dismissal - No steps had been taken by Appellant to proceed with the appeal - Full Bench on its own motion according to Practice Note 2 of 2000, required by notice to the parties to submit to the Commission in writing, should they wish to do so, whether the appeal should be dismissed there having been no steps taken to advance it for a period of 12 months - No submissions had been received, on behalf of Appellant - Written submissions had been received on behalf of the Respondent - Full Bench unanimously found inter alia, that the equity, good conscience and substantial merits of the case required that the case be dismissed and more particularly, it was not in the public interest that a matter which had not been prosecuted for such an inordinate period of time, should not be dismissed (see s.26(1)(a) and s.27(1)(a)(ii) of the Act) - Dismissed for want of prosecution - Mr G De Freitas -v- Youanmi Site Service Road Train Bulk Haulage - FBA 15 of 2002 - Full Bench - SHARKEY P/SCOTT C/WOOD C - 06/05/03 - Road Transport	1129
<sup>2</sup> Appeal against Decision of Commission (81WAIG1413) re unfair dismissal - On the day of the hearing Full Bench was advised by the Counsel for the Appellant that Appellant had died - Notwithstanding the opposition of the Agent for the Respondent, Full Bench adjourned the matter to enable the solicitors for the estate to consider what ought to be done - Application was made to substitute Appellant's wife as the executor of the will of the Appellant, as a party in lieu of the Appellant and application was not opposed - Full Bench reviewed authorities, Acts and found inter alia, that the order to substitute the executor for the deceased as Appellant was both necessary and required in order to serve the interests of justice, however, after the order for substitution was made, Appellant executor applied for leave to discontinue the appeal and the application was not objected to and was granted - Granted - Mr JA Fuller -v- North Beach Bowling Club - FBA 31 of 2001 - Full Bench - SHARKEY P/COLEMAN CC/BEECH SC - 05/05/03 - Sport and Recreation	1131
<sup>4</sup> Application for Orders pursuant to s.66 of the I.R. Act - Applicant argued inter alia, that there had been no election under the CSA rules, and the General Secretary and Assistant General Secretary had ipso facto been invalidly appointed contrary to the CSA rules, and ultra vires those rules - Further, Applicant argued that once the SPSF ceased to exist, there had to be a new s.71 application, and the Full Bench had to be satisfied anew of the s.71 requirements, about a new Counterpart Federal Body, the CPSU and this had not been done - Respondent argued that the agreement made under s.202 of the Federal legislation continued in force by virtue of s.253TA of the WR Act, thus enabling persons appointed or elected pursuant to the rule of the CPSU to become General Secretary and Assistant General Secretary of the CSA - Respondent, further submitted that the Commission, constituted by the President, had no jurisdiction to consider the effect of the WR Act and the s.202 agreement - President found that it was within his jurisdiction under s.66(2) of the Act to determine whether the rules of the CSA have been observed or not, and particularly whether persons are officers of the CSA pursuant to its rules or by the operation of any law - President reviewed legal principles, relevant Acts, agreement and the CSA rules and found that the appointments to the offices of the WA Branch Secretary and WA Branch Assistant Secretary of the CPSU, could not constitute or serve as valid elections or appointments to the offices of General Secretary and Assistant Secretary in accordance with the rules of the CSA, and that they therefore have not, since 28 November 2001, validly occupied those offices - Supplementary Reasons for Decision, Declarations and Orders Issued - Mr N Jones -v- Civil Service Association of Western Australia Incorporated - PRES 3 of 2003 - President - SHARKEY P - 10/04/03 - Unions	1146

## CUMULATIVE DIGEST—continued

	Page
ACT - INTERPRETATION OF—continued	
Appeal against decision to suspend made on 16/7/2002 - Preliminary issues re extension of time, perceived bias and whether matter ought proceed in public interest - Appellant argued that Respondent had failed to adhere to the disciplinary procedures and to comply with the requirements of the PSM Act 1994 - Appellant sought Orders that the Respondent's action be reviewed, modified, nullified and/or varied - Respondent argued that there had been no unlawful action undertaken and that the direction to the Appellant to not attend work did not constitute a suspension in accordance to the PSM Act 1994 - Further, Respondent argued that PSAB had no jurisdiction to deal with the matter and opposed the application for extension of time - Public Service Appeal Board invited the parties to make written submissions on whether or not the matter should proceed in the public interest - PSAB found that in accordance with the Act, the Board had a responsibility to manage the process of a particular case as it sees appropriate and the fact that Appellant would have preferred a different process did not meet the test of perceived bias - PSAB reviewed authorities and was unanimously of the view that the extension of time ought be granted because the Respondent had been made aware of the Appellant's challenge since the time expired for the filing of the appeal - PSAB concluded that there was no right of appeal to the Board arising from any action under s.82 of the PSM Act, there was no valid appeal before the board, in accordance with its jurisdiction and accordingly, had the Board the jurisdiction to deal with the matter, it would not have dismissed the appeal in the public interest as the passage of time and events had not resolved the matter or meant that it was merely academic to proceed - Orders Issued - Mr S Kelly -v- Director General, Department of Justice - PSAB 12 of 2002 - Public Service Appeal Board - SCOTT C - 17/04/03 - Government Administration .....	1283
<sup>1</sup> Appeal against Decision of Commission in Court Session (83WAIG57) re registration of an award - Appellant appealed on the ground that Commission in Court Session erred in law by wrongly construing or interpreting s41(6) of the I.R. Act, 1979 and Clause 45 of the Burswood International Resort Casino Employees Industrial Agreement 2001 AG 169 of 2001 - Appellant sought to have the decision of CICS quashed and the application for the award dismissed - Industrial Appeal Court reviewed authorities, I.R. Act, Agreement and the majority IAC found inter alia, that it was proper to have regard to the legislation as it stood as at the date of enforcement of the contract not at its entry date, that the relationship between the parties and the options available to them were regulated by statute and the statute extended the agreement to facilitate a smooth transition to its replacement at any time from the nominal expiry date of the agreement - Further, IAC found that it was not intended that an industrial agreement be used as a vehicle for altering the statutory scheme for facilitating the replacement of an industrial agreement after its nominal expiry date and that insofar as clause 45 prohibited the Respondent from taking steps for a substitute award as contemplated in s41 of the Act it was to that extend void - Dismissed - Burswood Resort (Management) Ltd -v- Australian Liquor, Hospitality and Miscellaneous Workers Union, Western Australian Branch - IAC 1 of 2003 - Industrial Appeal Court - Owen J./Scott J./Parker J. - 13/05/03 - Accommodatn, Cafes&Restaurants .....	1371
<sup>2</sup> Application for alteration of rule 5 - Eligibility - Full Bench reviewed union rules, relevant sections of the I.R. Act and was satisfied, on evidence, that all of the relevant requirements of s.55 and s.56 of the Act had been met, save and except for s.55(4)(a) - Full Bench was not satisfied that the meeting which approved the alterations was a meeting called especially for the purpose of considering the proposed alterations within the meaning of rule 40 of the rules of the Applicant, thus, it was unable to find that the alteration which was authorised by an annual general meeting, was authorised in accordance with the rules - Full Bench not being satisfied that s.55(4)(a) of the Act had been complied with, refused and dismissed the application - Dismissed - United Firefighters Union of Western Australia -v- (Not applicable) - FBM 1 of 2003 - Full Bench - SHARKEY P/SCOTT C/HARRISON C - 03/06/03 - Unions....	1400
<sup>2</sup> Application for Declaration pursuant to s.71 of the I.R. Act - Applicant sought a declaration pursuant to s.71(2) of the Act that the CPSU and SPSF Group was the counterpart federal body of the CSA - Applicant argued that the requirements for issuing the declaration as prescribed in s.71(3) of the Act had been satisfied - The interveners alleged that the application was not filed in accordance with the rules and was therefore invalid - In written submissions which were tendered at the proceeding, it was submitted that the CSA Council did not have the power to 'regularise' or 'validate' ex post that which was done unlawfully because 'those powers' (sic) required specific statutory provisions - Full Bench reviewed CSA rules, Acts, authorities and found inter alia, that pursuant to s.71 of the Act, the branch was the counterpart federal body in relation to the state organisation, because the rules of which relating to the qualifications of persons for membership and prescribing the offices which shall exist within the branch were deemed to be the same as the rules of the state organisation relating to the corresponding subject matter - Full Bench concluded that it would grant the application and make the s.71 declaration sought, there being no valid obstacle to it being granted, and it being satisfied that, having regard to the provisions of s.71, the branch was the counterpart federal body to the applicant - Granted - Civil Service Association of Western Australia Incorporated - v- (Not applicable) - FBM 4 of 2003 - Full Bench - SHARKEY P/BEECH SC/SCOTT C - 23/05/03 - Unions .....	1403
Conference referred re refusal of Respondent to reclassify positions - Applicant Union argued that the Group-Worker positions have been "transformed" into Juvenile Justice Officer position and sought order that the permanent officers whose positions have been transformed to be reclassified with the positions - Respondent objected to and opposed the claim - Public Service Arbitrator reviewed authorities and relevant Acts and found that although it had the jurisdiction in s.80E, it was the case that an Arbitrator exercising that jurisdiction does not have the power to make an order directing a public service employer to act contrary to his or her obligations under the Public Sector Management Act 1994 - Commission concluded inter alia, that the Union's claim was not able to be granted by virtue of the legislative requirements for the appointment to public service positions - Dismissed - Civil Service Association of Western Australia Incorporated -v- Hon Attorney General - PSACR 9,10 of 2003 - Public Service Arbitrator - BEECH SC - 15/05/03 - Government Administration.....	1481
Application for orders to reverse decision of Respondent to reprimand and transfer an employee and to impose penalty on employee - Preliminary issues raised re Commission's jurisdiction to entertain the application - Applicant Union argued Respondent had not complied with the relevant provisions of the Public Sector Management Act 1994 and that its member had been denied natural justice - Respondent denied that Applicant member had been treated unfairly or inappropriately under the PSM Act - Commission considered relevant legislative provisions and declared, inter alia, that the proceedings were validly brought and Commission could enquire into and deal with the subject matter - Further, Commission reviewed relevant Acts, authorities, the Dodd and Archibald reports and found that there had not been strict compliance with statutory scheme, the process undertaken by the Respondent, as reflected in the Dodd and Archibald reports, constituted a denial of natural justice to the employee - Commission found that the failure by Respondent to afford employee an opportunity of being heard on the issue of penalty, following its findings of guilt in relation to the charges, was also a denial of natural justice and that Respondent's decision to impose penalty on employee ought be quashed - Upheld, Declaration and Order Issued - Mr G Johnston -v- Mr Ron Mance, Acting Director General Department of Education - APPL 2302 of 2001 - KENNER C - 06/08/01 - Education .....	1553
ALLOWANCE	
Conference referred re shift allowance - Applicant Union sought a declaration that a contractual entitlement existed that Groupworkers and Senior Groupworkers employed by the Respondent be paid the Commuted Shift Allowance when in receipt of workers' compensation benefits - Applicant Union argued that it was neither equitable nor in good conscience that the Respondent should withdraw the entitlement unilaterally - Respondent opposed the claim and argued that the declaration should not be granted - Further, Respondent argued inter alia, that Applicant had not met the tests necessary to demonstrate that the condition of payment of the Allowance was sufficiently well known or acquiesced in that it could be assumed by everyone entering into a contract that it would form part of the contract - Public Service Arbitrator applied tests and found that the evidence failed to meet one of the four essential tests, and it was unable to determine that a contractual entitlement existed in that regard - Further, PSA made no findings and drew no conclusions to the Applicant's argument regarding Respondent's alleged unilateral withdrawal of the payment as it had not been the subject of evidence, and was not properly before the Commission - Dismissed - Civil Service Association of Western Australia Incorporated -v- Director General, Department of Justice - PSACR 56 of 2002 - SCOTT C - 11/02/03 - Government Administration .....	295
Application re contractual entitlements - Applicants argued their contractual entitlement to four weeks notice had been confirmed by the Respondent and they should receive a further two weeks wages as payment in lieu of notice in accordance with what they believed their contractual arrangements entitled them to - Respondent argued the contractual entitlements have been discharged in full and payments made on termination were in line with arrangements entered into between the parties - Commission found that there was a contractual entitlement to four weeks pay on termination and that this was paid on the basis of two weeks notice and two weeks redundancy - Dismissed - Mr BK Farrell -v- Q Multimediu Limited - APPL 1335,1336 of 2001 - COLEMAN CC - 14/05/03 - Paper Manufacturing.....	1496

## CUMULATIVE DIGEST—continued

	Page
ANNUAL LEAVE	
Complaint re breach of Restaurant, Tearoom and Catering Award 1979 No. R48/1978 - Claimant argued that she was entitled to annual leave because although she was paid a casual rate she was in fact a part-time employee as evidenced by the regular hours, continuous employment and the rosters that she was required to work - Respondents argued that she left on her own accord and that she was not entitled to annual leave as she was a casual employee - Further, Respondents argued that she was a casual employee as evidenced by the pay rate she received and that she was aware that she was being paid casual rates - Industrial Magistrate found that she was working as a part-time employee notwithstanding that she was being paid a casual rate and thus she was entitled to annual leave - Granted - Ms KJ Broadfoot -v- Andrew Ha C/- Paramount Bar & Cafe & Other -M 56 of 2002 - Industrial Magistrate - Cicchini IM - 07/08/02 - Accommodatn, Cafes&Restaurants.....	300
Claim re breach of the Clerks (Accountants Employees) Award No. A8 of 1982 - Claimant argued that Respondent had breached clauses 7B(3), 12(1) 10(1) and 14(2) of the Award by virtue of his failure to pay her entitlements pursuant to those provisions upon termination - Defendant argued that Claimant was at all material times a casual employee and not entitled to annual leave or public holiday pay or payment in lieu of notice and that termination was in accordance with the terms of their written agreement - Industrial Magistrate concluded that there was a mutual expectation of continuity of employment because the written agreement between the parties was both permanent and long-term, that flexibility, of itself, does not render a permanent relationship a casual one and that Claimant did not fall within the definition of casual employees as provided by the Award - Further, that Claimant had proved that Defendant had breached the Award by failing to make the appropriate payment in lieu of notice and also by failing to pay holiday pay and annual leave entitlements - Reasons for Decision Issued - Mr RM D'Arcy -v- Professional Innovators Pty Ltd - M 272 of 2002 - Industrial Magistrate - 26/02/03 - Finance.....	513
Complaint re breach of award - Claimant Union argued that Defendant breached award by not paying member award entitlements such as sick leave, public holidays, annual leave or pay in lieu and redundancy payments - Defendant argued that there was no redundancy payments because employee had not been made redundant and that accrued annual leave was not paid because employee abandoned his job - Further, that employee was paid superannuation and long service leave but was not paid allowances - Industrial Magistrate reviewed award and evidence and found that Claimant had failed to prove that employee was employed in a classification covered by the Award; that employee was engaged in work which was substantially or wholly covered by the Award and that the Award applied to the Defendant's operations - Reasons for Decision Issued - Australian Liquor, Hospitality and Miscellaneous Workers Union, Western Australian Branch -v- Derby Frail Aged and Disabled Hostel - Ngamang Bawoona - CP 292 of 2000 - Industrial Magistrate - 28/08/00 - General Construction.....	518
Complaints re breach of Workplace Agreement - Respondent argued that Claimants failed to comply with section 54(1) of the Workplace Agreement Act 1993 by not including a certificate in the claim, which raised jurisdictional issues and that the Workplace Agreements to which Claimants were party precludes any claim relating to any period prior to the Workplace Agreement coming into effect, rendering the substantive claims untenable - Industrial Magistrate found that entitlements accrued prior to the Workplace Agreements coming into effect were not lost by virtue of provisions of the MCE Act - Further, IM found that the claims were fundamentally flawed by virtue of the fact that the certificate was not included in the claims and stated that fresh pleadings must be filed re entitlements under MCE Act - Dismissed - Mr D Davy -v- Austal Ships Pty Ltd - M 313,314,315,316,317,318,319,320 of 2002 - Industrial Magistrate - Cicchini IM - 13/02/03 - Water Transport.....	552
Complaint re breach of Workplace Agreement re unfair dismissal - Complainant argued that dismissal was unfair and sought reinstatement or compensation and that Defendant had failed to pay him entitlements under the workplace agreement including annual leave and sick leave - Defendant argued that Complainant had misappropriated money and also that Complainant had been overpaid owing Defendant approximately \$2000 - Industrial Magistrate found that Complainant had been unfairly dismissed and there was no evidence established that monies had been misappropriated - Further, Complainant was entitled to annual leave, sick leave and other remuneration - Reasons for Decision Issued - Mr ID Riley -v- Healy Airconditioning Pty Ltd - CP 1 of 2001 - Industrial Magistrate - Cicchini IM - 15/08/01 - Personal & Household Good W/sg.....	556
Complaint re breach of award - Claimant argued that she was employed on a part-time basis and was therefore entitled to annual leave and public holiday payments - Defendant argued that Claimant was a casual employee who had received casual loading, or in the alternative that the amount claimed should be offset against overpayment of wages - Industrial Magistrate found that Claimant was a part-time employee due to the substantial notice given when leave was taken and due to the mutual expectation of continuity of employment - IM found that payments made for a particular purpose cannot be attributed to another cause or purpose and therefore cannot operate to set-off or extinguish the totality of the amounts claimed - Granted - Ms JM Villanova -v- Balwa Pty Ltd T/as 7 Mile Inn - M 206,222,257,258,279 of 2002 - Industrial Magistrate - Cicchini IM - Accommodatn, Cafes&Restaurants.....	559
Application re unfair dismissal and contractual entitlements - Applicant argued that she was given insufficient notice of termination and was owed annual leave payments after having been forced to resign - Respondent argued that Applicant resigned of her own volition and therefore, was not entitled to notice or annual leave entitlements - Commission found that Applicant resigned of her own volition and not through actions by Respondent calculated to seriously damage the relationship of confidence and trust between parties - Commission found there was no constructive dismissal and Applicant was therefore not entitled to notice or annual leave payments - Dismissed - Mrs GFJ Greaves -v- The Sisters of Mercy Perth (Amalgamated) Inc trading as Santa Maria College - APPL 691 of 2002 - HARRISON C - 20/02/03 - Accommodatn, Cafes&Restaurants.....	596
Application re contractual entitlements - Applicant argued that he was owed wages, tool and fuel allowances, annual leave and superannuation - Respondent argued that it was not able to pay Applicant, as he no longer owns the business - Commission found that pursuant to the Minimum Conditions of Employment Act 1993, Applicant was entitled to be paid the wages he would have earned between 01/01/02 - 21/01/02, a proportion of the holiday pay as at 21/01/02 and superannuation, although it had no jurisdiction to enforce superannuation payments - Claim for tool and fuel allowance was not made out - Granted in Part - Mr D Smith -v- Zoulfikar Rahal - APPL 1538 of 2002 - BEECH SC - 03/12/02 - Other Services.....	614
Application re unfair dismissal and contractual entitlements - Applicant argued that Respondent's conduct evinced an intention to force him to resign and that he was left no option but to resign and that Respondent had breached a fundamental condition of the contract of employment in that it had failed to administer the bonus and failed to pay entitlements owed - Respondent argued that Applicant had tendered his resignation which was accepted and that the letter of resignation did not indicate any specific problems - Commission found that Applicant had tendered his resignation, that there was no linkage between the resignation and the bonus and Respondent did not breach the contract of employment - Further, Commission found that Respondent owed Applicant two days annual leave - Order Issued - Mr PA Hirschberg -v- Logica Pty Ltd - APPL 1518 of 2002 - SCOTT C - 07/03/03 - Health Services.....	1043
Application re unfair dismissal and denied contractual entitlements - Applicant argued the dismissal was unfair as the respondents refused to re-engage him upon his return from leave, that he made several attempts to contact the respondents to advise them of his availability for work upon his return from leave and that he should be paid denied contractual entitlements, pay in lieu of notice, reimbursement for fuel and purchases of materials and pro rata annual leave - Respondents argued they did not dismiss applicant, that his employment was of a casual nature, he did not regularly work 38 to 40 hours per week and that his employment was not covered by an award - Further, that Applicant was not entitled to notice or pro-rata annual leave, that applicant did not make any arrangements to take a period of leave and there was no indication from the applicant that he intended to return to work - Commission found inter alia, that in the circumstances of there being no application to extend time then the application was automatically out of time, that applicant's employment could not be regarded as casual for the purpose of any considerations of the employment contract coming to an end and as the applicant bears the onus of proving his case, and as Commission was unable to conclude in his favour, on the basis of the evidence having equal weight, then unfortunately for the applicant his case in respect of the unfair dismissal claim must fail - Further, Commission found that the claim for denied contractual entitlements and re-imbusement of expense of purchasing materials had been made out - Ordered Accordingly - Mr JG Bethell -v- Peter Raymond & Caroline A Hunt trading as PR Hunt Builders - APPL 1724 of 2002 - SCOTT C - 08/04/03 - Construction Trade Services.....	1181

## CUMULATIVE DIGEST—continued

	Page
<b>ANNUAL LEAVE—continued</b>	
Application re harsh, oppressive and unfair dismissal and contractual entitlements - Respondent argued that applicant was dismissed for gross misconduct, incompetence and neglect in the course of the performance of duties - Commission reviewed evidence and found inter alia, that Applicant's dismissal was not harsh, oppressive or unfair because Applicant knowingly allowed cheques to be issued when there were insufficient funds in the account - Further, Commission reviewed employment agreement, authorities and found on evidence that Respondent had discharged the onus upon it to show that the serious misconduct for which Applicant was dismissed had been made out, therefore the Respondent was entitled to dismiss Applicant in accordance with the terms of his employment agreement - Commission also found on evidence that Applicant had established that he was entitled to a benefit under his contract to which Respondent had denied him - Unfair dismissal claim dismissed and claim for denied contractual entitlements granted - Mr A Francois -v- Buzz Dance Theatre Limited - APPL 884 of 2002 - BEECH SC - 09/04/03 - Other Recreation Services .....	1198
Application re unfair dismissal and contractual entitlements seeking compensation, salary in lieu of notice, payment for bonuses, accrued annual leave, superannuation contributions and overtime payments - Applicant argued that there was no valid reason for her dismissal and that she was never warned her employment was in jeopardy, by reason of financial performance or otherwise - Respondent argued that Applicant's dismissal was for financial reasons, that Applicant had also breached her contract of employment by arranging placement of a friend on a without fee basis and that she displayed gross disloyalty by seeking alternative employment whilst she was engaged by the Respondent - Commission reviewed authorities, MCE Act and found inter alia, that there was a substantive and justifiable reason for the termination of the Applicant's employment and that Applicant had not established her claims - Dismissed - A McNamara -v- Loton Holdings Pty Ltd (ACN 00 - APPL 2223 of 2001 - KENNER C - 01/05/03 - Business Services .....	1224
Application re contractual entitlement seeking payment of one week's notice - Respondent argued the applicant's contract was terminated due to performance reasons - Commission found that applicant's employment was terminated at the employer's hands whilst on probation, that applicant was owed one week's pay in lieu of notice and ordered that respondent pay applicant the denied contractual entitlements - Granted - Mrs NN Gamlin -v- Capebay Holdings - APPL 1688 of 2002 - WOOD C - 17/04/03 - Property Services.....	1504
<b>APPEAL</b>	
<sup>2</sup> Appeal against Decision of Commission (82WAIG2188) re unfair dismissal - First Appeal No. FBA38/2002 - Appellant grounds of appeal was against the declaration that she was not dismissed in January 2001 and the order for compensation insofar as it "failed" to take account of the income that Appellant would likely have received from her participation in the on-call roster system operated by the Respondent - Second Appeal No. FBA39/2002 - Cross appeal by Respondent appealing against part of the decision relating to the Appellant's dismissal and her entitlement to compensation being a casual employee - Full Bench reviewed authorities, all of the evidence and material and all of the submissions, and found that there has been no error in the exercise of the discretion as alleged established, and no ground of appeal had been made out - Dismissed - Mrs CJ Byrne -v- Brian Ferrall Twaddle t/a Mount Hospital Pharmacy - FBA 38,39 of 2002 - Full Bench - SHARKEY P/GREGOR C/SCOTT C - 20/12/02 - Health Services .....	5
<sup>2</sup> Appeal against Decision of Industrial Magistrate (unreported) re breach of agreement - Appellant appealed against the Magistrate's refusal to make an order for costs - Application by Respondent to adduce new evidence was dismissed - Full Bench reviewed authorities and evidence and found on a number of reasons that the exercise of the discretion at first instance to deny an order for costs to the Appellant miscarried, and the Appellant had so established - Upheld and Remitted - The Construction, Forestry, Mining and Energy Union of Workers -v- Carl Anthony Perrot & Sandra Lee Perrott trading as C & S Perrott - FBA 44 of 2002 - Full Bench - SHARKEY P/BEECH SC/SCOTT C - 12/12/02.....	17
Appeal against Decision to suspend Union member - Appellant sought further orders for full discovery, production and inspection of documents and that Appellant had attended Respondent's premises for the purpose of examining documents which were produced but which were not available for copying and was concerned as to the allegedly vague nature those documents produced - Further, the documents which were provided did not allow Appellant to argue his case - Respondent argued that the preliminary investigation did not relate to a decision which the Board had power to adjust pursuant to S.80I of the Industrial Relations Act 1979 - Respondent also argued that there was nothing put forward to demonstrate why the documents should be made available to Appellant - Public Service Appeal Board found that there was nothing further which the Board ought do in respect of discovery, nothing new of substance had arisen which changed what was ordered on 20 September 2002 and that application for discovery ought to be dismissed - Dismissed - Mr S Kelly -v- Director General, Department of Justice - PSAB 12 of 2002 - Public Service Arbitrator - SCOTT C - 12/12/02 - Government Administration.....	183
<sup>1</sup> Appeal against Decision of Commission in Court Session (82WAIG544) re registration of new award - Appellant argued that there was a miscarriage of the discretion to make the award by Commission in Court Session and relied upon findings of CICS that a reason for the creation of the Appellant was for Burswood Resort (Management) Limited to avoid its legal obligations under the industrial agreement - Further, the CICS failed to properly exercise its jurisdiction or to properly exercise any discretion to make an award pursuant to Principle 10 of the Wage Fixing Principles - Respondent Union opposed the appeal - Industrial Appeal Court found and appreciated the serious nature of the inference that it was asked to draw and did not consider that that CICS applied the wrong test in law in drawing such inference - Further, IAC found that CICS was not in error in concluding that there was no breach of Wage Fixing Principle 10 in all the circumstances of this case, the terms of the award expressly excluded work done in competition with outside catering contractors - Dismissed - Burswood Catering and Entertainment Pty Ltd -v- Australian Liquor, Hospitality and Miscellaneous Workers Union, Western Australian Branch - IAC 5 of 2002 - Industrial Appeal Court - 18/12/02 - Accommodatn, Cafes&Restaurants .....	201
<sup>1</sup> Appeal against Decision of Commission in Court Session (82WAIG2432) re registration of a new award - Appellant argued that the CICS erred in law in finding that it had jurisdiction to determine the application and that there was no industrial matter between the parties of such nature as to give rise to jurisdiction in the Industrial Commission - Further, Appellant argued that any further proceedings or decision or determination of the Commission would be held or made in excess of or without jurisdiction - Respondent opposed the Appeal - Industrial Appeal Court found that the principal issue raised by the grounds of appeal were whether certain matters that were said to have been covered by an industrial agreement that was still in force between the parties could be dealt with by the Commission as industrial matters - Further, IAC found that no error had been demonstrated in the decision of the Commission in Court Session in determining that the Commission had jurisdiction to deal with the application, therefore, the appeal was dismissed - Dismissed - Burswood Resort (Management) Limited -v- Australian Liquor, Hospitality and Miscellaneous Workers Union, Western Australian Branch - IAC 9 of 2002 - Industrial Appeal Court - 18/12/02 - Accommodatn, Cafes&Restaurants.....	208
<sup>2</sup> Appeal against Decision of Commission (82WAIG2280) re unfair dismissal and contractual entitlements - Applicant argued that the learned Commissioner was in error when Commission failed to order general discovery and that such an order should have been made and thereby an error was made in the exercise of the Commission's discretion - Respondent argued and submitted that an order for discovery was not of such importance that in the public interest an appeal should lie and that the decision appealed against was both interlocutory and discretionary and could not readily be appealed against - Full Bench found that it would be loathe to consider an appeal on a point of practice and procedure or an interlocutory decision and thus unduly delay proceedings and reluctant to interfere with the exercise of the discretion of the Commission in such matters - Dismissed - Ms P Alderson -v- St Columba - Kingswood College - FBA 41 of 2002 - Full Bench - SHARKEY P/COLEMAN CC/HARRISON C - 30/01/03 - Education .....	215
<sup>2</sup> Appeal against Decision of Commission (82WAIG2195) re unfair dismissal - Appellant argued that the Commission and the Learned Commissioner did not act in equity, good conscience and substantial merits of the case, that the Learned Senior Commissioner did not see the alleged offensive gesture and thus, included contempt of court - Respondent argued that appeal should be dismissed - Full Bench found that the decision was a discretionary decision and that it was for Appellant to establish that the exercised discretion was miscarried - Further, Full Bench found that Appellant had failed to establish his case, that there was no evidence of procedural or substantive unfairness in the dismissal of the application established and no grounds of the appeal were made out - Dismissed - Mr R De Vos -v- Minit Australia Pty Ltd (ACN 000328825) - FBA 40 of 2002 - Full Bench - SHARKEY P/COLEMAN CC/WOOD C - 08/01/03 - Personal & Household Good Rtlg.....	219

## CUMULATIVE DIGEST—continued

APPEAL—continued	Page
<sup>2</sup> Appeal against Decision of Commission (82WAIG1298) re unfair dismissal - Appellant argued that Commissioner failed to direct himself as to the onus of proof with respect to the issue of probation and ought to have found that the onus of proof was with Respondent and ought to have found that Respondent on the balance of probabilities had failed to prove that a three month probationary period applied to the Appellant's employment contract - Respondent opposed the appeal - Full Bench found that this was a discretionary decision and the principle applied was that Full Bench had no warrant to interfere with the decision unless Appellant established that there was a miscarriage of the exercise of discretion at first instance - Full Bench found that the discretion was miscarried according to the principles from the evidence given by Appellant and upheld the Appeal - Appeal upheld and the decision at first instance varied - Mr R Koster -v- Volute Pty Ltd trading as Catt Design - FBA 32 of 2002 - Full Bench - SHARKEY P/GREGOR C/HARRISON C - 08/01/03 - Other Manufacturing .....	225
Appeal against Decision of Respondent in regards to disciplinary matters relating to an employee - Appellant Union argued that the procedure adopted by Respondent in this matter was so badly flawed that the findings, conclusions and the penalty could not be sustained and that the substance of the complaints could not be separated from the procedure - Further, Appellant argued that while the PSAB could adjust the decision it could only do so after reviewing what Respondent had done - Respondent argued that it undertook a preliminary investigation of the complaint formed a suspicion that employee had misconducted himself and then proceeded with a disciplinary process - Further, Respondent proceeded with a formal process as required by the PSM Act and relied on various legislation or policies in respect of each allegation of misconduct - Public Service Appeal Board found that many of the grounds of appeal were not made out and that the Respondent had obligations towards its employees regarding equal opportunity and sexual harassment - Further, PSAB found that the process had allowed employee natural justice in that he was provided with the allegations, that he had more than a reasonable opportunity to respond at the appropriate stages of the process and had taken the opportunities provided by him, thus PSAB were not satisfied that employee was denied natural justice - PSAB upheld the appeal as it related to the findings not being in the course of official duties and otherwise dismissed the appeal as it related to the issues of merit and process - Further, PSAB upheld the appeal in respect of the manner in which the Respondent had dealt with the imposition of the penalty - Upheld in part otherwise dismissed - Civil Service Association of Western Australia Incorporated -v- Director General, Department of Family and Children's Services - PSAB 4 of 2001 - Public Service Appeal Board - SCOTT C - 13/12/02 - Government Administration .	390
Appeal against Decision of Apprenticeship Tribunal re decision made on 27/09/2002 to allow a suspension of apprenticeship - Appellant argued that the Chairman erred in his findings as he accepted the submissions of Respondent and did not allow Appellant a full opportunity to present her case and documents - Respondent opposed the Appeal and argued that the suspension was warranted as Appellant was suspended for misconduct - Commission found that the Chairman's decision was discretionary and that Appellant had not proven on appeal that Chairman erred in the findings made - Further, Commission found that Chairman had correctly found aspects of misconduct on the part of the Appellant - Dismissed - Ms H Smith -v- Redz Hairdressing - APA 2 of 2002 - WOOD C - 28/01/03 - Personal and Other Services .....	400
<sup>1</sup> Appeal against Decision of Full Bench (82WAIG765) re breach of award in relation to underpayments and denial of benefits, flat hourly rate in excess of award entitlement for ordinary time, right of set-off, method of calculation of amount due to employee and whether claim truly for breach of award or for breach of over award agreement - IAC reviewed authorities, evidence and found inter alia, whether payment was made expressly or impliedly to cover a particular obligation, the payment could not be claimed as a set off, that the claim or the particulars of the claim was to enforce the award and not to enforce an over award agreement and that an application for enforcement of the terms and conditions of the award, could not proceed on the basis that what was due under the award was to be calculated by reference to the over award rate agreed between the parties - Upheld and Remitted - James Turner Roofing Pty Ltd -v- Mr CL Peters - IAC 7 of 2002 - Industrial Appeal Court - 10/03/03 - Construction Trade Services .....	427
<sup>1</sup> Appeal against Decision of Full Bench (82WAIG2409) re Long Service Leave entitlements - Question re jurisdiction - Appeal on ground that worker was an independent contractor and, whether appeal raised question of "construction and interpretation" of Long Service Leave Act, 1958 and Industrial Relations Act, 1979 - Industrial Appeal Court reviewed Acts, authorities and found that on the whole circumstances, it was open to both Industrial Magistrate and Full Bench to conclude that the relationship between employer and employee was never terminated in point of law and that it had jurisdiction to hear the appeal - Further, IAC concluded inter alia, that the Full Bench had not erred in the interpretation of the Long Service Leave Act, however, it had erred in misconstruing the nature of the power allowed to the Industrial Magistrate - Dismissed Act - United Construction Pty Ltd -v- Mr J Birighitti - IAC 11 of 2002 - Industrial Appeal Court - 27/02/03 - General Construction .....	434
<sup>2</sup> Appeal against Decision of Commission (82WAIG2579) re dismissed application to amend name of respondent - Appellant argued inter alia, that Commissioner at first instance erred in the exercise of her discretion by dismissing the application, by not correctly applying the principles and by failing to take into consideration or give sufficient weight to various facts - Appellant sought that the Orders at first instance be quashed, the application for change of name be allowed and the application alleging unfair dismissal seeking remedies be remitted to a different constituted Commission - Full Bench reviewed evidence, applied various principles and found that there was a genuine and reasonable mistake as to the identity of the employer and that the Commissioner erred by failing to consider or take into account the relevant fact, that by not permitting Appellant to join other parties in the event that one was not the correct party was an obvious occasion of likely severe detriment to the Appellant - Full Bench further found that the exercise of the discretion at first instance miscarried and had been established to have miscarried, having regard to the principles laid down in House v The King (op cit) - Upheld and Decision at first instance varied - Mr C Edwards -v- Pauline Dorn, Mirjana Tolich, Rosa Princi t/as Naval Garden Supplies & Other - FBA 45 of 2002 - Full Bench - SHARKEY P/BEECH SC/WOOD C - 27/02/03 - Other Personal Services .....	445
<sup>2</sup> Appeal against Decision of Commission (82WAIG2690) re unfair dismissal and contractual entitlements - There were two appeals against the Decision of the Commission and both were heard together - Appellant Respondent argued that Commissioner erred in law in finding that Applicant had been unfairly dismissed due to absence of reasonable notice and that Commissioner erred in law in finding that there was a failure to pay Applicant redundancy payment and a contractual entitlement for unpaid call outs - Appellant Applicant argued that Commissioner failed to take into account relevant factors namely the time that Appellant would take to return to previous remuneration levels and the consequent failure to compensate Appellant Applicant for such loss and injury - Full Bench found that the dismissal correctly was found to be harsh, oppressive and unfair because only three days notice of termination of the contract was given when three months notice was what should be implied - Further, Full Bench found that the loss caused by the unfair dismissal was the loss of reasonable notice quantifiable at and compensate by an amount equal to three months salary as ordered - Further, Full Bench dismissed Appeal No. FBA 47 of 2002 and Upheld Appeal No FBA 48 of 2002 in part and varied the decision at first instance by ordering the payment of an amount equal to one month's salary for compensation in addition to that already ordered to be paid - Orders issued - EPath WA Pty Ltd -v- Mr I Adriansz - FBA 47, 48 of 2002 - Full Bench - SHARKEY P/COLEMAN CC/BEECH SC - 21/02/03 - Health Services .....	454
<sup>2</sup> Appeal against Decision of Commission (82WAIG1298) re unfair dismissal - Full Bench issued supplementary reasons for decision regarding that monies might have been paid in reduction to the amount which the order subsequently ordered or will order to be paid was not a matter for the Full Bench - Further, Full Bench found that the part payment of the amount of the order was not a relevant matter to the order made - Order issued - Mr R Koster -v- Volute Pty Ltd trading as Catt Design - FBA 32 of 2002 - Full Bench - SHARKEY P/GREGOR C/HARRISON C - 12/02/03 - Other Manufacturing .....	465
Appeal pursuant to section 50 of the Construction Industry Portable Paid Long Service Leave Act 1985 re decision to refuse to recognise service towards an entitlement to long service leave - Applicant appealed against the decision of the Respondent to refuse to recognise service with Australian Skills Training Pty Ltd for the purposes of service towards an entitlement to long service leave and described his employment with the employer as being in the nature of construction work - Respondent argued that nature of work did not fall within the definition of construction industry and therefore could not attract credits towards long service leave - Board of Reference found that Applicant was not entitled to credits towards long service leave for the period employed with Australian Skills Training Pty Ltd as the employer was not and should not be registered as it was not in the construction industry - Reasons for Decision Issued - Mr C Rogers -v- Construction Industry Long Service Leave Payments Board - BOR 1 of 2002 - Board of Reference - SPURLING, J.A. - 12/02/03 - Construction Trade Services .....	562

## CUMULATIVE DIGEST—continued

## APPEAL—continued

- <sup>1</sup>Appeal against Decision of Full Bench (82WAIG212) re dismissed appeal in respect of an unfair dismissal claim - Appellant argued inter alia, that the Full Bench erred in law in failing to give proper consideration to and provide adequate reasons for two findings in particular, namely, that the requirements of the Minimum Conditions of Employment Act were complied with, and that the appellant waived his right to discuss the adverse effects of his redundancy at the meeting of the 18 May 2000 - Industrial Appeal Court reviewed authorities, Acts and evidence and found, inter alia, that the Appellant was entitled to succeed in his contention that Respondent employer failed to comply with his obligation to inform and discuss imposed upon the employer by s 41 of the MCE Act and that it was appropriate for the decisions made by the Commissioner and the Full Bench to be set aside and remitted to Commissioner Wood for a determination to be made as to whether the Appellant was entitled to relief having regard to the reasons of the Industrial Appeal Court - Upheld and Remitted - Mr GE Garbett -v- Midland Brick Company Pty Ltd - IAC 3 of 2002 - Industrial Appeal Court - 10/03/03 - Non-Metallic Min Product Mfg..... 893
- <sup>2</sup>Appeal against Decision of Commission (82WAIG3250) re transfer of an employee - Appellant argued that the Public Service Arbitrator erred in law in declaring that Appellant's decision to exclude the employee from the Broome Regional Prison was void, that the decision was within the Public Service Arbitrator's jurisdiction, and that the Appellant should not have ceased paying employee her ordinary salary - Appellant sought that the PSA's orders (1), (2) and (6) be quashed - Full Bench reviewed authorities and found inter alia, that the decision to exclude employee from Broome Regional Prison was an "industrial matter", and the decision to declare it void was within jurisdiction for that reason - Further, Full Bench found that the Arbitrator erred in ordering the Appellant to pay the employee indefinitely into the future when there was no evidence that she would perform any service, had performed any service or was entirely willing to - Upheld and order 6 of the decision at first instance quashed - Director General, Department of Justice (Formerly known as Ministry Of Justice) -v- Civil Service Association of Western Australia Incorporated - FBA 53 of 2002 - Full Bench - SHARKEY P/SCOTT C/WOOD C - 25/03/02 - Government Administration ..... 908
- <sup>2</sup>Appeal against Decision of Commission (82WAIG2690) re unfair dismissal and contractual entitlements - Solicitors for the Respondent wrote to the Commission requesting that the figure of compensation as contained in the Order of the Full Bench be amended because it was an incorrect figure and did not reflect the reasons for decision of the Full Bench - Full Bench concluded that pursuant to s.27(1)(m), it had jurisdiction to correct the order because the matter was still before the Commission until the 'slip rule error' in its order was corrected to reflect its decision - Supplementary Reasons for Decision and Correcting Order Issued - Mr I Adriansz -v- EPath WA Pty Ltd - FBA 48 of 2002 - Full Bench - SHARKEY P/COLEMAN CC/BEECH SC - 28/03/03 - Health Services ..... 917
- <sup>2</sup>Appeal against Decision of Commission (82WAIG3011) re unfair dismissal and contractual entitlements - Appellant argued that the Commissioner erred in having grave reservations about the evidence given by Applicant and that Commissioner erred in having no hesitation in preferring the evidence of Respondent to that of Appellant - Further, Commissioner erred in fact in finding that the written contracts were identical except for the commencement and expiry dates and erred in not finding that the true contract between the parties was a single ongoing contract of employment - Respondent opposed the appeal - Full Bench found that there was clear evidence that Appellant had entered and knew he had entered separate fixed term contracts which he recognised as did other witnesses as being different from permanent - Further, Full Bench found that there was no error in the decision in the first instance and that Commissioner correctly found that there was no dismissal and therefore the Commission was without jurisdiction and the appeal was dismissed - Dismissed - Mr R Gallotti -v- Argyle Diamond Mines Pty Ltd Trading as Argyle Diamonds - FBA 50 of 2002 - Full Bench - SHARKEY P/COLEMAN CC/BEECH SC - 13/03/03 - Other Mining ..... 919
- <sup>2</sup>Appeal against Decision of Commission (82WAIG3020) re unfair dismissal and contractual entitlements - Appellant argued that Commissioner erred in not finding that the dismissal was wrongful and erred in holding that there were implied in the Appellant's contract of employment the terms and conditions of Respondent's drug and alcohol policy - Further, Commissioner erred in not finding the Respondent's direction that Appellant undergo a random drug and alcohol test was unlawful and unreasonable and its subsequent conduct was unlawful, unreasonable and unfair and that Commissioner erred in not holding that the dismissal was harsh, oppressive or unfair - Respondent opposed the appeal - Full Bench found that Appellant's employment was governed by the Award and was harshly, oppressively or unfairly dismissed and that Commission should have found the Respondent had effected an unfair dismissal - Further, Full Bench found that the grounds were made out and that Full Bench was entitled to substitute the exercise of its discretion for that of the Commission at first instance applying the findings that should have been made - Appeal upheld and decision at first instance suspended and remitted to a Commissioner - Ms DCD Larkin -v- Boral Construction Materials Group Ltd - FBA 49 of 2002 - Full Bench - SHARKEY P/COLEMAN CC/BEECH SC - 20/03/03 - Other Mining ..... 929
- <sup>2</sup>Appeal against Decision of Commission (82WAIG3037) re unfair dismissal and contractual entitlements - Appellant sought leave to amend the grounds of appeal on the following grounds by deleting reference to Citigroup Pty Ltd in the heading of the Notice of Appeal as Citigroup Pty Ltd was in liquidation - First two Respondents submitted that the liquidator was not entitled to or required to appear and did not appear - Full Bench found that in reality it was not an application to amend the notice of appeal at all but an application to strike out Citigroup Pty Ltd (in liquidation) as a party to the appeal as there was no intention to proceed against Citigroup Pty Ltd on this appeal - Further, Full Bench found that the application should be dismissed on the merits in that it would deny Citigroup Pty Ltd a role in the appeal and may deny it natural justice and proceedings were otherwise adjourned to enable appellant to consider his position - Application to amend notice of appeal dismissed and appeal adjourned sine die - Mr AG Matthews -v- Cool or Cosy Pty Ltd; Ceil Comfort Home Insulation Pty Limited; Citigroup Pty Ltd - FBA 52 of 2002 - Full Bench - SHARKEY P/COLEMAN CC/GREGOR C - 18/03/03 - Various ..... 940
- Appeals against the Refusal by the Registrar to register Employer Employee Agreements - Appellant argued that the Deputy Registrar was in error when she refused registration of the EEA Agreements on the grounds that the EEAs did not comply with the requirements of s.97UY(3)(a) of the Industrial Relations Act 1979 in relation to the EEAs being presented for lodgement with the Registrar more than 21 days from the date of execution by the parties - Further, Appellant argued that Registrar may only refuse to accept an EEA for registration if it was presented for lodgement after the end of the 21 day period and had not complied with the Act in relation to lodgement requirements - An application for intervention was made by Mr Bibby, a duly authorised bargaining agent appointed by the parties to represent and intervene in the appeal proceedings - No appearance from Respondent - Commission found that the parties had complied with the regulations and had met the requirements in relation to lodgement - Further, Commission found that it was erroneous to conclude that the absence of the date of execution precluded acceptance by the Registrar of the lodgement of the EEAs for registration under the Act and that the Deputy Registrar erred in refusing the registration of the EEAs - Commission upheld the appeals, set aside the refusals and remitted the matters to the Registrar with the directions as set out in the Commission's order - Order and Direction Issued - City of Melville -v- Registrar - APPL 101,103,104,105,106,107 of 2003 - KENNER C - 28/03/03 - Government Administration ..... 1018
- <sup>2</sup>Appeal against Decision of Commission (unreported) re unfair dismissal - No steps had been taken by Appellant to proceed with the appeal - Full Bench on its own motion according to Practice Note 2 of 2000, required by notice to the parties to submit to the Commission in writing, should they wish to do so, whether the appeal should be dismissed there having been no steps taken to advance it for a period of 12 months - No submissions had been received, on behalf of Appellant - Written submissions had been received on behalf of the Respondent - Full Bench unanimously found inter alia, that the equity, good conscience and substantial merits of the case required that the case be dismissed and more particularly, it was not in the public interest that a matter which had not been prosecuted for such an inordinate period of time, should not be dismissed (see s.26(1)(a) and s.27(1)(a)(ii) of the Act) - Dismissed for want of prosecution - Mr G De Freitas -v- Youanmi Site Service Road Train Bulk Haulage - FBA 15 of 2002 - Full Bench - SHARKEY P/SCOTT C/WOOD C - 06/05/03 - Road Transport ..... 1129
- <sup>2</sup>Appeal against Decision of Commission (81WAIG1413) re unfair dismissal - On the day of the hearing Full Bench was advised by the Counsel for the Appellant that Appellant had died - Notwithstanding the opposition of the Agent for the Respondent, Full Bench adjourned the matter to enable the solicitors for the estate to consider what ought to be done - Application was made to substitute Appellant's wife as the executor of the will of the Appellant, as a party in lieu of the Appellant and application was not opposed - Full Bench reviewed authorities, Acts and found inter alia, that the order to substitute the executor for the deceased as Appellant was both necessary and required in order to serve the interests of justice, however, after the order for substitution was made, Appellant executor applied for leave to discontinue the appeal and the application was not objected to and was granted - Granted - Mr JA Fuller -v- North Beach Bowling Club - FBA 31 of 2001 - Full Bench - SHARKEY P/COLEMAN CC/BEECH SC - 05/05/03 - Sport and Recreation ... 1131

CUMULATIVE DIGEST—continued

APPEAL—continued	Page
<sup>2</sup> Appeal against Decision of Commission (83WAIG168) re unfair dismissal - Appellant argued that the Learned Commissioner erred in his findings, on numerous grounds relating to his employment relationship with the Respondent - Full Bench applied legal principles, reviewed indicia and authorities cited therein to determine the totality and the true nature of the contract and found inter alia, that it was open to the Commissioner at first instance to find, and the Commissioner should have found, that Appellant was an "employee" within the meaning of the definition of "employee" in s.7(a) of the Act, because he was a person employed by an employer to do work for hire or reward, and also because he was, within the meaning of the definition in s.7(b) of the Act, at all material times, a person whose usual status was that of an employee - Further, Full Bench found that Respondent was an employer because it was at all material times a company employing one or more employees, some of whom were not the Appellant, and that should have been so found - Full Bench found that the matter before the Commissioner was therefore an industrial matter as defined, and he was entitled to take cognisance of it pursuant to s.23 and s.29 of the Act - Upheld, Decision at first instance suspended and matter remitted to the Commission at first instance - Mr B Ryder -v- Beaulieu of Australia Limited - FBA 2 of 2003 - Full Bench - SHARKEY P/COLEMAN CC/GREGOR C - 29/04/03 - Personal & Household Good W/sg .....	1133
Appeal against decision to dismiss an employee - Appellant had not sought to prosecute her appeal - Public Service Appeal Board wrote to Appellant seeking answers to a number of questions on issues relating to her appeal - No respond from Appellant was received by the Board to ascertain why she had not proceeded with her appeal - PSAB found that Appellant would suffer no hardship if deprived of the opportunity to pursue her appeal, and there was no explanation as to what prejudice if any she might suffer by not being able to proceed - PSAB concluded that as Appellant had not responded at all and had not sought to prosecute the appeal after a period of 8 months from the date of filing of the appeal, that it was appropriate to order that the appeal be dismissed - Dismissed - Ms SM Almeida -v- Commissioner, Main Roads Western Australia - PSAB 11 of 2002 - Public Service Appeal Board - SCOTT C - 14/04/03 - Government Administration .....	1281
Appeal against decision to suspend made on 16/7/2002 - Preliminary issues re extension of time, perceived bias and whether matter ought proceed in public interest - Appellant argued that Respondent had failed to adhere to the disciplinary procedures and to comply with the requirements of the PSM Act 1994 - Appellant sought Orders that the Respondent's action be reviewed, modified, nullified and/or varied - Respondent argued that there had been no unlawful action undertaken and that the direction to the Appellant to not attend work did not constitute a suspension in accordance to the PSM Act 1994 - Further, Respondent argued that PSAB had no jurisdiction to deal with the matter and opposed the application for extension of time - Public Service Appeal Board invited the parties to make written submissions on whether or not the matter should proceed in the public interest - PSAB found that in accordance with the Act, the Board had a responsibility to manage the process of a particular case as it sees appropriate and the fact that Appellant would have preferred a different process did not meet the test of perceived bias - PSAB reviewed authorities and was unanimously of the view that the extension of time ought be granted because the Respondent had been made aware of the Appellant's challenge since the time expired for the filing of the appeal - PSAB concluded that there was no right of appeal to the Board arising from any action under s.82 of the PSM Act, there was no valid appeal before the board, in accordance with its jurisdiction and accordingly, had the Board the jurisdiction to deal with the matter, it would not have dismissed the appeal in the public interest as the passage of time and events had not resolved the matter or meant that it was merely academic to proceed - Orders Issued - Mr S Kelly -v- Director General, Department of Justice - PSAB 12 of 2002 - Public Service Appeal Board - SCOTT C - 17/04/03 - Government Administration .....	1283
<sup>1</sup> Appeal against Decision of Commission in Court Session (83WAIG57) re registration of an award - Appellant appealed on the ground that Commission in Court Session erred in law by wrongly construing or interpreting s41(6) of the I.R. Act, 1979 and Clause 45 of the Burswood International Resort Casino Employees Industrial Agreement 2001 AG 169 of 2001 - Appellant sought to have the decision of CICS quashed and the application for the award dismissed - Industrial Appeal Court reviewed authorities, I.R. Act, Agreement and the majority IAC found inter alia, that it was proper to have regard to the legislation as it stood as at the date of enforcement of the contract not at its entry date, that the relationship between the parties and the options available to them were regulated by statute and the statute extended the agreement to facilitate a smooth transition to its replacement at any time from the nominal expiry date of the agreement - Further, IAC found that it was not intended that an industrial agreement be used as a vehicle for altering the statutory scheme for facilitating the replacement of an industrial agreement after its nominal expiry date and that insofar as clause 45 prohibited the Respondent from taking steps for a substitute award as contemplated in s41 of the Act it was to that extend void - Dismissed - Burswood Resort (Management) Ltd -v- Australian Liquor, Hospitality and Miscellaneous Workers Union, Western Australian Branch - IAC 1 of 2003 - Industrial Appeal Court - Owen J./Scott J./Parker J. - 13/05/03 - Accommodatn, Cafes&Restaurants .....	1371
<sup>2</sup> Appeal against Decision of Commission (83WAIG155) re dismissed claim for compensation - Appellant argued that the learned Commissioner erred in law in dismissing his claim for compensation after finding that the termination of employment was unfair and in that respect the Commission failed to properly assess his loss arising from the unfair dismissal and was in error in taking into account entitlements paid by the respondent in the termination of employment arising from his redundancy - Appellant sought that there be a payment of compensation by the respondent, assessed for the loss that he suffered from the date of dismissal to the date of hearing - Full Bench applied legal principles and found that the Commissioner at first instance made no error in finding as she did, that Appellant suffered no loss because of the amount which he was paid, and no loss could or should be found to have been established - Further, Full Bench found that there was no error established in the exercise of the discretion and no ground of appeal had been made out - Dismissed - Mr PJ Caffery -v- Chubb Security Australia Pty Ltd t/as Chubb Protective Services - FBA 54 of 2002 - Full Bench - SHARKEY P/COLEMAN CC/BEECH SC - 01/05/03 - Personal and Other Services .....	1381
<sup>2</sup> Appeal against Decision of Commission (82WAIG3287) re unfair dismissal and contractual entitlements - Application by Appellant to amend grounds of appeal was dismissed - Appellant argued that the learned Commissioner erred in fact and in law in finding that the Appellant 'misconducted himself by not fulfilling the requirements of the job for which he claimed he had skills to undertake and for which he was employed' and in finding that the Appellant's contract of employment provided for a salary of \$60,000.00 per annum, to be paid pro-rata for the period of the nine month contract - Further, Appellant sought that the appeal be upheld and order of the Commission be set aside - Full Bench applied legal principles and found on evidence that the Commissioner was entitled and correct in finding as she did, that there was no error at first instance, discretionary or otherwise established by Appellant and that no ground of appeal was made out - Dismissed - Mr RA James -v- Australian Integration Management Services Corporation Pty Ltd - FBA 55 of 2002 - Full Bench - SHARKEY P/COLEMAN CC/GREGOR C - 23/05/03 - Other Services .....	1387
<sup>2</sup> Appeal against Decision of Commission (83WAIG1053) re dismissed unfair dismissal claim lodged out of time - Appellant argued that the learned Commissioner erred in law when having listed the Appellant's application for hearing he dismissed the application without hearing or taking any evidence on oath - Appellant sought orders that the appeal be upheld and decision at first instance be suspended and matter referred back to the Senior Commissioner - No appearance on behalf of the Respondent - Full Bench cited authorities and found inter alia, that Appellant was not afforded procedural fairness or natural justice because findings were made which assessed matters based on the mere plausibility of assertions of fact from the bar table instead of evidence on oath or affirmation subject to cross-examination - Upheld, Decision at first instance suspended and the matter remitted to the Commission at first instance to be heard and determined accordingly to law and the reasons of the Full Bench - Mr J Rodriguez -v- Parks Industries Pty Ltd - FBA 6 of 2003 - Full Bench - SHARKEY P/KENNER C/WOOD C - 06/06/03 - Other Services .....	1395
Appeals re reclassification of position - Parties agreed that the matter ought be dealt with by the Arbitrator on the basis of written submission - Public Service Arbitrator reviewed authorities and submissions and found that there was no industrial matter upon which Commission could exercise jurisdiction because at the time the Appellants filed Notices of Appeal, their employment was the subject of a Workplace Agreement pursuant to the Workplace Agreement Act 1993 - Dismissed for want of jurisdiction - Mr PE Bullen -v- WorkCover W.A - PSA 5,7,8 of 2000 - Public Service Arbitrator - SCOTT C - 22/05/03 - Government Administration .....	1551
<b>APPRENTICES AND JUNIORS</b>	
Application to vary Electrical Contracting Industry Award - Applicant Union sought to increase the rates of adult apprentices employed under the Award to an amount equivalent to the rates in the Metal Trades (General) Award by aligning the rate of adult apprentices to those of third year apprentices - Chamber of Commerce and Industry (CCI) sought to intervene on behalf of its members and as a section 50 party - Respondent and CCI opposed the application and argued that the claim should be dismissed because it was without merit, without precedent and that it imposed an unfair cost on employers - Commission found that application should be granted in part and ordered that a clause similar to that inserted in the Metal Trades (General) Award be granted in the Award - Award varied - COMM, ELECTRIC, ELECT, ENERGY -v- The Electrical Contractors' Association of Western Australia (Union of Employers) & Others - APPL 284 of 2001 - GREGOR C - 25/02/03 - Other Services .....	680

## CUMULATIVE DIGEST—continued

## AWARDS/AGREEMENTS - INTERPRETATION OF

	Page
<sup>2</sup> Application for a new award, Burswood International Resort Casino Employees Award 2002 - Applicant Union applied for the registration of the above award to replace and supersede the Burswood International Resort Casino Employees' Industrial Agreement Ag 169 of 2001 and the Burswood Island Resort Employees Award No. A23 and A25 of 1985 - Further, Applicant Union argued that the terms of the award were substantially those that applied to the employees of Respondent who had entered into an Australian Workplace Agreement and that it was unfair for the Respondent to discriminate against employees because they chose to be covered by a collective agreement registered under the Industrial Relations Act 1979 - Respondent argued that Applicant's claim should be dismissed under s.27(1)(a)(iii) of the IRC Act on the grounds that further proceedings were not necessary or desirable in the public interest as the Union's claim breached clause 45 of the registered agreement and in that it should not allow a party to press for a claim that was contrary to its own agreement - Further, Respondent argued that Union could not make out a claim under Principle 10 as it could not justify why the claim had not been progressed as an industrial agreement under s.41 of the Act and it was an abuse of the process because the purpose of the application was not directed at protecting existing employees whose conditions of employment were not regulated by the 2001 Agreement - Commission in Court Session found that that Applicant Union had made out a case under Principal 10 and that a new award should be issued - Further, CICS found that the operative date should be from 10 July 2002, the date the application was lodged in the Commission - Granted - Australian Liquor, Hospitality and Miscellaneous Workers Union, Western Australian Branch -v- Burswood Resort (Management) Limited - A 4 of 2002 - Commission in Court Session - SMITH C/WOOD C/HARRISON C - 25/11/02 - Accommodatn, Cafes&Restaurants.....	57
Application to vary the Metal Trades (General) Award 1966 No. 13 of 1965 - Applicant sought orders that its name be deleted from the Second Schedule list of Respondents of the award because of the administration burden from time to time when various amendments take place to the award - Respondents objected to the application because Applicant had been named in the award since the sixties and should be retained - Commission found that Applicant had no operations in the area or scope of the Award and that it was important to update its awards and orders to avoid named respondents that are not in the industry as it was not productive - Granted - Caterpillar of Aust -v- AUTO, FOOD, METAL, ENGIN UNION & Other - APPL 1190 of 2002 - GREGOR C - 24/12/02 - Metal Product Manufacturing.....	140
Application re contractual entitlements - Applicant argued that he should be paid for work performed by way of settled transactions that occurred after termination of his employment, and that he "closed" prior to his departure from Respondent - Respondent tendered a variety of documents relating to the matter which the Commission accepted as exhibits - Commission reviewed the relevant Agreement and found on evidence that the Applicant "closed" a number of transactions, prior to the termination of his employment, which subsequently became "Paid Deals" for the purposes of the Agreement - Further, Commission found that the claims in respect of these transactions were entitlements due to the Applicant under his contract with the Respondent - Granted in Part and Order Issued - Mr JDH Terry -v- Iaian Melotte, City Finance Pty Ltd - APPL 181 of 2002 - KENNER C - 04/12/02 - Finance.....	175
<sup>1</sup> Appeal against Decision of Commission in Court Session (82WAIG2432) re registration of a new award - Appellant argued that the CICS erred in law in finding that it had jurisdiction to determine the application and that there was no industrial matter between the parties of such nature as to give rise to jurisdiction in the Industrial Commission - Further, Appellant argued that any further proceedings or decision or determination of the Commission would be held or made in excess of or without jurisdiction - Respondent opposed the Appeal - Industrial Appeal Court found that the principal issue raised by the grounds of appeal were whether certain matters that were said to have been covered by an industrial agreement that was still in force between the parties could be dealt with by the Commission as industrial matters - Further, IAC found that no error had been demonstrated in the decision of the Commission in Court Session in determining that the Commission had jurisdiction to deal with the application, therefore, the appeal was dismissed - Dismissed - Burswood Resort (Management) Limited -v- Australian Liquor, Hospitality and Miscellaneous Workers Union, Western Australian Branch - IAC 9 of 2002 - Industrial Appeal Court - 18/12/02 - Accommodatn, Cafes&Restaurants.....	208
Application re interpretation of Western Australian Police Service Enterprise Agreement PSA AG 8 of 2001 - Applicant Union sought an interpretation of clause 37 - Entitlement to Leave and Allowances Through Illness or Injury of the Agreement - Applicant Union argued that by providing medical certificates to cover the period of absence, member had complied with the requirements and was entitled to payment - Respondent argued that there was a right to make enquiries and seek clarification including employees to attend a medical practitioner of employer's choosing - Public Service Arbitrator found that the application in its current form was not within the powers of the Commission to determine the interpretation - Further, if the question were posed differently Arbitrator found that the clause does not prescribe all the conditions which might reasonably apply for granting sick leave - Reasons for Decision Issued - Western Australian Police Union of Workers -v- Commissioner of Police - P 24 of 2002 - Public Service Arbitrator - SCOTT C - 04/02/03 - Government Administration.....	283
Complaint re breach of award - Claimant Union argued that Defendant breached award by not paying member award entitlements such as sick leave, public holidays, annual leave or pay in lieu and redundancy payments - Defendant argued that there was no redundancy payments because employee had not been made redundant and that accrued annual leave was not paid because employee abandoned his job - Further, that employee was paid superannuation and long service leave but was not paid allowances - Industrial Magistrate reviewed award and evidence and found that Complainant had failed to prove that employee was employed in a classification covered by the Award; that employee was engaged in work which was substantially or wholly covered by the Award and that the Award applied to the Defendant's operations - Reasons for Decision Issued - Australian Liquor, Hospitality and Miscellaneous Workers Union, Western Australian Branch -v- Derby Frail Aged and Disabled Hostel - Ngamang Bawoona - CP 292 of 2000 - Industrial Magistrate - 28/08/00 - General Construction.....	518
Complaint re breach of award - Claimant argued that she was employed on a part-time basis and was therefore entitled to annual leave and public holiday payments - Defendant argued that Claimant was a casual employee who had received casual loading, or in the alternative that the amount claimed should be offset against overpayment of wages - Industrial Magistrate found that Claimant was a part-time employee due to the substantial notice given when leave was taken and due to the mutual expectation of continuity of employment - IM found that payments made for a particular purpose cannot be attributed to another cause or purpose and therefore cannot operate to set-off or extinguish the totality of the amounts claimed - Granted - Ms JM Villanova -v- Balwa Pty Ltd T/as 7 Mile Inn - M 206,222,257,258,279 of 2002 - Industrial Magistrate - Cicchini IM - Accommodatn, Cafes&Restaurants.....	559
Complaint re breach of Shop and Warehouse (Wholesale and Retail Establishment) State Award 1977 No. R32 of 1976 - Claimants argued that Respondent had breached the award in relation to matters including display of roster, overtime, annual leave, times and wages record, other provisions and introduction of change - Further, Claimants argued that they were in effect Shop Assistants and not Store Managers as this was in name only - Respondent argued that there was a no case submission as Respondent was not bound by the award and Claimants were employed as Store Managers - Industrial Magistrate found that Respondent was bound by the award and that the Claimants were employed as a Store Manager and were paid as a Store Manager - Further, Industrial Magistrate found that they were not employed in any of the callings mentioned in the award - Dismissed - Mrs MA MacFarlane -v- Bed, Bath N. Table Pty Ltd - M 234,236 of 2002 - Industrial Magistrate - Tarr IM - 07/03/03 - Personal & Household Good Rtlg.....	1015
Appeals against the Refusal by the Registrar to register Employer Employee Agreements - Appellant argued that the Deputy Registrar was in error when she refused registration of the EEA Agreements on the grounds that the EEAs did not comply with the requirements of s.97UY(3)(a) of the Industrial Relations Act 1979 in relation to the EEAs being presented for lodgement with the Registrar more than 21 days from the date of execution by the parties - Further, Appellant argued that Registrar may only refuse to accept an EEA for registration if it was presented for lodgement after the end of the 21 day period and had not complied with the Act in relation to lodgement requirements - An application for intervention was made by Mr Bibby, a duly authorised bargaining agent appointed by the parties to represent and intervene in the appeal proceedings - No appearance from Respondent - Commission found that the parties had complied with the regulations and had met the requirements in relation to lodgement - Further, Commission found that it was erroneous to conclude that the absence of the date of execution precluded acceptance by the Registrar of the lodgement of the EEAs for registration under the Act and that the Deputy Registrar erred in refusing the registration of the EEAs - Commission upheld the appeals, set aside the refusals and remitted the matters to the Registrar with the directions as set out in the Commission's order - Order and Direction Issued - City of Melville -v- Registrar - APPL 101,103,104,105,106,107 of 2003 - KENNER C - 28/03/03 - Government Administration.....	1018

CUMULATIVE DIGEST—continued

	Page
AWARDS/AGREEMENTS - INTERPRETATION OF—continued	
<sup>1</sup> Appeal against Decision of Commission in Court Session (83WAIG57) re registration of an award - Appellant appealed on the ground that Commission in Court Session erred in law by wrongly construing or interpreting s41(6) of the I.R. Act, 1979 and Clause 45 of the Burswood International Resort Casino Employees Industrial Agreement 2001 AG 169 of 2001 - Appellant sought to have the decision of CICS quashed and the application for the award dismissed - Industrial Appeal Court reviewed authorities, I.R. Act, Agreement and the majority IAC found inter alia, that it was proper to have regard to the legislation as it stood as at the date of enforcement of the contract not at its entry date, that the relationship between the parties and the options available to them were regulated by statute and the statute extended the agreement to facilitate a smooth transition to its replacement at any time from the nominal expiry date of the agreement - Further, IAC found that it was not intended that an industrial agreement be used as a vehicle for altering the statutory scheme for facilitating the replacement of an industrial agreement after its nominal expiry date and that insofar as clause 45 prohibited the Respondent from taking steps for a substitute award as contemplated in s41 of the Act it was to that extend void - Dismissed - Burswood Resort (Management) Ltd -v- Australian Liquor, Hospitality and Miscellaneous Workers Union, Western Australian Branch - IAC 1 of 2003 - Industrial Appeal Court - Owen J./Scott J./Parker J. - 13/05/03 - Accommodatn, Cafes&Restaurants .....	1371
AWARDS	
<sup>3</sup> Application to vary Iron Ore Production and Processing (BHP Billiton Iron Ore Pty Ltd) Award 2002 - Applicants sought liberty to apply for a variation to the directions in essence on the grounds that the directions issued were unfair and unreasonable in terms of the time frames for the parties to file and serve their witness statements - Respondent argued that the witness statements be dealt with through simultaneous filing with an application for a new award - Commission in Court Session found that they were not in the view that the directions were either unfair or unreasonable and that the application to vary the directions issued was refused - Directions Issued - AUTO, FOOD, METAL, ENGIN UNION -v- BHP Billiton Iron Ore Pty Ltd - APPL 1646 of 2002 - Commission in Court Session - KENNER C/WOOD C/HARRISON C - 11/12/02 - Metal Ore Mining.....	21
<sup>3</sup> Application to vary the Hospital Salaried Officers' Award 1968 No. 39 of 1968 to incorporate a new classification structure for clinical psychologists and for the retrospective date of operation to have effect from 18 August 1997 - Applicant Union argued, inter alia, that the complexity of the profession, amounts to a significant change in work value and this should be recognised with increases in salary and the provision of a career structure for clinical psychologists - Respondents submitted numerous points and argued that the change in work value for the profession had been accommodated in classification restructuring that took place early 1990s, that pressures now being experienced by senior clinical psychologists could be overcome by the creation of more positions at higher levels and being filled on a "competitive basis" - Further, the development of professional skills evidenced by the use of more sophisticated tests and assessments and an involvement in direct patient referrals reflected normal development within a profession - Commission in Court Session considered evidence, submissions, authorities and Wage Fixing Principles and concluded that there had been a net increase in work value which was sufficient in the terms of the Work Value Principles, "to warrant the creation of a new classification or upgrading to a higher classification", however, they had reservations about the claim in its current form - CICS sought that the parties enter into discussions with a view to resolving the issues regarding the creation and filling more senior positions bearing in mind that the positions previously at lower level would move to higher increments and levels; and the creation of new grades and definitions for the establishment of higher level grades 3 to 5, and how those grades and definitions are to be reflected - CICS considered that there were special circumstances within the terms of s.39 of the Act, which made it fair and right to grant some degree of retrospectivity in the operation of any re-classification for clinical psychologists currently employed with the Respondents, who are re-classified as a result of this decision - CICS set the operative date from the 1st September 2001 - Matter divided and Granted in Part - Hospital Salaried Officers Association of Western Australia (Union of Workers) -v- Royal Perth Hospital & Others - P 39 of 1997 - Commission in Court Session - COLEMAN CC/BEECH SC/SCOTT C - 16/12/02 - Health Services .....	23
<sup>3</sup> Application for a new award, Burswood International Resort Casino Employees Award 2002 - Applicant Union applied for the registration of the above award to replace and supersede the Burswood International Resort Casino Employees' Industrial Agreement Ag 169 of 2001 and the Burswood Island Resort Employees Award No. A23 and A25 of 1985 - Further, Applicant Union argued that the terms of the award were substantially those that applied to the employees of Respondent who had entered into an Australian Workplace Agreement and that it was unfair for the Respondent to discriminate against employees because they chose to be covered by a collective agreement registered under the Industrial Relations Act 1979 - Respondent argued that Applicant's claim should be dismissed under s.27(1)(a)(iii) of the IRC Act on the grounds that further proceedings were not necessary or desirable in the public interest as the Union's claim breached clause 45 of the registered agreement and in that it should not allow a party to press for a claim that was contrary to its own agreement - Further, Respondent argued that Union could not make out a claim under Principle 10 as it could not justify why the claim had not been progressed as an industrial agreement under s.41 of the Act and it was an abuse of the process because the purpose of the application was not directed at protecting existing employees whose conditions of employment were not regulated by the 2001 Agreement - Commission in Court Session found that that Applicant Union had made out a case under Principal 10 and that a new award should be issued - Further, CICS found that the operative date should be from 10 July 2002, the date the application was lodged in the Commission - Granted - Australian Liquor, Hospitality and Miscellaneous Workers Union, Western Australian Branch -v- Burswood Resort (Management) Limited - A 4 of 2002 - Commission in Court Session - SMITH C/WOOD C/HARRISON C - 25/11/02 - Accommodatn, Cafes&Restaurants.....	57
Application to vary the Metal Trades (General) Award 1966 No. 13 of 1965 - Applicant sought orders that its name be deleted from the Second Schedule list of Respondents of the award because of the administration burden from time to time when various amendments take place to the award - Respondents objected to the application because Applicant had been named in the award since the sixties and should be retained - Commission found that Applicant had no operations in the area or scope of the Award and that it was important to update its awards and orders to avoid named respondents that are not in the industry as it was not productive - Granted - Caterpillar of Aust -v- AUTO, FOOD, METAL, ENGIN UNION & Other - APPL 1190 of 2002 - GREGOR C - 24/12/02 - Metal Product Manufacturing .....	140
<sup>1</sup> Appeal against Decision of Commission in Court Session (82WAIG544) re registration of new award - Appellant argued that there was a miscarriage of the discretion to make the award by Commission in Court Session and relied upon findings of CICS that a reason for the creation of the Appellant was for Burswood Resort (Management) Limited to avoid its legal obligations under the industrial agreement - Further, the CICS failed to properly exercise its jurisdiction or to properly exercise any discretion to make an award pursuant to Principle 10 of the Wage Fixing Principles - Respondent Union opposed the appeal - Industrial Appeal Court found and appreciated the serious nature of the inference that it was asked to draw and did not consider that that CICS applied the wrong test in law in drawing such inference - Further, IAC found that CICS was not in error in concluding that there was no breach of Wage Fixing Principle 10 in all the circumstances of this case, the terms of the award expressly excluded work done in competition with outside catering contractors - Dismissed - Burswood Catering and Entertainment Pty Ltd -v- Australian Liquor, Hospitality and Miscellaneous Workers Union, Western Australian Branch - IAC 5 of 2002 - Industrial Appeal Court - 18/12/02 - Accommodatn, Cafes&Restaurants .....	201
<sup>1</sup> Appeal against Decision of Commission in Court Session (82WAIG2432) re registration of a new award - Appellant argued that the CICS erred in law in finding that it had jurisdiction to determine the application and that there was no industrial matter between the parties of such nature as to give rise to jurisdiction in the Industrial Commission - Further, Appellant argued that any further proceedings or decision or determination of the Commission would be held or made in excess of or without jurisdiction - Respondent opposed the Appeal - Industrial Appeal Court found that the principal issue raised by the grounds of appeal were whether certain matters that were said to have been covered by an industrial agreement that was still in force between the parties could be dealt with by the Commission as industrial matters - Further, IAC found that no error had been demonstrated in the decision of the Commission in Court Session in determining that the Commission had jurisdiction to deal with the application, therefore, the appeal was dismissed - Dismissed - Burswood Resort (Management) Limited -v- Australian Liquor, Hospitality and Miscellaneous Workers Union, Western Australian Branch - IAC 9 of 2002 - Industrial Appeal Court - 18/12/02 - Accommodatn, Cafes&Restaurants .....	208
Application to vary Electrical Contracting Industry Award - Applicant Union sought to increase the rates of adult apprentices employed under the Award to an amount equivalent to the rates in the Metal Trades (General) Award by aligning the rate of adult apprentices to those of third year apprentices - Chamber of Commerce and Industry (CCI) sought to intervene on behalf of its members and as a section 50 party - Respondent and CCI opposed the application and argued that the claim should be dismissed because it was without merit, without precedent and that it imposed an unfair cost on employers - Commission found that application should be granted in part and ordered that a clause similar to that inserted in the Metal Trades (General) Award be granted in the Award - Award varied - COMM, ELECTRIC, ELECT, ENERGY -v- The Electrical Contractors' Association of Western Australia (Union of Employers) & Others - APPL 284 of 2001 - GREGOR C - 25/02/03 - Other Services.....	680

## CUMULATIVE DIGEST—continued

	Page
<b>AWARDS—continued</b>	
Application to vary Electrical, Engineering and Building Trades (West Australian Newspaper Limited) Award 1988 - Applicant Union sought to update allowances in accordance with the State Wage Principles (82WAIG1386) - Respondent consented to the variation - Commission varied the award by consent - Granted - COMM, ELECTRIC, ELECT, ENERGY -v- West Australian Newspapers Ltd - APPL 1866 of 2002 - WOOD C - 12/02/03 - Other Services.....	683
Application to vary Children's Services (Private) Award, Children's Services Consent Award 1984 and Child Care (Subsidised Centres) Award - Applicant Union argued that the variation to the awards are substantially the same, to insert the recent changes to the Community Services (Child Care) Regulations 1988 - Applicant Union sought to have inserted in each award a new classification for an 'E Worker' which was a class of child care worker that had been recently created under the Regulations, also including reimbursements of certain expenses - Respondent argued there was no objection to the creation of an E classification within the awards however objected to two steps rates being inserted and opposed the application for the allowances - Commission found that the applications were brought pursuant to the Statement of Principles in the 2001 State Wage Case decision and provided for the work value changes - Further, Commission was satisfied that the creation of an E classification should be created pursuant to the Work Value Principle and that the two step rates were properly struck and that the allowances should be allowed with concessions - Ordered Accordingly - Australian Liquor, Hospitality and Miscellaneous Workers Union, Western Australian Branch -v- Bassendean Day Care Centre - APPL 1280,1281,1282 of 2001 - SMITH C - 04/02/02 - Other Services.....	958
Application to vary Metal Trades (General) Award - Applicant sought to vary Award by increasing rates of allowances - Respondent argued that the claim was unfair in that it would provide for payments of a significant sum to employees in the industry with a significant departure from existing award conditions - Commission directed the parties to have discussions about the issues and then to report back which the parties did not do so - Commission found that the application presented confusing arguments and had decided in view of its history the application be dismissed - Dismissed - AUTO, FOOD, METAL, ENGIN UNION -v- Anodisers W.A. - APPLA 1756B of 2001 - COLEMAN CC - 24/03/03 - Metal Product Manufacturing.....	975
<sup>1</sup> Appeal against Decision of Commission in Court Session (83WAIG57) re registration of an award - Appellant appealed on the ground that Commission erred in law by wrongly construing or interpreting s41(6) of the I.R. Act, 1979 and Clause 45 of the Burswood International Resort Casino Employees Industrial Agreement 2001 AG 169 of 2001 - Appellant sought to have the decision of CICS quashed and the application for the award dismissed - Industrial Appeal Court reviewed authorities, I.R. Act, Agreement and the majority IAC found inter alia, that it was proper to have regard to the legislation as it stood as at the date of enforcement of the contract not at its entry date, that the relationship between the parties and the options available to them were regulated by statute and the statute extended the agreement to facilitate a smooth transition to its replacement at any time from the nominal expiry date of the agreement - Further, IAC found that it was not intended that an industrial agreement be used as a vehicle for altering the statutory scheme for facilitating the replacement of an industrial agreement after its nominal expiry date and that insofar as clause 45 prohibited the Respondent from taking steps for a substitute award as contemplated in s41 of the Act it was to that extend void - Dismissed - Burswood Resort (Management) Ltd -v- Australian Liquor, Hospitality and Miscellaneous Workers Union, Western Australian Branch - IAC 1 of 2003 - Industrial Appeal Court - Owen J./Scott J./Parker J. - 13/05/03 - Accommodatn, Cafes&Restaurants .....	1371
Application to vary a number of Independent Schools Awards - Applicant Union sought to incorporate terms and conditions applying in the non-government schools' sector, and to bring the awards in line with the provisions of the Workplace Relation Act 1996 covering termination of employment, and to incorporate requirements included in the Minimum Conditions of Employment Act 1993, the Superannuation Guarantee (Administration) Act 1992, the I.R. Act 1979 and increases to allowances pursuant to Principle 5 of the Statement of Principles of the 2002 State Wage Case - Applicant Union argued inter alia, that the terms of variations relating to redundancy and long service leave incorporate conditions currently applying to the majority of employees covered by the awards and employees not covered by enterprise agreements should not be excluded from the terms of these provisions - Respondent argued that the operative date for all variations should be the date of hearing except those relating to redundancy, payment of relief psychologists and houseparents should have a prospective date of 1 January 2004 as variations involve budgetary issues for some respondents - Commission was satisfied that the variations relating to redundancy and long service leave brought under Principle 10 of the 2002 State Wage Case, should be incorporated into the awards - Commission refused to grant a retrospective date for the operation of the variations relating to redundancy and found it had insufficient evidence as to when an agreement was reached in relation to that issue - Commission found that respondents have had substantial notice of the nature of all the proposed variations, that there had been no details about any hardship that will be suffered if the operative date was to be date of hearing and accepted Applicant's argument that an operative date of 1 January 2003 was appropriate for the variation - Awards Varied - INDEPENDENT SCHOOLS SAL OFFIC -v- The Anglican Schools Commission (Inc.) & Others - APPL 922,1045,1046,1047 of 2002 - HARRISON C - 04/06/03 - Education.....	1425
<b>BOARD OF REFERENCE</b>	
Appeal pursuant to section 50 of the Construction Industry Portable Paid Long Service Leave Act 1985 re decision to refuse to recognise service towards an entitlement to long service leave - Applicant appealed against the decision of the Respondent to refuse to recognise service with Australian Skills Training Pty Ltd for the purposes of service towards an entitlement to long service leave and described his employment with the employer as being in the nature of construction work - Respondent argued that nature of work did not fall within the definition of construction industry and therefore could not attract credits towards long service leave - Board of Reference found that Applicant was not entitled to credits towards long service leave for the period employed with Australian Skills Training Pty Ltd as the employer was not and should not be registered as it was not in the construction industry - Reasons for Decision Issued - Mr C Rogers -v- Construction Industry Long Service Leave Payments Board - BOR 1 of 2002 - Board of Reference - SPURLING, J.A. - 12/02/03 - Construction Trade Services .....	562
<b>BONUS</b>	
Application re contractual entitlements - Applicant argued that he was entitled to a bonus under his contract of service which had not been paid and that the specified target had been achieved thus there was no reason not to pay bonus - Respondent argued that the bonus was a discretionary payment and there was no entitlement to a bonus - Commission found that there was a contract of employment, that there was an entitlement to bonus payment and that Applicant was entitled to the bonus payment - Granted - Mr JH Nolan -v- Signature Security Group Pty Ltd - APPL 939 of 2002 - GREGOR C - 10/12/02 - Machining and Motor Veh Whlslg .....	164
Application re unfair dismissal and contractual entitlements - Applicant argued that Respondent's conduct evinced an intention to force him to resign and that he was left no option but to resign and that Respondent had breached a fundamental condition of the contract of employment in that it had failed to administer the bonus and failed to pay entitlements owed - Respondent argued that Applicant had tendered his resignation which was accepted and that the letter of resignation did not indicate any specific problems - Commission found that Applicant had tendered his resignation, that there was no linkage between the resignation and the bonus and Respondent did not breach the contract of employment - Further, Commission found that Respondent owed Applicant two days annual leave - Order Issued - Mr PA Hirschberg -v- Logica Pty Ltd - APPL 1518 of 2002 - SCOTT C - 07/03/03 - Health Services.....	1043
Application re unfair dismissal and contractual entitlements seeking compensation, salary in lieu of notice, payment for bonuses, accrued annual leave, superannuation contributions and overtime payments - Applicant argued that there was no valid reason for her dismissal and that she was never warned her employment was in jeopardy, by reason of financial performance or otherwise - Respondent argued that Applicant's dismissal was for financial reasons, that Applicant had also breached her contract of employment by arranging placement of a friend on a without fee basis and that she displayed gross disloyalty by seeking alternative employment whilst she was engaged by the Respondent - Commission reviewed authorities, MCE Act and found inter alia, that there was a substantive and justifiable reason for the termination of the Applicant's employment and that Applicant had not established her claims - Dismissed - A McNamara -v- Loton Holdings Pty Ltd (ACN 00 - APPL 2223 of 2001 - KENNER C - 01/05/03 - Business Services .....	1224
<b>BREACH OF ACTS/AWARDS/ORDERS</b>	
Complaint re breach of Award - Claimant's Union sought to amend the claim by substituting the employee's name as the claimant - Industrial Magistrate reviewed various Acts and Regulations and found that there was a fundamental flaw in the claim, that there was simply no evidence, which could enable it to exercise its discretion even though it had the power to do so pursuant to Order 16 Rule 1 of the Local Court Rules 1961, therefore, the application was refused - Struck out for want of jurisdiction - AUTO, FOOD, METAL, ENGIN UNION -v- Austal Ships Pty Ltd - M 375 of 2001 - Industrial Magistrate - Cicchini IM - 18/11/02 - Machinery & Equipment Mfg.....	298

## CUMULATIVE DIGEST—continued

	Page
<b>BREACH OF ACTS/AWARDS/ORDERS—continued</b>	
Complaint re breach of award - Complainant Union signalled their intention to amend the claims so that they were not predicated upon the applicability of the Award - Respondent argued that the applications be dismissed and sought costs in relation to the applications as it attempted to resolve matters by way of agreement but was forced to make applications in order to resolve the issues - Industrial Magistrate found that the claims could not be amended as that would be tantamount to raising a new cause of action - Further, Industrial Magistrate found that Respondent had been put to cost in bringing these applications to finally resolve the matters and had incurred expenses in doing so - Reasons for Decision Issued - AUTO, FOOD, METAL, ENGIN UNION -v- Bell-A-Bike Rottneest Pty Ltd - M 268, M 270, M 271, M 272, M 286 of 2001 - Industrial Magistrate - Cicchini IM - 15/01/03 - Personal Services .....	299
Complaint re breach of Restaurant, Tearoom and Catering Award 1979 No. R48/1978 - Claimant argued that she was entitled to annual leave because although she was paid a casual rate she was in fact a part-time employee as evidenced by the regular hours, continuous employment and the rosters that she was required to work - Respondents argued that she left on her own accord and that she was not entitled to annual leave as she was a casual employee - Further, Respondents argued that she was a casual employee as evidenced by the pay rate she received and that she was aware that she was being paid casual rates - Industrial Magistrate found that she was working as a part-time employee notwithstanding that she was being paid a casual rate and thus she was entitled to annual leave - Granted - Ms KJ Broadfoot -v- Andrew Ha C/- Paramount Bar & Cafe & Other - M 56 of 2002 - Industrial Magistrate - Cicchini IM - 07/08/02 - Accommodatn, Cafes&Restaurants .....	300
Complaint re alleged breach of Section 49(M)(1) of the I.R. Act 1979 - Applicant Union argued that Respondents had breached section 49(M) of the IR Act and sought injunctive relief against Respondents and interim orders pursuant to section 83E(5) of the Act to prevent further breaches - Respondents argued and opposed the applications seeking interim orders and made application for the adjournment of the matters - Further, Respondents argued that there were proceedings on foot in the Federal Court of Australia with respect to substantially the same matter which struck at the validity of the relevant provisions referred to and that this Court should defer its consideration of the matter pending the determination of the matter by the Federal Court of Australia - Further, Honourable Minister for Employment and Workplace Relations of the Commonwealth of Australia sought leave to intervene - Industrial Magistrate found that there was no legislative basis for intervention, that the Court did not possess inherent jurisdiction as it was a creature of statute and it operated within the statutory framework provided - Further, IM found that it was undesirable for the matter to proceed until the Federal Court had dealt with the matter and had determined it as there would be a final determination of the constitutional issues before these proceedings and thus acceded to the applications made by Respondents for an adjournment of the proceedings - Reasons for Decision Issued - The Construction, Forestry, Mining and Energy Union of Workers -v- Woodside Energy Limited (ABN 63 005 482 986) & Other - M 304 of 2002 - Industrial Magistrate - Cicchini IM - 27/11/02 - Oil and Gas Extraction .....	302
Complaint re alleged failure to comply with C S Perrott Industrial Agreement No. AG 191 of 1997 and the Building Trades (Construction) Award No. 14 of 1978 - Claimant Union argued that Respondents breached the agreement by failing to pay site allowance, the correct redundancy entitlements, accrued sick leave on termination and failed to apply the first on - last off requirement - Further, Claimant Union argued that Respondent had committed various breaches of the Award including failure to pay fares and travelling allowance and failure to provide time and wages records as requested - Respondents argued that the worker was not an employee but rather a subcontractor and denied that worker was engaged pursuant to the Agreement - Further, Respondents denied they were liable to pay site allowance, redundancy entitlements and sick leave indeed they claim that he had been overpaid for fares and travelling and into the superannuation fund - Industrial Magistrate found that the alleged breaches had been proven with the exception of one being the failure to apply the first on - last off requirement - IM also imposed penalties and awarded prejudgement interest and refused the application for costs - However, after claim for costs was remitted back to Industrial Magistrate from Full Bench, IM ordered Respondents to pay costs to Claimant - Reasons for Decision Issued - Construction, Forestry, Mining and Energy Union -v- Carl Anthony Perrot & Sandra Lee Perrott trading as C & S Perrott - M 18 of 2002 - Industrial Magistrate - Cicchini IM - 17/07/02 - Construction Trade Services .....	305
Complaint re breach of Restaurant, Tearoom and Catering Workers Award No. R48 of 1978 - Claimant argued that Respondent had failed during the period of employment to pay him appropriate wages and overtime in accordance with the provisions of clauses 10 and 21 of the Award that bound Respondent - Respondent admitted that the Award bound the parties and that Claimant worked as a full time chef for the Respondent but denied it had breached the Award as alleged - Further, Respondent informed the Industrial Magistrate's Court that it had over the material period inadvertently underpaid Claimant \$7,745.00 however denied the claim - Industrial Magistrate found that Claimant had failed to establish on the balance of probabilities that he had worked the times he alleged and thus failed to establish each alleged breach - Further, Industrial Magistrate made an order in favour of Claimant with respect to the amount of \$7,745.00 - Reasons for Decision issued - Mr A Kaew-Ard -v- Sawasdee Pty Ltd - M 193 of 2002 - Industrial Magistrate - Cicchini IM - 06/02/03 - Accommodatn, Cafes&Restaurants .....	314
Complaints re authority of Claimant to file claim re breach of award - Respondent sought that the claims be dismissed or otherwise amended so that it comply with the Act - Further, Respondent argued that Claimant lacked standing to bring the claims and that his appointment as an inspector under s.84(2) of the Workplace Relations Act 1996 was not validly made - Claimant argued against the Respondent's submissions - Industrial Magistrate found that Respondent's arguments were baseless and unsupported by authority, that the applications brought by Respondent were misconceived, based on its erroneous interpretation of the relevant provisions and regulations - IM further found that Respondent's interlocutory applications should be dismissed and the Claimant's interlocutory applications be allowed - Upheld - Greg Logan-Scales, Department of Consumer & Employment Protection -v- Olten Pty Ltd (ACN 076 543 130) t/a MSA Security - M 248,249 of 2002 - Industrial Magistrate - Cicchini IM - 27/11/02 - Business Services .....	323
Complaint re breach of Enterprise Bargaining Agreement - Claimant Union argued that Defendant had breached Clause 22(b) of the Agreement by failing to pay public holiday penalties - Defendant denied claim and argued inter alia, that employees were paid according to the EBA - Industrial Magistrate reviewed Acts, Agreement and found inter alia, that the application of the clause in this instance had the effect of producing an inequitable result for employees that worked on public holidays and that all employees were technically adequately compensated whether they work on the public holiday or the day in lieu thereof - Reasons for Decision Issued - The Australian Nursing Federation, Industrial Union of Workers Perth -v- Silver Chain Nursing Association Inc - CP 61,62 of 2000 - Industrial Magistrate - Cicchini IM - 23/11/00 - Health Services .....	508
Claim re breach of the Clerks (Accountants Employees) Award No. A8 of 1982 - Claimant argued that Respondent had breached clauses 7B(3), 12(1) 10(1) and 14(2) of the Award by virtue of his failure to pay her entitlements pursuant to those provisions upon termination - Defendant argued that Claimant was at all material times a casual employee and not entitled to annual leave or public holiday pay or payment in lieu of notice and that termination was in accordance with the terms of their written agreement - Industrial Magistrate concluded that there was a mutual expectation of continuity of employment because the written agreement between the parties was both permanent and long-term, that flexibility, of itself, does not render a permanent relationship a casual one and that Claimant did not fall within the definition of casual employees as provided by the Award - Further, that Claimant had proved that Defendant had breached the Award by failing to make the appropriate payment in lieu of notice and also by failing to pay holiday pay and annual leave entitlements - Reasons for Decision Issued - Mr RM D'Arcy -v- Professional Innovators Pty Ltd - M 272 of 2002 - Industrial Magistrate - 26/02/03 - Finance .....	513
Complaint re breach of award - Claimant Union argued that Defendant breached award by not paying member award entitlements such as sick leave, public holidays, annual leave or pay in lieu and redundancy payments - Defendant argued that there was no redundancy payments because employee had not been made redundant and that accrued annual leave was not paid because employee abandoned his job - Further, that employee was paid superannuation and long service leave but was not paid allowances - Industrial Magistrate reviewed award and evidence and found that Complainant had failed to prove that employee was employed in a classification covered by the Award; that employee was engaged in work which was substantially or wholly covered by the Award and that the Award applied to the Defendant's operations - Reasons for Decision Issued - Australian Liquor, Hospitality and Miscellaneous Workers Union, Western Australian Branch -v- Derby Frail Aged and Disabled Hostel - Ngamang Bawoona - CP 292 of 2000 - Industrial Magistrate - 28/08/00 - General Construction .....	518
Claim re breach of award seeking redundancy payment - Claimants argued that they were made redundant, that restructuring was orchestrated at achieving resignations and also sought to recover costs, and the imposition of a penalty upon Respondent for the breach - Respondent argued that as a result of low occupancy rates, a decision was made to restructure and alternative positions was offered, however both Claimants abandoned their employment - Industrial Magistrate reviewed authorities and found on evidence that there was no redundancy in either case, that Claimants were offered alternative employment without loss of entitlements and that the employment relationship came about at the initiative of the Claimants - Reasons for Decision Issued - Ms KF Franz -v- R.D. Miles & Co. Pty Ltd (ACN 008 727 866) - M 292,405 of 2001 - Industrial Magistrate - Cicchini IM - 08/08/01 - Health Services .....	527

CUMULATIVE DIGEST—*continued*

	Page
<b>BREACH OF ACTS/AWARDS/ORDERS—<i>continued</i></b>	
Claim re breach of Workplace Agreement - Claimant argued that he was owed payment for being on call - Defendant argued a lack of jurisdiction and that there was no provision for an availability allowance due to payment in excess of that normally paid to a practitioner and the need to have been rostered on, which the Claimant wasn't - Defendant argued that dispute was capable of resolution as per the Dispute Settlement Procedure contained in the WPA - Industrial Magistrate found that the allowance was not subject to rostering provisions and Claimant was therefore entitled to recover payment pursuant to the terms of the WPA, that the Claimant complied with the Dispute Settlement Procedure, that there was no jurisdictional impediment and that the Defendant underpaid the Claimant - Reasons for Decision Issued - Dr J Gill -v- Commissioner of Health - M 26 of 2002 - Industrial Magistrate - Cicchini IM - 20/12/02 - Health Services.....	532
Claim re breach of Order - Claimant Union argued that Defendant contravened a Commission order - Defendant argued that Claimant refused to obey a lawful and reasonable instruction - Industrial Magistrate found that Claimant's refusal to carry out duties resulted from medical advice, therefore, it could not reasonably comply with the direction - Further, IM found that the Order was flagrantly breached, that proceedings were vexatiously defended and ordered Defendant to pay costs and a penalty to the Claimant - Reasons for Decision Issued - Australian Liquor, Hospitality and Miscellaneous Workers Union, Western Australian Branch -v- Burswood Resort (Management) Ltd - M 175 of 2001 - Industrial Magistrate - Cicchini IM - 12/12/02 - Accommodatn, Cafes&Restaurants.....	541
Complaint re breach of Enterprise Bargaining Agreement - Claimant Union argued that Respondent had failed to comply with clause 9.1(b) of the Chubb-Westrail Enterprise Bargaining Agreement 2001 and sought Orders that Defendant comply with the EEA by paying employee monies due, penalty rates and pay Claimant Union the costs and expenses to these proceedings - Defendant argued that on the strength of the police charge, the Claimant was guilty of serious misconduct warranting termination - Industrial Magistrate found that the Claimant failed to prove on the balance of probabilities that the EBA was breached - Dismissed - Australian Liquor, Hospitality and Miscellaneous Workers Union, Western Australian Branch -v- Chubb Security Australia Pty Ltd - M 277,309 of 2002 - Industrial Magistrate - Cicchini IM - 26/02/03 - Personal Services.....	546
Complaint re breach of award - Complainant argued that Defendant failed to keep proper time and wages records - Defendant argued that other records exist which may comply with award requirements - Industrial Magistrate found that the defendant failed to keep proper time and wages records and imposed a penalty of one tenth of the maximum penalty - Reasons for Decision Issued - LIQUOR, HOSPITALITY & MISC -v- Olten Pty Ltd - CP 235 of 1999 - Cicchini IM - 14/12/02 - Other Services.....	549
Complaint re breach of Workplace Agreement - Claimant sought unpaid entitlements pursuant to the workplace agreement, including claims for pre-judgment interest, penalties pursuant to s83(6) of the I.R. Act, 1979 and costs - Defendant conceded that the Claimant was entitled to payment for normal working hours and holiday pay but denied liability for the payment of pay in lieu of notice, maintaining that the Claimant resigned, and in such circumstances was not entitled to pay in lieu of notice under the workplace agreement - Industrial Magistrate was not satisfied based on the evidence presented that the Claimant was dismissed, therefore his claim for one week's pay in lieu of notice was dismissed - Further, IM issued Orders by consent, that Respondent pay the Claimant the amount of \$1058.00 plus interest fixed at \$40.00, and reimburse the Claimant the amount of \$40.00 being the cost of making the claim - Reasons for Decision Issued - Mr P Maindok -v- Cabletech Electrical Pty Ltd - M 124 of 2001 - Industrial Magistrate - Tarr IM - 22/11/01 - Other Services.....	551
Complaints re breach of Workplace Agreement - Respondent argued that Claimants failed to comply with section 54(1) of the Workplace Agreement Act 1993 by not including a certificate in the claim, which raised jurisdictional issues and that the Workplace Agreements to which Claimants were party precludes any claim relating to any period prior to the Workplace Agreement coming into effect, rendering the substantive claims untenable - Industrial Magistrate found that entitlements accrued prior to the Workplace Agreements coming into effect were not lost by virtue of provisions of the MCE Act - Further, IM found that the claims were fundamentally flawed by virtue of the fact that the certificate was not included in the claims and stated that fresh pleadings must be filed re entitlements under MCE Act - Dismissed - Mr RA Sosa -v- Austal Ships Pty Ltd - M 313,314,315,316,317,318,319,320 of 2002 - Industrial Magistrate - Cicchini IM - 13/02/03 - Water Transport.....	552
Complaint re breach of award - Claimant argued that she was employed on a part-time basis and was therefore entitled to annual leave and public holiday payments - Defendant argued that Claimant was a casual employee who had received casual loading, or in the alternative that the amount claimed should be offset against overpayment of wages - Industrial Magistrate found that Claimant was a part-time employee due to the substantial notice given when leave was taken and due to the mutual expectation of continuity of employment - IM found that payments made for a particular purpose cannot be attributed to another cause or purpose and therefore cannot operate to set-off or extinguish the totality of the amounts claimed - Granted - Ms JM Villanova -v- Balwa Pty Ltd T/as 7 Mile Inn - M 206,222,257,258,279 of 2002 - Industrial Magistrate - Cicchini IM - Accommodatn, Cafes&Restaurants.....	559
Application re unfair dismissal - Applicant argued that Respondent had breached section 41 of the Minimum Conditions of Employment Act 1993 in that it did not properly discuss or inform Applicant of its decision to restructure, did not provide proper criteria for assessing who was to be made redundant and that another employee should have been made redundant instead of Applicant - Respondent argued that there was no procedural unfairness in the redundancy as Applicant was advised soon after the decision was made, was offered outplacement assistance and was paid a generous redundancy payment - Commission found that there was no breach by Respondent of section 41 of the Minimum Conditions of Employment Act to warrant a finding of unfair dismissal - Dismissed - Ms AV Ross -v- Diamond Offshore General Company - APPL 1133 of 2002 - WOOD C - 07/03/03 - Other Services.....	608
Complaint re breach of Shop and Warehouse (Wholesale and Retail Establishment) State Award 1977 No. R32 of 1976 - Claimants argued that Respondent had breached the award in relation to matters including display of roster, overtime, annual leave, times and wages record, other provisions and introduction of change - Further, Claimants argued that they were in effect Shop Assistants and not Store Managers as this was in name only - Respondent argued that there was a no case submission as Respondent was not bound by the award and Claimants were employed as Store Managers - Industrial Magistrate found that Respondent was bound by the award and that the Claimants were employed as a Store Manager and were paid as a Store Manager - Further, Industrial Magistrate found that they were not employed in any of the callings mentioned in the award - Dismissed - Mrs MA MacFarlane -v- Bed, Bath N. Table Pty Ltd - M 234,236 of 2002 - Industrial Magistrate - Tarr IM - 07/03/03 - Personal & Household Good Rtlg.....	1015
Conference referred re breach of the requirements of the PSM Act 1994 - Applicant Union argued that the employee had been subjected to a campaign of intimidation, harassment and victimisation that would amount to workplace bullying, the employee was suffering anxiety and it had been assessed that her work had been a critical and significant factor in its cause - Applicant Union sought orders inter alia, that the Public Advocate cease and desist workplace bullying and provide the necessary assistance to relocate employee to a suitable alternative position within the public sector - Respondent objected to and opposed the claims and the declaration and orders being sought by the applicant - Public Service Arbitrator found inter alia, that there was not the 'repetitive' treatment or behaviour necessary to establish the campaign alleged by the Union, that the evidence showed that the employee had not been subjected to a campaign of intimidation, harassment and victimisation that would amount to workplace bullying and the orders sought by the Union had not been made out - Dismissed - Civil Service Association of Western Australia Incorporated -v- Director General, Department of Justice (Formerly known as Ministry Of Justice) - PSACR 20 of 2002 - Public Service Arbitrator - BEECH SC - 12/05/03 - Government Administration.....	1167
<b>CASUAL WORK</b>	
Complaint re breach of Restaurant, Tearoom and Catering Award 1979 No. R48/1978 - Claimant argued that she was entitled to annual leave because although she was paid a casual rate she was in fact a part-time employee as evidenced by the regular hours, continuous employment and the rosters that she was required to work - Respondents argued that she left on her own accord and that she was not entitled to annual leave as she was a casual employee - Further, Respondents argued that she was a casual employee as evidenced by the pay rate she received and that she was aware that she was being paid casual rates - Industrial Magistrate found that she was working as a part-time employee notwithstanding that she was being paid a casual rate and thus she was entitled to annual leave - Granted - Ms KJ Broadfoot -v- Andrew Ha C/- Paramount Bar & Cafe & Other - M 56 of 2002 - Industrial Magistrate - Cicchini IM - 07/08/02 - Accommodatn, Cafes&Restaurants.....	300

## CUMULATIVE DIGEST—continued

	Page
<b>CASUAL WORK—continued</b>	
Application re unfair dismissal and contractual entitlements - Applicant argued that he was unfairly dismissed and that there was a contract of employment in place which had been breached - Further, Applicant argued that after a workplace accident had occurred he was removed from the mine site and not offered any further work - Respondent argued that there was no requirement for Applicant to return to the mine site and that ongoing offers of a similar nature were made - Commission found that contract of employment came to an end by frustration, by the operation that the contract was brought to an end beyond the Respondent's control - Further, Commission was not persuaded that in all the circumstances the Respondent did other than treat the Applicant fairly - Dismissed - Mr DW Helier - v- Belminco Pty Ltd - APPL 1255 of 2001 - KENNER C - 06/12/02 - Services to Mining .....	1041
Application re unfair dismissal - Applicant argued that the respondent had reacted aggressively to a query from her regarding the amount of wages she was paid and she was dismissed - Respondent argued he did not dismiss the applicant, she was a casual employee, she was not doing the cleaning work requested and he was aware of a rumour that the applicant was looking for work elsewhere - Commission found inter alia, that applicant was unfairly dismissed, that reinstatement was impracticable and awarded compensation - Granted - Ms RA Napoli -v- Kamel Lebeidi - Sugar Gum Restaurant - APPL 1778 of 1998 - BEECH SC - 08/02/99 - Accommodatn, Cafes & Restaurants .....	1242
<b>CLASSIFICATION</b>	
<sup>3</sup> Application to vary the Hospital Salaried Officers' Award 1968 No. 39 of 1968 to incorporate a new classification structure for clinical psychologists and for the retrospective date of operation to have effect from 18 August 1997 - Applicant Union argued, inter alia, that the complexity of the profession, amounts to a significant change in work value and this should be recognised with increases in salary and the provision of a career structure for clinical psychologists - Respondents submitted numerous points and argued that the change in work value for the profession had been accommodated in classification restructuring that took place early 1990s, that pressures now being experienced by senior clinical psychologists could be overcome by the creation of more positions at higher levels and being filled on a "competitive basis" - Further, the development of professional skills evidenced by the use of more sophisticated tests and assessments and an involvement in direct patient referrals reflected normal development within a profession - Commission in Court Session considered evidence, submissions, authorities and Wage Fixing Principles and concluded that there had been a net increase in work value which was sufficient in the terms of the Work Value Principles, "to warrant the creation of a new classification or upgrading to a higher classification", however, they had reservations about the claim in its current form - CICS sought that the parties enter into discussions with a view to resolving the issues regarding the creation and filling more senior positions bearing in mind that the positions previously at lower level would move to higher increments and levels; and the creation of new grades and definitions for the establishment of higher level grades 3 to 5, and how those grades and definitions are to be reflected - CICS considered that there were special circumstances within the terms of s.39 of the Act, which made it fair and right to grant some degree of retrospectivity in the operation of any re-classification for clinical psychologists currently employed with the Respondents, who are re-classified as a result of this decision - CICS set the operative date from the 1st September 2001 - Matter divided and Granted in Part - Hospital Salaried Officers Association of Western Australia (Union of Workers) -v- Royal Perth Hospital & Others - P 39 of 1997 - Commission in Court Session - COLEMAN CC/BEECH SC/SCOTT C - 16/12/02 - Health Services .....	23
Application to vary Children's Services (Private) Award, Children's Services Consent Award 1984 and Child Care (Subsidised Centres) Award - Applicant Union argued that the variation to the awards are substantially the same, to insert the recent changes to the Community Services (Child Care) Regulations 1988 - Applicant Union sought to have inserted in each award a new classification for an 'E Worker' which was a class of child care worker that had been recently created under the Regulations, also including reimbursements of certain expenses - Respondent argued there was no objection to the creation of an E classification within the awards however objected to two steps rates being inserted and opposed the application for the allowances - Commission found that the applications were brought pursuant to the Statement of Principles in the 2001 State Wage Case decision and provided for the work value changes - Further, Commission was satisfied that the creation of an E classification should be created pursuant to the Work Value Principle and that the two step rates were properly struck and that the allowances should be allowed with concessions - Ordered Accordingly - Australian Liquor, Hospitality and Miscellaneous Workers Union, Western Australian Branch -v- Bassendean Day Care Centre - APPL 1280,1281,1282 of 2001 - SMITH C - 04/02/02 - Other Services .....	958
Complaint re breach of Shop and Warehouse (Wholesale and Retail Establishment) State Award 1977 No. R32 of 1976 - Claimants argued that Respondent had breached the award in relation to matters including display of roster, overtime, annual leave, times and wages record, other provisions and introduction of change - Further, Claimants argued that they were in effect Shop Assistants and not Store Managers as this was in name only - Respondent argued that there was a no case submission as Respondent was not bound by the award and Claimants were employed as Store Managers - Industrial Magistrate found that Respondent was bound by the award and that the Claimants were employed as a Store Manager and were paid as a Store Manager - Further, Industrial Magistrate found that they were not employed in any of the callings mentioned in the award - Dismissed - Mrs MA MacFarlane -v- Bed, Bath N. Table Pty Ltd - M 234,236 of 2002 - Industrial Magistrate - Tarr IM - 07/03/03 - Personal & Household Good Rtlg .....	1015
Conference referred re refusal of Respondent to reclassify positions - Applicant Union argued that the Group-Worker positions have been "transformed" into Juvenile Justice Officer position and sought order that the permanent officers whose positions have been transformed to be reclassified with the positions - Respondent objected to and opposed the claim - Public Service Arbitrator reviewed authorities and relevant Acts and found that although it had the jurisdiction in s.80E, it was the case that an Arbitrator exercising that jurisdiction does not have the power to make an order directing a public service employer to act contrary to his or her obligations under the Public Sector Management Act 1994 - Commission concluded inter alia, that the Union's claim was not able to be granted by virtue of the legislative requirements for the appointment to public service positions - Dismissed - Civil Service Association of Western Australia Incorporated -v- Hon Attorney General - PSACR 9,10 of 2003 - Public Service Arbitrator - BEECH SC - 15/05/03 - Government Administration .....	1481
Appeals re reclassification of position - Parties agreed that the matter ought be dealt with by the Arbitrator on the basis of written submission - Public Service Arbitrator reviewed authorities and submissions and found that there was no industrial matter upon which Commission could exercise jurisdiction because at the time the Appellants filed Notices of Appeal, their employment was the subject of a Workplace Agreement pursuant to the Workplace Agreement Act 1993 - Dismissed for want of jurisdiction - Mr P Brash -v- WorkCover W.A. - PSA 5,7,8 of 2000 - Public Service Arbitrator - SCOTT C - 22/05/03 - Government Administration .....	1551
<b>COMPENSATION</b>	
<sup>2</sup> Appeal against Decision of Commission (82WAIG2188) re unfair dismissal - First Appeal No. FBA38/2002 - Appellant grounds of appeal was against the declaration that she was not dismissed in January 2001 and the order for compensation insofar as it "failed" to take account of the income that Appellant would likely have received from her participation in the on-call roster system operated by the Respondent - Second Appeal No. FBA39/2002 - Cross appeal by Respondent appealing against part of the decision relating to the Appellant's dismissal and her entitlement to compensation being a casual employee - Full Bench reviewed authorities, all of the evidence and material and all of the submissions, and found that there has been no error in the exercise of the discretion as alleged established, and no ground of appeal had been made out - Dismissed - Mrs CJ Byrne -v- Brian Ferrall Twaddle t/a Mount Hospital Pharmacy - FBA 38,39 of 2002 - Full Bench - SHARKEY P/GREGOR C/SCOTT C - 20/12/02 - Health Services .....	5
Application re unfair dismissal - Applicant argued that dismissal was unfair because Respondent had to make a choice between his family or her and he chose his family and also asked Applicant what it would take to have her leave her job quietly - Further, Applicant argued that Respondent alleged that she had misappropriated money which was not the case and established that it was not the case - Respondent argued that Applicant had agreed to resign, the basis of the resignation was that she be paid her entitlements plus two week's pay and at the time he believed that Applicant had written cheques in the amounts which he thought was inappropriate and he attempted to stop payment - Commission found that the relationship came to an end by the dismissal of Applicant in the circumstances where Respondent was trying to balance competing obligations of Applicant as an employee and family obligations - Further, Commission found that Applicant had never misappropriated money and that Applicant had been the subject of damaging rumours that she had misappropriated the Respondent's funds - Finally, Commission awarded six months compensation - Granted - Mrs KM Bristow -v- Bay of Isles Aboriginal community Inc. - APPL 873 of 2002 - GREGOR C - 09/12/02 - Community Services .....	150

## CUMULATIVE DIGEST—continued

## COMPENSATION—continued

	Page
Application re unfair dismissal seeking compensation - Applicant argued that in all of the circumstances, given the lack of procedural fairness, his termination was unfair on the basis that the requirements under s.41 of the Minimum Conditions Employment Act 1993 were not met - Respondent argued there was no unfair dismissal, that the onus on the Applicant to demonstrate that he was unfairly terminated had not been made out and that there was no breach of s.41 of the MCE Act as numerous discussions were held with the Applicant, and consultation took place in order to avoid or minimise the effect of significant change on the Applicant - Commission reviewed authorities, Part 5 of the MCEA and found that Applicant was treated unfairly on the basis that he was not given sufficient notice of his termination in order to canvass alternatives, that it was also clear that the requirements of Part 5 of the MCEA in relation to attend job interviews were not met by the Respondent and given that the Applicant was afforded insufficient notice and was not given time to attend job interviews, his termination was unfair - However, given that the Applicant was paid a redundancy payment of 26 weeks' pay and five weeks' pay in lieu of notice, Commission concluded that the amount of five weeks' pay as compensation was to be offset against these payment, thus no monies were due to be paid to the Applicant - Dismissed - Mr PJ Caffery -v- Chubb Security Australia Pty Ltd t/as Chubb Protective Services - APPL 390 of 2002 - HARRISON C - 02/12/02 - Personal and Other Services.....	155
Application re unfair dismissal - Applicant argued that Respondent had terminated Applicant unfairly by not giving any warning that his services were to be terminated - Further, Applicant argued that as an agent he should also be given the benefits as an employee - Respondent argued that Applicant was an independent contractor and not an employee and was paid one month's retainer on termination as business was suffering a downturn - Commission considered whether Applicant operated under a contract of service or a contract for service and determined that the Commission was guided by what the parties intended - Commission found that Applicant clearly viewed himself as an agent and found that the arrangement of the parties was one where Applicant was not seen by either party as one of employer and employee and dismissed the application for want of jurisdiction - Dismissed for want of jurisdiction - Mr B Ryder -v- Beaulieu of Australia Limited - APPL 2307 of 2001 - WOOD C - 20/12/02 - Other Manufacturing.....	168
<sup>2</sup> Appeal against Decision of Commission (82WAIG1298) re unfair dismissal - Appellant argued that Commissioner failed to direct himself as to the onus of proof with respect to the issue of probation and ought to have found that the onus of proof was with Respondent and ought to have found that Respondent on the balance of probabilities had failed to prove that a three month probationary period applied to the Appellant's employment contract - Respondent opposed the appeal - Full Bench found that this was a discretionary decision and the principle applied was that Full Bench had no warrant to interfere with the decision unless Appellant established that there was a miscarriage of the exercise of discretion at first instance - Full Bench found that the discretion was miscarried according to the principles from the evidence given by Appellant and upheld the Appeal - Appeal upheld and the decision at first instance varied - Mr R Koster -v- Volute Pty Ltd trading as Catt Design - FBA 32 of 2002 - Full Bench - SHARKEY P/GREGOR C/HARRISON C - 08/01/03 - Other Manufacturing.....	225
Application re unfair dismissal - Applicant argued that dismissal was unfair because Respondent gave him no warnings about his performance, that he had only twice not turned up to work due to illness and was terminated in a summary fashion without reason and in an inappropriate manner - Respondent argued that Applicant was a casual employee, and as one hour's pay in lieu of notice was given as provided for in the Award, Applicant was lawfully terminated - Further, Respondent argued that there were good reasons to terminate because he was not turning up to work and there were complaints about Applicant's attitude and his cleaning standards - Commission found Applicant was denied procedural fairness given the way he was terminated, that he was not given any notice when Respondent effected his termination and as reinstatement was impracticable, compensation was awarded - Granted - Mr SVC Datta -v- Mastercare Property Services (WA) Pty Ltd - APPL 826 of 2002 - HARRISON C - 22/01/03 - Business Services.....	327
Application re unfair dismissal seeking reinstatement - Applicant argued that there was no reason for his termination, that he was denied natural justice in relation to the procedure adopted by the Respondent to terminate him and that Respondent should not have formed the view that he had misconducted himself given that the original conviction had been quashed on appeal and the DPP determined not to proceed with a retrial - Respondent argued that Commission lacked jurisdiction to deal with the matter as the Applicant was on a fixed term contract which expired due to the effluxion of time - Further, Respondent argued inter alia, that the Applicant's termination was capable of being effected given the evidence before the jury at first instance, and the jury's decision in finding Applicant guilty - Commission found on facts and was satisfied on balance that Respondent had not demonstrated that Applicant was guilty of misconduct justifying summary dismissal - Commission found that Applicant was treated unfairly and harshly and was denied procedural fairness in relation to the way these allegations were put to him - Further, Commission found that Respondent's conduct on this occasion was extremely callous and oppressive and ordered compensation in lieu of reinstatement - Upheld and Order Issued - " I" -v- Mr Paul Albert Director General Department of Education Western Australia - APPL 347 of 2002 - HARRISON C - 15/01/03 - Education.....	335
Application re unfair dismissal - Applicant argued that dismissal was unfair because she was terminated without warning, that she was unaware that Respondent was dissatisfied with her performance until the day she was terminated and sought compensation - Respondent argued that Applicant was dismissed on the grounds of unsatisfactory performance and poor attitude and that Applicant had been counselled on a number of occasions about her unsatisfactory performance prior to the termination of her employment - Commission found that Respondent had made up their mind to terminate Applicant's employment about six weeks before they did so and could have warned Applicant that she had six weeks to improve but did not do so - Further, Commission found that Applicant was unfairly dismissed and that reinstatement was not practical and awarded compensation - Granted - Mrs C Johnson -v- Millswan holdings Pty Ltd ACN 063 694 299 T/A Drivewest Car Rentals - APPL 1076 of 2002 - SMITH C - 31/01/03 - Motor Vehicle Rtlg & Services.....	348
Application re unfair dismissal seeking orders pursuant to s.23A of the I.R. Act - Applicant argued that at no time had the quality of his workmanship been raised as an issue with him, nor had he been warned that his position was in jeopardy - Respondent argued inter alia, that Applicant was warned verbally on several occasions that he must be accountable for the quality of printing produced and that strict checking procedures had to be complied with, however, he did not do so and continued to produce work of poor standard - Commission found that Applicant did identify the difficulties with the quality of printing and chemicals used, that he made every effort to resolve them and that he was hindered in that process by the Respondent providing incorrect chemicals - Commission further found that Respondent's conduct was premeditated, that Applicant was dismissed in a summary fashion, therefore, dismissal was unfair and awarded compensation - Granted - Mr J Leeson -v- Classic FB Holdings - APPL 701 of 2002 - GREGOR C - 03/02/03 - Other Services.....	355
Application re unfair dismissal - Applicant argued that dismissal was unfair because she was on probation at the time and she did not receive any kind of feedback or warning that her employment was not viewed positively or that Respondent was not satisfied with her work - Respondent argued that Applicant was not meeting the required standard of performance - Commission found on evidence that Applicant's dismissal was unfair because Applicant was not given targets, budgets or levels of competent performance to meet and she would not have known how she was performing relevant to any set target - Commission found that reinstatement was impracticable and ordered compensation - Granted - Mrs L McDade -v- Paceway Mitsubishi - APPL 1649 of 2002 - BEECH SC - 14/01/03 - Motor Vehicle Rtlg & Services.....	358
Application re unfair dismissal - Applicant argued that the dismissal was unfair because Applicant had tendered her resignation or offered to resign but was told by Respondent to "piss off" - Respondent opposed the application and had sought an adjournment but presented no evidence - Commission dismissed the application for an adjournment and found in favour of Applicant in that Applicant was dismissed summarily and did not resign from her employment - Further, Commission found that reinstatement was not an option and awarded compensation - Granted - Ms SM Theil -Harkin -v- Elizabeth Wiese & Associates, Solicitors - APPL 886 of 2002 - WOOD C - 21/01/03 - Other Services.....	369

## CUMULATIVE DIGEST—continued

	Page
COMPENSATION—continued	
<sup>2</sup> Appeal against Decision of Commission (82WAIG2690) re unfair dismissal and contractual entitlements - There were two appeals against the Decision of the Commission and both were heard together - Appellant Respondent argued that Commissioner erred in law in finding that Applicant had been unfairly dismissed due to absence of reasonable notice and that Commissioner erred in law in finding that there was a failure to pay Applicant redundancy payment and a contractual entitlement for unpaid call outs - Appellant Applicant argued that Commissioner failed to take into account relevant factors namely the time that Appellant would take to return to previous remuneration levels and the consequent failure to compensate Appellant Applicant for such loss and injury - Full Bench found that the dismissal correctly was found to be harsh, oppressive and unfair because only three days notice of termination of the contract was given when three months notice was what should be implied - Further, Full Bench found that the loss caused by the unfair dismissal was the loss of reasonable notice quantifiable at and compensate by an amount equal to three months salary as ordered - Further, Full Bench dismissed Appeal No. FBA 47 of 2002 and Upheld Appeal No FBA 48 of 2002 in part and varied the decision at first instance by ordering the payment of an amount equal to one month's salary for compensation in addition to that already ordered to be paid - Orders issued - EPath WA Pty Ltd -v- Mr I Adriansz - FBA 47, 48 of 2002 - Full Bench - SHARKEY P/COLEMAN CC/BEECH SC - 21/02/03 - Health Services.....	454
<sup>2</sup> Appeal against Decision of Commission (82WAIG1298) re unfair dismissal - Full Bench issued supplementary reasons for decision regarding that monies might have been paid in reduction to the amount which the order subsequently ordered or will order to be paid was not a matter for the Full Bench - Further, Full Bench found that the part payment of the amount of the order was not a relevant matter to the order made - Order issued - Mr R Koster -v- Volute Pty Ltd trading as Catt Design - FBA 32 of 2002 - Full Bench - SHARKEY P/GREGOR C/HARRISON C - 12/02/03 - Other Manufacturing.....	465
Complaint re breach of Workplace Agreement re unfair dismissal - Complainant argued that dismissal was unfair and sought reinstatement or compensation and that Defendant had failed to pay him entitlements under the workplace agreement including annual leave and sick leave - Defendant argued that Complainant had misappropriated money and also that Complainant had been overpaid owing Defendant approximately \$2000 - Industrial Magistrate found that Complainant had been unfairly dismissed and there was no evidence established that monies had been misappropriated - Further, Complainant was entitled to annual leave, sick leave and other remuneration - Reasons for Decision Issued - Mr ID Riley -v- Healy Airconditioning Pty Ltd - CP 1 of 2001 - Industrial Magistrate - Cicchini IM - 15/08/01 - Personal & Household Good W/sg.....	556
Application re unfair dismissal and contractual entitlements - Applicant argued that termination was unfair because she was given insufficient notice and was harsh in the way it was effected and sought compensation - Respondent argued that the reason to terminate Applicant's contract of employment was due to a redundancy situation and the process of effecting Applicant's termination was not unfair - Commission found that Applicant was terminated for a valid reason but was not given adequate notice due to the termination, the actual notice was too short and unreasonable - Further, Commission found that reinstatement was impracticable and awarded compensation - Upheld and Order Issued - Ms R Clements -v- Caldera Nominees Pty Ltd ABN 96276831947 T/as Harrington Brokers - APPL 1093 of 2002 - HARRISON C - 28/02/03 - Insurance.....	587
Application re unfair dismissal - Applicant argued that Respondent had breached section 41 of the Minimum Conditions of Employment Act 1993 in that it did not properly discuss or inform Applicant of its decision to restructure, did not provide proper criteria for assessing who was to be made redundant and that another employee should have been made redundant instead of Applicant - Respondent argued that there was no procedural unfairness in the redundancy as Applicant was advised soon after the decision was made, was offered outplacement assistance and was paid a generous redundancy payment - Commission found that there was no breach by Respondent of section 41 of the Minimum Conditions of Employment Act to warrant a finding of unfair dismissal - Dismissed - Ms AV Ross -v- Diamond Offshore General Company - APPL 1133 of 2002 - WOOD C - 07/03/03 - Other Services.....	608
<sup>2</sup> Appeal against Decision of Commission (82WAIG2690) re unfair dismissal and contractual entitlements - Solicitors for the Respondent wrote to the Commission requesting that the figure of compensation as contained in the Order of the Full Bench be amended because it was an incorrect figure and did not reflect the reasons for decision of the Full Bench - Full Bench concluded that pursuant to s.27(1)(m), it had jurisdiction to correct the order because the matter was still before the Commission until the 'slip rule error' in its order was corrected to reflect its decision - Supplementary Reasons for Decision and Correcting Order Issued - Mr I Adriansz -v- EPath WA Pty Ltd - FBA 48 of 2002 - Full Bench - SHARKEY P/COLEMAN CC/BEECH SC - 28/03/03 - Health Services.....	917
<sup>2</sup> Appeal against Decision of Commission (82WAIG3020) re unfair dismissal and contractual entitlements - Appellant argued that Commissioner erred in not finding that the dismissal was wrongful and erred in holding that there were implied in the Appellant's contract of employment the terms and conditions of Respondent's drug and alcohol policy - Further, Commissioner erred in not finding the Respondent's direction that Appellant undergo a random drug and alcohol test was unlawful and unreasonable and its subsequent conduct was unlawful, unreasonable and unfair and that Commissioner erred in not holding that the dismissal was harsh, oppressive or unfair - Respondent opposed the appeal - Full Bench found that Appellant's employment was governed by the Award and was harshly, oppressively or unfairly dismissed and that Commission should have found the Respondent had effected an unfair dismissal - Further, Full Bench found that the grounds were made out and that Full Bench was entitled to substitute the exercise of its discretion for that of the Commission at first instance applying the findings that should have been made - Appeal upheld and decision at first instance suspended and remitted to a Commissioner - Ms DCD Larkin -v- Boral Construction Materials Group Ltd - FBA 49 of 2002 - Full Bench - SHARKEY P/COLEMAN CC/BEECH SC - 20/03/03 - Other Mining.....	929
Application re unfair dismissal and contractual entitlements - Applicant argued that the dismissal was unfair because safety issues were never raised and were not an issue and sought compensation - Further, Applicant sought benefits under his contract of employment in relation to notice of termination - Respondent denied Applicant was unfairly terminated and argued that Applicant was not due any monies pursuant to his contract of employment - Further, Respondent argued that it was appropriate to terminate Applicant's contract of employment as Applicant continually defied instructions and had received adequate warnings regarding his performance and safety record - Commission found Respondent may have had some concerns about aspects of the Applicant's performance however these concerns were never relayed to the Applicant and there was no warning - Further Commission found that there was no substantive reason for the termination of Applicant's contract of service which was procedurally unfair and that Applicant was not given sufficient opportunity to respond to the allegations against him - Commission found that Applicant was unfairly terminated and awarded compensation and was also awarded contractual benefits which consisted of underpayment of notice and vehicle expenses - Upheld, compensation awarded and contractual benefits partially granted - Mr A Cockram -v- Emporio Homes Pty Ltd, Patricia Edingertha Emporio Property Consultants - APPL 1043 of 2002 - HARRISON C - 18/03/03 - General Construction.....	1026
Application re harsh, oppressive and unfair dismissal seeking compensation - Applicant argued that she did not resign from her employment but was unfairly dismissed because of an accusation of theft - Respondent argued that he was not accusing Applicant of any wrongdoing, that he requested Applicant to drop off the keys after Applicant advised him that she was finishing because she was starting a new job - Commission reviewed authorities and found on evidence that Applicant was dismissed and the dismissal was harsh oppressive and unfair - Further, with regard to compensation, Commission found that in the absence of any evidence to make findings, it was not open to determine any compensation for loss as the Applicant had failed to establish it - Declaration Issued - Ms SE Dunn -v- Brian Bentley and Pauline Bentley and Joseph Sherlock in partnership T/A Video Ezy Woodbridge - APPL 1192 of 2002 - KENNER C - 04/04/03 - Personal Services.....	1033
Application re unfair dismissal - Applicant argued that dismissal was unfair because of the manner it was conducted, that she felt humiliated and devastated by her treatment by Respondent, and that she was also not given any notice or opportunity to discuss the matter - Respondent argued that Applicant had been made redundant effective immediately as there was no other roles available for her in the organisation, that she was paid four weeks' redundancy payment and that the redundancy was genuine - Commission found that Applicant was unfairly dismissed as the Minimum Conditions of Employment Act had not been complied with in a number of respects - Further, Commission found that reinstatement was impracticable and ordered that Applicant be paid notice payment, compensation and injury - Upheld and Order Issued - Ms JL Fitzgerald -v- Telis Pty Ltd - APPL 576 of 2002 - HARRISON C - 20/03/03 - Other Services.....	1036

## CUMULATIVE DIGEST—continued

## COMPENSATION—continued

	Page
Application re unfair dismissal and contractual entitlements - Applicant argued that employment terminated without notice on his return from holidays and found upon a visit for severance pay a new manager had been appointed - Applicant sought compensation and the reimbursement of court costs - Respondent failed to appear - Commission reviewed authorities and found that Applicant was terminated, that he was denied procedural fairness as no warnings were given to him, that no notice was given to him that he was to be terminated nor was the Applicant paid any monies in lieu of notice on termination, nor was the Applicant given the opportunity to discuss the Respondent's view that it could no longer afford to pay the Applicant - Further, Commission found that Applicant was unfairly terminated both substantively and procedurally and awarded compensation in lieu of reinstatement, and denied benefits - Commission was not satisfied that the circumstances of this matter were such as to warrant an order for costs against the Respondent - Upheld and Order Issued - Mr SN Kirkham -v- Premium Partners Pty Ltd t/as Allsteel Designs - APPL 1130 of 2002 - HARRISON C - 28/03/03 - General Construction.....	1050
Application re unfair dismissal seeking compensation - Applicant argued he believed he went about his job in a safe manner, the respondent did not raise any complaints about his approach to work although on a number of occasions safety had been brought to his attention and he was not given an opportunity to explain his story - Respondent argued the applicant's performance was acceptable except his attitude to safety and because of continued breaches of safety in the best interests of work colleagues and in accordance with the Respondent's duty of care the applicant was dismissed - Commission found that the applicant knew that there were concerns held by the respondent in regard to safety issues and even though the termination was procedurally flawed, the termination could not be categorised as harsh, oppressive or unfair - Dismissed - Mr JSM Babbage -v- Tony Sadler Pty Ltd - APPL 1764 of 2002 - GREGOR C - 05/05/03 - Personal & Household Good Rtlg.....	1179
Application re unfair dismissal and denied contractual entitlements - Applicant argued the dismissal was unfair as the respondents refused to re-engage him upon his return from leave, that he made several attempts to contact the respondents to advise them of his availability for work upon his return from leave and that he should be paid denied contractual entitlements, pay in lieu of notice, reimbursement for fuel and purchases of materials and pro rata annual leave - Respondents argued they did not dismiss applicant, that his employment was of a casual nature, he did not regularly work 38 to 40 hours per week and that his employment was not covered by an award - Further, that Applicant was not entitled to notice or pro-rata annual leave, that applicant did not make any arrangements to take a period of leave and there was no indication from the applicant that he intended to return to work - Commission found inter alia, that in the circumstances of there being no application to extend time then the application was automatically out of time, that applicant's employment could not be regarded as casual for the purpose of any considerations of the employment contract coming to an end and as the applicant bears the onus of proving his case, and as Commission was unable to conclude in his favour, on the basis of the evidence having equal weight, then unfortunately for the applicant his case in respect of the unfair dismissal claim must fail - Further, Commission found that the claim for denied contractual entitlements and re-imbursment of expense of purchasing materials had been made out - Ordered Accordingly - Mr JG Bethell -v- Peter Raymond & Caroline A Hunt trading as PR Hunt Builders - APPL 1724 of 2002 - SCOTT C - 08/04/03 - Construction Trade Services.....	1181
Application re unfair dismissal seeking compensation - Applicant argued that she was not aware of formal disciplinary proceedings against her, she was not warned of the consequences of her alleged poor performance, she did not receive any written warnings, was not advised that her employment was in jeopardy, she was dismissed whilst on sick leave and the dismissal therefore was unlawful - Respondent argued that the Applicant was dismissed as she did not assist the Industrial Officer as required in her contract, did not attend for work during her required hours, shed was away from work during the day without authorisation or advising anyone and that she was seeking to repudiate her contract - Commission found the Applicant's treatment fell short of any sense of fairness, was not in accordance with her contract of employment, that dismissal was unfair and an order was issued awarding compensation - Order Issued - Ms M Hunter -v- Curtin Academic Staff Association - APPL 933 of 2002 - WOOD C - 08/04/03 - Education.....	1204
Application re unfair dismissal seeking compensation - Applicant argued she was unfairly dismissed by the respondent as a consequence of the disclosure of a federal police clearance - Respondent argued that the applicant was not unfairly dismissed and denies that it employed the applicant on the basis of what is described as a conditional offer of employment - Commission found that applicant was offered employment by the respondent, that the employment offer was conditional upon the satisfaction of a term that a federal police clearance was furnished by applicant and that it was open for the respondent to withdraw the offer on the basis that the condition precedent in the contract was not satisfied - Dismissed - Mrs JL Issit -v- Synergy - APPL 1459 of 2002 - KENNER C - 07/03/03 - Business Services.....	1212
Application re unfair dismissal and contractual entitlements seeking two weeks' pay in lieu of notice - Applicant argued that he was threatened by Respondent to resign immediately otherwise monies owed to him would be withheld, was not allowed to work out his notice period, was given no warnings about his performance and his termination was unfair as no proper process was followed in effecting the termination - Respondent argued that there was no dismissal, that Applicant resigned of his own volition and as Applicant resigned, no notice period was due - Commission reviewed authorities and found that Applicant was terminated at the instigation of the employer, thus a dismissal did take place - Further, Commission found that the Applicant was denied procedural fairness, that he was not given notice of his termination, that he was not given opportunity to respond to the issues, therefore termination was both substantively and procedurally - Commission awarded payment of two weeks' notice in accordance with the Award and also awarded compensation for loss - Upheld and Orders Issued - Mr ALC Lewis -v- Eastmere Nominees Pty Ltd - APPL 1377 of 2002 - HARRISON C - 04/04/03.....	1218
Application re unfair dismissal and contractual entitlements seeking compensation, salary in lieu of notice, payment for bonuses, accrued annual leave, superannuation contributions and overtime payments - Applicant argued that there was no valid reason for her dismissal and that she was never warned her employment was in jeopardy, by reason of financial performance or otherwise - Respondent argued that Applicant's dismissal was for financial reasons, that Applicant had also breached her contract of employment by arranging placement of a friend on a without fee basis and that she displayed gross disloyalty by seeking alternative employment whilst she was engaged by the Respondent - Commission reviewed authorities, MCE Act and found inter alia, that there was a substantive and justifiable reason for the termination of the Applicant's employment and that Applicant had not established her claims - Dismissed - A McNamara -v- Loton Holdings Pty Ltd (ACN 00 - APPL 2223 of 2001 - KENNER C - 01/05/03 - Business Services.....	1224
Application re unfair dismissal - Applicant argued he should not have been chosen for redundancy as the process lacked fairness, he had no knowledge of, or input to, how the assessment was made, the decision making process leading to him being made redundant was flawed and the comparison document drawn up by the respondent was inaccurate - Further, Applicant argued he was not given an opportunity to demonstrate his capacities given the nature of the process adopted by the respondent or any opportunity to canvass alternatives to termination and he was not working on the project that the respondent lost when he was made redundant - Respondent argued they had the right to decide which employees were to be made redundant, that it was not unusual when a major contract was lost for employees to be made redundant, that after evaluating all the supervisors it was appropriate for the respondent to choose the applicant for redundancy and that it was appropriate to terminate the applicant's contract of employment in preference to that of another employee - Commission found s.41 and s.43 of the Minimum Conditions of Employment Act were not met or complied with by the respondent, the process adopted by the respondent was unfair, inappropriate and callous and the applicant was denied procedural fairness and natural justice in relation to this process - Further, Applicant was not given an opportunity to demonstrate why he should not be chosen for redundancy and an order was issued alleging unfair dismissal and awarding compensation - Ordered Accordingly - Mr DS Morris -v- ABB Australia Pty Ltd - APPL 276 of 2002 - HARRISON C - 11/04/03 - Business Services.....	1236
Application re unfair dismissal - Applicant argued that the respondent had reacted aggressively to a query from her regarding the amount of wages she was paid and she was dismissed - Respondent argued he did not dismiss the applicant, she was a casual employee, she was not doing the cleaning work requested and he was aware of a rumour that the applicant was looking for work elsewhere - Commission found inter alia, that applicant was unfairly dismissed, that reinstatement was impracticable and awarded compensation - Granted - Ms RA Napoli -v- Kamel Lebeidi - Sugar Gum Restaurant - APPL 1778 of 1998 - BEECH SC - 08/02/99 - Accommodation, Cafes & Restaurants.....	1242

## CUMULATIVE DIGEST—continued

	Page
COMPENSATION—continued	
Application for extension of time to file an application re unfair dismissal - Applicant argued that upon receiving advice from a government department she did commence an application in the Equal Opportunity Commission very promptly, that in subsequent to a discussion with a person at the EOC, she was advised that she could commence proceedings in this Commission and that at no time was she aware of the 28 day time limit to lodge an application - Commission found on evidence that applicant had acted promptly on all advice given to her, that she was unaware of the 28 day time limit and that the respondent was not able to inform the Commission of any prejudice beyond that which would normally be expected, that is, the prejudice of having to defend proceedings brought against it - Granted - LI Pearce -v- Tomlinson Ltd - APPL 90 of 2003 - KENNER C - 11/04/03.....	1247
Application re unfair dismissal and contractual entitlements seeking compensation - Applicant argued that Respondent had a history of unfairness towards her and as a result of discussion on the last working day prior to her dismissal, she was informed by Respondent that she was to be paid \$13.00 per hour for all duties and that she could either accept it or "go and walk" - Applicant further argued that she was not given any reason other than that she was not wanted any more - Respondent argued that as a casual employee Applicant only had one hour's notice to leave her employment and she only had to be given one hour's notice of termination and that Applicant breached her contract of employment by not working out her notice - Commission found on evidence that Applicant was a casual employee, that Applicant's employment was terminated due to a restructure, however, Respondent's decision not to tell Applicant of her dismissal until one hour before her rostered finishing time showed absolutely no consideration to the consequences for Applicant or her circumstances - Further, Commission found that Applicant's dismissal, though lawful, was nevertheless harsh, oppressive and unfair, that reinstatement was impracticable and awarded compensation and contractual entitlements claim - Granted - Ms M Slatter -v- Cityfire Holdings Pty Ltd T/A Skaters on Ice - APPL 1495 of 2002 - BEECH SC - 15/04/03 - Sport and Recreation.....	1254
Application re unfair dismissal seeking compensation - Applicant argued he was not given any warning or any reason for his dismissal, that there was no opportunity for discussion with the respondent about reduction of working hours or resolution of the issue - Respondent argued the dismissal came about due to a history of bad work performance that caused the respondent to suffer financially, that the financial pressures created by applicant were such it was no longer possible to employ him and at the same time deal with the improvement of the respondent's financial circumstances - Commission found there were some malafidies in the conduct of the respondent in respect to their answer to the claim for unfair dismissal - Further, that applicant was dismissed summarily, there was no ground to support a dismissal for misconduct, therefore there was no ground on which to base summary termination and an order was issued awarding compensation - Granted - Mr GC Sutton -v- Audio Visual Technical Services - APPL 398 of 2002 - GREGOR C - 30/04/02 - Motion Picture Radio & TV Serv.....	1258
Conference referred re alleged summary dismissal seeking compensation and denied contractual entitlements - Applicant Union argued that employee was unfairly summarily dismissed following the tender of his resignation by the giving of one month's notice in writing to the Respondent and that employee had a contractual entitlement to payment of overtime that arose out of his attendance at mandatory company training - Respondent objected to and opposed the claims and argued that employee's refusal to be available to go offshore whilst the contract remained on foot was unacceptable and Respondent had no alternative but to bring the employment to an end - Commission reviewed authorities and found inter alia, that employee had not made out his claim for unfair dismissal because whilst the employment contract remained on foot, the requirement to attend from time to time offshore, as part of his duties, was an essential condition of his employment, that his refusal was deliberate or "wilful" and the effect of employee's repudiation was to say to the Respondent he was only prepared to perform his contract of employment in a fundamentally different way to that which he was obliged to do - Commission concluded that employee should be paid at time and one half for the Saturdays he attended the training course, for the 24 hours on the out bound journey to France and 24 hours at double time for Sunday travel - Upheld in Part - The Australian Workers' Union, West Australian Branch, Industrial Union of Workers -v- Schlumberger Oilfield Australia Pty Ltd ABN 26003264597 - CR 39 of 2002 - KENNER C - 18/12/02 - Services to Mining.....	1268
<sup>2</sup> Appeal against Decision of Commission (83WAIG155) re dismissed claim for compensation - Appellant argued that the learned Commissioner erred in law in dismissing his claim for compensation after finding that the termination of employment was unfair and in that respect the Commission failed to properly assess his loss arising from the unfair dismissal and was in error in taking into account entitlements paid by the respondent in the termination of employment arising from his redundancy - Appellant sought that there be a payment of compensation by the respondent, assessed for the loss that he suffered from the date of dismissal to the date of hearing - Full Bench applied legal principles and found that the Commissioner at first instance made no error in finding as she did, that Appellant suffered no loss because of the amount which he was paid, and no loss could or should be found to have been established - Further, Full Bench found that there was no error established in the exercise of the discretion and no ground of appeal had been made out - Dismissed - Mr PJ Caffery -v- Chubb Security Australia Pty Ltd t/as Chubb Protective Services - FBA 54 of 2002 - Full Bench - SHARKEY P/COLEMAN CC/BEECH SC - 01/05/03 - Personal and Other Services.....	1381
Application re unfair dismissal seeking compensation - Applicant argued when she commenced with the respondent there was no order to the office, the respondent requested that she sort out the mess in the office and it was up to her to organise the smooth functioning of the office - Applicant also argued she was not given a warning or told that her position was in jeopardy - Respondent argued the standard of work and full scope of the job were explained clearly to the applicant, the manner in which her main duties were carried out was far from acceptable and did not meet the standards discussed on commencement of her employment - Further, respondent argued that Applicant was granted three extensions on her probation period, that Respondent discussed the problems with her regularly but no improvements were made - Commission found that any difficulties that arose did so from lack of instruction and communication from the Respondent - Further, Commission found that applicant was not afforded a fair go all round and was dismissed unfairly - Granted, Supplementary Reasons for Decision and Order Issued - Mrs AJ Harvey -v- LRC Pty Ltd - APPL 1497 of 2002 - WOOD C - 23/05/03 - Business Services.....	1512
Application re unfair dismissal - Applicant argued the respondent did not demonstrate sufficient reason for summary dismissal, it was not clear that the respondent required written permission to open the pool outside normal hours, much of the evidence relied upon by the respondent in regard to her misconduct was based on hearsay, money collected from each triathlon was not used for her personal gain and the respondent was aware of the triathlons taking place so there was no breach of Schedule A - Clause 16 of the respondent's contract - Respondent argued the applicant breached the respondent's contract and the applicant misconducted herself sufficient to warrant summary dismissal - Commission found the respondent had not demonstrated that the applicant was guilty of gross misconduct justifying summary dismissal, the applicant was treated unfairly and harshly because she was not given sufficient opportunity to defend herself and the respondent did not conduct a full and comprehensive investigation into the events surrounding the applicant's termination - Commission also found that the applicant was not afforded 'a fair go all round' - Upheld and Order Issued - Mrs FA Webster -v- Prestige Property Management Services - Mr Rod Stewart - APPL 737 of 2002 - HARRISON C - 09/05/03 - Community Services.....	1529
Conference referred re unfair dismissal - Applicant Union argued its member was unfairly dismissed by the respondent for reasons of redundancy, that there was no valid reason for the dismissal and the dismissal was unfair and unjust - Respondent argued the termination was fair due to reduction of work and requested the application be dismissed - Commission found that when Respondent brought the employment contract to an end it did not comply with the requirements of Part 5 of the MCE nor did it comply with Clause 32 or 32A of the Award - Further, Commission reviewed authorities and found that not only the dismissal was unfair for the manner in which it was given, it was unfair because of the circumstances in which it was given and amounts to an abuse of the employers right to terminate - Commission applied principles and found that applicant member had been compensated in excess of his loss already and for that reason there was no compensation orderable or payable to him pursuant to the Act - Ordered Accordingly - AUTO, FOOD, METAL, ENGIN UNION -v- Seagate Structural Engineering Pty Ltd - CR 267 of 2002 - GREGOR C - 13/05/03 - Metal Product Manufacturing.....	1537

## CUMULATIVE DIGEST—continued

	Page
CONFERENCE	
Conference referred re shift allowance - Applicant Union sought a declaration that a contractual entitlement existed that Groupworkers and Senior Groupworkers employed by the Respondent be paid the Commuted Shift Allowance when in receipt of workers' compensation benefits - Applicant Union argued that it was neither equitable nor in good conscience that the Respondent should withdraw the entitlement unilaterally - Respondent opposed the claim and argued that the declaration should not be granted - Further, Respondent argued inter alia, that Applicant had not met the tests necessary to demonstrate that the condition of payment of the Allowance was sufficiently well known or acquiesced in that it could be assumed by everyone entering into a contract that it would form part of the contract - Public Service Arbitrator applied tests and found that the evidence failed to meet one of the four essential tests, and it was unable to determine that a contractual entitlement existed in that regard - Further, PSA made no findings and drew no conclusions to the Applicant's argument regarding Respondent's alleged unilateral withdrawal of the payment as it had not been the subject of evidence, and was not properly before the Commission - Dismissed - Civil Service Association of Western Australia Incorporated -v- Director General, Department of Justice - PSACR 56 of 2002 - SCOTT C - 11/02/03 - Government Administration.....	295
Conference referred re alleged refusal to allow Applicant Union official access to the Respondents' workplace - Applicant Union argued that the rights of entry for union officials became a statutory code introduced by the Labour Relations Reform Act 2002 dealing with rights of entry into premises where relevant employees work - Further, Applicant Union submitted that the Commission did not have the jurisdiction to declare the parties rights as to right of entry under the Industrial Relations Act 1979 - Respondent argued that the Act did not preclude the Commission from making an order that union officials be subject to a random drug and alcohol test prior to entering Respondent's premises and that it would be consistent with the scheme of legislation and its policy was consistent with the workplace health and safety - Commission found and declared that the Respondents did not have the right to require Mr Brett Davis, an authorised representative of the Applicant Union, in possession of the requisite authority, exercising his rights under Division 2G of the Industrial Relations Act 1979, to submit a random drug and alcohol test, as a condition of the exercise of those rights - Declaration Issued - AUTO, FOOD, METAL, ENGIN UNION -v- Transfield Services (Australia) Pty Ltd & Other - CR 71 of 2002 - KENNER C - 12/12/02 - Unions.....	376
Conference referred re breach of the requirements of the Public Sector Management Act 1994 - Preliminary issue re appearance by counsel - Applicant Union objected to the appearance of counsel - Respondent requested representation by counsel - Public Service Arbitrator determined that counsel may appear and be heard in relation to the claim for an order and would accommodate the appearance of counsel on that issue either orally or in writing in all other respects leave for counsel to appear was not granted - Leave for counsel to appear generally refused - Civil Service Association of Western Australia Incorporated -v- Director General, Department of Justice (Formerly known as Ministry Of Justice) - PSACR 20 of 2002 - Public Service Arbitrator - BEECH SC - 07/03/03 - Government Administration.....	503
Conference referred re on-call allowance - Applicant sought a declaration that it be entitled to an on-call allowance - Respondent argued that Applicant was not rostered on and that it constituted emergency returns and was therefore entitled to emergency return to work rates - Respondent argued that enforcement of an award entitlement was the exclusive province of the IMC - Commission found that whilst it was bound to act without regard to technicalities and legal form, this does not extend to acting outside its jurisdiction - Commission found that the order sought would effectively vary the Agreement retrospectively, which the Commission does not have power to do - Dismissed - Western Australian Police Union of Workers -v- Commissioner of Police - PSACR 34 of 2002 - Public Service Arbitrator - SCOTT C - 14/02/03 - Public Order & Safety Services.....	506
Conference re refusal of the Respondent to reclassify positions - Applicant Union sought an interim order preventing Respondent from filling Juvenile Justice Officer positions until the claim of the Union that Group Workers be reclassified was decided by Commission - Respondent argued that it was not aware of any threat of industrial action - Public Service Arbitrator issued interim order sought by Applicant Union in that it prevents the filling of the positions at the end of that process - Interim order issued - Civil Service Association of Western Australia Incorporated -v- The Director General, Department of Justice - PSAC 9 of 2003 - Public Service Arbitrator - BEECH SC - 12/03/03 - Government Administration.....	985
Conference referred re breach of the requirements of the PSM Act 1994 - Applicant Union argued that the employee had been subjected to a campaign of intimidation, harassment and victimisation that would amount to workplace bullying, the employee was suffering anxiety and it had been assessed that her work had been a critical and significant factor in its cause - Applicant Union sought orders inter alia, that the Public Advocate cease and desist workplace bullying and provide the necessary assistance to relocate employee to a suitable alternative position within the public sector - Respondent objected to and opposed the claims and the declaration and orders being sought by the applicant - Public Service Arbitrator found inter alia, that there was not the 'repetitive' treatment or behaviour necessary to establish the campaign alleged by the Union, that the evidence showed that the employee had not been subjected to a campaign of intimidation, harassment and victimisation that would amount to workplace bullying and the orders sought by the Union had not been made out - Dismissed - Civil Service Association of Western Australia Incorporated -v- Director General, Department of Justice (Formerly known as Ministry Of Justice) - PSACR 20 of 2002 - Public Service Arbitrator - BEECH SC - 12/05/03 - Government Administration.....	1167
Conference referred re alleged summary dismissal seeking compensation and denied contractual entitlements - Applicant Union argued that employee was unfairly summarily dismissed following the tender of his resignation by the giving of one month's notice in writing to the Respondent and that employee had a contractual entitlement to payment of overtime that arose out of his attendance at mandatory company training - Respondent objected to and opposed the claims and argued that employee's refusal to be available to go offshore whilst the contract remained on foot was unacceptable and Respondent had no alternative but to bring the employment to an end - Commission reviewed authorities and found inter alia, that employee had not made out his claim for unfair dismissal because whilst the employment contract remained on foot, the requirement to attend from time to time offshore, as part of his duties, was an essential condition of his employment, that his refusal was deliberate or "wilful" and the effect of employee's repudiation was to say to the Respondent he was only prepared to perform his contract of employment in a fundamentally different way to that which he was obliged to do - Commission concluded that employee should be paid at time and one half for the Saturdays he attended the training course, for the 24 hours on the out bound journey to France and 24 hours at double time for Sunday travel - Upheld in Part - The Australian Workers' Union, West Australian Branch, Industrial Union of Workers -v- Schlumberger Oilfield Australia Pty Ltd ABN 26003264597 - CR 39 of 2002 - KENNER C - 18/12/02 - Services to Mining.....	1268
Conference referred re unfair dismissal - Applicant Union argued its member was unfairly dismissed by the respondent for reasons of redundancy, that there was no valid reason for the dismissal and the dismissal was unfair and unjust - Respondent argued the termination was fair due to reduction of work and requested the application be dismissed - Commission found that when Respondent brought the employment contract to an end it did not comply with the requirements of Part 5 of the MCE nor did it comply with Clause 32 or 32A of the Award - Further, Commission reviewed authorities and found that not only the dismissal was unfair for the manner in which it was given, it was unfair because of the circumstances in which it was given and amounts to an abuse of the employers right to terminate - Commission applied principles and found that applicant member had been compensated in excess of his loss already and for that reason there was no compensation orderable or payable to him pursuant to the Act - Ordered Accordingly - AUTO, FOOD, METAL, ENGIN UNION -v- Seagate Structural Engineering Pty Ltd - CR 267 of 2002 - GREGOR C - 13/05/03 - Metal Product Manufacturing.....	1537
CONTRACT OF SERVICE	
Application re unfair dismissal - Applicant argued that dismissal was unfair because Respondent had to make a choice between his family or her and he chose his family and also asked Applicant what it would take to have her leave her job quietly - Further, Applicant argued that Respondent alleged that she had misappropriated money which was not the case and established that it was not the case - Respondent argued that Applicant had agreed to resign, the basis of the resignation was that she be paid her entitlements plus two week's pay and at the time he believed that Applicant had written cheques in the amounts which he thought was inappropriate and he attempted to stop payment - Commission found that the relationship came to an end by the dismissal of Applicant in the circumstances where Respondent was trying to balance competing obligations of Applicant as an employee and family obligations - Further, Commission found that Applicant had never misappropriated money and that Applicant had been the subject to damaging rumours that she had misappropriated the Respondent's funds - Finally, Commission awarded six months compensation - Granted - Mrs KM Bristow -v- Bay of Isles Aboriginal community Inc. - APPL 873 of 2002 - GREGOR C - 09/12/02 - Community Services.....	150

## CUMULATIVE DIGEST—continued

	Page
CONTRACT OF SERVICE—continued	
Application re unfair dismissal - Applicant argued that dismissal was unfair because Applicant had not yet attended court to prove his innocence of the charge - Respondent argued that termination of the contract of employment was because of unauthorised possession of company equipment and the reason given lacked credibility to the extent that there had been a serious breach of the employment contract and a breakdown in trust - Commission found that there has been a lack of response from Applicant in relation to this matter - Further, Commission found that Applicant had been found guilty of theft which was the substantive reason for the dismissal and Commission considered that it was in the public interest to dismiss application - Dismissed in the public interest - Mr G Chapman -v- Worsley Alumina Pty Ltd - APPL 1495 of 2001 - WOOD C - 20/11/02 - Services to Mining .....	160
Application re contractual entitlements - Applicant argued that he was entitled to a bonus under his contract of service which had not been paid and that the specified target had been achieved thus there was no reason not to pay bonus - Respondent argued that the bonus was a discretionary payment and there was no entitlement to a bonus - Commission found that there was a contract of employment, that there was an entitlement to bonus payment and that Applicant was entitled to the bonus payment - Granted - Mr JH Nolan -v- Signature Security Group Pty Ltd - APPL 939 of 2002 - GREGOR C - 10/12/02 - Machining and Motor Veh Whlslg .....	164
Application re contractual entitlements - No appearance by the Applicant - Respondent argued that the matter should be dismissed with costs - Commission was satisfied that Applicant had been given every opportunity to prosecute his claim and had chosen not to do so - Further, Commission was not satisfied that the circumstances of this matter were so extreme as to warrant an order for costs against Applicant - Dismissed - Mr MA Taranto -v- Goldburn Fishing Co. Pty Ltd - APPL 235,431 of 2002 - HARRISON C - 31/12/02 - Commercial Fishing .....	174
Application re contractual entitlements - Applicant argued that he should be paid for work performed by way of settled transactions that occurred after termination of his employment, and that he "closed" prior to his departure from Respondent - Respondent tendered a variety of documents relating to the matter which the Commission accepted as exhibits - Commission reviewed the relevant Agreement and found on evidence that the Applicant "closed" a number of transactions, prior to the termination of his employment, which subsequently became "Paid Deals" for the purposes of the Agreement - Further, Commission found that the claims in respect of these transactions were entitlements due to the Applicant under his contract with the Respondent - Granted in Part and Order Issued - Mr JDH Terry -v- Iaian Melotte, City Finance Pty Ltd - APPL 181 of 2002 - KENNER C - 04/12/02 - Finance .....	175
<sup>2</sup> Appeal against Decision of Commission (82WAIG2280) re unfair dismissal and contractual entitlements - Applicant argued that the learned Commissioner was in error when Commission failed to order general discovery and that such an order should have been made and thereby an error was made in the exercise of the Commission's discretion - Respondent argued and submitted that an order for discovery was not of such importance that in the public interest an appeal should lie and that the decision appealed against was both interlocutory and discretionary and could not readily be appealed against - Full Bench found that it would be loathe to consider an appeal on a point of practice and procedure or an interlocutory decision and thus unduly delay proceedings and reluctant to interfere with the exercise of the discretion of the Commission in such matters - Dismissed - Ms P Alderson -v- St Columba - Kingswood College - FBA 41 of 2002 - Full Bench - SHARKEY P/COLEMAN CC/HARRISON C - 30/01/03 - Education .....	215
Conference referred re shift allowance - Applicant Union sought a declaration that a contractual entitlement existed that Groupworkers and Senior Groupworkers employed by the Respondent be paid the Commuted Shift Allowance when in receipt of workers' compensation benefits - Applicant Union argued that it was neither equitable nor in good conscience that the Respondent should withdraw the entitlement unilaterally - Respondent opposed the claim and argued that the declaration should not be granted - Further, Respondent argued inter alia, that Applicant had not met the tests necessary to demonstrate that the condition of payment of the Allowance was sufficiently well known or acquiesced in that it could be assumed by everyone entering into a contract that it would form part of the contract - Public Service Arbitrator applied tests and found that the evidence failed to meet one of the four essential tests, and it was unable to determine that a contractual entitlement existed in that regard - Further, PSA made no findings and drew no conclusions to the Applicant's argument regarding Respondent's alleged unilateral withdrawal of the payment as it had not been the subject of evidence, and was not properly before the Commission - Dismissed - Civil Service Association of Western Australia Incorporated -v- Director General, Department of Justice - PSACR 56 of 2002 - SCOTT C - 11/02/03 - Government Administration .....	295
Application re unfair dismissal - Applicant argued that dismissal was unfair because she was harassed out of her employment and her hours of work were being cut - Respondent argued that Applicant was aware her hours were at the Respondent's discretion and she was offered work - Commission found that there was no evidence before it that the Respondent's conduct in these circumstances constituted a breach of a fundamental condition of the contract of employment such as to enable the employee to treat the employment as brought to an end - Further, Commission was not satisfied that there was a dismissal, or a termination at the initiative of Respondent - Dismissed - Ms N English -v- The Windsor Hotel South Perth Pty Ltd - APPL 1284 of 2002 - SCOTT C - 03/02/02 - Accommodatn, Cafes&Restaurants .....	331
Application re contractual entitlements - Applicant sought payment of commission owed under his contract of employment - No appearance for the Respondent - Commission found on evidence that Applicant was due under his contract of employment the sum of \$1,950 gross in commission and ordered the Respondent to pay that amount to the Applicant - Granted - Mr A Greeneklee -v- Ozzi-Tech Security Pty Ltd - APPL 1379 of 2002 - WOOD C - 28/01/03 - Personal & Household Good Rtlg .....	332
Application re unfair dismissal - Applicant argued that Respondent's conduct towards her constituted a constructive dismissal by there being a breach of a fundamental term of the contract of employment, an implied term of trust and confidence and she had no alternative but to tender her resignation under pressure - Respondent argued that Applicant tendered her resignation after being approached regarding her unresponsive behaviour and attitude - Commission found that Respondent did not force Applicant's resignation rather, there was counselling and a warning about her attitude and Commission did not accept that Applicant had no alternative but to resign - Further, Commission concluded that there was no dismissal and accordingly, no jurisdiction on the part of the Commission to hear and determine such claim - Dismissed - MS CM Perriman -v- Heiniken Australia Pty Ltd - APPL 928 of 2002 - SCOTT C - 30/01/03 - Food, Beverage and Tobacco Mfg .....	367
<sup>2</sup> Appeal against Decision of Commission (82WAIG2690) re unfair dismissal and contractual entitlements - There were two appeals against the Decision of the Commission and both were heard together - Appellant Respondent argued that Commissioner erred in law in finding that Applicant had been unfairly dismissed due to absence of reasonable notice and that Commissioner erred in law in finding that there was a failure to pay Applicant redundancy payment and a contractual entitlement for unpaid call outs - Appellant Applicant argued that Commissioner failed to take into account relevant factors namely the time that Appellant would take to return to previous remuneration levels and the consequent failure to compensate Appellant Applicant for such loss and injury - Full Bench found that the dismissal correctly was found to be harsh, oppressive and unfair because only three days notice of termination of the contract was given when three months notice was what should be implied - Further, Full Bench found that the loss caused by the unfair dismissal was the loss of reasonable notice quantifiable at and compensate by an amount equal to three months salary as ordered - Further, Full Bench dismissed Appeal No. FBA 47 of 2002 and Upheld Appeal No FBA 48 of 2002 in part and varied the decision at first instance by ordering the payment of an amount equal to one month's salary for compensation in addition to that already ordered to be paid - Orders issued - Mr I Adriansz -v- EPath WA Pty Ltd - FBA 47, 48 of 2002 - Full Bench - SHARKEY P/COLEMAN CC/BEECH SC - 21/02/03 - Health Services .....	454
Application re contractual entitlements - Applicant argued that she had been denied contractual entitlements that arose from an agreed redundancy package - Respondent opposed the application and argued that Applicant had expressed an interest in voluntary redundancy but no decision about acceptance of voluntary redundancies had been made - Commission found that the issue turns on the evidence as to whether the acceptance of voluntary redundancy was conditional upon Applicant remaining in employment to 21 December 2001 - Further, Commission found that Respondent had not accepted what Applicant was purporting to offer - Dismissed - Ms B Altham -v- Cable Sands (WA) Pty Ltd - APPL 2192 of 2001 - KENNER C - 07/03/03 - Metal Ore Mining .....	572
Application re contractual entitlements - Applicant argued that he was denied contractual benefits after leaving his employment voluntarily - Respondent argued that the Applicant failed to discharge the onus upon him to prove that he was an employee at the relevant time - Commission found that Applicant had not discharged the onus to prove his case, that there was ambiguity in the contract and that the money taken by the Applicant was well in excess of what he was due for reimbursement - Dismissed - Mr IR Bianchi -v- Bianchi Corporation t/as Onyxbar - APPL 937 of 2002 - WOOD C - 14/02/03 - Accommodatn, Cafes&Restaurants .....	581

## CUMULATIVE DIGEST—continued

	Page
<b>CONTRACT OF SERVICE—continued</b>	
Application re contractual entitlements - Applicant argued that application could proceed without Respondent - Respondent made no appearance - Commission found that under s.29AA of the Act, it was prohibited from determining the matter, as no industrial instrument applied to the Applicant and because his contract of employment provided for a salary exceeding the prescribed amount - Dismissed - Mr JG Kelly -v- ITSP Australia Pty Ltd - APPL 1711 of 2002 - BEECH SC - 14/02/03 - Machinery & Equipment Mfg .....	605
Application re contractual entitlements - Applicant argued that he was owed wages, tool and fuel allowances, annual leave and superannuation - Respondent argued that it was not able to pay Applicant, as he no longer owns the business - Commission found that pursuant to the Minimum Conditions of Employment Act 1993, Applicant was entitled to be paid the wages he would have earned between 01/01/02 - 21/01/02, a proportion of the holiday pay as at 21/01/02 and superannuation, although it had no jurisdiction to enforce superannuation payments - Claim for tool and fuel allowance was not made out - Granted in Part - Mr D Smith -v- Zoulfikar Rahal - APPL 1538 of 2002 - BEECH SC - 03/12/02 - Other Services.....	614
<sup>2</sup> Appeal against Decision of Commission (82WAIG2690) re unfair dismissal and contractual entitlements - Solicitors for the Respondent wrote to the Commission requesting that the figure of compensation as contained in the Order of the Full Bench be amended because it was an incorrect figure and did not reflect the reasons for decision of the Full Bench - Full Bench concluded that pursuant to s.27(1)(m), it had jurisdiction to correct the order because the matter was still before the Commission until the 'slip rule error' in its order was corrected to reflect its decision - Supplementary Reasons for Decision and Correcting Order Issued - Mr I Adriansz -v- EPath WA Pty Ltd - FBA 48 of 2002 - Full Bench - SHARKEY P/COLEMAN CC/BEECH SC - 28/03/03 - Health Services .....	917
<sup>2</sup> Appeal against Decision of Commission (82WAIG3011) re unfair dismissal and contractual entitlements - Appellant argued that the Commissioner erred in having grave reservations about the evidence given by Applicant and that Commissioner erred in having no hesitation in preferring the evidence of Respondent to that of Appellant - Further, Commissioner erred in fact in finding that the written contracts were identical except for the commencement and expiry dates and erred in not finding that the true contract between the parties was a single ongoing contract of employment - Respondent opposed the appeal - Full Bench found that there was clear evidence that Appellant had entered and knew he had entered separate fixed term contracts which he recognised as did other witnesses as being different from permanent - Further, Full Bench found that there was no error in the decision in the first instance and that Commissioner correctly found that there was no dismissal and therefore the Commission was without jurisdiction and the appeal was dismissed - Dismissed - Mr R Gallotti -v- Argyle Diamond Mines Pty Ltd Trading as Argyle Diamonds - FBA 50 of 2002 - Full Bench - SHARKEY P/COLEMAN CC/BEECH SC - 13/03/03 - Other Mining .....	919
<sup>2</sup> Appeal against Decision of Commission (82WAIG3020) re unfair dismissal and contractual entitlements - Appellant argued that Commissioner erred in not finding that the dismissal was wrongful and erred in holding that there were implied in the Appellant's contract of employment the terms and conditions of Respondent's drug and alcohol policy - Further, Commissioner erred in not finding the Respondent's direction that Appellant undergo a random drug and alcohol test was unlawful and unreasonable and its subsequent conduct was unlawful, unreasonable and unfair and that Commissioner erred in not holding that the dismissal was harsh, oppressive or unfair - Respondent opposed the appeal - Full Bench found that Appellant's employment was governed by the Award and was harshly, oppressively or unfairly dismissed and that Commission should have found the Respondent had effected an unfair dismissal - Further, Full Bench found that the grounds were made out and that Full Bench was entitled to substitute the exercise of its discretion for that of the Commission at first instance applying the findings that should have been made - Appeal upheld and decision at first instance suspended and remitted to a Commissioner - Ms DCD Larkin -v- Boral Construction Materials Group Ltd - FBA 49 of 2002 - Full Bench - SHARKEY P/COLEMAN CC/BEECH SC - 20/03/03 - Other Mining.....	929
<sup>2</sup> Appeal against Decision of Commission (82WAIG3037) re unfair dismissal and contractual entitlements - Appellant sought leave to amend the grounds of appeal on the following grounds by deleting reference to Citigroup Pty Ltd in the heading of the Notice of Appeal as Citigroup Pty Ltd was in liquidation - First two Respondents submitted that the liquidator was not entitled to or required to appear and did not appear - Full Bench found that in reality it was not an application to amend the notice of appeal at all but an application to strike out Citigroup Pty Ltd (in liquidation) as a party to the appeal as there was no intention to proceed against Citigroup Pty Ltd on this appeal - Further, Full Bench found that the application should be dismissed on the merits in that it would deny Citigroup Pty Ltd a role in the appeal and may deny it natural justice and proceedings were otherwise adjourned to enable appellant to consider his position - Application to amend notice of appeal dismissed and appeal adjourned sine die - Mr AG Matthews -v- Cool or Cosy Pty Ltd; Ceil Comfort Home Insulation Pty Limited; Citigroup Pty Ltd - FBA 52 of 2002 - Full Bench - SHARKEY P/COLEMAN CC/GREGOR C - 18/03/03 - Various.....	940
Application re unfair dismissal and contractual entitlements - Applicant argued that the dismissal was unfair because safety issues were never raised and were not an issue and sought compensation - Further, Applicant sought benefits under his contract of employment in relation to notice of termination - Respondent denied Applicant was unfairly terminated and argued that Applicant was not due any monies pursuant to his contract of employment - Further, Respondent argued that it was appropriate to terminate Applicant's contract of employment as Applicant continually defied instructions and had received adequate warnings regarding his performance and safety record - Commission found Respondent may have had some concerns about aspects of the Applicant's performance however these concerns were never relayed to the Applicant and there was no warning - Further Commission found that there was no substantive reason for the termination of Applicant's contract of service which was procedurally unfair and that Applicant was not given sufficient opportunity to respond to the allegations against him - Commission found that Applicant was unfairly terminated and awarded compensation and was also awarded contractual benefits which consisted of underpayment of notice and vehicle expenses - Upheld, compensation awarded and contractual benefits partially granted - Mr A Cockram -v- Emporio Homes Pty Ltd, Patricia Edingertha Emporio Property Consultants - APPL 1043 of 2002 - HARRISON C - 18/03/03 - General Construction.....	1026
Application re unfair dismissal and contractual entitlements - Applicant argued that he was unfairly dismissed and that there was a contract of employment in place which had been breached - Further, Applicant argued that after a workplace accident had occurred he was removed from the mine site and not offered any further work - Respondent argued that there was no requirement for Applicant to return to the mine site and that ongoing offers of a similar nature were made - Commission found that contract of employment came to an end by frustration, by the operation that the contract was brought to an end beyond the Respondent's control - Further, Commission was not persuaded that in all the circumstances the Respondent did other than treat the Applicant fairly - Dismissed - Mr DW Helier -v- Belminco Pty Ltd - APPL 1255 of 2001 - KENNER C - 06/12/02 - Services to Mining .....	1041
Application re unfair dismissal and contractual entitlements - Applicant argued that Respondent's conduct evinced an intention to force him to resign and that he was left no option but to resign and that Respondent had breached a fundamental condition of the contract of employment in that it had failed to administer the bonus and failed to pay entitlements owed - Respondent argued that Applicant had tendered his resignation which was accepted and that the letter of resignation did not indicate any specific problems - Commission found that Applicant had tendered his resignation, that there was no linkage between the resignation and the bonus and Respondent did not breach the contract of employment - Further, Commission found that Respondent owed Applicant two days annual leave - Order Issued - Mr PA Hirschberg -v- Logica Pty Ltd - APPL 1518 of 2002 - SCOTT C - 07/03/03 - Health Services.....	1043
Application re contractual entitlements - Applicant argued that he had not been paid for 10 weeks of his employment and declared that he was bankrupt - Respondent opposed the application and sought the dismissal of the application - Commission found that the entitlement under his contract of employment was by the operation of the Bankruptcy Act 1966 vested in the Official Trustee and for that reason could not be continued by Applicant on his own behalf and the Commission adjourned the application sine die to allow Applicant to seek advice - Adjourned sine die due to bankruptcy of Applicant - Mr RE Impson -v- Mr K Bradley - APPL 1324 of 2002 - BEECH SC - 28/03/03 - Other Services .....	1048
Application re unfair dismissal and contractual entitlements - Applicant argued that employment terminated without notice on his return from holidays and found upon a visit for severance pay a new manager had been appointed - Applicant sought compensation and the reimbursement of court costs - Respondent failed to appear - Commission reviewed authorities and found that Applicant was terminated, that he was denied procedural fairness as no warnings were given to him, that no notice was given to him that he was to be terminated nor was the Applicant paid any monies in lieu of notice on termination, nor was the Applicant given the opportunity to discuss the Respondent's view that it could no longer afford to pay the Applicant - Further, Commission found that Applicant was unfairly terminated both substantively and procedurally and awarded compensation in lieu of reinstatement, and denied benefits - Commission was not satisfied that the circumstances of this matter were such as to warrant an order for costs against the Respondent - Upheld and Order Issued - Mr SN Kirkham -v- Premium Partners Pty Ltd t/as Allsteel Designs - APPL 1130 of 2002 - HARRISON C - 28/03/03 - General Construction.....	1050

## CUMULATIVE DIGEST—continued

	Page
CONTRACT OF SERVICE—continued	
Application re unfair dismissal and contractual entitlements - Respondent raised preliminary issue re Applicant incorrectly naming Respondent in the notice of application - Application by Applicant seeking to amend the Respondent's name was granted - Applicant argued that she had to resign after being terminated in order to obtain alternative employment and to ensure that Respondent would not claim commissions due to her for sales completed following her termination - Applicant argued that no issue was raised with her about any lack of co-operation between her and the other employees - Respondent denied that Applicant was unfairly terminated and argued that she resigned from her employment on her own volition - Further, Respondent argued that the commission claimed by Applicant was incorrect and counter proposed with a different quantum - Commission found on evidence that Applicant resigned of her own volition, thus no termination took place, and that Commission lacked jurisdiction to deal with this part of the application - Further, based on Respondent's contention that monies was owed to Applicant, Commission awarded the Applicant claim for benefits under her contract of employment - Dismissed for want of jurisdiction and application for contractual benefits partially allowed - Mrs MA Trimboli -v- Cusma Corporation Pty Ltd t/as Cusma Property Consultants - APPL 1276 of 2002 - HARRISON C - 28/03/03 - Property Services .....	1055
Application re unfair dismissal and denied contractual entitlements - Applicant argued the dismissal was unfair as the respondents refused to re-engage him upon his return from leave, that he made several attempts to contact the respondents to advise them of his availability for work upon his return from leave and that he should be paid denied contractual entitlements, pay in lieu of notice, reimbursement for fuel and purchases of materials and pro rata annual leave - Respondents argued they did not dismiss applicant, that his employment was of a casual nature, he did not regularly work 38 to 40 hours per week and that his employment was not covered by an award - Further, that Applicant was not entitled to notice or pro-rata annual leave, that applicant did not make any arrangements to take a period of leave and there was no indication from the applicant that he intended to return to work - Commission found inter alia, that in the circumstances of there being no application to extend time then the application was automatically out of time, that applicant's employment could not be regarded as casual for the purpose of any considerations of the employment contract coming to an end and as the applicant bears the onus of proving his case, and as Commission was unable to conclude in his favour, on the basis of the evidence having equal weight, then unfortunately for the applicant his case in respect of the unfair dismissal claim must fail - Further, Commission found that the claim for denied contractual entitlements and re-imbursment of expense of purchasing materials had been made out - Ordered Accordingly - Mr JG Bethell -v- Peter Raymond & Caroline A Hunt trading as PR Hunt Builders - APPL 1724 of 2002 - SCOTT C - 08/04/03 - Construction Trade Services .....	1181
Application re contractual entitlements - Applicant argued a redundancy payment was due to him under his contract of employment and he had relied upon an undertaking which he says the company gave to its employees in a letter - Respondent argued no such undertaking was given, the letter the applicant referred to was badly drafted and the company's position was made clear to the applicant prior to his resignation - Respondent also argued a redundancy package was not available to staff who relocated to Karratha - Commission found based on the evidence presented that applicant's contract did not include the payment of a redundancy benefit if he chose to relocate to Karratha - Dismissed - Mr S Brink -v- Schlumberger Oilfield Australia Pty Limited ACN 003 264 597 - APPL 1416 of 2002 - WOOD C - 08/05/03 - Services to Mining.....	1184
Application re harsh, oppressive and unfair dismissal and contractual entitlements - Respondent argued that applicant was dismissed for gross misconduct, incompetence and neglect in the course of the performance of duties - Commission reviewed evidence and found inter alia, that Applicant's dismissal was not harsh, oppressive or unfair because Applicant knowingly allowed cheques to be issued when there were insufficient funds in the account - Further, Commission reviewed employment agreement, authorities and found on evidence that Respondent had discharged the onus upon it to show that the serious misconduct for which Applicant was dismissed had been made out, therefore the Respondent was entitled to dismiss Applicant in accordance with the terms of his employment agreement - Commission also found on evidence that Applicant had established that he was entitled to a benefit under his contract to which Respondent had denied him - Unfair dismissal claim dismissed and claim for denied contractual entitlements granted - Mr A Francois -v- Buzz Dance Theatre Limited - APPL 884 of 2002 - BEECH SC - 09/04/03 - Other Recreation Services .....	1198
Application re unfair dismissal seeking compensation - Applicant argued that she was not aware of formal disciplinary proceedings against her, she was not warned of the consequences of her alleged poor performance, she did not receive any written warnings, was not advised that her employment was in jeopardy, she was dismissed whilst on sick leave and the dismissal therefore was unlawful - Respondent argued that the Applicant was dismissed as she did not assist the Industrial Officer as required in her contract, did not attend for work during her required hours, shed was away from work during the day without authorisation or advising anyone and that she was seeking to repudiate her contract - Commission found the Applicant's treatment fell short of any sense of fairness, was not in accordance with her contract of employment, that dismissal was unfair and an order was issued awarding compensation - Order Issued - Ms M Hunter -v- Curtin Academic Staff Association - APPL 933 of 2002 - WOOD C - 08/04/03 - Education.....	1204
Application re unfair dismissal and contractual entitlements seeking two weeks' pay in lieu of notice - Applicant argued that he was threatened by Respondent to resign immediately otherwise monies owed to him would be withheld, was not allowed to work out his notice period, was given no warnings about his performance and his termination was unfair as no proper process was followed in effecting the termination - Respondent argued that there was no dismissal, that Applicant resigned of his own volition and as Applicant resigned, no notice period was due - Commission reviewed authorities and found that Applicant was terminated at the instigation of the employer, thus a dismissal did take place - Further, Commission found that the Applicant was denied procedural fairness, that he was not given notice of his termination, that he was not given opportunity to respond to the issues, therefore termination was both substantively and procedurally - Commission awarded payment of two weeks' notice in accordance with the Award and also awarded compensation for loss - Upheld and Orders Issued - Mr ALC Lewis -v- Eastmere Nominees Pty Ltd - APPL 1377 of 2002 - HARRISON C - 04/04/03.....	1218
Application for extension of time to file application re unfair dismissal and denied contractual entitlements - Applicant argued that the application was not filed as he awaited a response from the respondent to a letter sent by his Solicitor to the respondent - Respondent argued there would be a prejudice to the respondent if the matter were to proceed in the circumstances of the delay given that the respondent did not have advice of the intention of the applicant to lodge a claim until some three months after the applicant's dismissal - Commission found the reason for delay in the circumstances of the applicant having legal advice and prompting from the Commission was not adequate and the applicant has not met the obligation that falls to him to prosecute his claim with appropriate diligence and an order was issued dismissing the application - Dismissed - Mr MW Leysenaar -v- Darren Bracewell, Seagate Holdings Pty Ltd - APPL 127 of 2003 - SCOTT C - 14/04/03 - Other Services.....	1221
Application re unfair dismissal and contractual entitlements seeking compensation, salary in lieu of notice, payment for bonuses, accrued annual leave, superannuation contributions and overtime payments - Applicant argued that there was no valid reason for her dismissal and that she was never warned her employment was in jeopardy, by reason of financial performance or otherwise - Respondent argued that Applicant's dismissal was for financial reasons, that Applicant had also breached her contract of employment by arranging placement of a friend on a without fee basis and that she displayed gross disloyalty by seeking alternative employment whilst she was engaged by the Respondent - Commission reviewed authorities, MCE Act and found inter alia, that there was a substantive and justifiable reason for the termination of the Applicant's employment and that Applicant had not established her claims - Dismissed - A McNamara -v- Loton Holdings Pty Ltd (ACN 00 - APPL 2223 of 2001 - KENNER C - 01/05/03 - Business Services.....	1224
Application re contractual entitlements - Applicant sought payment for overtime and argued that he was advised of the flexible hours and time off in lieu arrangement at the interview, that he expressed his dissatisfaction with the arrangement on the condition that he would be disadvantaged if he was unable to take time off and that one of the Respondent partner agreed and said that they would treat all of their employees fairly - Respondent argued that there was no such contractual term to entitle the Applicant to payment for overtime, that Applicant was advised of his working arrangements and that Applicant expressed no reservations about the time off in lieu arrangement - Further, Respondent made application for costs - Commission found that Applicant did not indicate any reservations about his working arrangements, that there was no such term between the parties and the Applicant's contract of employment does not give him a benefit to payment for overtime - Further, Commission reviewed authorities and concluded inter alia, that the circumstances of the case met the tests for awarding costs - Contractual entitlements claim dismissed and application for costs granted in part - Mr B Mitchem -v- Parkfeeds (WA) Pty Ltd - APPL 1618 of 2001 - SCOTT C - 09/08/02.....	1230

## CUMULATIVE DIGEST—continued

	Page
<b>CONTRACT OF SERVICE—continued</b>	
Application re unfair dismissal - Applicant argued he should not have been chosen for redundancy as the process lacked fairness, he had no knowledge of, or input to, how the assessment was made, the decision making process leading to him being made redundant was flawed and the comparison document drawn up by the respondent was inaccurate - Further, Applicant argued he was not given an opportunity to demonstrate his capacities given the nature of the process adopted by the respondent or any opportunity to canvass alternatives to termination and he was not working on the project that the respondent lost when he was made redundant - Respondent argued they had the right to decide which employees were to be made redundant, that it was not unusual when a major contract was lost for employees to be made redundant, that after evaluating all the supervisors it was appropriate for the respondent to choose the applicant for redundancy and that it was appropriate to terminate the applicant's contract of employment in preference to that of another employee - Commission found s.41 and s.43 of the Minimum Conditions of Employment Act were not met or complied with by the respondent, the process adopted by the respondent was unfair, inappropriate and callous and the applicant was denied procedural fairness and natural justice in relation to this process - Further, Applicant was not given an opportunity to demonstrate why he should not be chosen for redundancy and an order was issued alleging unfair dismissal and awarding compensation - Ordered Accordingly - Mr DS Morris -v- ABB Australia Pty Ltd - APPL 276 of 2002 - HARRISON C - 11/04/03 - Business Services.....	1236
Application re contractual entitlements - Applicant argued when her employment was terminated she was advised she would be paid 3 months' salary in lieu of notice in addition to salary due for work already completed, holiday pay and all other outstanding entitlements and to date she has not been paid any monies - Respondent did not appear at the hearing - Commission found that sufficient notice had been given to the respondent in regard to the hearing and it was satisfied on evidence that applicant had made out her case that she had been denied benefits due to her under her contract of employment with the respondent - Granted - Ms AC Pringle -v- ITSP Australia Pty Ltd - APPL 1467 of 2002 - HARRISON C - 02/05/03 - Communication Services.....	1251
Application for adjournment re unfair dismissal and contractual entitlements - Applicant argued he had to change his representation and had attempted to collect evidence from the respondent, that respondent holds records that will establish his application, that respondent had refused to supply information in this respect and it was necessary for his agent to seek to summons witnesses and obtain disclosure of documents - Respondent argued that the dismissal was due to the downturn in trade, that this application had caused him lots of stress and he would not want such a lengthy period of time to pass before the matter was resolved - Commission found that applicant had more than ample time to address the need to prepare for the hearing and that not to refuse the adjournment would cause injustice to the respondent - Refused - Subsequently applicant advised the Commission that the issues had been resolved - Discontinued - Mr GR Sampson -v- Albany Interiors Carpet Hotline - APPL 223 of 2001 - BEECH SC - 06/06/01 - Construction Trade Services.....	1252
Application re unfair dismissal and contractual entitlements seeking compensation - Applicant argued that Respondent had a history of unfairness towards her and as a result of discussion on the last working day prior to her dismissal, she was informed by Respondent that she was to be paid \$13.00 per hour for all duties and that she could either accept it or "go and walk" - Applicant further argued that she was not given any reason other than that she was not wanted any more - Respondent argued that as a casual employee Applicant only had one hour's notice to leave her employment and she only had to be given one hour's notice of termination and that Applicant breached her contract of employment by not working out her notice - Commission found on evidence that Applicant was a casual employee, that Applicant's employment was terminated due to a restructure, however, Respondent's decision not to tell Applicant of her dismissal until one hour before her rostered finishing time showed absolutely no consideration to the consequences for Applicant or her circumstances - Further, Commission found that Applicant's dismissal, though lawful, was nevertheless harsh, oppressive and unfair, that reinstatement was impracticable and awarded compensation and contractual entitlements claim - Granted - Ms M Slatter -v- Cityfire Holdings Pty Ltd T/A Skaters on Ice - APPL 1495 of 2002 - BEECH SC - 15/04/03 - Sport and Recreation .....	1254
Application re contractual entitlement - Applicant argued that she worked full time for the Respondent from 15 August 2000 to 4 May 2001 but was not paid her wages for the period 4 December 2000 to 4 May 2001 - Respondent did not appear - Commission found inter alia, that albeit the Applicant's evidence was unchallenged by the Respondent, it was open to be accepted, however, there were too many inconsistencies to enable the Commission to rely on the evidence given on the Applicant's behalf and the fact that the Respondent did not attend at hearing does not absolve the Applicant from proving that her application had merit - Further, Commission found that it could not determine what Applicant's contract was and could not find that Applicant was due the payments which she claimed - Dismissed - Ms DA Thompson -v- Hotshot Nominees Pty Ltd ABN 83 087 263 938 - APPL 917 of 2002 - WOOD C - 17/04/03 - Print, Publish & Rcd Media .....	1261
Conference referred re alleged summary dismissal seeking compensation and denied contractual entitlements - Applicant Union argued that employee was unfairly summarily dismissed following the tender of his resignation by the giving of one month's notice in writing to the Respondent and that employee had a contractual entitlement to payment of overtime that arose out of his attendance at mandatory company training - Respondent objected to and opposed the claims and argued that employee's refusal to be available to go offshore whilst the contract remained on foot was unacceptable and Respondent had no alternative but to bring the employment to an end - Commission reviewed authorities and found inter alia, that employee had not made out his claim for unfair dismissal because whilst the employment contract remained on foot, the requirement to attend from time to time offshore, as part of his duties, was an essential condition of his employment, that his refusal was deliberate or "wilful" and the effect of employee's repudiation was to say to the Respondent he was only prepared to perform his contract of employment in a fundamentally different way to that which he was obliged to do - Commission concluded that employee should be paid at time and one half for the Saturdays he attended the training course, for the 24 hours on the out bound journey to France and 24 hours at double time for Sunday travel - Upheld in Part - The Australian Workers' Union, West Australian Branch, Industrial Union of Workers -v- Schlumberger Oilfield Australia Pty Ltd ABN 26003264597 - CR 39 of 2002 - KENNER C - 18/12/02 - Services to Mining .....	1268
Application re unfair dismissal and contractual entitlements - Applicant sought redundancy payment, accrued sick leave, long service leave and payment for financial hardship due to his new job paying much lesser for the same work - Respondent argued that there was a downturn at the time of dismissal, the Applicant was made redundant and Applicant was aware that he was to be made redundant - Commission reviewed authorities and found on evidence that Applicant's application was 74 days out of time because the Applicant lodged his application first in the Federal Commission and once he knew that there was a jurisdictional challenge to his application, he took no further steps at that point in time to clarify his application, or to make the application in this Commission, therefore it would not be unfair for his application not to be accepted out of time - Commission concluded that it had doubt that the claims for long service leave and for financial hardship could be claimed and that it would convene a conference to deal with the matters in respect of redundancy and sick leave which are claimed as contractual benefits - Referral out of time not accepted - Order Issued - MR RS Brown -v- RCR Tomlinson Ltd - APPL 231 of 2003 - WOOD C - 12/05/03 - Motor Vehicle Rtlg & Services.....	1484
Application re contractual entitlements - Applicants argued their contractual entitlement to four weeks notice had been confirmed by the Respondent and they should receive a further two weeks wages as payment in lieu of notice in accordance with what they believed their contractual arrangements entitled them to - Respondent argued the contractual entitlements have been discharged in full and payments made on termination were in line with arrangements entered into between the parties - Commission found that there was a contractual entitlement to four weeks pay on termination and that this was paid on the basis of two weeks notice and two weeks redundancy - Dismissed - Mr K D'Souza -v- Q Multimedum Limited - APPL 1335,1336 of 2001 - COLEMAN CC - 14/05/03 - Paper Manufacturing.....	1496
Application re contractual entitlement seeking payment of one week's notice - Respondent argued the applicant's contract was terminated due to performance reasons - Commission found that applicant's employment was terminated at the employer's hands whilst on probation, that applicant was owed one week's pay in lieu of notice and ordered that respondent pay applicant the denied contractual entitlements - Granted - Mrs NN Gamlin -v- Capebay Holdings - APPL 1688 of 2002 - WOOD C - 17/04/03 - Property Services.....	1504

## CUMULATIVE DIGEST—continued

	Page
<b>CONTRACT OF SERVICE—continued</b>	
Application re unfair dismissal and contractual entitlements - Applicant argued that the process used to effect her termination was unfair because she believed that Respondent did not give proper weight to her side of the story and even though she had not fully complied with the Respondent's procedures, she did not repeat the misdemeanours for which she was reprimanded, therefore it was inappropriate to terminate her contract of employment - Respondent argued that Applicant had breached Respondent's medical procedures, that Applicant had repudiated her contract of employment by behaving in the way she did, therefore it was appropriate to summarily terminate her - Respondent further argued that there were no benefits due to the Applicant under her contract of employment - Commission reviewed authorities and found on evidence that the Respondent had demonstrated that there was sufficient reason to summarily terminate the Applicant's contract of employment, that the Applicant was afforded procedural fairness in relation to the termination and that the Respondent conducted appropriate investigations into the Applicant's conduct in relation to these matters, therefore Applicant was not unfairly dismissed - Commission further found that Applicant had not discharged the onus on her to establish any entitlements to this claim and accordingly dismissed Applicant's claim for contractual entitlements - Dismissed - Mrs JE Gibson -v- The Sisters of Mercy Perth (Amalgamated) Inc - APPL 644 of 2002 - HARRISON C - 29/05/03 - Education.....	1505
Application for extension of time to file an application re unfair dismissal - Applicant argued she was confused and thought the Australian Workplace Agreement applied to her employment and therefore ought to commence proceedings in the Australian Industrial Relations Commission - Commission found the onus was on employees to take all reasonable steps to ensure they are commencing proceedings in the appropriate jurisdiction, that there was little or no evidence before the Commission to indicate other steps were taken by the applicant to properly ascertain the correct jurisdiction and a considerable period of time lapsed before the applicant took any steps to lodge an application - Dismissed - Mrs M Kostovski -v- Gull Petroleum (WA) Pty Ltd - APPL 260 of 2003 - KENNER C - 06/05/03 - Petroleum Coal Chemical Assoc .....	1516
Application for extension of time to file application re unfair dismissal - Applicant argued that the delay in lodging his application was because he was exchanging emails with a representative of the respondent in regard to taxation of his ex gratia payment - Respondent argued the applicant had not provided information that the termination would be contested - Commission found the delay in this application was almost three times the period provided in the Act, the applicant was not dismissed so the jurisdiction which resides in the Commission to hear the industrial matter referred under s.29 of the Act does not arise therefore the application was without jurisdiction and there was no case to be argued - Dismissed - Mr SJ Moretti -v- Canning Vale Weaving Mills Ltd - APPL 355 of 2003 - GREGOR C - 14/05/03 - Other Manufacturing .....	1519
Application re contractual entitlements - Applicant argued there was an understanding that the respondent had guaranteed him three months' work as a trainer subsequent to his contract of employment with the respondent ceasing and the respondent repudiated its original agreement - Respondent argued there was no contractual arrangement to provide the applicant employment subsequent to his termination thus there was no obligation on the respondent to pay the applicant an additional three months' wages - Commission found the applicant had not established he was owed three months' wages as a benefit under his contract of employment with the respondent and there was no contractual arrangement between the applicant and the respondent for the respondent to guarantee three months' work to the applicant subsequent to his termination - Dismissed - Mr G Sparmon -v- Air BP - APPL 722 of 2002 - HARRISON C - 05/05/03 - Air & Space Transport .....	1523
<b>CONTRACT OUT OF AWARD</b>	
Complaint re alleged failure to comply with C S Perrott Industrial Agreement No. AG 191 of 1997 and the Building Trades (Construction) Award No. 14 of 1978 - Claimant Union argued that Respondents breached the agreement by failing to pay site allowance, the correct redundancy entitlements, accrued sick leave on termination and failed to apply the first on - last off requirement - Further, Claimant Union argued that Respondent had committed various breaches of the Award including failure to pay fares and travelling allowance and failure to provide time and wages records as requested - Respondents argued that the worker was not an employee but rather a subcontractor and denied that worker was engaged pursuant to the Agreement - Further, Respondents denied they were liable to pay site allowance, redundancy entitlements and sick leave indeed they claim that he had been overpaid for fares and travelling and into the superannuation fund - Industrial Magistrate found that the alleged breaches had been proven with the exception of one being the failure to apply the first on - last off requirement - IM also imposed penalties and awarded prejudgement interest and refused the application for costs - However, after claim for costs was remitted back to Industrial Magistrate from Full Bench, IM ordered Respondents to pay costs to Claimant - Reasons for Decision Issued - Construction, Forestry, Mining and Energy Union -v- Carl Anthony Perrot & Sandra Lee Perrott trading as C & S Perrott - M 18 of 2002 - Industrial Magistrate - Cicchini IM - 17/07/02 - Construction Trade Services.....	305
Complaint re breach of award - Claimant Union argued that Defendant breached award by not paying member award entitlements such as sick leave, public holidays, annual leave or pay in lieu and redundancy payments - Defendant argued that there was no redundancy payments because employee had not been made redundant and that accrued annual leave was not paid because employee abandoned his job - Further, that employee was paid superannuation and long service leave but was not paid allowances - Industrial Magistrate reviewed award and evidence and found that Claimant had failed to prove that employee was employed in a classification covered by the Award; that employee was engaged in work which was substantially or wholly covered by the Award and that the Award applied to the Defendant's operations - Reasons for Decision Issued - Australian Liquor, Hospitality and Miscellaneous Workers Union, Western Australian Branch -v- Derby Frail Aged and Disabled Hostel - Ngamang Bawoona - CP 292 of 2000 - Industrial Magistrate - 28/08/00 - General Construction.....	518
<b>COSTS</b>	
<sup>2</sup> Appeal against Decision of Industrial Magistrate (unreported) re breach of agreement - Appellant appealed against the Magistrate's refusal to make an order for costs - Application by Respondent to adduce new evidence was dismissed - Full Bench reviewed authorities and evidence and found on a number of reasons that the exercise of the discretion at first instance to deny an order for costs to the Appellant miscarried, and the Appellant had so established - Upheld and Remitted - The Construction, Forestry, Mining and Energy Union of Workers -v- Carl Anthony Perrot & Sandra Lee Perrott trading as C & S Perrott - FBA 44 of 2002 - Full Bench - SHARKEY P/BEECH SC/SCOTT C - 12/12/02 .....	17
Application re contractual entitlements - No appearance by the Applicant - Respondent argued that the matter should be dismissed with costs - Commission was satisfied that Applicant had been given every opportunity to prosecute his claim and had chosen not to do so - Further, Commission was not satisfied that the circumstances of this matter were so extreme as to warrant an order for costs against Applicant - Dismissed - Mr MA Taranto -v- Goldburn Fishing Co. Pty Ltd - APPL 235,431 of 2002 - HARRISON C - 31/12/02 - Commercial Fishing .....	174
Complaint re breach of award - Complainant Union signalled their intention to amend the claims so that they were not predicated upon the applicability of the Award - Respondent argued that the applications be dismissed and sought costs in relation to the applications as it attempted to resolve matters by way of agreement but was forced to make applications in order to resolve the issues - Industrial Magistrate found that the claims could not be amended as that would be tantamount to raising a new cause of action - Further, Industrial Magistrate found that Respondent had been put to cost in bringing these applications to finally resolve the matters and had incurred expenses in doing so - Reasons for Decision Issued - AUTO, FOOD, METAL, ENGIN UNION -v- Bell-A-Bike Rottneest Pty Ltd - M 268, M 270, M 271, M 272, M 286 of 2001 - Industrial Magistrate - Cicchini IM - 15/01/03 - Personal Services .....	299
Complaint re alleged failure to comply with C S Perrott Industrial Agreement No. AG 191 of 1997 and the Building Trades (Construction) Award No. 14 of 1978 - Claimant Union argued that Respondents breached the agreement by failing to pay site allowance, the correct redundancy entitlements, accrued sick leave on termination and failed to apply the first on - last off requirement - Further, Claimant Union argued that Respondent had committed various breaches of the Award including failure to pay fares and travelling allowance and failure to provide time and wages records as requested - Respondents argued that the worker was not an employee but rather a subcontractor and denied that worker was engaged pursuant to the Agreement - Further, Respondents denied they were liable to pay site allowance, redundancy entitlements and sick leave indeed they claim that he had been overpaid for fares and travelling and into the superannuation fund - Industrial Magistrate found that the alleged breaches had been proven with the exception of one being the failure to apply the first on - last off requirement - IM also imposed penalties and awarded prejudgement interest and refused the application for costs - However, after claim for costs was remitted back to Industrial Magistrate from Full Bench, IM ordered Respondents to pay costs to Claimant - Reasons for Decision Issued - Construction, Forestry, Mining and Energy Union -v- Carl Anthony Perrot & Sandra Lee Perrott trading as C & S Perrott - M 18 of 2002 - Industrial Magistrate - Cicchini IM - 17/07/02 - Construction Trade Services.....	305

## CUMULATIVE DIGEST—continued

## COSTS—continued

	Page
Claim re breach of award seeking redundancy payment - Claimants argued that they were made redundant, that restructuring was orchestrated at achieving resignations and also sought to recover costs, and the imposition of a penalty upon Respondent for the breach - Respondent argued that as a result of low occupancy rates, a decision was made to restructure and alternative positions was offered, however both Claimants abandoned their employment - Industrial Magistrate reviewed authorities and found on evidence that there was no redundancy in either case, that Claimants were offered alternative employment without loss of entitlements and that the employment relationship came about at the initiative of the Claimants - Reasons for Decision Issued - Ms KB Millsted -v- R.D. Miles & Co. Pty Ltd (ACN 008 727 866) - M 292,405 of 2001 - Industrial Magistrate - Cicchini IM - 08/08/01 - Health Services.....	527
Claim re breach of Order - Claimant Union argued that Defendant contravened a Commission order - Defendant argued that Claimant refused to obey a lawful and reasonable instruction - Industrial Magistrate found that Claimant's refusal to carry out duties resulted from medical advice, therefore, it could not reasonably comply with the direction - Further, IM found that the Order was flagrantly breached, that proceedings were vexatiously defended and ordered Defendant to pay costs and a penalty to the Claimant - Reasons for Decision Issued - Australian Liquor, Hospitality and Miscellaneous Workers Union, Western Australian Branch -v- Burswood Resort (Management) Ltd - M 175 of 2001 - Industrial Magistrate - Cicchini IM - 12/12/02 - Accommodatn, Cafes&Restaurants.....	541
Complaint re breach of Enterprise Bargaining Agreement - Claimant Union argued that Respondent had failed to comply with clause 9.1(b) of the Chubb-Westrail Enterprise Bargaining Agreement 2001 and sought Orders that Defendant comply with the EEA by paying employee monies due, penalty rates and pay Claimant Union the costs and expenses to these proceedings - Defendant argued that on the strength of the police charge, the Claimant was guilty of serious misconduct warranting termination - Industrial Magistrate found that the Claimant Union failed to prove on the balance of probabilities that the EBA was breached - Dismissed - Australian Liquor, Hospitality and Miscellaneous Workers Union, Western Australian Branch -v- Chubb Security Australia Pty Ltd - M 277,309 of 2002 - Industrial Magistrate - Cicchini IM - 26/02/03 - Personal Services.....	546
Complaint re breach of Workplace Agreement - Claimant sought unpaid entitlements pursuant to the workplace agreement, including claims for pre-judgment interest, penalties pursuant to s83(6) of the I.R. Act, 1979 and costs - Defendant conceded that the Claimant was entitled to payment for normal working hours and holiday pay but denied liability for the payment of pay in lieu of notice, maintaining that the Claimant resigned, and in such circumstances was not entitled to pay in lieu of notice under the workplace agreement - Industrial Magistrate was not satisfied based on the evidence presented that the Claimant was dismissed, therefore his claim for one week's pay in lieu of notice was dismissed - Further, IM issued Orders by consent, that Respondent pay the Claimant the amount of \$1058.00 plus interest fixed at \$40.00, and reimburse the Claimant the amount of \$40.00 being the cost of making the claim - Reasons for Decision Issued - Mr P Mairdok -v- Cabletech Electrical Pty Ltd - M 124 of 2001 - Industrial Magistrate - Tarr IM - 22/11/01 - Other Services.....	551
Application re unfair dismissal and contractual entitlements - Applicant argued that employment terminated without notice on his return from holidays and found upon a visit for severance pay a new manager had been appointed - Applicant sought compensation and the reimbursement of court costs - Respondent failed to appear - Commission reviewed authorities and found that Applicant was terminated, that he was denied procedural fairness as no warnings were given to him, that no notice was given to him that he was to be terminated nor was the Applicant paid any monies in lieu of notice on termination, nor was the Applicant given the opportunity to discuss the Respondent's view that it could no longer afford to pay the Applicant - Further, Commission found that Applicant was unfairly terminated both substantively and procedurally and awarded compensation in lieu of reinstatement, and denied benefits - Commission was not satisfied that the circumstances of this matter were such as to warrant an order for costs against the Respondent - Upheld and Order Issued - Mr SN Kirkham -v- Premium Partners Pty Ltd t/as Allsteel Designs - APPL 1130 of 2002 - HARRISON C - 28/03/03 - General Construction.....	1050
Application re contractual entitlements - Applicant sought payment for overtime and argued that he was advised of the flexible hours and time off in lieu arrangement at the interview, that he expressed his dissatisfaction with the arrangement on the condition that he would be disadvantaged if he was unable to take time off and that one of the Respondent partner agreed and said that they would treat all of their employees fairly - Respondent argued that there was no such contractual term to entitle the Applicant to payment for overtime, that Applicant was advised of his working arrangements and that Applicant expressed no reservations about the time off in lieu arrangement - Further, Respondent made application for costs - Commission found that Applicant did not indicate any reservations about his working arrangements, that there was no such term between the parties and the Applicant's contract of employment does not give him a benefit to payment for overtime - Further, Commission reviewed authorities and concluded inter alia, that the circumstances of the case met the tests for awarding costs - Contractual entitlements claim dismissed and application for costs granted in part - Mr B Mitchem -v- Parkfeeds (WA) Pty Ltd - APPL 1618 of 2001 - SCOTT C - 09/08/02.....	1230

## CONSUMER PRICE INDEX

<sup>3</sup> Application to vary the Hospital Salaried Officers' Award 1968 No. 39 of 1968 to incorporate a new classification structure for clinical psychologists and for the retrospective date of operation to have effect from 18 August 1997 - Applicant Union argued, inter alia, that the complexity of the profession, amounts to a significant change in work value and this should be recognised with increases in salary and the provision of a career structure for clinical psychologists - Respondents submitted numerous points and argued that the change in work value for the profession had been accommodated in classification restructuring that took place early 1990s, that pressures now being experienced by senior clinical psychologists could be overcome by the creation of more positions at higher levels and being filled on a "competitive basis" - Further, the development of professional skills evidenced by the use of more sophisticated tests and assessments and an involvement in direct patient referrals reflected normal development within a profession - Commission in Court Session considered evidence, submissions, authorities and Wage Fixing Principles and concluded that there had been a net increase in work value which was sufficient in the terms of the Work Value Principles, "to warrant the creation of a new classification or upgrading to a higher classification", however, they had reservations about the claim in its current form - CICS sought that the parties enter into discussions with a view to resolving the issues regarding the creation and filling more senior positions bearing in mind that the positions previously at lower level would move to higher increments and levels; and the creation of new grades and definitions for the establishment of higher level grades 3 to 5, and how those grades and definitions are to be reflected - CICS considered that there were special circumstances within the terms of s.39 of the Act, which made it fair and right to grant some degree of retrospectivity in the operation of any re-classification for clinical psychologists currently employed with the Respondents, who are re-classified as a result of this decision - CICS set the operative date from the 1st September 2001 - Matter divided and Granted in Part - Hospital Salaried Officers Association of Western Australia (Union of Workers) -v- Royal Perth Hospital & Others - P 39 of 1997 - Commission in Court Session - COLEMAN CC/BEECH SC/SCOTT C - 16/12/02 - Health Services.....	23
---	----

## DANGEROUS WORK

Application re revocation of right of entry permit - Application for an adjournment dismissed on the grounds that Commission was not satisfied that the refusal of the adjournment would result in a serious injustice to one party - Applicant argued that Respondent's representative had acted improperly and as a result of that conduct, Applicant suffered loss and damage and became exposed to the risk of liquidated damages for delay in completing the project - Applicant further argued that the limits of "proper" behaviour could be ascertained from the scope of the licence to enter the premises conferred by s.49H and s.49I and that license does not permit conducting safety audits - Respondent opposed the allegations and argued inter alia, that there was a legitimate safety concern on this particular site, that its representative was at one stage exercising powers but did not act improperly in the exercise of those powers - Commission found on evidence that the Respondent's representative did not intentionally or unduly hinder the employer or employees during working time and that whilst industrial action could have been avoided, he did not act in an improper manner in the exercise of powers under Division 2G of the Act - Dismissed - Silent Vector Pty Ltd t/a Sizer Builders -v- The Construction, Forestry, Mining and Energy Union of Workers - APPL 42,63 of 2003 - BEECH SC - 25/02/03 - General Construction.....	564
---	-----

## CUMULATIVE DIGEST—continued

DATE OF OPERATION	Page
<sup>3</sup> Application to vary the Hospital Salaried Officers' Award 1968 No. 39 of 1968 to incorporate a new classification structure for clinical psychologists and for the retrospective date of operation to have effect from 18 August 1997 - Applicant Union argued, inter alia, that the complexity of the profession, amounts to a significant change in work value and this should be recognised with increases in salary and the provision of a career structure for clinical psychologists - Respondents submitted numerous points and argued that the change in work value for the profession had been accommodated in classification restructuring that took place early 1990s, that pressures now being experienced by senior clinical psychologists could be overcome by the creation of more positions at higher levels and being filled on a "competitive basis" - Further, the development of professional skills evidenced by the use of more sophisticated tests and assessments and an involvement in direct patient referrals reflected normal development within a profession - Commission in Court Session considered evidence, submissions, authorities and Wage Fixing Principles and concluded that there had been a net increase in work value which was sufficient in the terms of the Work Value Principles, "to warrant the creation of a new classification or upgrading to a higher classification", however, they had reservations about the claim in its current form - CICS sought that the parties enter into discussions with a view to resolving the issues regarding the creation and filling more senior positions bearing in mind that the positions previously at lower level would move to higher increments and levels; and the creation of new grades and definitions for the establishment of higher level grades 3 to 5, and how those grades and definitions are to be reflected - CICS considered that there were special circumstances within the terms of s.39 of the Act, which made it fair and right to grant some degree of retrospectivity in the operation of any re-classification for clinical psychologists currently employed with the Respondents, who are re-classified as a result of this decision - CICS set the operative date from the 1st September 2001 - Matter divided and Granted in Part - Hospital Salaried Officers Association of Western Australia (Union of Workers) -v- Royal Perth Hospital & Others - P 39 of 1997 - Commission in Court Session - COLEMAN CC/BEECH SC/SCOTT C - 16/12/02 - Health Services .....	23
Application to vary a number of Independent Schools Awards - Applicant Union sought to incorporate terms and conditions applying in the non-government schools' sector, and to bring the awards in line with the provisions of the Workplace Relation Act 1996 covering termination of employment, and to incorporate requirements included in the Minimum Conditions of Employment Act 1993, the Superannuation Guarantee (Administration) Act 1992, the I.R. Act 1979 and increases to allowances pursuant to Principle 5 of the Statement of Principles of the 2002 State Wage Case - Applicant Union argued inter alia, that the terms of variations relating to redundancy and long service leave incorporate conditions currently applying to the majority of employees covered by the awards and employees not covered by enterprise agreements should not be excluded from the terms of these provisions - Respondent argued that the operative date for all variations should be the date of hearing except those relating to redundancy, payment of relief psychologists and houseparents should have a prospective date of 1 January 2004 as variations involve budgetary issues for some respondents - Commission was satisfied that the variations relating to redundancy and long service leave brought under Principle 10 of the 2002 State Wage Case, should be incorporated into the awards - Commission refused to grant a retrospective date for the operation of the variations relating to redundancy and found it had insufficient evidence as to when an agreement was reached in relation to that issue - Commission found that respondents have had substantial notice of the nature of all the proposed variations, that there had been no details about any hardship that will be suffered if the operative date was to be date of hearing and accepted Applicant's argument that an operative date of 1 January 2003 was appropriate for the variation - Awards Varied - INDEPENDENT SCHOOLS SAL OFFIC -v- The Anglican Schools Commission (Inc.) & Others - APPL 922,1045,1046,1047 of 2002 - HARRISON C - 04/06/03 - Education .....	1425
<b>EMPLOYEE</b>	
Application re unfair dismissal - Applicant argued that Respondent had terminated Applicant unfairly by not giving any warning that his services were to be terminated - Further, Applicant argued that as an agent he should also be given the benefits as an employee - Respondent argued that Applicant was an independent contractor and not an employee and was paid one month's retainer on termination as business was suffering a downturn - Commission considered whether Applicant operated under a contract of service or a contract for service and determined that the Commission was guided by what the parties intended - Commission found that Applicant clearly viewed himself as an agent and found that the arrangement of the parties was one where Applicant was not seen by either party as one of employer and employee and dismissed the application for want of jurisdiction - Dismissed for want of jurisdiction - Mr B Ryder -v- Beaulieu of Australia Limited - APPL 2307 of 2001 - WOOD C - 20/12/02 - Other Manufacturing .....	168
Complaint re alleged failure to comply with C S Perrott Industrial Agreement No. AG 191 of 1997 and the Building Trades (Construction) Award No. 14 of 1978 - Claimant Union argued that Respondents breached the agreement by failing to pay site allowance, the correct redundancy entitlements, accrued sick leave on termination and failed to apply the first on - last off requirement - Further, Claimant Union argued that Respondent had committed various breaches of the Award including failure to pay fares and travelling allowance and failure to provide time and wages records as requested - Respondents argued that the worker was not an employee but rather a subcontractor and denied that worker was engaged pursuant to the Agreement - Further, Respondents denied they were liable to pay site allowance, redundancy entitlements and sick leave indeed they claim that he had been overpaid for fares and travelling and into the superannuation fund - Industrial Magistrate found that the alleged breaches had been proven with the exception of one being the failure to apply the first on - last off requirement - IM also imposed penalties and awarded prejudgement interest and refused the application for costs - However, after claim for costs was remitted back to Industrial Magistrate from Full Bench, IM ordered Respondents to pay costs to Claimant - Reasons for Decision Issued - Construction, Forestry, Mining and Energy Union -v- Carl Anthony Perrot & Sandra Lee Perrott trading as C & S Perrott - M 18 of 2002 - Industrial Magistrate - Cicchini IM - 17/07/02 - Construction Trade Services.....	305
Application re unfair dismissal - Applicant argued that dismissal was unfair because she was harassed out of her employment and her hours of work were being cut - Respondent argued that Applicant was aware her hours were at the Respondent's discretion and she was offered work - Commission found that there was no evidence before it that the Respondent's conduct in these circumstances constituted a breach of a fundamental condition of the contract of employment such as to enable the employee to treat the employment as brought to an end - Further, Commission was not satisfied that there was a dismissal, or a termination at the initiative of Respondent - Dismissed - Ms N English -v- The Windsor Hotel South Perth Pty Ltd - APPL 1284 of 2002 - SCOTT C - 03/02/02 - Accommodatn, Cafes&Restaurants .....	331
<sup>1</sup> Appeal against Decision of Full Bench (82WAIG2409) re Long Service Leave entitlements - Question re jurisdiction - Appeal on ground that worker was an independent contractor and, whether appeal raised question of "construction and interpretation" of Long Service Leave Act, 1958 and Industrial Relations Act, 1979 - Industrial Appeal Court reviewed Acts, authorities and found that on the whole circumstances, it was open to both Industrial Magistrate and Full Bench to conclude that the relationship between employer and employee was never terminated in point of law and that it had jurisdiction to hear the appeal - Further, IAC concluded inter alia, that the Full Bench had not erred in the interpretation of the Long Service Leave Act, however, it had erred in misconstruing the nature of the power allowed to the Industrial Magistrate - Dismissed Act - United Construction Pty Ltd -v- Mr J Birighitti - IAC 11 of 2002 - Industrial Appeal Court - 27/02/03 - General Construction .....	434
<sup>2</sup> Appeal against Decision of Commission (83WAIG168) re unfair dismissal - Appellant argued that the Learned Commissioner erred in his findings, on numerous grounds relating to his employment relationship with the Respondent - Full Bench applied legal principles, reviewed indicia and authorities cited therein to determine the totality and the true nature of the contract and found inter alia, that it was open to the Commissioner at first instance to find, and the Commissioner should have found, that Appellant was an "employee" within the meaning of the definition of "employee" in s.7(a) of the Act, because he was a person employed by an employer to do work for hire or reward, and also because he was, within the meaning of the definition in s.7(b) of the Act, at all material times, a person whose usual status was that of an employee - Further, Full Bench found that Respondent was an employer because it was at all material times a company employing one or more employees, some of whom were not the Appellant, and that should have been so found - Full Bench found that the matter before the Commissioner was therefore an industrial matter as defined, and he was entitled to take cognisance of it pursuant to s.23 and s.29 of the Act - Upheld, Decision at first instance suspended and matter remitted to the Commission at first instance - Mr B Ryder -v- Beaulieu of Australia Limited - FBA 2 of 2003 - Full Bench - SHARKEY P/COLEMAN CC/GREGOR C - 29/04/03 - Personal & Household Good W/sg .....	1133

## CUMULATIVE DIGEST—continued

	Page
<b>ENFORCEMENT OF ACTS/AWARDS/ORDERS</b>	
<p><sup>1</sup>Appeal against Decision of Full Bench (82WAIG765) re breach of award in relation to underpayments and denial of benefits, flat hourly rate in excess of award entitlement for ordinary time, right of set-off, method of calculation of amount due to employee and whether claim truly for breach of award or for breach of over award agreement - IAC reviewed authorities, evidence and found inter alia, whether payment was made expressly or impliedly to cover a particular obligation, the payment could not be claimed as a set off, that the claim or the particulars of the claim was to enforce the award and not to enforce an over award agreement and that an application for enforcement of the terms and conditions of the award, could not proceed on the basis that what was due under the award was to be calculated by reference to the over award rate agreed between the parties - Upheld and Remitted - James Turner Roofing Pty Ltd -v- Mr CL Peters - IAC 7 of 2002 - Industrial Appeal Court - 10/03/03 - Construction Trade Services .....</p>	427
<p>Complaint re alleged breaches of clauses 3(1)(4)(5) &amp; 4(1) of Industrial Relations (Industrial Agents) Regulations 1997 Schedule 1 - Complainant sought an extension of time to bring proceedings before the Industrial Magistrate in his application to have Respondents deregistered as Industrial Agents pursuant to the Industrial Relations (Industrial Agents) Regulations 1997 - Further Complainant argued that Industrial Magistrate did have the powers and jurisdiction to deal with complaint, that appeal had been properly initiated pursuant to the provisions of the Industrial Magistrate's Regulations and that the Registrar's decision was in effect a determination made for the purposes of regulation 15(3)(a) - Respondents lodged an interlocutory application and sought orders that the application be dismissed or struck out on the grounds that the application was out of time, functus officio, against public interest and with insufficient merit - Further, Respondent argued that in respect of regulations 12 of the I.R. Act there was no substantial compliance - Industrial Magistrate reviewed the relevant legislation and the intention of the legislation, the jurisdiction of the Industrial Magistrate's Court and found that under the proper administration of the Acts and Regulations an Industrial Magistrate could make a determination or a decision as to whether or not the registration of an industrial agent was to be cancelled - Further, IM found that it had no power to rule or view that the Registrar in dealing with the complaint in the circumstances was an unauthorised act or a series of unauthorised acts and that it could not be said that the matter was functus officio - IM further found that under regulation 19 of the I.R. Act an Industrial Magistrate had power to cancel registration of an industrial agent and consider allegations that there had been a breach of the code of conduct an industrial agent was subject to when they were registered - Industrial Magistrate granted the parties an extension of time in respect to the application of the extension of time within which an appeal may be commenced prior to final orders - Reasons for Decision Issued - Mr JRA Acosta -v- Mr G Broderick &amp; Other - M 200 of 2002 - Industrial Magistrate - Graeme Neil Calder - 28/03/03 - Other Services .....</p>	986
<b>ENTRY: RIGHT OF</b>	
<p>Conference referred re alleged refusal to allow Applicant Union official access to the Respondents' workplace - Applicant Union argued that the rights of entry for union officials became a statutory code introduced by the Labour Relations Reform Act 2002 dealing with rights of entry into premises where relevant employees work - Further, Applicant Union submitted that the Commission did not have the jurisdiction to declare the parties rights as to right of entry under the Industrial Relations Act 1979 - Respondent argued that the Act did not preclude the Commission from making an order that union officials be subject to a random drug and alcohol test prior to entering Respondent's premises and that it would be consistent with the scheme of legislation and its policy was consistent with the workplace health and safety - Commission found and declared that the Respondents did not have the right to require Mr Brett Davis, an authorised representative of the Applicant Union, in possession of the requisite authority, exercising his rights under Division 2G of the Industrial Relations Act 1979, to submit a random drug and alcohol test, as a condition of the exercise of those rights - Declaration Issued - AUTO, FOOD, METAL, ENGIN UNION -v- Transfield Services (Australia) Pty Ltd &amp; Other - CR 71 of 2002 - KENNER C - 12/12/02 - Unions .....</p>	376
<p>Complaint re contravention of s.96J of the I.R. Act - Claimant sought order that Respondent be restrained from entering premises and from directing its members to stop work - Further, Claimant submitted that in relation to all matters before IMC falling within general jurisdiction, the Court, by virtue of regulation 49(5) of the IMC (General Jurisdiction) Regulations 2000, was not bound by the rules of evidence - Industrial Magistrate found that the Act enabled it to deal with the matter as if these proceedings were an action within the Local Court and therefore had jurisdiction - Further, IM concluded that it was not bound by rules of evidence due to the interlocutory nature of the claim, that evidence was lacking and that there remained a substantive issue and did not want to pre-empt the trial - Dismissed - Silent Vector Pty Ltd t/a Sizer Builders -v- The Construction, Forestry, Mining and Energy Union of Workers - M 388 of 2001; CP 2,3,4,5,6,7 of 2002; M 75,76,121,122,188,263 of 2002 - Industrial Magistrate - Cicchini IM - 04/09/02 - General Construction .....</p>	525
<p>Application re revocation of right of entry permit - Applicant sought that hearing dates be vacated and matters adjourned pending determination of criminal charges against Union representatives - Further, Applicant objected to any application by the Respondent for the Commission to exercise its discretion under s.27(1)(a)(ii) and (iv) - Respondent Union consented subject to proceedings in related applications being similarly vacated and adjourned - Commission applied principle and was satisfied that the hearing dates ought be vacated and applications adjourned to await the outcome of related criminal proceedings - Granted - Silent Vector Pty Ltd t/a Sizer Builders -v- The Construction, Forestry, Mining and Energy Union of Workers - APPL 1986,1987 of 2002 and APPL 92, 93 of 2003 - BEECH SC - 26/02/03 - General Construction .....</p>	563
<p>Application re revocation of right of entry permit - Application for an adjournment dismissed on the grounds that Commission was not satisfied that the refusal of the adjournment would result in a serious injustice to one party - Applicant argued that Respondent's representative had acted improperly and as a result of that conduct, Applicant suffered loss and damage and became exposed to the risk of liquidated damages for delay in completing the project - Applicant further argued that the limits of "proper" behaviour could be ascertained from the scope of the licence to enter the premises conferred by s.49H and s.49I and that license does not permit conducting safety audits - Respondent opposed the allegations and argued inter alia, that there was a legitimate safety concern on this particular site, that its representative was at one stage exercising powers but did not act improperly in the exercise of those powers - Commission found on evidence that the Respondent's representative did not intentionally or unduly hinder the employer or employees during working time and that whilst industrial action could have been avoided, he did not act in an improper manner in the exercise of powers under Division 2G of the Act - Dismissed - Silent Vector Pty Ltd t/a Sizer Builders -v- The Construction, Forestry, Mining and Energy Union of Workers - APPL 42,63 of 2003 - BEECH SC - 25/02/03 - General Construction .....</p>	564
<b>EXTENSION OF TIME</b>	
<p>Application re unfair dismissal - Applicant lodged an application for an extension of time in which to file application and argued that the reasons for the delay related to her pregnancy, the birth of her child, her recovery and the illness of the child - Respondent opposed the applications - Commission found that there was no power to extend time in accordance with s.29(3) of the I.R. Act, in respect of an application filed on 16 October 2002 relating to a termination of employment in May 2002 - Dismissed - Mrs RJ Alberghini -v- Dr Geoffrey Bower Isotope Imaging Hollywood Hospital - APPL 1729 of 2002 - SCOTT C - 10/01/03 - Health Services .....</p>	326
<p>Application re unfair dismissal and contractual entitlements - Applicant argued that she intended to lodge her application within the 28 day time frame and lodged it in the Commission within the 28 day time limit, subsequent to lodging her application she was informed by Registry that Form 1 was missing from her application and needed to be completed and returned, she received a copy of a Form 1 on 9 October 2002 and lodged Form 1 the next day - Respondent argued that Applicant was terminated on 6 September 2002 - Commission found that Applicant was not sent the correct form in the first instance and that there was a valid reason why Applicant did not comply with the required 28 day time frame for lodging her application, it was clear that as soon as Applicant received the Form 1 she filed her application promptly the next day - Application to accept Applicant's claim which was lodged out of time granted - Mrs ES Harrison -v- Emmanuel Michael Papadoulis T/A Great Australian Travel Centre - APPL 1701 of 2002 - HARRISON C - 16/01/03 - Other Services .....</p>	333
<p>Application re unfair dismissal - Applicant argued that he was unfairly dismissed and that the Commission was within jurisdiction to consider the acceptance of the present application out of time - Respondent denied Applicant's allegations and raised as a preliminary issue that the Commission was without jurisdiction to entertain the claim on the basis proceedings commenced after 1 August 2002 whilst termination of employment took place on 26 July 2002 and there was no ability for Commission to extend time under the IR Act - Commission found that the amendments effected by the Labour Relations Reform Act 2002 to repeal s29(2) of the Act and to enact the new ss29(2) and s29(3) were not retrospective in the sense that the datum point for the termination of the employment was 1 August 2002 and not a date earlier for the purposes of the 28 day time limit - Dismissed for want of jurisdiction - Mr K McEwan -v- Australasian Correctional Management Pty Ltd (ACN 051 130 600) - APPL 1469 of 2002 - KENNER C - 10/12/02 - Food Retailing ...</p>	360

CUMULATIVE DIGEST—*continued*

	Page
EXTENSION OF TIME— <i>continued</i>	
Application re unfair dismissal seeking extension of time - Applicant argued that circumstances surrounding the resignation amount to a dismissal of him by the Respondent - Further, Applicant argued that after the dismissal he could not afford the filing fee hence the delay in lodging his application - Commission applying the Principles set out in Azzalini's Case (ibid) found the length of the delay was not justifiable on the evidence before the Commission - Further, Commission found on Applicant's own evidence, that Applicant was not dismissed from his employment but left it voluntarily, therefore, there had been no dismissal to attract the jurisdiction in the Commission - Commission also found that Applicant's case would have no prospect to succeed and that it would be fair not to accept an application out of time in these circumstances - Dismissed - Mr P Scott -v- Sealcorp Holdings Limited (ABN 28 009 143 597) - APPL 289 of 2003 - GREGOR C - 01/04/03 - Insurance.....	1070
Application for extension of time to file application for harsh, oppressive and unfair dismissal - Applicant argued that the delay in lodging her application was due to Christmas break, that she wanted to prove that termination was in fact a true redundancy and that the work continued to be performed by someone else - Respondent argued that due to the economic situation there was a downturn in business at that time and needed to make the position redundant - Commission found on evidence that while the employer did not follow all appropriate processes, Applicant's position was in fact redundant and that the rationale for Applicant's delay in lodging her application was not reasonable, therefore the referral out of time was not accepted - Dismissed - Ms B Bryant -v- Boomerang Paper WA Pty Ltd - APPL 162 of 2003 - WOOD C - 25/03/03 - Paper Manufacturing .....	1188
Application for extension of time to file application re unfair dismissal - Applicant argued the Commission ought to accept the application out of time as he was unable to get representation from Solicitors prior to 17 January 2003 due to the Christmas period, he was unaware of the 28 day time limit to lodge a claim in the Commission and he would suffer material prejudice if he was not able to proceed with his claim - Commission found that it would be unfair not to extend time in the present case therefore an order was made to accept the Applicant's application and the matter referred by the Commission to a Deputy Registrar for conciliation pursuant to s.32 of the Act - Granted - Mr B Carrington -v- Perth 4WD Wreckers Pty Ltd trading as The Perth 4WD Centre - APPL 99 of 2003 - KENNER C - 28/03/03 - Machining and Motor Vehicle Wholesaling .....	1192
Application for extension of time to file application re unfair dismissal - Applicant argued the delay came as a miscalculation by his legal representative and that his case was not a genuine redundancy but dismissal had occurred following safety concerns - Respondent argued that no safety issues had been raised by Applicant while working on the project completed immediately prior to the redundancy - Commission found there was an acceptable explanation for the delay, that the interest of justice outweigh the prejudice to the employer and that it would be unfair not to accept the application - Granted - Mr P Dawson -v- Devaugh Pty Ltd ABN 73 008 792 265 - APPL 175 of 2003 - COLEMAN CC - 10/04/03 - Construction Trade Services.....	1194
Application for extension of time to file application re unfair dismissal - Applicant argued the reason for delay in lodging the application was he was given incorrect information by the Department of Consumer and Employment Protection, the 28 day period was a mere technicality and the Applicant took steps to make it clear to the Respondent that he contested the dismissal and was intending to lodge an application - Respondent argued there was no notification by the Applicant that he intended to contest his dismissal and that it was prejudiced, as a potential key witness that was available if the application had been made within time was no longer in the country and unavailable - Commission found that the application was 98 days out of time and the Applicant did not show that there was an acceptable explanation for the delay in lodging his application and an order was issued dismissing the application - Dismissed - Mr V Dimitriou -v- Energy World Corporation Limited - APPL 360 of 2003 - BEECH SC - 22/04/03 - Other Services .....	1195
Application for extension of time to file an application re unfair dismissal - Applicant argued his application was filed out of time as he understood he had one month to lodge his application, not 28 days, that he did not have the money to lodge his claim until his son commenced work and he was able to borrow the money - Commission accepted the reasons for the delay and found that the delay was small and would not cause any prejudice to the respondent - Granted - Mr DW Evans -v- Jim Catchpole Civil Infrastructure - APPL 1763 of 2002 - WOOD C - 12/12/02 - General Construction.....	1197
Application for extension of time to file application re unfair dismissal and denied contractual entitlements - Applicant argued that the application was not filed as he awaited a response from the respondent to a letter sent by his Solicitor to the respondent - Respondent argued there would be a prejudice to the respondent if the matter were to proceed in the circumstances of the delay given that the respondent did not have advice of the intention of the applicant to lodge a claim until some three months after the applicant's dismissal - Commission found the reason for delay in the circumstances of the applicant having legal advice and prompting from the Commission was not adequate and the applicant has not met the obligation that falls to him to prosecute his claim with appropriate diligence and an order was issued dismissing the application - Dismissed - Mr MW Leysenaar -v- Darren Bracewell, Seagate Holdings Pty Ltd - APPL 127 of 2003 - SCOTT C - 14/04/03 - Other Services.....	1221
Application re unfair dismissal - Applicant argued he had difficulty contacting his solicitor, that telephone calls had not been returned and he assumed the solicitor would deal with the service of the application - No appearance on behalf of the respondent - Commission found a six week period had elapsed since the applicant had filed the application in the Commission and when he contacted a solicitor, that applicant had not responded to communication from the Commission, therefore he was entirely responsible for the lack of service of the application - Dismissed - Mr AG McGuire -v- Liz Baggetta of Millennium Inorganic Chemicals - APPL 245 of 2003 - SCOTT C - 12/05/03 - Other Manufacturing.....	1223
Application re unfair dismissal seeking extension of time pursuant to s.29(3) of the I.R. Act - Applicant argued that she was aware of the 28 day time limit at the time that she contemplated taking these proceedings, but that some personal factors and some health factors were relevant to the delay that took place - Commission applied legal principles and found that the length of the delay was substantial, and although it appeared from the Applicant that she would contest the employer's decision, from the date of termination, no further steps were taken by her to put the Respondent on notice that the dismissal was being contested - Further, Commission found that if it was to accept the application for extension of time, then there may be some prejudice occasioned upon Respondent, therefore, it was not persuaded that it ought exercise its discretion to receive the application out of time in the present circumstances - Dismissed for want of jurisdiction - Ms JS Palmer -v- Mr D Palumbo - APPL 26 of 2003 - KENNER C - 01/04/3003 - Food Retailing .....	1245
Application for extension of time to file an application re unfair dismissal - Applicant argued that upon receiving advice from a government department she did commence an application in the Equal Opportunity Commission very promptly, that in subsequent to a discussion with a person at the EOC, she was advised that she could commence proceedings in this Commission and that at no time was she aware of the 28 day time limit to lodge an application - Commission found on evidence that applicant had acted promptly on all advice given to her, that she was unaware of the 28 day time limit and that the respondent was not able to inform the Commission of any prejudice beyond that which would normally be expected, that is, the prejudice of having to defend proceedings brought against it - Granted - LI Pearce -v- Tomlinson Ltd - APPL 90 of 2003 - KENNER C - 11/04/03.....	1247
Application for extension of time to file an application re unfair dismissal - Applicant argued he was waiting until he received a Separation Certificate from the respondent as he needed to know the reason the respondent relied upon to dismiss him - Commission accepted applicant's explanation for the delay and found that the period of delay in filing was so short and whether or not there was a sufficiently arguable case, the Applicant must be given the benefit of the doubts - Commission concluded that it intend to grant the extension for the application to be dealt with by the Commission and in view of its comments about the unfair dismissal, it was appropriate that it refer the matter to the Chief Commissioner for his consideration of reallocation to the Commission otherwise constituted - Granted - Mr A Vanyi -v- Greg Turner (Director), Boston Technologies T/AS Copier Wholesale - APPL 319 of 2003 - KENNER C - 10/04/03 - Machining and Motor Veh Wholesaling.....	1265

## CUMULATIVE DIGEST—continued

## EXTENSION OF TIME—continued

- Appeal against decision to suspend made on 16/7/2002 - Preliminary issues re extension of time, perceived bias and whether matter ought proceed in public interest - Appellant argued that Respondent had failed to adhere to the disciplinary procedures and to comply with the requirements of the PSM Act 1994 - Appellant sought Orders that the Respondent's action be reviewed, modified, nullified and/or varied - Respondent argued that there had been no unlawful action undertaken and that the direction to the Appellant to not attend work did not constitute a suspension in accordance to the PSM Act 1994 - Further, Respondent argued that PSAB had no jurisdiction to deal with the matter and opposed the application for extension of time - Public Service Appeal Board invited the parties to make written submissions on whether or not the matter should proceed in the public interest - PSAB found that in accordance with the Act, the Board had a responsibility to manage the process of a particular case as it sees appropriate and the fact that Appellant would have preferred a different process did not meet the test of perceived bias - PSAB reviewed authorities and was unanimously of the view that the extension of time ought be granted because the Respondent had been made aware of the Appellant's challenge since the time expired for the filing of the appeal - PSAB concluded that there was no right of appeal to the Board arising from any action under s.82 of the PSM Act, there was no valid appeal before the board, in accordance with its jurisdiction and accordingly, had the Board the jurisdiction to deal with the matter, it would not have dismissed the appeal in the public interest as the passage of time and events had not resolved the matter or meant that it was merely academic to proceed - Orders Issued - Mr S Kelly -v- Director General, Department of Justice - PSAB 12 of 2002 - Public Service Appeal Board - SCOTT C - 17/04/03 - Government Administration ..... 1283
- <sup>2</sup>Appeal against Decision of Commission (83WAIG1053) re dismissed unfair dismissal claim lodged out of time - Appellant argued that the learned Commissioner erred in law when having listed the Appellant's application for hearing he dismissed the application without hearing or taking any evidence on oath - Appellant sought orders that the appeal be upheld and decision at first instance be suspended and matter referred back to the Senior Commissioner - No appearance on behalf of the Respondent - Full Bench cited authorities and found inter alia, that Appellant was not afforded procedural fairness or natural justice because findings were made which assessed matters based on the mere plausibility of assertions of fact from the bar table instead of evidence on oath or affirmation subject to cross-examination - Upheld, Decision at first instance suspended and the matter remitted to the Commission at first instance to be heard and determined accordingly to law and the reasons of the Full Bench - Mr J Rodriguez -v- Parks Industries Pty Ltd - FBA 6 of 2003 - Full Bench - SHARKEY P/KENNER C/WOOD C - 06/06/03 - Other Services ..... 1395
- Application re unfair dismissal and contractual entitlements - Applicant sought redundancy payment, accrued sick leave, long service leave and payment for financial hardship due to his new job paying much lesser for the same work - Respondent argued that there was a downturn at the time of dismissal, the Applicant was made redundant and Applicant was aware that he was to be made redundant - Commission reviewed authorities and found on evidence that Applicant's application was 74 days out of time because the Applicant lodged his application first in the Federal Commission and once he knew that there was a jurisdictional challenge to his application, he took no further steps at that point in time to clarify his application, or to make the application in this Commission, therefore it would not be unfair for his application not to be accepted out of time - Commission concluded that it had doubt that the claims for long service leave and for financial hardship could be claimed and that it would convene a conference to deal with the matters in respect of redundancy and sick leave which are claimed as contractual benefits - Referral out of time not accepted - Order Issued - MR RS Brown -v- RCR Tomlinson Ltd - APPL 231 of 2003 - WOOD C - 12/05/03 - Motor Vehicle Rtlg & Services ..... 1484
- Application re unfair dismissal - Commission called proceeding on of its own motion as the application was filed some six months or thereabouts out of time - Commission also found the applicant accepted in her evidence she was advised of her application being well out of time and nothing further was done for some time and the delay has been compounded by the applicant's failure to take heed of advice and to commence proceedings - Dismissed - Ms J Dimasi -v- Alphapharm Pty Ltd ABN 93 002 359 739 - APPL 291 of 2003 - KENNER C - 09/05/03 - Health Services ..... 1495
- Application re unfair dismissal seeking compensation - Commission called proceedings on its own motion by reason that application was filed out of time - Applicant argued that although she had been advised of the need to file the application within 28 days of the date of termination of employment she sought legal advice and the firm of solicitors was on leave until 6 January 2003 - Respondent opposed the application and said that at all times it treated the Applicant fairly and there was no indication to it that a claim would be filed against it until the notice of application was received by service - Commission was not persuaded in the circumstances that an extension of time should be granted because the applicant admitted to her credit, that she was aware of the necessity to bring these proceedings within 28 days - Dismissed for want of jurisdiction - Miss KJ Francis -v- Pilbeam Family Trust t/a Stamp-It Rubber Stamp Co (WA) - APPL 27 of 2003 - KENNER C - 24/03/03 - Property and Business Services ..... 1502
- Application for extension of time to file an application re unfair dismissal - Applicant argued she was confused and thought the Australian Workplace Agreement applied to her employment and therefore ought to commence proceedings in the Australian Industrial Relations Commission - Commission found the onus was on employees to take all reasonable steps to ensure they are commencing proceedings in the appropriate jurisdiction, that there was little or no evidence before the Commission to indicate other steps were taken by the applicant to properly ascertain the correct jurisdiction and a considerable period of time lapsed before the applicant took any steps to lodge an application - Dismissed - Mrs M Kostovski -v- Gull Petroleum (WA) Pty Ltd - APPL 260 of 2003 - KENNER C - 06/05/03 - Petroleum Coal Chemical Assoc ..... 1516
- Application re unfair dismissal - Application lodged out of time - Commission reviewed authorities and considered it would be unfair not to accept the Applicant's referral out of time because she was dismissed without notice and without warning, and in the circumstances particularly the lack of response from the Respondent, then the illness and hospitalisation of the Applicant's children, the reasons for the delay was understandable - Commission concluded that there was no prejudice to the Respondent above and beyond having to face an application for unfair dismissal - Accepted - Mrs E Massandy -v- Fred Margaria Cleaning Services - APPL 318 of 2003 - WOOD C - 09/05/03 - Personal Services ..... 1518
- Application for extension of time to file application re unfair dismissal - Applicant argued that the delay in lodging his application was because he was exchanging emails with a representative of the respondent in regard to taxation of his ex gratia payment - Respondent argued the applicant had not provided information that the termination would be contested - Commission found the delay in this application was almost three times the period provided in the Act, the applicant was not dismissed so the jurisdiction which resides in the Commission to hear the industrial matter referred under s.29 of the Act does not arise therefore the application was without jurisdiction and there was no case to be argued - Dismissed - Mr SJ Moretti -v- Canning Vale Weaving Mills Ltd - APPL 355 of 2003 - GREGOR C - 14/05/03 - Other Manufacturing ..... 1519
- Application re unfair dismissal lodged out of time - Applicant argued his application was lodged out of time as he did not have the money for the filing fee - Commission considered the evidence and it was not persuaded as to the reason for applicant not having money for the claim given his strong denial of the allegation that led to his dismissal - Commission concluded inter alia, that even though application was only one day out of time, in the context of Applicant's probationary employment, and that within the 10 days of his employment he had already received a written warning, possibly two oral warnings, and an allegation had been made against him, it had not been persuaded that it would be unfair not to accept his claim - Dismissed - Mr NJ Roberts -v- John Ryan owner of Metro Security Services - APPL 242 of 2003 - BEECH SC - 01/05/03 - Public Order & Safety Services ..... 1521
- Application re unfair dismissal - Commission called these proceedings on its own motion as application was out of time - Commission found that 46 days was a significant delay and was a factor which must be taken against the applicant and the application, and the state of the evidence was such that there was no real and proper explanation for the delay - Further, Commission had significant doubts as to whether the applicant, as a matter of fact and law, was an employee of the respondent as at the time it was alleged the relationship came to an end - Application for extension of time refused and application for unfair dismissal dismissed for want of jurisdiction - Mr D Suparta -v- Swan Transit Operations Pty Ltd - APPL 135 of 2003 - KENNER C - 09/05/03 - Road Transport ..... 1527

## CUMULATIVE DIGEST—continued

	Page
<b>HOURS OF WORK</b>	
Complaint re breach of Restaurant, Tearoom and Catering Workers Award No. R48 of 1978 - Claimant argued that Respondent had failed during the period of employment to pay him appropriate wages and overtime in accordance with the provisions of clauses 10 and 21 of the Award that bound Respondent - Respondent admitted that the Award bound the parties and that Claimant worked as a full time chef for the Respondent but denied it had breached the Award as alleged - Further, Respondent informed the Industrial Magistrate's Court that it had over the material period inadvertently underpaid Claimant \$7,745.00 however denied the claim - Industrial Magistrate found that Claimant had failed to establish on the balance of probabilities that he had worked the times he alleged and thus failed to establish each alleged breach - Further, Industrial Magistrate made an order in favour of Claimant with respect to the amount of \$7,745.00 - Reasons for Decision issued - Mr A Kaew-Ard -v- Sawasdee Pty Ltd - M 193 of 2002 - Industrial Magistrate - Cicchini IM - 06/02/03 - Accommodatn, Cafes&Restaurants.....	314
<b>INDUSTRIAL ACTION</b>	
<sup>4</sup> Application for Orders pursuant to s.66 of the I.R. Act - Applicant argued that Respondent and its members had breached its rules and s.6 of the Act - Respondent opposed application and argued that the President lacked jurisdiction to hear and determine the matter - President found on evidence that Applicant was not a person prescribed as having right to make application pursuant to s.66 of the Act, and in particular s.66(1), that there was no jurisdiction to hear and determine application as the application sought orders in relation to the organisation's rules of which Applicant was not a member and has never been a member - Dismissed - Mr DP Deen -v- The Construction, Forestry, Mining and Energy Union of Workers - PRES 35 of 2002 - President - SHARKEY P - 08/01/03 - Unions.....	233
Complaint re contravention of s.96J of the I.R. Act - Claimant sought order that Respondent be restrained from entering premises and from directing its members to stop work - Further, Claimant submitted that in relation to all matters before IMC falling within general jurisdiction, the Court, by virtue of regulation 49(5) of the IMC (General Jurisdiction) Regulations 2000, was not bound by the rules of evidence - Industrial Magistrate found that the Act enabled it to deal with the matter as if these proceedings were an action within the Local Court and therefore had jurisdiction - Further, IM concluded that it was not bound by rules of evidence due to the interlocutory nature of the claim, that evidence was lacking and that there remained a substantive issue and did not want to pre-empt the trial - Dismissed - Silent Vector Pty Ltd t/a Sizer Builders -v- The Construction, Forestry, Mining and Energy Union of Workers - M 388 of 2001;CP 2,3,4,5,6,7 of 2002;M 75,76,121,122,188,263 of 2002 - Industrial Magistrate - Cicchini IM - 04/09/02 - General Construction.....	525
Application re revocation of right of entry permit - Application for an adjournment dismissed on the grounds that Commission was not satisfied that the refusal of the adjournment would result in a serious injustice to one party - Applicant argued that Respondent's representative had acted improperly and as a result of that conduct, Applicant suffered loss and damage and became exposed to the risk of liquidated damages for delay in completing the project - Applicant further argued that the limits of "proper" behaviour could be ascertained from the scope of the licence to enter the premises conferred by s.49H and s.49I and that license does not permit conducting safety audits - Respondent opposed the allegations and argued inter alia, that there was a legitimate safety concern on this particular site, that its representative was at one stage exercising powers but did not act improperly in the exercise of those powers - Commission found on evidence that the Respondent's representative did not intentionally or unduly hinder the employer or employees during working time and that whilst industrial action could have been avoided, he did not act in an improper manner in the exercise of powers under Division 2G of the Act - Dismissed - Silent Vector Pty Ltd t/a Sizer Builders -v- The Construction, Forestry, Mining and Energy Union of Workers - APPL 42,63 of 2003 - BEECH SC - 25/02/03 - General Construction.....	564
Conference re refusal of the Respondent to reclassify positions - Applicant Union sought an interim order preventing Respondent from filling Juvenile Justice Officer positions until the claim of the Union that Group Workers be reclassified was decided by Commission - Respondent argued that it was not aware of any threat of industrial action - Public Service Arbitrator issued interim order sought by Applicant Union in that it prevents the filling of the positions at the end of that process - Interim order issued - Civil Service Association of Western Australia Incorporated -v- The Director General, Department of Justice - PSAC 9 of 2003 - Public Service Arbitrator - BEECH SC - 12/03/03 - Government Administration.....	985
<b>INDUSTRIAL MATTER</b>	
<sup>3</sup> Application for a new award, Burswood International Resort Casino Employees Award 2002 - Applicant Union applied for the registration of the above award to replace and supersede the Burswood International Resort Casino Employees' Industrial Agreement Ag 169 of 2001 and the Burswood Island Resort Employees Award No. A23 and A25 of 1985 - Further, Applicant Union argued that the terms of the award were substantially those that applied to the employees of Respondent who had entered into an Australian Workplace Agreement and that it was unfair for the Respondent to discriminate against employees because they chose to be covered by a collective agreement registered under the Industrial Relations Act 1979 - Respondent argued that Applicant's claim should be dismissed under s.27(1)(a)(iii) of the IRC Act on the grounds that further proceedings were not necessary or desirable in the public interest as the Union's claim breached clause 45 of the registered agreement and in that it should not allow a party to press for a claim that was contrary to its own agreement - Further, Respondent argued that Union could not make out a claim under Principle 10 as it could not justify why the claim had not been progressed as an industrial agreement under s.41 of the Act and it was an abuse of the process because the purpose of the application was not directed at protecting existing employees whose conditions of employment were not regulated by the 2001 Agreement - Commission in Court Session found that that Applicant Union had made out a case under Principle 10 and that a new award should be issued - Further, CICS found that the operative date should be from 10 July 2002, the date the application was lodged in the Commission - Granted - Australian Liquor, Hospitality and Miscellaneous Workers Union, Western Australian Branch -v- Burswood Resort (Management) Limited - A 4 of 2002 - Commission in Court Session - SMITH C/WOOD C/HARRISON C - 25/11/02 - Accommodatn, Cafes&Restaurants.....	57
Application to vary the Metal Trades (General) Award 1966 No. 13 of 1965 - Applicant sought orders that its name be deleted from the Second Schedule list of Respondents of the award because of the administration burden from time to time when various amendments take place to the award - Respondents objected to the application because Applicant had been named in the award since the sixties and should be retained - Commission found that Applicant had no operations in the area or scope of the Award and that it was important to update its awards and orders to avoid named respondents that are not in the industry as it was not productive - Granted - Caterpillar of Aust -v- AUTO, FOOD, METAL, ENGIN UNION & Other - APPL 1190 of 2002 - GREGOR C - 24/12/02 - Metal Product Manufacturing.....	140
Application for Order pursuant to Section 80E re disciplinary action taken against an employee - Applicant Union argued that Respondent bring to an end the disciplinary process on the basis that there are significant procedural flaws, including denial of natural justice to member and that he had not committed breaches in circumstances which related to his employment entitling Respondent to undertake any disciplinary enquiries - Respondent argued that it was entitled to undertake and complete any disciplinary enquiries - Public Service Arbitrator found that the disciplinary process in this matter was not baseless and did not suffer the significant flaws or breaches such as to warrant the process being halted - Dismissed - Civil Service Association of Western Australia Incorporated -v- Director General, Department of Family and Children's Services - P 41 of 2001 - Public Service Arbitrator - SCOTT C - 16/12/02 - Government Administration.....	146
<sup>1</sup> Appeal against Decision of Commission in Court Session (82WAIG2432) re registration of a new award - Appellant argued that the CICS erred in law in finding that it had jurisdiction to determine the application and that there was no industrial matter between the parties of such nature as to give rise to jurisdiction in the Industrial Commission - Further, Appellant argued that any further proceedings or decision or determination of the Commission would be held or made in excess of or without jurisdiction - Respondent opposed the Appeal - Industrial Appeal Court found that the principal issue raised by the grounds of appeal were whether certain matters that were said to have been covered by an industrial agreement that was still in force between the parties could be dealt with by the Commission as industrial matters - Further, IAC found that no error had been demonstrated in the decision of the Commission in Court Session in determining that the Commission had jurisdiction to deal with the application, therefore, the appeal was dismissed - Dismissed - Burswood Resort (Management) Limited -v- Australian Liquor, Hospitality and Miscellaneous Workers Union, Western Australian Branch - IAC 9 of 2002 - Industrial Appeal Court - 18/12/02 - Accommodatn, Cafes&Restaurants.....	208

## CUMULATIVE DIGEST—continued

## INDUSTRIAL MATTER—continued

	Page
<sup>4</sup> Application for Orders pursuant to s.66 of the I.R. Act - Applicant argued that Respondent and its members had breached its rules and s.6 of the Act - Respondent opposed application and argued that the President lacked jurisdiction to hear and determine the matter - President found on evidence that Applicant was not a person prescribed as having right to make application pursuant to s.66 of the Act, and in particular s.66(1), that there was no jurisdiction to hear and determine application as the application sought orders in relation to the organisation's rules of which Applicant was not a member and has never been a member - Dismissed - Mr DP Deen -v- The Construction, Forestry, Mining and Energy Union of Workers - PRES 35 of 2002 - President - SHARKEY P - 08/01/03 - Unions .....	233
Complaint re alleged breach of Section 49(M)(1) of the I.R. Act 1979 - Applicant Union argued that Respondents had breached section 49(M) of the IR Act and sought injunctive relief against Respondents and interim orders pursuant to section 83E(5) of the Act to prevent further breaches - Respondents argued and opposed the applications seeking interim orders and made application for the adjournment of the matters - Further, Respondents argued that there were proceedings on foot in the Federal Court of Australia with respect to substantially the same matter which struck at the validity of the relevant provisions referred to and that this Court should defer its consideration of the matter pending the determination of the matter by the Federal Court of Australia - Further, Honourable Minister for Employment and Workplace Relations of the Commonwealth of Australia sought leave to intervene - Industrial Magistrate found that there was no legislative basis for intervention, that the Court did not possess inherent jurisdiction as it was a creature of statute and it operated within the statutory framework provided - Further, IM found that it was undesirable for the matter to proceed until the Federal Court had dealt with the matter and had determined it as there would be a final determination of the constitutional issues before these proceedings and thus acceded to the applications made by Respondents for an adjournment of the proceedings - Reasons for Decision Issued - The Construction, Forestry, Mining and Energy Union of Workers -v- Woodside Energy Limited (ABN 63 005 482 986) & Other - M 304 of 2002 - Industrial Magistrate - Cicchini IM - 27/11/02 - Oil and Gas Extraction .....	302
Application re revocation of right of entry permit - Application for an adjournment dismissed on the grounds that Commission was not satisfied that the refusal of the adjournment would result in a serious injustice to one party - Applicant argued that Respondent's representative had acted improperly and as a result of that conduct, Applicant suffered loss and damage and became exposed to the risk of liquidated damages for delay in completing the project - Applicant further argued that the limits of "proper" behaviour could be ascertained from the scope of the licence to enter the premises conferred by s.49H and s.49I and that license does not permit conducting safety audits - Respondent opposed the allegations and argued inter alia, that there was a legitimate safety concern on this particular site, that its representative was at one stage exercising powers but did not act improperly in the exercise of those powers - Commission found on evidence that the Respondent's representative did not intentionally or unduly hinder the employer or employees during working time and that whilst industrial action could have been avoided, he did not act in an improper manner in the exercise of powers under Division 2G of the Act - Dismissed - Silent Vector Pty Ltd t/a Sizer Builders -v- The Construction, Forestry, Mining and Energy Union of Workers - APPL 42,63 of 2003 - BEECH SC - 25/02/03 - General Construction .....	564
<sup>2</sup> Appeal against Decision of Commission (82WAIG3250) re transfer of an employee - Appellant argued that the Public Service Arbitrator erred in law in declaring that Appellant's decision to exclude the employee from the Broome Regional Prison was void, that the decision was within the Public Service Arbitrator's jurisdiction, and that the Appellant should not have ceased paying employee her ordinary salary - Appellant sought that the PSA's orders (1), (2) and (6) be quashed - Full Bench reviewed authorities and found inter alia, that the decision to exclude employee from Broome Regional Prison was an "industrial matter", and the decision to declare it void was within jurisdiction for that reason - Further, Full Bench found that the Arbitrator erred in ordering the Appellant to pay the employee indefinitely into the future when there was no evidence that she would perform any service, had performed any service or was entirely willing to - Upheld and order 6 of the decision at first instance quashed - Director General, Department of Justice (Formerly known as Ministry Of Justice) -v- Civil Service Association of Western Australia Incorporated - FBA 53 of 2002 - Full Bench - SHARKEY P/SCOTT C/WOOD C - 25/03/02 - Government Administration .....	908
<sup>4</sup> Application for orders pursuant to s.66 of the I.R. Act - Applicant's complaint was that the Respondent acted contrary to rule 3 of its rules in refusing to allow an external person to represent it in the matter relating to Applicant and at his expense - Respondent opposed the claim - President reviewed legal principles and found inter alia, that it had not been established that there was any rule, express or implied, which had been breach or not performed, and that no order was necessary to ensure that any wrong was avoided since no wrong had been or was likely to have been committed in relation to the rules in this instance - Having regard to s.26(1) and s.26(1)(c) of the Act, President found that the merits lay with the Respondent CSA and the case for the Applicant had not been established - Further, President was not persuaded that the application to strike out the particulars was made out and that it was satisfied entirely that there was sufficient material there for the Respondent to know and answer the case which was alleged against it - Dismissed, Orders and Directions Issued and Application for interim orders dismissed - Mr NJ Jones -v- Civil Service Association of Western Australia Incorporated - PRES 1 of 2003 - President - SHARKEY P - 31/03/03 - Unions .....	945
<sup>4</sup> Application for orders pursuant to s.66 of the I.R. Act - Applicant argued that Respondent had acted contrary to rule 3 of its rules by failing to act fairly and in the interests of its member - Respondent opposed application and denied that it had breached its rules or acted in a tyrannical oppressive, unreasonable or undemocratic way - President reviewed authorities, union rules and found inter alia, that the decision to refuse Applicant legal assistance was unfair and unreasonable and did not advance the objects contained in the rules - President ordered that Applicant's application be reconsidered and that this be done only after an opinion was derived from a solicitor of Applicant's choice and such opinion be funded by the Respondent - Orders and Directions Issued - Application granted in part - Mr GJ Wauhop -v- Civil Service Association of Western Australia Incorporated - PRES 2 of 2003 - President - SHARKEY P - 28/03/03 - Unions .....	951
<sup>2</sup> Appeal against Decision of Commission (83WAIG168) re unfair dismissal - Appellant argued that the Learned Commissioner erred in his findings, on numerous grounds relating to his employment relationship with the Respondent - Full Bench applied legal principles, reviewed indicia and authorities cited therein to determine the totality and the true nature of the contract and found inter alia, that it was open to the Commissioner at first instance to find, and the Commissioner should have found, that Appellant was an "employee" within the meaning of the definition of "employee" in s.7(a) of the Act, because he was a person employed by an employer to do work for hire or reward, and also because he was, within the meaning of the definition in s.7(b) of the Act, at all material times, a person whose usual status was that of an employee - Further, Full Bench found that Respondent was an employer because it was at all material times a company employing one or more employees, some of whom were not the Appellant, and that should have been so found - Full Bench found that the matter before the Commissioner was therefore an industrial matter as defined, and he was entitled to take cognisance of it pursuant to s.23 and s.29 of the Act - Upheld, Decision at first instance suspended and matter remitted to the Commission at first instance - Mr B Ryder -v- Beaulieu of Australia Limited - FBA 2 of 2003 - Full Bench - SHARKEY P/COLEMAN CC/GREGOR C - 29/04/03 - Personal & Household Good W/sg.....	1133
<sup>4</sup> Application for Orders pursuant to s.66 of the I.R. Act - Applicant argued inter alia, that there had been no election under the CSA rules, and the General Secretary and Assistant General Secretary had ipso facto been invalidly appointed contrary to the CSA rules, and ultra vires those rules - Further, Applicant argued that once the SPSF ceased to exist, there had to be a new s.71 application, and the Full Bench had to be satisfied anew of the s.71 requirements, about a new Counterpart Federal Body, the CPSU and this had not been done - Respondent argued that the agreement made under s.202 of the Federal legislation continued in force by virtue of s.253TA of the WR Act, thus enabling persons appointed or elected pursuant to the rule of the CPSU to become General Secretary and Assistant General Secretary of the CSA - Respondent, further submitted that the Commission, constituted by the President, had no jurisdiction to consider the effect of the WR Act and the s.202 agreement - President found that it was within his jurisdiction under s.66(2) of the Act to determine whether the rules of the CSA have been observed or not, and particularly whether persons are officers of the CSA pursuant to its rules or by the operation of any law - President reviewed legal principles, relevant Acts, agreement and the CSA rules and found that the appointments to the offices of the WA Branch Secretary and WA Branch Assistant Secretary of the CPSU, could not constitute or serve as valid elections or appointments to the offices of General Secretary and Assistant Secretary in accordance with the rules of the CSA, and that they therefore have not, since 28 November 2001, validly occupied those offices - Supplementary Reasons for Decision, Declarations and Orders Issued - Mr N Jones -v- Civil Service Association of Western Australia Incorporated - PRES 3 of 2003 - President - SHARKEY P - 10/04/03 - Unions .....	1146

## CUMULATIVE DIGEST—continued

	Page
<b>INDUSTRIAL MATTER—continued</b>	
<sup>2</sup> Application for Declaration pursuant to s.71 of the I.R. Act - Applicant sought a declaration pursuant to s.71(2) of the Act that the CPSU and SPSF Group was the counterpart federal body of the CSA - Applicant argued that the requirements for issuing the declaration as prescribed in s.71(3) of the Act had been satisfied - The interveners alleged that the application was not filed in accordance with the rules and was therefore invalid - In written submissions which were tendered at the proceeding, it was submitted that the CSA Council did not have the power to 'regularise' or 'validate' ex post that which was done unlawfully because 'those powers' (sic) required specific statutory provisions - Full Bench reviewed CSA rules, Acts, authorities and found inter alia, that pursuant to s.71 of the Act, the branch was the counterpart federal body in relation to the state organisation, because the rules of which relating to the qualifications of persons for membership and prescribing the offices which shall exist within the branch were deemed to be the same as the rules of the state organisation relating to the corresponding subject matter - Full Bench concluded that it would grant the application and make the s.71 declaration sought, there being no valid obstacle to it being granted, and it being satisfied that, having regard to the provisions of s.71, the branch was the counterpart federal body to the applicant - Granted - Civil Service Association of Western Australia Incorporated - v- (Not applicable) - FBM 4 of 2003 - Full Bench - SHARKEY P/BEECH SC/SCOTT C - 23/05/03 - Unions.....	1403
Appeals re reclassification of position - Parties agreed that the matter ought be dealt with by the Arbitrator on the basis of written submission - Public Service Arbitrator reviewed authorities and submissions and found that there was no industrial matter upon which Commission could exercise jurisdiction because at the time the Appellants filed Notices of Appeal, their employment was the subject of a Workplace Agreement pursuant to the Workplace Agreement Act 1993 - Dismissed for want of jurisdiction - Mr DK Spivey -v- WorkCover W.A - PSA 5,7,8 of 2000 - Public Service Arbitrator - SCOTT C - 22/05/03 - Government Administration .....	1551
<b>INDUSTRY ALLOWANCE</b>	
Application to vary Electrical, Engineering and Building Trades (West Australian Newspaper Limited) Award 1988 - Applicant Union sought to update allowances in accordance with the State Wage Principles (82WAIG1386) - Respondent consented to the variation - Commission varied the award by consent - Granted - COMM, ELECTRIC, ELECT, ENERGY -v- West Australian Newspapers Ltd - APPL 1866 of 2002 - WOOD C - 12/02/03 - Other Services .....	683
Application to vary Children's Services (Private) Award, Children's Services Consent Award 1984 and Child Care (Subsidised Centres) Award - Applicant Union argued that the variation to the awards are substantially the same, to insert the recent changes to the Community Services (Child Care) Regulations 1988 - Applicant Union sought to have inserted in each award a new classification for an 'E Worker' which was a class of child care worker that had been recently created under the Regulations, also including reimbursements of certain expenses - Respondent argued there was no objection to the creation of an E classification within the awards however objected to two steps rates being inserted and opposed the application for the allowances - Commission found that the applications were brought pursuant to the Statement of Principles in the 2001 State Wage Case decision and provided for the work value changes - Further, Commission was satisfied that the creation of an E classification should be created pursuant to the Work Value Principle and that the two step rates were properly struck and that the allowances should be allowed with concessions - Ordered Accordingly - Australian Liquor, Hospitality and Miscellaneous Workers Union, Western Australian Branch -v- Bassendean Day Care Centre - APPL 1280,1281,1282 of 2001 - SMITH C - 04/02/02 - Other Services .....	958
<b>INTERPRETATION-WORDS &amp; PHRASES</b>	
<sup>2</sup> Appeal against Decision of Commission (82WAIG2188) re unfair dismissal - First Appeal No. FBA38/2002 - Appellant grounds of appeal was against the declaration that she was not dismissed in January 2001 and the order for compensation insofar as it "failed" to take account of the income that Appellant would likely have received from her participation in the on-call roster system operated by the Respondent - Second Appeal No. FBA39/2002 - Cross appeal by Respondent appealing against part of the decision relating to the Appellant's dismissal and her entitlement to compensation being a casual employee - Full Bench reviewed authorities, all of the evidence and material and all of the submissions, and found that there has been no error in the exercise of the discretion as alleged established, and no ground of appeal had been made out - Dismissed - Brian Ferrall Twaddle t/a Mount Hospital Pharmacy -v- Mrs CJ Byrne - FBA 38,39 of 2002 - Full Bench - SHARKEY P/GREGOR C/SCOTT C - 20/12/02 - Health Services .....	5
<sup>2</sup> Appeal against Decision of Industrial Magistrate (unreported) re breach of agreement - Appellant appealed against the Magistrate's refusal to make an order for costs - Application by Respondent to adduce new evidence was dismissed - Full Bench reviewed authorities and evidence and found on a number of reasons that the exercise of the discretion at first instance to deny an order for costs to the Appellant miscarried, and the Appellant had so established - Upheld and Remitted - The Construction, Forestry, Mining and Energy Union of Workers -v- Carl Anthony Perrot & Sandra Lee Perrott trading as C & S Perrott - FBA 44 of 2002 - Full Bench - SHARKEY P/BEECH SC/SCOTT C - 12/12/02 .....	17
Application re unfair dismissal - Applicant argued that no appropriate training was given to her during her term of employment, that she was not given warning about her performance or advised that her employment was in jeopardy and that she believed she was dismissed so that another employee could take her job - Respondent argued that Applicant was dismissed for unsatisfactory work performance following numerous discussions with her during the course of her employment and that her performance never reached the required standard - Commission reviewed authorities and found on evidence that Applicant was regularly advised about her performance, she was warned and knew that her job was in jeopardy and that her performance never reached an adequate level - Further, Commission found that in all circumstances, Applicant had failed to prove her allegations of unfair dismissal - Dismissed - Miss K Grant -v- Boomerang Environmental Industr - APPL 752 of 2002 - WOOD C - 24/12/02 - Business Services.....	161
Complaint re breach of award - Complainant Union signalled their intention to amend the claims so that they were not predicated upon the applicability of the Award - Respondent argued that the applications be dismissed and sought costs in relation to the applications as it attempted to resolve matters by way of agreement but was forced to make applications in order to resolve the issues - Industrial Magistrate found that the claims could not be amended as that would be tantamount to raising a new cause of action - Further, Industrial Magistrate found that Respondent had been put to cost in bringing these applications to finally resolve the matters and had incurred expenses in doing so - Reasons for Decision Issued - AUTO, FOOD, METAL, ENGIN UNION -v- Bell-A-Bike Rottnest Pty Ltd - M 268, M 270, M 271, M 272, M 286 of 2001 - Industrial Magistrate - Cicchini IM - 15/01/03 - Personal Services .....	299
<sup>1</sup> Appeal against Decision of Full Bench (82WAIG765) re breach of award in relation to underpayments and denial of benefits, flat hourly rate in excess of award entitlement for ordinary time, right of set-off, method of calculation of amount due to employee and whether claim truly for breach of award or for breach of over award agreement - IAC reviewed authorities, evidence and found inter alia, whether payment was made expressly or impliedly to cover a particular obligation, the payment could not be claimed as a set off, that the claim or the particulars of the claim was to enforce the award and not to enforce an over award agreement and that an application for enforcement of the terms and conditions of the award, could not proceed on the basis that what was due under the award was to be calculated by reference to the over award rate agreed between the parties - Upheld and Remitted - James Turner Roofing Pty Ltd -v- Mr CL Peters - IAC 7 of 2002 - Industrial Appeal Court - 10/03/03 - Construction Trade Services.....	427
<sup>1</sup> Appeal against Decision of Full Bench (82WAIG2409) re Long Service Leave entitlements - Question re jurisdiction - Appeal on ground that worker was an independent contractor and, whether appeal raised question of "construction and interpretation" of Long Service Leave Act, 1958 and Industrial Relations Act, 1979 - Industrial Appeal Court reviewed Acts, authorities and found that on the whole circumstances, it was open to both Industrial Magistrate and Full Bench to conclude that the relationship between employer and employee was never terminated in point of law and that it had jurisdiction to hear the appeal - Further, IAC concluded inter alia, that the Full Bench had not erred in the interpretation of the Long Service Leave Act, however, it had erred in misconstruing the nature of the power allowed to the Industrial Magistrate - Dismissed Act - United Construction Pty Ltd -v- Mr J Birighitti - IAC 11 of 2002 - Industrial Appeal Court - 27/02/03 - General Construction .....	434

## CUMULATIVE DIGEST—continued

## INTERPRETATION-WORDS &amp; PHRASES—continued

- <sup>1</sup>Appeal against Decision of Full Bench (82WAIG212) re dismissed appeal in respect of an unfair dismissal claim - Appellant argued inter alia, that the Full Bench erred in law in failing to give proper consideration to and provide adequate reasons for two findings in particular, namely, that the requirements of the Minimum Conditions of Employment Act were complied with, and that the appellant waived his right to discuss the adverse effects of his redundancy at the meeting of the 18 May 2000 - Industrial Appeal Court reviewed authorities, Acts and evidence and found, inter alia, that the Appellant was entitled to succeed in his appeal in respect of his contention that Respondent employer failed to comply with his obligation to inform and discuss imposed upon the employer by s.41 of the MCE Act and that it was appropriate for the decisions made by the Commissioner and the Full Bench to be set aside and remitted to Commissioner Wood for a determination to be made as to whether the Appellant was entitled to relief having regard to the reasons of the Industrial Appeal Court - Upheld and Remitted - Mr GE Garbett -v- Midland Brick Company Pty Ltd - IAC 3 of 2002 - Industrial Appeal Court - 10/03/03 - Non-Metallic Min Product Mfg..... 893
- <sup>2</sup>Appeal against Decision of Commission (82WAIG3250) re transfer of an employee - Appellant argued that the Public Service Arbitrator erred in law in declaring that Appellant's decision to exclude the employee from the Broome Regional Prison was void, that the decision was within the Public Service Arbitrator's jurisdiction, and that the Appellant should not have ceased paying employee her ordinary salary - Appellant sought that the PSA's orders (1), (2) and (6) be quashed - Full Bench reviewed authorities and found inter alia, that the decision to exclude employee from Broome Regional Prison was an "industrial matter", and the decision to declare it void was within jurisdiction for that reason - Further, Full Bench found that the Arbitrator erred in ordering the Appellant to pay the employee indefinitely into the future when there was no evidence that she would perform any service, had performed any service or was entirely willing to - Upheld and order 6 of the decision at first instance quashed - Director General, Department of Justice (Formerly known as Ministry Of Justice) -v- Civil Service Association of Western Australia Incorporated - FBA 53 of 2002 - Full Bench - SHARKEY P/SCOTT C/WOOD C - 25/03/02 - Government Administration ..... 908
- <sup>4</sup>Application for orders pursuant to s.66 of the I.R. Act - Applicant's complaint was that the Respondent acted contrary to rule 3 of its rules in refusing to allow an external person to represent it in the matter relating to Applicant and at his expense - Respondent opposed the claim - President reviewed legal principles and found inter alia, that it had not been established that there was any rule, express or implied, which had been breach or not performed, and that no order was necessary to ensure that any wrong was avoided since no wrong had been or was likely to have been committed in relation to the rules in this instance - Having regard to s.26(1) and s.26(1)(c) of the Act, President found that the merits lay with the Respondent CSA and the case for the Applicant had not been established - Further, President was not persuaded that the application to strike out the particulars was made out and that it was satisfied entirely that there was sufficient material there for the Respondent to know and answer the case which was alleged against it - Dismissed, Orders and Directions Issued and Application for interim orders dismissed - Mr NJ Jones -v- Civil Service Association of Western Australia Incorporated - PRES 1 of 2003 - President - SHARKEY P - 31/03/03 - Unions ..... 945
- <sup>4</sup>Application for orders pursuant to s.66 of the I.R. Act - Applicant argued that Respondent had acted contrary to rule 3 of its rules by failing to act fairly and in the interests of its member - Respondent opposed application and denied that it had breached its rules or acted in a tyrannical oppressive, unreasonable or undemocratic way - President reviewed authorities, union rules and found inter alia, that the decision to refuse Applicant legal assistance was unfair and unreasonable and did not advance the objects contained in the rules - President ordered that Applicant's application be reconsidered and that this be done only after an opinion was derived from a solicitor of Applicant's choice and such opinion be funded by the Respondent - Orders and Directions Issued - Application granted in part - Mr GJ Wauhup -v- Civil Service Association of Western Australia Incorporated - PRES 2 of 2003 - President - SHARKEY P - 28/03/03 - Unions ..... 951
- Complaint re alleged breaches of clauses 3(1)(4)(5) & 4(1) of Industrial Relations (Industrial Agents) Regulations 1997 Schedule 1 - Complainant sought an extension of time to bring proceedings before the Industrial Magistrate in his application to have Respondents deregistered as Industrial Agents pursuant to the Industrial Relations (Industrial Agents) Regulations 1997 - Further Complainant argued that Industrial Magistrate did have the powers and jurisdiction to deal with complaint, that appeal had been properly initiated pursuant to the provisions of the Industrial Magistrate's Regulations and that the Registrar's decision was in effect a determination made for the purposes of regulation 15(3)(a) - Respondents lodged an interlocutory application and sought orders that the application be dismissed or struck out on the grounds that the application was out of time, functus officio, against public interest and with insufficient merit - Further, Respondent argued that in respect of regulations 12 of the I.R. Act there was no substantial compliance - Industrial Magistrate reviewed the relevant legislation and the intention of the legislation, the jurisdiction of the Industrial Magistrate's Court and found that under the proper administration of the Acts and Regulations an Industrial Magistrate could make a determination or a decision as to whether or not the registration of an industrial agent was to be cancelled - Further, IM found that it had no power to rule or view that the Registrar in dealing with the complaint in the circumstances was an unauthorised act or a series of unauthorised acts and that it could not be said that the matter was functus officio - IM further found that under regulation 19 of the I.R. Act an Industrial Magistrate had power to cancel registration of an industrial agent and consider allegations that there had been a breach of the code of conduct an industrial agent was subject to when they were registered - Industrial Magistrate granted the parties an extension of time in respect to the application of the extension of time within which an appeal may be commenced prior to final orders - Reasons for Decision Issued - Mr JRA Acosta -v- Mr G Broderick & Other - M 200 of 2002 - Industrial Magistrate - Graeme Neil Calder - 28/03/03 - Other Services ..... 986
- Application re unfair dismissal and contractual entitlements - Applicant argued that employment terminated without notice on his return from holidays and found upon a visit for severance pay a new manager had been appointed - Applicant sought compensation and the reimbursement of court costs - Respondent failed to appear - Commission reviewed authorities and found that Applicant was terminated, that he was denied procedural fairness as no warnings were given to him, that no notice was given to him that he was to be terminated nor was the Applicant paid any monies in lieu of notice on termination, nor was the Applicant given the opportunity to discuss the Respondent's view that it could no longer afford to pay the Applicant - Further, Commission found that Applicant was unfairly terminated both substantively and procedurally and awarded compensation in lieu of reinstatement, and denied benefits - Commission was not satisfied that the circumstances of this matter were such as to warrant an order for costs against the Respondent - Upheld and Order Issued - Mr SN Kirkham -v- Premium Partners Pty Ltd t/as Allsteel Designs - APPL 1130 of 2002 - HARRISON C - 28/03/03 - General Construction ..... 1050
- Application re unfair dismissal seeking extension of time - Applicant argued that circumstances surrounding the resignation amount to a dismissal of him by the Respondent - Further, Applicant argued that after the dismissal he could not afford the filing fee hence the delay in lodging his application - Commission applying the Principles set out in Azzalini's Case (ibid) found the length of the delay was not justifiable on the evidence before the Commission - Further, Commission found on Applicant's own evidence, that Applicant was not dismissed from his employment but left it voluntarily, therefore, there had been no dismissal to attract the jurisdiction in the Commission - Commission also found that Applicant's case would have no prospect to succeed and that it would be fair not to accept an application out of time in these circumstances - Dismissed - Mr P Scott -v- Sealcorp Holdings Limited (ABN 28 009 143 597) - APPL 289 of 2003 - GREGOR C - 01/04/03 - Insurance ..... 1070
- <sup>2</sup>Appeal against Decision of Commission (83WAIG168) re unfair dismissal - Appellant argued that the Learned Commissioner erred in his findings, on numerous grounds relating to his employment relationship with the Respondent - Full Bench applied legal principles, reviewed indicia and authorities cited therein to determine the totality and the true nature of the contract and found inter alia, that it was open to the Commissioner at first instance to find, and the Commissioner should have found, that Appellant was an "employee" within the meaning of the definition of "employee" in s.7(a) of the Act, because he was a person employed by an employer to do work for hire or reward, and also because he was, within the meaning of the definition in s.7(b) of the Act, at all material times, a person whose usual status was that of an employee - Further, Full Bench found that Respondent was an employer because it was at all material times a company employing one or more employees, some of whom were not the Appellant, and that should have been so found - Full Bench found that the matter before the Commissioner was therefore an industrial matter as defined, and he was entitled to take cognisance of it pursuant to s.23 and s.29 of the Act - Upheld, Decision at first instance suspended and matter remitted to the Commission at first instance - Mr B Ryder -v- Beaulieu of Australia Limited - FBA 2 of 2003 - Full Bench - SHARKEY P/COLEMAN C/GREGOR C - 29/04/03 - Personal & Household Good W/sg..... 1133

## CUMULATIVE DIGEST—continued

	Page
INTERPRETATION-WORDS & PHRASES—continued	
<sup>4</sup> Application for Orders pursuant to s.66 of the I.R. Act - Applicant sought a declaration and interim orders relating to, inter alia, the rules of the Respondent organisation, "the CSA", their observance or non-observance and the manner of their observance, within the meaning of s.66(2) of the Act - President applied legal principles and found inter alia, that there was a substantial case to be tried, that the consequences of making the order are readily reversible by an order to the contrary if the merits of the matter require it upon the final hearing and determination - Further, having regard to the equity, good conscience and substantial merits of the case, President was of the view that it should make an interim order in similar terms, in substance, to the order made in <i>Neville Jones v Civil Service Association of WA Inc</i> (op cit) - President added that it will make orders which affect the whole of the Council because they do not affect adversely the three members who are not parties to these proceedings and that there was nothing preventing those three persons to become parties to, or to intervene in, and thus to participate in these proceedings - Directions and Interim Orders Issued - Mr B Ellis & Others -v- Civil Service Association of Western Australia Incorporated - PRES 5 of 2003 - President - SHARKEY P - 16/04/03 - Unions .....	1144
<sup>4</sup> Application for Orders pursuant to s.66 of the I.R. Act - Applicant argued that a resolution SCM06/02, passed on 20 November 2002 was legally and factually incorrect and that the president complied with the rules and did afford procedural fairness - Respondent denied that applicant was entitled to the orders and directions sought and argued that clause 1 of the resolution SCM06/02 stated "act in consultation with the principal officers" not "officer" as referred to by the Applicant - President reviewed authorities, relevant sections of the CSA rules and found on evidence that the CSA was in breach of its rules in that the Council passed resolution SCM06/02, in particular because it was not a matter which the CSA should consider, being a CPSU matter - President declared that the president acted within the rules in obtaining the legal advice necessary to enable her to carry out her duties and that such expense was properly incurred - Further, President had doubts that the matter was at all a matter relating to the rules of an "organisation" as defined in s.7 of the Act, and therefore may not be within jurisdiction under s.66 - President found inter alia, that even if it was to act within jurisdiction and power by making the orders sought, the equity, good conscience and substantial merits of the matter, do not constrain it to make the orders sought - Dismissed - DM Robertson -v- Civil Service Association of Western Australia Incorporated - PRES 4 of 2003 - President - SHARKEY P - 17/04/03 - Unions .....	1156
Application pursuant to s.80E of the I.R. Act seeking an Order for discovery - Applicant argued that the order should issue for discovery verified by an affidavit "to ensure that the list was true, accurate, correct and complete" and to provide him with the protection necessary in respect of discovery - Applicant further argued inter alia, that there are a number of documents which have not been discovered, in particular a report by investigators and that the documents relate to and only exist because of the allegations and are relevant to the proper hearing and determination of the matter - Respondent had previously consented to discovery and argued that no order was necessary as the parties had in fact already dealt with it, that not only had it provided discovery but had assisted by providing copies of the documents themselves - Commission reviewed authorities and found inter alia, that those reports into the investigations were not appropriate for discovery for two reasons being, that the issue being dealt with was the transfer of Applicant and that the reports followed investigations conducted after the transfer and these investigations were not the subject of these proceedings - Commission concluded that its role was to provide real solution to real issues not to issue orders which would appear to be unnecessary - Dismissed - Civil Service Association of Western Australia Incorporated -v- Anti-Corruption Commission - P 50 of 2002 - Public Service Arbitrator - SCOTT C - 29/04/03 - Government Administration .....	1165
Application re unfair dismissal seeking extension of time pursuant to s.29(3) of the I.R. Act - Applicant argued that she was aware of the 28 day time limit at the time that she contemplated taking these proceedings, but that some personal factors and some health factors were relevant to the delay that took place - Commission applied legal principles and found that the length of the delay was substantial, and although it appeared from the Applicant that she would contest the employer's decision, from the date of termination, no further steps were taken by her to put the Respondent on notice that the dismissal was being contested - Further, Commission found that if it was to accept the application for extension of time, then there may be some prejudice occasioned upon Respondent, therefore, it was not persuaded that it ought exercise its discretion to receive the application out of time in the present circumstances - Dismissed for want of jurisdiction - Ms JS Palmer -v- Mr D Palumbo - APPL 26 of 2003 - KENNER C - 01/04/3003 - Food Retailing .....	1245
Application for extension of time to file an application re unfair dismissal - Applicant argued he was waiting until he received a Separation Certificate from the respondent as he needed to know the reason the respondent relied upon to dismiss him - Commission accepted applicant's explanation for the delay and found that the period of delay in filing was so short and whether or not there was a sufficiently arguable case, the Applicant must be given the benefit of the doubts - Commission concluded that it intend to grant the extension for the application to be dealt with by the Commission and in view of its comments about the unfair dismissal, it was appropriate that it refer the matter to the Chief Commissioner for his consideration of reallocation to the Commission otherwise constituted - Granted - Mr A Vanyi -v- Greg Turner (Director), Boston Technologies T/AS Copier Wholesale - APPL 319 of 2003 - KENNER C - 10/04/03 - Machining and Motor Veh Wholesaling .....	1265
Appeal against decision to suspend made on 16/7/2002 - Preliminary issues re extension of time, perceived bias and whether matter ought proceed in public interest - Appellant argued that Respondent had failed to adhere to the disciplinary procedures and to comply with the requirements of the PSM Act 1994 - Appellant sought Orders that the Respondent's action be reviewed, modified, nullified and/or varied - Respondent argued that there had been no unlawful action undertaken and that the direction to the Appellant to not attend work did not constitute a suspension in accordance to the PSM Act 1994 - Further, Respondent argued that PSAB had no jurisdiction to deal with the matter and opposed the application for extension of time - Public Service Appeal Board invited the parties to make written submissions on whether or not the matter should proceed in the public interest - PSAB found that in accordance with the Act, the Board had a responsibility to manage the process of a particular case as it sees appropriate and the fact that Appellant would have preferred a different process did not meet the test of perceived bias - PSAB reviewed authorities and was unanimously of the view that the extension of time ought be granted because the Respondent had been made aware of the Appellant's challenge since the time expired for the filing of the appeal - PSAB concluded that there was no right of appeal to the Board arising from any action under s.82 of the PSM Act, there was no valid appeal before the board, in accordance with its jurisdiction and accordingly, had the Board the jurisdiction to deal with the matter, it would not have dismissed the appeal in the public interest as the passage of time and events had not resolved the matter or meant that it was merely academic to proceed - Orders Issued - Mr S Kelly -v- Director General, Department of Justice - PSAB 12 of 2002 - Public Service Appeal Board - SCOTT C - 17/04/03 - Government Administration .....	1283
<sup>1</sup> Appeal against Decision of Commission in Court Session (83WAIG57) re registration of an award - Appellant appealed on the ground that Commission in Court Session erred in law by wrongly construing or interpreting s41(6) of the I.R. Act, 1979 and Clause 45 of the Burswood International Resort Casino Employees Industrial Agreement 2001 AG 169 of 2001 - Appellant sought to have the decision of CICS quashed and the application for the award dismissed - Industrial Appeal Court reviewed authorities, I.R. Act, Agreement and the majority IAC found inter alia, that it was proper to have regard to the legislation as it stood as at the date of enforcement of the contract not at its entry date, that the relationship between the parties and the options available to them were regulated by statute and the statute extended the agreement to facilitate a smooth transition to its replacement at any time from the nominal expiry date of the agreement - Further, IAC found that it was not intended that an industrial agreement be used as a vehicle for altering the statutory scheme for facilitating the replacement of an industrial agreement after its nominal expiry date and that insofar as clause 45 prohibited the Respondent from taking steps for a substitute award as contemplated in s41 of the Act it was to that extend void - Dismissed - Burswood Resort (Management) Ltd -v- Australian Liquor, Hospitality and Miscellaneous Workers Union, Western Australian Branch - IAC 1 of 2003 - Industrial Appeal Court - Owen J./Scott J./Parker J. - 13/05/03 - Accommodatn, Cafes&Restaurants .....	1371
<sup>2</sup> Appeal against Decision of Commission (82WAIG3287) re unfair dismissal and contractual entitlements - Application by Appellant to amend grounds of appeal was dismissed - Appellant argued that the learned Commissioner erred in fact and in law in finding that the Appellant 'misconducted himself by not fulfilling the requirements of the job for which he claimed he had skills to undertake and for which he was employed' and in finding that the Appellant's contract of employment provided for a salary of \$60,000.00 per annum, to be paid pro-rata for the period of the nine month contract - Further, Appellant sought that the appeal be upheld and order of the Commission be set aside - Full Bench applied legal principles and found on evidence that the Commissioner was entitled and correct in finding as she did, that there was no error at first instance, discretionary or otherwise established by Appellant and that no ground of appeal was made out - Dismissed - Mr RA James -v- Australian Integration Management Services Corporation Pty Ltd - FBA 55 of 2002 - Full Bench - SHARKEY P/COLEMAN CC/GREGOR C - 23/05/03 - Other Services .....	1387

## CUMULATIVE DIGEST—continued

## INTERPRETATION-WORDS &amp; PHRASES—continued

- <sup>2</sup>Application for Declaration pursuant to s.71 of the I.R. Act - Applicant sought a declaration pursuant to s.71(2) of the Act that the CPSU and SPSF Group was the counterpart federal body of the CSA - Applicant argued that the requirements for issuing the declaration as prescribed in s.71(3) of the Act had been satisfied - The interveners alleged that the application was not filed in accordance with the rules and was therefore invalid - In written submissions which were tendered at the proceeding, it was submitted that the CSA Council did not have the power to 'regularise' or 'validate' ex post that which was done unlawfully because 'those powers' (sic) required specific statutory provisions - Full Bench reviewed CSA rules, Acts, authorities and found inter alia, that pursuant to s.71 of the Act, the branch was the counterpart federal body in relation to the state organisation, because the rules of which relating to the qualifications of persons for membership and prescribing the offices which shall exist within the branch were deemed to be the same as the rules of the state organisation relating to the corresponding subject matter - Full Bench concluded that it would grant the application and make the s.71 declaration sought, there being no valid obstacle to it being granted, and it being satisfied that, having regard to the provisions of s.71, the branch was the counterpart federal body to the applicant - Granted - Civil Service Association of Western Australia Incorporated - v- (Not applicable) - FBM 4 of 2003 - Full Bench - SHARKEY P/BEECH SC/SCOTT C - 23/05/03 - Unions ..... 1403
- <sup>4</sup>Application for Orders pursuant to s.66 of the I.R Act - Respondent applied under s.71 of the Act for a declaration pursuant to s.71(2) of the Act that the CPSU was the counterpart federal body of the CSA - Applicant did not oppose to the order sought - President found inter alia, having regard to the equity, good conscience and substantial merits of the case and the relevant considerations laid down in Jones v CSA (op cit), that it should make the order sought to maintain the former de facto holders of office pending the hearing and determination of the s.71 application or until there was an election or other order or the time fixed generally in its order expires - Order and Declaration Issued because they do not affect adversely the three members who are not parties to these proceedings and that there was nothing preventing those three persons to become parties to, or to intervene in, and thus to participate in these proceedings - Directions and Interim Orders Issued - Mr B Ellis & Others -v- Civil Service Association of Western Australia Incorporated - PRES 5 of 2003 - President - SHARKEY P - 14/05/03 - Unions ..... 1412
- Conference referred re unfair dismissal - Applicant Union argued its member was unfairly dismissed by the respondent for reasons of redundancy, that there was no valid reason for the dismissal and the dismissal was unfair and unjust - Respondent argued the termination was fair due to reduction of work and requested the application be dismissed - Commission found that when Respondent brought the employment contract to an end it did not comply with the requirements of Part 5 of the MCE nor did it comply with Clause 32 or 32A of the Award - Further, Commission reviewed authorities and found that not only the dismissal was unfair for the manner in which it was given, it was unfair because of the circumstances in which it was given and amounts to an abuse of the employers right to terminate - Commission applied principles and found that applicant member had been compensated in excess of his loss already and for that reason there was no compensation orderable or payable to him pursuant to the Act - Ordered Accordingly - AUTO, FOOD, METAL, ENGIN UNION -v- Seagate Structural Engineering Pty Ltd - CR 267 of 2002 - GREGOR C - 13/05/03 - Metal Product Manufacturing ..... 1537
- Application for orders to reverse decision of Respondent to reprimand and transfer an employee and to impose penalty on employee - Preliminary issues raised re Commission's jurisdiction to entertain the application - Applicant Union argued Respondent had not complied with the relevant provisions of the Public Sector Management Act 1994 and that its member had been denied natural justice - Respondent denied that Applicant member had been treated unfairly or inappropriately under the PSM Act - Commission considered relevant legislative provisions and declared, inter alia, that the proceedings were validly brought and Commission could enquire into and deal with the subject matter - Further, Commission reviewed relevant Acts, authorities, the Dodd and Archibald reports and found that there had not been strict compliance with statutory scheme, the process undertaken by the Respondent, as reflected in the Dodd and Archibald reports, constituted a denial of natural justice to the employee - Commission found that the failure by Respondent to afford employee an opportunity of being heard on the issue of penalty, following its findings of guilt in relation to the charges, was also a denial of natural justice and that Respondent's decision to impose penalty on employee ought be quashed - Upheld, Declaration and Order Issued - Mr G Johnston -v- Mr Ron Mance, Acting Director General Department of Education - APPL 2302 of 2001 - KENNER C - 06/08/01 - Education ..... 1553
- INTERVENTION**
- Complaint re alleged breach of Section 49(M)(1) of the I.R. Act 1979 - Applicant Union argued that Respondents had breached section 49(M) of the IR Act and sought injunctive relief against Respondents and interim orders pursuant to section 83E(5) of the Act to prevent further breaches - Respondents argued and opposed the applications seeking interim orders and made application for the adjournment of the matters - Further, Respondents argued that there were proceedings on foot in the Federal Court of Australia with respect to substantially the same matter which struck at the validity of the relevant provisions referred to and that this Court should defer its consideration of the matter pending the determination of the matter by the Federal Court of Australia - Further, Honourable Minister for Employment and Workplace Relations of the Commonwealth of Australia sought leave to intervene - Industrial Magistrate found that there was no legislative basis for intervention, that the Court did not possess inherent jurisdiction as it was a creature of statute and it operated within the statutory framework provided - Further, IM found that it was undesirable for the matter to proceed until the Federal Court had dealt with the matter and had determined it as there would be a final determination of the constitutional issues before these proceedings and thus acceded to the applications made by Respondents for an adjournment of the proceedings - Reasons for Decision Issued - The Construction, Forestry, Mining and Energy Union of Workers -v- Woodside Energy Limited (ABN 63 005 482 986) & Other - M 304 of 2002 - Industrial Magistrate - Cicchini IM - 27/11/02 - Oil and Gas Extraction ..... 302
- Application for joinder of party to an application for an enterprise order pursuant to s.421 - Applicant Union sought for joinder as a party to the application as it had participated in the negotiations and was a bargaining party on behalf of its members - Respondent Union had no objection whilst Respondent (Coromal Caravans) opposed the joinder to the application - Commission found that Applicant Union had been a negotiating party for the purposes of the bargaining initiated under s.42 by the AMWU and that Respondent would suffer little, if any detriment from granting the application for joinder - Granted - AUTO, FOOD, METAL, ENGIN UNION -v- Coromal Caravans - APPL 2075 of 2002 - BEECH SC - 24/01/03 - Machining and Motor Veh Whlslg ..... 389
- Appeals against the Refusal by the Registrar to register Employer Employee Agreements - Appellant argued that the Deputy Registrar was in error when she refused registration of the EEA Agreements on the grounds that the EEAs did not comply with the requirements of s.97UY(3)(a) of the Industrial Relations Act 1979 in relation to the EEAs being presented for lodgement with the Registrar more than 21 days from the date of execution by the parties - Further, Appellant argued that Registrar may only refuse to accept an EEA for registration if it was presented for lodgement after the end of the 21 day period and had not complied with the Act in relation to lodgement requirements - An application for intervention was made by Mr Bibby, a duly authorised bargaining agent appointed by the parties to represent and intervene in the appeal proceedings - No appearance from Respondent - Commission found that the parties had complied with the regulations and had met the requirements in relation to lodgement - Further, Commission found that it was erroneous to conclude that the absence of the date of execution precluded acceptance by the Registrar of the lodgement of the EEAs for registration under the Act and that the Deputy Registrar erred in refusing the registration of the EEAs - Commission upheld the appeals, set aside the refusals and remitted the matters to the Registrar with the directions as set out in the Commission's order - Order and Direction Issued - City of Melville -v- Registrar - APPL 101,103,104,105,106,107 of 2003 - KENNER C - 28/03/03 - Government Administration ..... 1018
- <sup>2</sup>Application for Declaration pursuant to s.71 of the I.R. Act - Applicant sought a declaration pursuant to s.71(2) of the Act that the CPSU and SPSF Group was the counterpart federal body of the CSA - Applicant argued that the requirements for issuing the declaration as prescribed in s.71(3) of the Act had been satisfied - The interveners alleged that the application was not filed in accordance with the rules and was therefore invalid - In written submissions which were tendered at the proceeding, it was submitted that the CSA Council did not have the power to 'regularise' or 'validate' ex post that which was done unlawfully because 'those powers' (sic) required specific statutory provisions - Full Bench reviewed CSA rules, Acts, authorities and found inter alia, that pursuant to s.71 of the Act, the branch was the counterpart federal body in relation to the state organisation, because the rules of which relating to the qualifications of persons for membership and prescribing the offices which shall exist within the branch were deemed to be the same as the rules of the state organisation relating to the corresponding subject matter - Full Bench concluded that it would grant the application and make the s.71 declaration sought, there being no valid obstacle to it being granted, and it being satisfied that, having regard to the provisions of s.71, the branch was the counterpart federal body to the applicant - Granted - Civil Service Association of Western Australia Incorporated - v- (Not applicable) - FBM 4 of 2003 - Full Bench - SHARKEY P/BEECH SC/SCOTT C - 23/05/03 - Unions ..... 1403

## CUMULATIVE DIGEST—continued

	Page
<b>JURISDICTION</b>	
Application re unfair dismissal - Applicant argued that he withdrew from his work after experiencing difficulties in the workplace and that he did not wish to be reinstated - Respondent argued that he was not terminated but he resigned and that there was no jurisdiction - Commission found that Applicant resigned and that his claim of unfair dismissal could not be substantiated - Dismissed for want of jurisdiction - Mr A Aung -v- Kresta Blinds and Curtains - APPL 1653 of 2002 - WOOD C - 11/12/02 - Machinery & Equipment Mfg...	149
Application re unfair dismissal - Applicant argued that he was unfairly dismissed whilst a casual employee employed under a registered workplace agreement and that this application was made appropriately from the advise of Commission Registry - Respondent argued that Commission did not have the jurisdiction to hear the matter as there were no terms in the workplace agreement as required by section 7G of the Industrial Relations Act 1979 which permitted the Commission to hear the claim - Commission found that the workplace agreement did not encompass a referral of a claim for unfair dismissal as per section 7G of Industrial Relations Act and thus did not have the jurisdiction to deal with the claim - Dismissed for want of jurisdiction - Mr J Pettit -v- Mr Bradley Harris (Director) Dewson Bicton - APPL 775 of 2002 - WOOD C - 11/11/02 - Personal & Household Good Rtlg .....	166
Application re unfair dismissal - Applicant argued that Respondent had terminated Applicant unfairly by not giving any warning that his services were to be terminated - Further, Applicant argued that as an agent he should also be given the benefits as an employee - Respondent argued that Applicant was an independent contractor and not an employee and was paid one month's retainer on termination as business was suffering a downturn - Commission considered whether Applicant operated under a contract of service or a contract for service and determined that the Commission was guided by what the parties intended - Commission found that Applicant clearly viewed himself as an agent and found that the arrangement of the parties was one where Applicant was not seen by either party as one of employer and employee and dismissed the application for want of jurisdiction - Dismissed for want of jurisdiction - Mr B Ryder -v- Beaulieu of Australia Limited - APPL 2307 of 2001 - WOOD C - 20/12/02 - Other Manufacturing .....	168
Application re unfair dismissal seeking compensation - Respondent argued that on the day in question not only the Applicant told the Managing Director she resigned, she also told her personal staff and conducted herself in a fashion that indicated that she had resigned - Commission considered all the evidence and submissions and found that Applicant did in fact resign her position with the Respondent and because she resigned, she had no standing under s.29(1)(b)(i) to bring the application - Dismissed for want of jurisdiction - Mrs K Thomas -v- Perth Office Systems Pty Ltd t/a Ricoh Business Centre - APPL 399 of 2002 - GREGOR C - 10/12/02 - Business Services .....	177
Appeal against Decision to suspend Union member - Appellant sought further orders for full discovery, production and inspection of documents and that Appellant had attended Respondent's premises for the purpose of examining documents which were produced but which were not available for copying and was concerned as to the allegedly vague nature those documents produced - Further, the documents which were provided did not allow Appellant to argue his case - Respondent argued that the preliminary investigation did not relate to a decision which the Board had power to adjust pursuant to S.801 of the Industrial Relations Act 1979 - Respondent also argued that there was nothing put forward to demonstrate why the documents should be made available to Appellant - Public Service Appeal Board found that there was nothing further which the Board ought do in respect of discovery, nothing new of substance had arisen which changed what was ordered on 20 September 2002 and that application for discovery ought to be dismissed - Dismissed - Mr S Kelly -v- Director General, Department of Justice - PSAB 12 of 2002 - Public Service Arbitrator - SCOTT C - 12/12/02 - Government Administration .....	183
<sup>1</sup> Appeal against Decision of Commission in Court Session (82WAIG2432) re registration of a new award - Appellant argued that the CICS erred in law in finding that it had jurisdiction to determine the application and that there was no industrial matter between the parties of such nature as to give rise to jurisdiction in the Industrial Commission - Further, Appellant argued that any further proceedings or decision or determination of the Commission would be held or made in excess of or without jurisdiction - Respondent opposed the Appeal - Industrial Appeal Court found that the principal issue raised by the grounds of appeal were whether certain matters that were said to have been covered by an industrial agreement that was still in force between the parties could be dealt with by the Commission as industrial matters - Further, IAC found that no error had been demonstrated in the decision of the Commission in Court Session in determining that the Commission had jurisdiction to deal with the application, therefore, the appeal was dismissed - Dismissed - Burswood Resort (Management) Limited -v- Australian Liquor, Hospitality and Miscellaneous Workers Union, Western Australian Branch - IAC 9 of 2002 - Industrial Appeal Court - 18/12/02 - Accommodatn, Cafes&Restaurants .....	208
<sup>4</sup> Application for Orders pursuant to s.66 of the I.R. Act - Applicant argued that Respondent and its members had breached its rules and s.6 of the Act - Respondent opposed application and argued that the President lacked jurisdiction to hear and determine the matter - President found on evidence that Applicant was not a person prescribed as having right to make application pursuant to s.66 of the Act, and in particular s.66(1), that there was no jurisdiction to hear and determine application as the application sought orders in relation to the organisation's rules of which Applicant was not a member and has never been a member - Dismissed - Mr DP Deen -v- The Construction, Forestry, Mining and Energy Union of Workers - PRES 35 of 2002 - President - SHARKEY P - 08/01/03 - Unions .....	233
Complaint re breach of Award - Claimant's Union sought to amend the claim by substituting the employee's name as the claimant - Industrial Magistrate reviewed various Acts and Regulations and found that there was a fundamental flaw in the claim, that there was simply no evidence, which could enable it to exercise its discretion even though it had the power to do so pursuant to Order 16 Rule 1 of the Local Court Rules 1961, therefore, the application was refused - Struck out for want of jurisdiction - AUTO, FOOD, METAL, ENGIN UNION -v- Austal Ships Pty Ltd - M 375 of 2001 - Industrial Magistrate - Cicchini IM - 18/11/02 - Machinery & Equipment Mfg.....	298
Complaint re alleged breach of Section 49(M)(1) of the I.R. Act 1979 - Applicant Union argued that Respondents had breached section 49(M) of the IR Act and sought injunctive relief against Respondents and interim orders pursuant to section 83E(5) of the Act to prevent further breaches - Respondents argued and opposed the applications seeking interim orders and made application for the adjournment of the matters - Further, Respondents argued that there were proceedings on foot in the Federal Court of Australia with respect to substantially the same matter which struck at the validity of the relevant provisions referred to and that this Court should defer its consideration of the matter pending the determination of the matter by the Federal Court of Australia - Further, Honourable Minister for Employment and Workplace Relations of the Commonwealth of Australia sought leave to intervene - Industrial Magistrate found that there was no legislative basis for intervention, that the Court did not possess inherent jurisdiction as it was a creature of statute and it operated within the statutory framework provided - Further, IM found that it was undesirable for the matter to proceed until the Federal Court had dealt with the matter and had determined it as there would be a final determination of the constitutional issues before these proceedings and thus acceded to the applications made by Respondents for an adjournment of the proceedings - Reasons for Decision Issued - The Construction, Forestry, Mining and Energy Union of Workers -v- Woodside Energy Limited (ABN 63 005 482 986) & Other - M 304 of 2002 - Industrial Magistrate - Cicchini IM - 27/11/02 - Oil and Gas Extraction .....	302
Complaints re discrimination of member organisation under section 96C of the IR Act - Complainant argued Ms Peak was a solicitor and authorised to make complaints on behalf of her client and was employed by the CFMEUW Union and that Applicant was a member of CFMEUW Union - Respondents argued that there was no case to answer on the basis that Complainant had failed to establish that they were validly made - Further, Respondents argued that there was no proof of the fact that Elisabeth Peak was authorised to make the complaints - Industrial Magistrate found that there was no case to answer by the Defendant in each instance and that the solicitor employed by the Union could not act on the instructions of the Union in bringing the complaints but must act on the instructions of Complainant - Struck out - Mr C Workman -v- CECK Pty Ltd - CP 3,4,6,7 of 2002 - Industrial Magistrate - Cicchini IM - 19/12/02 .....	324
Application re unfair dismissal seeking reinstatement - Applicant argued that there was no reason for his termination, that he was denied natural justice in relation to the procedure adopted by the Respondent to terminate him and that Respondent should not have formed the view that he had misconducted himself given that the original conviction had been quashed on appeal and the DPP determined not to proceed with a retrial - Respondent argued that Commission lacked jurisdiction to deal with the matter as the Applicant was on a fixed term contract which expired due to the effluxion of time - Further, Respondent argued inter alia, that the Applicant's termination was capable of being effected given the evidence before the jury at first instance, and the jury's decision in finding Applicant guilty - Commission found on facts and was satisfied on balance that Respondent had not demonstrated that Applicant was guilty of misconduct justifying summary dismissal - Commission found that Applicant was treated unfairly and harshly and was denied procedural fairness in relation to the way these allegations were put to him - Further, Commission found that Respondent's conduct on this occasion was extremely callous and oppressive and ordered compensation in lieu of reinstatement - Upheld and Order Issued - "I" -v- Mr Paul Albert Director General Department of Education Western Australia - APPL 347 of 2002 - HARRISON C - 15/01/03 - Education.....	335

## CUMULATIVE DIGEST—continued

## JURISDICTION—continued

	Page
Application re unfair dismissal - Applicant argued that he was unfairly dismissed and that the Commission was within jurisdiction to consider the acceptance of the present application out of time - Respondent denied Applicant's allegations and raised as a preliminary issue that the Commission was without jurisdiction to entertain the claim on the basis proceedings commenced after 1 August 2002 whilst termination of employment took place on 26 July 2002 and there was no ability for Commission to extend time under the IR Act - Commission found that the amendments effected by the Labour Relations Reform Act 2002 to repeal s29(2) of the Act and to enact the new ss29(2) and s29(3) were not retrospective in the sense that the datum point for the termination of the employment was 1 August 2002 and not a date earlier for the purposes of the 28 day time limit - Dismissed for want of jurisdiction - Mr K McEwan -v- Australasian Correctional Management Pty Ltd (ACN 051 130 600) - APPL 1469 of 2002 - KENNER C - 10/12/02 - Food Retailing ...	360
Application re unfair dismissal - Applicant argued that Respondent's conduct towards her constituted a constructive dismissal by there being a breach of a fundamental term of the contract of employment, an implied term of trust and confidence and she had no alternative but to tender her resignation under pressure - Respondent argued that Applicant tendered her resignation after being approached regarding her unresponsive behaviour and attitude - Commission found that Respondent did not force Applicant's resignation rather, there was counselling and a warning about her attitude and Commission did not accept that Applicant had no alternative but to resign - Further, Commission concluded that there was no dismissal and accordingly, no jurisdiction on the part of the Commission to hear and determine such claim - Dismissed - MS CM Perriman -v- Heiniken Australia Pty Ltd - APPL 928 of 2002 - SCOTT C - 30/01/03 - Food, Beverage and Tobacco Mfg.....	367
<sup>1</sup> Appeal against Decision of Full Bench (82WAIG765) re breach of award in relation to underpayments and denial of benefits, flat hourly rate in excess of award entitlement for ordinary time, right of set-off, method of calculation of amount due to employee and whether claim truly for breach of award or for breach of over award agreement - IAC reviewed authorities, evidence and found inter alia, whether payment was made expressly or impliedly to cover a particular obligation, the payment could not be claimed as a set off, that the claim or the particulars of the claim was to enforce the award and not to enforce an over award agreement and that an application for enforcement of the terms and conditions of the award, could not proceed on the basis that what was due under the award was to be calculated by reference to the over award rate agreed between the parties - Upheld and Remitted - James Turner Roofing Pty Ltd -v- Mr CL Peters - IAC 7 of 2002 - Industrial Appeal Court - 10/03/03 - Construction Trade Services.....	427
<sup>1</sup> Appeal against Decision of Full Bench (82WAIG2409) re Long Service Leave entitlements - Question re jurisdiction - Appeal on ground that worker was an independent contractor and, whether appeal raised question of "construction and interpretation" of Long Service Leave Act, 1958 and Industrial Relations Act, 1979 - Industrial Appeal Court reviewed Acts, authorities and found that on the whole circumstances, it was open to both Industrial Magistrate and Full Bench to conclude that the relationship between employer and employee was never terminated in point of law and that it had jurisdiction to hear the appeal - Further, IAC concluded inter alia, that the Full Bench had not erred in the interpretation of the Long Service Leave Act, however, it had erred in misconstruing the nature of the power allowed to the Industrial Magistrate - Dismissed Act - United Construction Pty Ltd -v- Mr J Birighitti - IAC 11 of 2002 - Industrial Appeal Court - 27/02/03 - General Construction.....	434
<sup>2</sup> Appeal against Decision of Commission (82WAIG2579) re dismissed application to amend name of respondent - Appellant argued inter alia, that Commissioner at first instance erred in the exercise of her discretion by dismissing the application, by not correctly applying the principles and by failing to take into consideration or give sufficient weight to various facts - Appellant sought that the Orders at first instance be quashed, the application for change of name be allowed and the application alleging unfair dismissal seeking remedies be remitted to a different constituted Commission - Full Bench reviewed evidence, applied various principles and found that there was a genuine and reasonable mistake as to the identity of the employer and that the Commissioner erred by failing to consider or take into account the relevant fact, that by not permitting Appellant to join other parties in the event that one was not the correct party was an obvious occasion of likely severe detriment to the Appellant - Full Bench further found that the exercise of the discretion at first instance miscarried and had been established to have miscarried, having regard to the principles laid down in House v The King (op cit) - Upheld and Decision at first instance varied - Mr C Edwards -v- Pauline Dorn, Mirjana Tolich, Rosa Princi t/as Naval Garden Supplies & Other - FBA 45 of 2002 - Full Bench - SHARKEY P/BEECH SC/WOOD C - 27/02/03 - Other Personal Services.....	445
Conference referred re on-call allowance - Applicant sought a declaration that it be entitled to an on-call allowance - Respondent argued that Applicant was not rostered on and that it constituted emergency returns and was therefore entitled to emergency return to work rates - Respondent argued that enforcement of an award entitlement was the exclusive province of the IMC - Commission found that whilst it was bound to act without regard to technicalities and legal form, this does not extend to acting outside its jurisdiction - Commission found that the order sought would effectively vary the Agreement retrospectively, which the Commission does not have power to do - Dismissed - Western Australian Police Union of Workers -v- Commissioner of Police - PSACR 34 of 2002 - Public Service Arbitrator - SCOTT C - 14/02/03 - Public Order & Safety Services.....	506
Complaint re breach of Enterprise Bargaining Agreement - Claimant Union argued that Defendant had breached Clause 22(b) of the Agreement by failing to pay public holiday penalties - Defendant denied claim and argued inter alia, that employees were paid according to the EBA - Industrial Magistrate reviewed Acts, Agreement and found inter alia, that the application of the clause in this instance had the effect of producing an inequitable result for employees that worked on public holidays and that all employees were technically adequately compensated whether they work on the public holiday or the day in lieu thereof - Reasons for Decision Issued - The Australian Nursing Federation, Industrial Union of Workers Perth -v- Silver Chain Nursing Association Inc - CP 61.62 of 2000 - Industrial Magistrate - Cicchini IM - 23/11/00 - Health Services.....	508
Claim re breach of Workplace Agreement - Claimant argued that he was owed payment for being on call - Defendant argued a lack of jurisdiction and that there was no provision for an availability allowance due to payment in excess of that normally paid to a practitioner and the need to have been rostered on, which the Claimant wasn't - Defendant argued that dispute was capable of resolution as per the Dispute Settlement Procedure contained in the WPA - Industrial Magistrate found that the allowance was not subject to rostering provisions and Claimant was therefore entitled to recover payment pursuant to the terms of the WPA, that the Claimant complied with the Dispute Settlement Procedure, that there was no jurisdictional impediment and that the Defendant underpaid the Claimant - Reasons for Decision Issued - Dr J Gill -v- Commissioner of Health - M 26 of 2002 - Industrial Magistrate - Cicchini IM - 20/12/02 - Health Services.....	532
Application re unfair dismissal and contractual entitlements - Applicant argued that she was given insufficient notice of termination and was owed annual leave payments after having been forced to resign - Respondent argued that Applicant resigned of her own volition and therefore, was not entitled to notice or annual leave entitlements - Commission found that Applicant resigned of her own volition and not through actions by Respondent calculated to seriously damage the relationship of confidence and trust between parties - Commission found there was no constructive dismissal and Applicant was therefore not entitled to notice or annual leave payments - Dismissed - Mrs GFJ Greaves -v- The Sisters of Mercy Perth (Amalgamated) Inc trading as Santa Maria College - APPL 691 of 2002 - HARRISON C - 20/02/03 - Accommodatn, Cafes&Restaurants.....	596
Application re unfair dismissal - Applicant argued that he understood to be employed under a registered workplace agreement when terminated and thus filed a claim in the Industrial Magistrate's Court where a jurisdictional argument arose and the Industrial Magistrate found there was no registered workplace agreement - Respondent opposed the application and argued that Commission had no jurisdiction to deal with matter - Commission found that application was lodged 41 days after matter was unsuccessful in the Industrial Magistrate's Court and there was no valid reason for the delay thus it was dismissed for want of jurisdiction - Dismissed for want of jurisdiction - Mr GW Rogers -v- DMW Constructions Pty Ltd - APPL 1833 of 2002 - HARRISON C - 05/03/03 - Construction Trade Services.....	606
Application re unfair dismissal seeking Orders pursuant to s.23A of the I.R. Act - Applicant argued that there was no notice given - Respondent argued that Applicant was consistently late for work and that complaints had been made about his driving habits - Commission found that Applicant had not discharged his onus of proof, that he had failed to work out the notice period and had therefore abandoned the contract of employment and that it had no jurisdiction to hear the claim - Dismissed - Mr TW Scott -v- Woodsies Windscreens - APPL 1607 of 2002 - GREGOR C - 14/02/03 - Machinery & Equipment Mfg.....	612

## CUMULATIVE DIGEST—continued

JURISDICTION—continued	Page
<sup>2</sup> Appeal against Decision of Commission (82WAIG3250) re transfer of an employee - Appellant argued that the Public Service Arbitrator erred in law in declaring that Appellant's decision to exclude the employee from the Broome Regional Prison was void, that the decision was within the Public Service Arbitrator's jurisdiction, and that the Appellant should not have ceased paying employee her ordinary salary - Appellant sought that the PSA's orders (1), (2) and (6) be quashed - Full Bench reviewed authorities and found inter alia, that the decision to exclude employee from Broome Regional Prison was an "industrial matter", and the decision to declare it void was within jurisdiction for that reason - Further, Full Bench found that the Arbitrator erred in ordering the Appellant to pay the employee indefinitely into the future when there was no evidence that she would perform any service, had preformed any service or was entirely willing to - Upheld and order 6 of the decision at first instance quashed - Director General, Department of Justice (Formerly known as Ministry Of Justice) -v- Civil Service Association of Western Australia Incorporated - FBA 53 of 2002 - Full Bench - SHARKEY P/SCOTT C/WOOD C - 25/03/02 - Government Administration.....	908
<sup>2</sup> Appeal against Decision of Commission (82WAIG2690) re unfair dismissal and contractual entitlements - Solicitors for the Respondent wrote to the Commission requesting that the figure of compensation as contained in the Order of the Full Bench be amended because it was an incorrect figure and did not reflect the reasons for decision of the Full Bench - Full Bench concluded that pursuant to s.27(1)(m), it had jurisdiction to correct the order because the matter was still before the Commission until the 'slip rule error' in its order was corrected to reflect its decision - Supplementary Reasons for Decision and Correcting Order Issued - Mr I Adriansz -v- EPath WA Pty Ltd - FBA 48 of 2002 - Full Bench - SHARKEY P/COLEMAN CC/BEECH SC - 28/03/03 - Health Services.....	917
<sup>2</sup> Appeal against Decision of Commission (82WAIG3011) re unfair dismissal and contractual entitlements - Appellant argued that the Commissioner erred in having grave reservations about the evidence given by Applicant and that Commissioner erred in having no hesitation in preferring the evidence of Respondent to that of Appellant - Further, Commissioner erred in fact in finding that the written contracts were identical except for the commencement and expiry dates and erred in not finding that the true contract between the parties was a single ongoing contract of employment - Respondent opposed the appeal - Full Bench found that there was clear evidence that Appellant had entered and knew he had entered separate fixed term contracts which he recognised as did other witnesses as being different from permanent - Further, Full Bench found that there was no error in the decision in the first instance and that Commissioner correctly found that there was no dismissal and therefore the Commission was without jurisdiction and the appeal was dismissed - Dismissed - Mr R Gallotti -v- Argyle Diamond Mines Pty Ltd Trading as Argyle Diamonds - FBA 50 of 2002 - Full Bench - SHARKEY P/COLEMAN CC/BEECH SC - 13/03/03 - Other Mining.....	919
<sup>2</sup> Appeal against Decision of Commission (82WAIG3037) re unfair dismissal and contractual entitlements - Appellant sought leave to amend the grounds of appeal on the following grounds by deleting reference to Citigroup Pty Ltd in the heading of the Notice of Appeal as Citigroup Pty Ltd was in liquidation - First two Respondents submitted that the liquidator was not entitled to or required to appear and did not appear - Full Bench found that in reality it was not an application to amend the notice of appeal at all but an application to strike out Citigroup Pty Ltd (in liquidation) as a party to the appeal as there was no intention to proceed against Citigroup Pty Ltd on this appeal - Further, Full Bench found that the application should be dismissed on the merits in that it would deny Citigroup Pty Ltd a role in the appeal and may deny it natural justice and proceedings were otherwise adjourned to enable appellant to consider his position - Application to amend notice of appeal dismissed and appeal adjourned sine die - Mr AG Matthews -v- Cool or Cosy Pty Ltd; Ceil Comfort Home Insulation Pty Limited; Citigroup Pty Ltd - FBA 52 of 2002 - Full Bench - SHARKEY P/COLEMAN CC/GREGOR C - 18/03/03 - Various.....	940
<sup>4</sup> Application for orders pursuant to s.66 of the I.R. Act - Applicant's complaint was that the Respondent acted contrary to rule 3 of its rules in refusing to allow an external person to represent it in the matter relating to Applicant and at his expense - Respondent opposed the claim - President reviewed legal principles and found inter alia, that it had not been established that there was any rule, express or implied, which had been breach or not performed, and that no order was necessary to ensure that any wrong was avoided since no wrong had been or was likely to have been committed in relation to the rules in this instance - Having regard to s.26(1) and s.26(1)(c) of the Act, President found that the merits lay with the Respondent CSA and the case for the Applicant had not been established - Further, President was not persuaded that the application to strike out the particulars was made out and that it was satisfied entirely that there was sufficient material there for the Respondent to know and answer the case which was alleged against it - Dismissed, Orders and Directions Issued and Application for interim orders dismissed - Mr NJ Jones -v- Civil Service Association of Western Australia Incorporated - PRES 1 of 2003 - President - SHARKEY P - 31/03/03 - Unions.....	945
<sup>4</sup> Application for orders pursuant to s.66 of the I.R. Act - Applicant argued that Respondent had acted contrary to rule 3 of its rules by failing to act fairly and in the interests of its member - Respondent opposed application and denied that it had breached its rules or acted in a tyrannical oppressive, unreasonable or undemocratic way - President reviewed authorities, union rules and found inter alia, that the decision to refuse Applicant legal assistance was unfair and unreasonable and did not advance the objects contained in the rules - President ordered that Applicant's application be reconsidered and that this be done only after an opinion was derived from a solicitor of Applicant's choice and such opinion be funded by the Respondent - Orders and Directions Issued - Application granted in part - Mr GJ Wauhopp -v- Civil Service Association of Western Australia Incorporated - PRES 2 of 2003 - President - SHARKEY P - 28/03/03 - Unions.....	951
Complaint re alleged breaches of clauses 3(1)(4)(5) & 4(1) of Industrial Relations (Industrial Agents) Regulations 1997 Schedule 1 - Complainant sought an extension of time to bring proceedings before the Industrial Magistrate in his application to have Respondents deregistered as Industrial Agents pursuant to the Industrial Relations (Industrial Agents) Regulations 1997 - Further Complainant argued that Industrial Magistrate did have the powers and jurisdiction to deal with complaint, that appeal had been properly initiated pursuant to the provisions of the Industrial Magistrate's Regulations and that the Registrar's decision was in effect a determination made for the purposes of regulation 15(3)(a) - Respondents lodged an interlocutory application and sought orders that the application be dismissed or struck out on the grounds that the application was out of time, functus officio, against public interest and with insufficient merit - Further, Respondent argued that in respect of regulations 12 of the I.R. Act there was no substantial compliance - Industrial Magistrate reviewed the relevant legislation and the intention of the legislation, the jurisdiction of the Industrial Magistrate's Court and found that under the proper administration of the Acts and Regulations an Industrial Magistrate could make a determination or a decision as to whether or not the registration of an industrial agent was to be cancelled - Further, IM found that it had no power to rule or view that the Registrar in dealing with the complaint in the circumstances was an unauthorised act or a series of unauthorised acts and that it could not be said that the matter was functus officio - IM further found that under regulation 19 of the I.R. Act an Industrial Magistrate had power to cancel registration of an industrial agent and consider allegations that there had been a breach of the code of conduct an industrial agent was subject to when they were registered - Industrial Magistrate granted the parties an extension of time in respect to the application of the extension of time within which an appeal may be commenced prior to final orders - Reasons for Decision Issued - Mr JRA Acosta -v- Mr G Broderick & Other - M 200 of 2002 - Industrial Magistrate - Graeme Neil Calder - 28/03/03 - Other Services.....	986
Complaints re unfair dismissal - Claimants argued inter alia, that Respondent failed to give them an opportunity to defend or rebut any allegations of misconduct justifying dismissal, and sought reinstatement together with the recovery of remuneration lost - Respondent denied allegations and denied that it had failed to afford procedural fairness - Further, Respondent argued that the actions constituted gross misconduct, that the dismissal was justified and not harsh or oppressive and that Claimants were not entitled to the amounts claimed or any amounts at all - Industrial Magistrate reviewed authorities, Acts and Regulations and found that the decision to terminate resulted directly from the raising of the safety issue, that the decision was made without merit and it was harsh, oppressive and unfair - Further, IM found that the factual circumstances which reflect the actual operation of the contractual relationship demonstrated that the employment relationship was a casual one, that the continuing relationship between the Claimants and Respondent did not in law evince a continuing contract and that it was without jurisdiction to hear and determine the claims - Reasons for Decision Issued - Mr LJA Clark -v- Marine Fire & Security Pty Ltd - M 363,364 of 2001 - Industrial Magistrate - Cicchini IM - 27/03/03 - Other Business Services.....	1005

## CUMULATIVE DIGEST—continued

## JURISDICTION—continued

- Application re unfair dismissal and contractual entitlements - Respondent raised preliminary issue re Applicant incorrectly naming Respondent in the notice of application - Applicant seeking to amend the Respondent's name was granted - Applicant argued that she had to resign after being terminated in order to obtain alternative employment and to ensure that Respondent would not claim commissions due to her for sales completed following her termination - Applicant argued that no issue was raised with her about any lack of co-operation between her and the other employees - Respondent denied that Applicant was unfairly terminated and argued that she resigned from her employment on her own volition - Further, Respondent argued that the commission claimed by Applicant was incorrect and counter proposed with a different quantum - Commission found on evidence that Applicant resigned of her own volition, thus no termination took place, and that Commission lacked jurisdiction to deal with this part of the application - Further, based on Respondent's contention that monies was owed to Applicant, Commission awarded the Applicant claim for benefits under her contract of employment - Dismissed for want of jurisdiction and application for contractual benefits partially allowed - Mrs MA Trimboli -v- Cusma Corporation Pty Ltd t/as Cusma Property Consultants - APPL 1276 of 2002 - HARRISON C - 28/03/03 - Property Services ..... 1055
- Application re unfair dismissal seeking extension of time - Applicant argued that circumstances surrounding the resignation amount to a dismissal of him by the Respondent - Further, Applicant argued that after the dismissal he could not afford the filing fee hence the delay in lodging his application - Commission applying the Principles set out in Azzalini's Case (ibid) found the length of the delay was not justifiable on the evidence before the Commission - Further, Commission found on Applicant's own evidence, that Applicant was not dismissed from his employment but left it voluntarily, therefore, there had been no dismissal to attract the jurisdiction in the Commission - Commission also found that Applicant's case would have no prospect to succeed and that it would be fair not to accept an application out of time in these circumstances - Dismissed - Mr P Scott -v- Sealcorp Holdings Limited (ABN 28 009 143 597) - APPL 289 of 2003 - GREGOR C - 01/04/03 - Insurance ..... 1070
- <sup>4</sup>Application for Orders pursuant to s.66 of the I.R. Act - Applicant argued inter alia, that there had been no election under the CSA rules, and the General Secretary and Assistant General Secretary had ipso facto been invalidly appointed contrary to the CSA rules, and ultra vires those rules - Further, Applicant argued that once the SPSF ceased to exist, there had to be a new s.71 application, and the Full Bench had to be satisfied anew of the s.71 requirements, about a new Counterpart Federal Body, the CPSU and this had not been done - Respondent argued that the agreement made under s.202 of the Federal legislation continued in force by virtue of s.253TA of the WR Act, thus enabling persons appointed or elected pursuant to the rule of the CPSU to become General Secretary and Assistant General Secretary of the CSA - Respondent, further submitted that the Commission, constituted by the President, had no jurisdiction to consider the effect of the WR Act and the s.202 agreement - President found that it was within his jurisdiction under s.66(2) of the Act to determine whether the rules of the CSA have been observed or not, and particularly whether persons are officers of the CSA pursuant to its rules or by the operation of any law - President reviewed legal principles, relevant Acts, agreement and the CSA rules and found that the appointments to the offices of the WA Branch Secretary and WA Branch Assistant Secretary of the CPSU, could not constitute or serve as valid elections or appointments to the offices of General Secretary and Assistant Secretary in accordance with the rules of the CSA, and that they therefore have not, since 28 November 2001, validly occupied those offices - Supplementary Reasons for Decision, Declarations and Orders Issued - Mr N Jones -v- Civil Service Association of Western Australia Incorporated - PRES 3 of 2003 - President - SHARKEY P - 10/04/03 - Unions ..... 1146
- <sup>4</sup>Application for Orders pursuant to s.66 of the I.R. Act - Applicant argued that a resolution SCM06/02, passed on 20 November 2002 was legally and factually incorrect and that the president complied with the rules and did afford procedural fairness - Respondent denied that applicant was entitled to the orders and directions sought and argued that clause 1 of the resolution SCM06/02 stated "in consultation with the principal officers" not "officer" as referred to by the Applicant - President reviewed authorities, relevant sections of the CSA rules and found on evidence that the CSA was in breach of its rules in that the Council passed resolution SCM06/02, in particular because it was not a matter which the CSA should consider, being a CPSU matter - President declared that the president acted within the rules in obtaining the legal advice necessary to enable her to carry out her duties and that such expense was properly incurred - Further, President had doubts that the matter was at all a matter relating to the rules of an "organisation" as defined in s.7 of the Act, and therefore may not be within jurisdiction under s.66 - President found inter alia, that even if it was to act within jurisdiction and power by making the orders sought, the equity, good conscience and substantial merits of the matter, do not constrain it to make the orders sought - Dismissed - DM Robertson -v- Civil Service Association of Western Australia Incorporated - PRES 4 of 2003 - President - SHARKEY P - 17/04/03 - Unions ..... 1156
- Application for leave to amend Notice of Answer and Counter Proposal re an unfair dismissal claim - Respondent sought leave to amend certain paragraphs of the Notice of Answer and Counter Proposal and to further insert a counter-claim - Applicant did not object to certain paragraphs of the amended Notice of Answer and opposed other paragraphs - Commission found inter alia, that there will be a prejudice to the applicant if certain paragraphs were amended and ordered that other than paragraph 1.3 and item 2, leave was granted to the respondent to substitute the schedule to the Notice of Answer and Counter Proposal as presented to the Commission on 1/4/2003 - Granted in Part - Applicant subsequently sought from the Commission an order dismissing the application - Dismissed - Mr TH Cameron -v- Boston Scientific Pty Ltd ACN 071 676 063 - APPL 2084 of 2002 - BEECH SC - 04/04/03 - Health Services ..... 1189
- Application re unfair dismissal seeking compensation - Applicant argued she was unfairly dismissed by the respondent as a consequence of the disclosure of a federal police clearance - Respondent argued that the applicant was not unfairly dismissed and denies that it employed the applicant on the basis of what is described as a conditional offer of employment - Commission found that applicant was offered employment by the respondent, that the employment offer was conditional upon the satisfaction of a term that a federal police clearance was furnished by applicant and that it was open for the respondent to withdraw the offer on the basis that the condition precedent in the contract was not satisfied - Dismissed - Mrs JL Issit -v- Synergy - APPL 1459 of 2002 - KENNER C - 07/03/03 - Business Services ..... 1212
- Application re unfair dismissal seeking extension of time pursuant to s.29(3) of the I.R. Act - Applicant argued that she was aware of the 28 day time limit at the time that she contemplated taking these proceedings, but that some personal factors and some health factors were relevant to the delay that took place - Commission applied legal principles and found that the length of the delay was substantial, and although it appeared from the Applicant that she would contest the employer's decision, from the date of termination, no further steps were taken by her to put the Respondent on notice that the dismissal was being contested - Further, Commission found that if it was to accept the application for extension of time, then there may be some prejudice occasioned upon Respondent, therefore, it was not persuaded that it ought exercise its discretion to receive the application out of time in the present circumstances - Dismissed for want of jurisdiction - Ms JS Palmer -v- Mr D Palumbo - APPL 26 of 2003 - KENNER C - 01/04/3003 - Food Retailing ..... 1245
- Appeal against decision to suspend made on 16/7/2002 - Preliminary issues re extension of time, perceived bias and whether matter ought proceed in public interest - Appellant argued that Respondent had failed to adhere to the disciplinary procedures and to comply with the requirements of the PSM Act 1994 - Appellant sought Orders that the Respondent's action be reviewed, modified, nullified and/or varied - Respondent argued that there had been no unlawful action undertaken and that the direction to the Appellant to not attend work did not constitute a suspension in accordance to the PSM Act 1994 - Further, Respondent argued that PSAB had no jurisdiction to deal with the matter and opposed the application for extension of time - Public Service Appeal Board invited the parties to make written submissions on whether or not the matter should proceed in the public interest - PSAB found that in accordance with the Act, the Board had a responsibility to manage the process of a particular case as it sees appropriate and the fact that Appellant would have preferred a different process did not meet the test of perceived bias - PSAB reviewed authorities and was unanimously of the view that the extension of time ought be granted because the Respondent had been made aware of the Appellant's challenge since the time expired for the filing of the appeal - PSAB concluded that there was no right of appeal to the Board arising from any action under s.82 of the PSM Act, there was no valid appeal before the board, in accordance with its jurisdiction and accordingly, had the Board the jurisdiction to deal with the matter, it would not have dismissed the appeal in the public interest as the passage of time and events had not resolved the matter or meant that it was merely academic to proceed - Orders Issued - Mr S Kelly -v- Director General, Department of Justice - PSAB 12 of 2002 - Public Service Appeal Board - SCOTT C - 17/04/03 - Government Administration ..... 1283

## CUMULATIVE DIGEST—continued

	Page
<b>JURISDICTION—continued</b>	
<sup>1</sup> Appeal against Decision of Commission in Court Session (83WAIG57) re registration of an award - Appellant appealed on the ground that Commission in Court Session erred in law by wrongly construing or interpreting s41(6) of the I.R. Act, 1979 and Clause 45 of the Burswood International Resort Casino Employees Industrial Agreement 2001 AG 169 of 2001 - Appellant sought to have the decision of CICS quashed and the application for the award dismissed - Industrial Appeal Court reviewed authorities, I.R. Act, Agreement and the majority IAC found inter alia, that it was proper to have regard to the legislation as it stood as at the date of enforcement of the contract not at its entry date, that the relationship between the parties and the options available to them were regulated by statute and the statute extended the agreement to facilitate a smooth transition to its replacement at any time from the nominal expiry date of the agreement - Further, IAC found that it was not intended that an industrial agreement be used as a vehicle for altering the statutory scheme for facilitating the replacement of an industrial agreement after its nominal expiry date and that insofar as clause 45 prohibited the Respondent from taking steps for a substitute award as contemplated in s41 of the Act it was to that extend void - Dismissed - Burswood Resort (Management) Ltd -v- Australian Liquor, Hospitality and Miscellaneous Workers Union, Western Australian Branch - IAC 1 of 2003 - Industrial Appeal Court - Owen J./Scott J./Parker J. - 13/05/03 - Accommodatn, Cafes&Restaurants .....	1371
<sup>2</sup> Application for alteration of rule 5 - Eligibility - Full Bench reviewed union rules, relevant sections of the I.R. Act and was satisfied, on evidence, that all of the relevant requirements of s.55 and s.56 of the Act had been met, save and except for s.55(4)(a) - Full Bench was not satisfied that the meeting which approved the alterations was a meeting called especially for the purpose of considering the proposed alterations within the meaning of rule 40 of the rules of the Applicant, thus, it was unable to find that the alteration which was authorised by an annual general meeting, was authorised in accordance with the rules - Full Bench not being satisfied that s.55(4)(a) of the Act had been complied with, refused and dismissed the application - Dismissed - United Firefighters Union of Western Australia -v- (Not applicable) - FBM 1 of 2003 - Full Bench - SHARKEY P/SCOTT C/HARRISON C - 03/06/03 - Unions ....	1400
Conference referred re refusal of Respondent to reclassify positions - Applicant Union argued that the Group-Worker positions have been "transformed" into Juvenile Justice Officer position and sought order that the permanent officers whose positions have been transformed to be reclassified with the positions - Respondent objected to and opposed the claim - Public Service Arbitrator reviewed authorities and relevant Acts and found that although it had the jurisdiction in s.80E, it was the case that an Arbitrator exercising that jurisdiction does not have the power to make an order directing a public service employer to act contrary to his or her obligations under the Public Sector Management Act 1994 - Commission concluded inter alia, that the Union's claim was not able to be granted by virtue of the legislative requirements for the appointment to public service positions - Dismissed - Civil Service Association of Western Australia Incorporated -v- The Director General, Department of Justice - PSACR 9,10 of 2003 - Public Service Arbitrator - BEECH SC - 15/05/03 - Government Administration .....	1481
Application re unfair dismissal seeking compensation - Commission called proceedings on its own motion by reason that application was filed out of time - Applicant argued that although she had been advised of the need to file the application within 28 days of the date of termination of employment she sought legal advice and the firm of solicitors was on leave until 6 January 2003 - Respondent opposed the application and said that at all times it treated the Applicant fairly and there was no indication to it that a claim would be filed against it until the notice of application was received by service - Commission was not persuaded in the circumstances that an extension of time should be granted because the applicant admitted to her credit, that she was aware of the necessity to bring these proceedings within 28 days - Dismissed for want of jurisdiction - Miss KJ Francis -v- Pilbeam Family Trust t/a Stamp-It Rubber Stamp Co (WA) - APPL 27 of 2003 - KENNER C - 24/03/03 - Property and Business Services .....	1502
Application for extension of time to file application re unfair dismissal - Applicant argued that the delay in lodging his application was because he was exchanging emails with a representative of the respondent in regard to taxation of his ex gratia payment - Respondent argued the applicant had not provided information that the termination would be contested - Commission found the delay in this application was almost three times the period provided in the Act, the applicant was not dismissed so the jurisdiction which resides in the Commission to hear the industrial matter referred under s.29 of the Act does not arise therefore the application was without jurisdiction and there was no case to be argued - Dismissed - Mr SJ Moretti -v- Canning Vale Weaving Mills Ltd - APPL 355 of 2003 - GREGOR C - 14/05/03 - Other Manufacturing .....	1519
Application re unfair dismissal - Commission called these proceedings on its own motion as application was out of time - Commission found that 46 days was a significant delay and was a factor which must be taken against the applicant and the application, and the state of the evidence was such that there was no real and proper explanation for the delay - Further, Commission had significant doubts as to whether the applicant, as a matter of fact and law, was an employee of the respondent as at the time it was alleged the relationship came to an end - Application for extension of time refused and application for unfair dismissal dismissed for want of jurisdiction - Mr D Suparta -v- Swan Transit Operations Pty Ltd - APPL 135 of 2003 - KENNER C - 09/05/03 - Road Transport .....	1527
Appeals re reclassification of position - Parties agreed that the matter ought be dealt with by the Arbitrator on the basis of written submission - Public Service Arbitrator reviewed authorities and submissions and found that there was no industrial matter upon which Commission could exercise jurisdiction because at the time the Appellants filed Notices of Appeal, their employment was the subject of a Workplace Agreement pursuant to the Workplace Agreement Act 1993 - Dismissed for want of jurisdiction - Mr PE Bullen -v- WorkCover W.A. - PSA 5,7,8 of 2000 - Public Service Arbitrator - SCOTT C - 22/05/03 - Government Administration .....	1551
Application for orders to reverse decision of Respondent to reprimand and transfer an employee and to impose penalty on employee - Preliminary issues raised re Commission's jurisdiction to entertain the application - Applicant Union argued Respondent had not complied with the relevant provisions of the Public Sector Management Act 1994 and that its member had been denied natural justice - Respondent denied that Applicant member had been treated unfairly or inappropriately under the PSM Act - Commission considered relevant legislative provisions and declared, inter alia, that the proceedings were validly brought and Commission could enquire into and deal with the subject matter - Further, Commission reviewed relevant Acts, authorities, the Dodd and Archibald reports and found that there had not been strict compliance with statutory scheme, the process undertaken by the Respondent, as reflected in the Dodd and Archibald reports, constituted a denial of natural justice to the employee - Commission found that the failure by Respondent to afford employee an opportunity of being heard on the issue of penalty, following its findings of guilt in relation to the charges, was also a denial of natural justice and that Respondent's decision to impose penalty on employee ought be quashed - Upheld, Declaration and Order Issued - Mr G Johnston -v- Mr Ron Mance, Acting Director General Department of Education - APPL 2302 of 2001 - KENNER C - 06/08/01 - Education .....	1553
<b>LONG SERVICE LEAVE</b>	
<sup>1</sup> Appeal against Decision of Full Bench (82WAIG2409) re Long Service Leave entitlements - Question re jurisdiction - Appeal on ground that worker was an independent contractor and, whether appeal raised question of "construction and interpretation" of Long Service Leave Act, 1958 and Industrial Relations Act, 1979 - Industrial Appeal Court reviewed Acts, authorities and found that on the whole circumstances, it was open to both Industrial Magistrate and Full Bench to conclude that the relationship between employer and employee was never terminated in point of law and that it had jurisdiction to hear the appeal - Further, IAC concluded inter alia, that the Full Bench had not erred in the interpretation of the Long Service Leave Act, however, it had erred in misconstruing the nature of the power allowed to the Industrial Magistrate - Dismissed Act - United Construction Pty Ltd -v- Mr J Birighitti - IAC 11 of 2002 - Industrial Appeal Court - 27/02/03 - General Construction .....	434
Complaint re breach of award - Claimant Union argued that Defendant breached award by not paying member award entitlements such as sick leave, public holidays, annual leave or pay in lieu and redundancy payments - Defendant argued that there was no redundancy payments because employee had not been made redundant and that accrued annual leave was not paid because employee abandoned his job - Further, that employee was paid superannuation and long service leave but was not paid allowances - Industrial Magistrate reviewed award and evidence and found that Complainant had failed to prove that employee was employed in a classification covered by the Award; that employee was engaged in work which was substantially or wholly covered by the Award and that the Award applied to the Defendant's operations - Reasons for Decision Issued - Australian Liquor, Hospitality and Miscellaneous Workers Union, Western Australian Branch -v- Derby Frail Aged and Disabled Hostel - Ngamang Bawoona - CP 292 of 2000 - Industrial Magistrate - 28/08/00 - General Construction .....	518

## CUMULATIVE DIGEST—continued

	Page
<b>LONG SERVICE LEAVE—continued</b>	
Appeal pursuant to section 50 of the Construction Industry Portable Paid Long Service Leave Act 1985 re decision to refuse to recognise service towards an entitlement to long service leave - Applicant appealed against the decision of the Respondent to refuse to recognise service with Australian Skills Training Pty Ltd for the purposes of service towards an entitlement to long service leave and described his employment with the employer as being in the nature of construction work - Respondent argued that nature of work did not fall within the definition of construction industry and therefore could not attract credits towards long service leave - Board of Reference found that Applicant was not entitled to credits towards long service leave for the period employed with Australian Skills Training Pty Ltd as the employer was not and should not be registered as it was not in the construction industry - Reasons for Decision Issued - Mr C Rogers -v- Construction Industry Long Service Leave Payments Board - BOR 1 of 2002 - Board of Reference - SPURLING, J.A. - 12/02/03 - Construction Trade Services .....	562
<b>MANAGERIAL PREROGATIVE</b>	
Application re harsh, oppressive and unfair dismissal - Respondent submitted that it suggested that the process of handling customer complaints needed to change from a "best practice" perspective and that Applicant would first deal with the complaint to ascertain whether it should go to the manufacturer or to the layers to be attended to - Further, Respondent argued that the direction was lawful and reasonable and Applicant refused to comply with it and said inter alia, that he would resign - Commission found on the evidence presented that the direction given to the Applicant was indeed lawful and reasonable, that it was the Respondent's prerogative to consider how it would deal with the customer complaints and that Applicant's complete and resolute refusal to countenance the proposal, placed the Respondent in a position where it had little alternative - Commission further found that in the circumstances of this matter, and notwithstanding Applicant's character and integrity, Applicant's resolute opposition to how his employer wished to change the complaints procedure made his position untenable - Commission concluded that it had not been persuaded that Applicant's dismissal was harsh, oppressive or unfair - Dismissed - Mr R Davies -v- Carpet Call WA Pty Ltd - APPL 2102 of 2002 - BEECH SC - 28/05/03 - Other Services .....	1491
<b>MISCONDUCT</b>	
Application for Order pursuant to Section 80E re disciplinary action taken against an employee - Applicant Union argued that Respondent bring to an end the disciplinary process on the basis that there are significant procedural flaws, including denial of natural justice to member and that he had not committed breaches in circumstances which related to his employment entitling Respondent to undertake any disciplinary enquiries - Respondent argued that it was entitled to undertake and complete any disciplinary enquiries - Public Service Arbitrator found that the disciplinary process in this matter was not baseless and did not suffer the significant flaws or breaches such as to warrant the process being halted - Dismissed - Civil Service Association of Western Australia Incorporated -v- Director General, Department of Family and Children's Services - P 41 of 2001 - Public Service Arbitrator - SCOTT C - 16/12/02 - Government Administration .....	146
Application re unfair dismissal - Applicant argued that dismissal was unfair because Respondent had to make a choice between his family or her and he chose his family and also asked Applicant what it would take to have her leave her job quietly - Further, Applicant argued that Respondent alleged that she had misappropriated money which was not the case and established that it was not the case - Respondent argued that Applicant had agreed to resign, the basis of the resignation was that she be paid her entitlements plus two week's pay and at the time he believed that Applicant had written cheques in the amounts which he thought was inappropriate and he attempted to stop payment - Commission found that the relationship came to an end by the dismissal of Applicant in the circumstances where Respondent was trying to balance competing obligations of Applicant as an employee and family obligations - Further, Commission found that Applicant had never misappropriated money and that Applicant had been the subject to damaging rumours that she had misappropriated the Respondent's funds - Finally, Commission awarded six months compensation - Granted - Mrs KM Bristow -v- Bay of Isles Aboriginal community Inc. - APPL 873 of 2002 - GREGOR C - 09/12/02 - Community Services .....	150
Application re unfair dismissal - Applicant argued that dismissal was unfair because Applicant had not yet attended court to prove his innocence of the charge - Respondent argued that termination of the contract of employment was because of unauthorised possession of company equipment and the reason given lacked credibility to the extent that there had been a serious breach of the employment contract and a breakdown in trust - Commission found that there has been a lack of response from Applicant in relation to this matter - Further, Commission found that Applicant had been found guilty of theft which was the substantive reason for the dismissal and Commission considered that it was in the public interest to dismiss application - Dismissed in the public interest - Mr G Chapman -v- Worsley Alumina Pty Ltd - APPL 1495 of 2001 - WOOD C - 20/11/02 - Services to Mining .....	160
<sup>2</sup> Appeal against Decision of Commission (82WAIG2195) re unfair dismissal - Appellant argued that the Commission and the Learned Commissioner did not act in equity, good conscience and substantial merits of the case, that the Learned Senior Commissioner did not see the alleged offensive gesture and thus, included contempt of court - Respondent argued that appeal should be dismissed - Full Bench found that the decision was a discretionary decision and that it was for Appellant to establish that the exercised discretion was miscarried - Further, Full Bench found that Appellant had failed to establish his case, that there was no evidence of procedural or substantive unfairness in the dismissal of the application established and no grounds of the appeal were made out - Dismissed - Mr R De Vos -v- Minit Australia Pty Ltd (ACN 000328825) - FBA 40 of 2002 - Full Bench - SHARKEY P/COLEMAN CC/WOOD C - 08/01/03 - Personal & Household Good Rtlg .....	219
Application re unfair dismissal - Applicant argued that dismissal was unfair because Respondent gave him no warnings about his performance, that he had only twice not turned up to work due to illness and was terminated in a summary fashion without reason and in an inappropriate manner - Respondent argued that Applicant was a casual employee, and as one hour's pay in lieu of notice was given as provided for in the Award, Applicant was lawfully terminated - Further, Respondent argued that there were good reasons to terminate because he was not turning up to work and there were complaints about Applicant's attitude and his cleaning standards - Commission found Applicant was denied procedural fairness given the way he was terminated, that he was not given any notice when Respondent effected his termination and as reinstatement was impracticable, compensation was awarded - Granted - Mr SVC Datta -v- Mastercare Property Services (WA) Pty Ltd - APPL 826 of 2002 - HARRISON C - 22/01/03 - Business Services .....	327
Application re unfair dismissal seeking reinstatement - Applicant argued that there was no reason for his termination, that he was denied natural justice in relation to the procedure adopted by the Respondent to terminate him and that Respondent should not have formed the view that he had misconducted himself given that the original conviction had been quashed on appeal and the DPP determined not to proceed with a retrial - Respondent argued that Commission lacked jurisdiction to deal with the matter as the Applicant was on a fixed term contract which expired due to the effluxion of time - Further, Respondent argued inter alia, that the Applicant's termination was capable of being effected given the evidence before the jury at first instance, and the jury's decision in finding Applicant guilty - Commission found on facts and was satisfied on balance that Respondent had not demonstrated that Applicant was guilty of misconduct justifying summary dismissal - Commission found that Applicant was treated unfairly and harshly and was denied procedural fairness in relation to the way these allegations were put to him - Further, Commission found that Respondent's conduct on this occasion was extremely callous and oppressive and ordered compensation in lieu of reinstatement - Upheld and Order Issued - "I" -v- Mr Paul Albert Director General Department of Education Western Australia - APPL 347 of 2002 - HARRISON C - 15/01/03 - Education .....	335
Appeal against Decision of Respondent in regards to disciplinary matters relating to an employee - Appellant Union argued that the procedure adopted by Respondent in this matter was so badly flawed that the findings, conclusions and the penalty could not be sustained and that the substance of the complaints could not be separated from the procedure - Further, Appellant argued that while the PSAB could adjust the decision it could only do so after reviewing what Respondent had done - Respondent argued that it undertook a preliminary investigation of the complaint formed a suspicion that employee had misconducted himself and then proceeded with a disciplinary process - Further, Respondent proceeded with a formal process as required by the PSM Act and relied on various legislation or policies in respect of each allegation of misconduct - Public Service Appeal Board found that many of the grounds of appeal were not made out and that the Respondent had obligations towards its employees regarding equal opportunity and sexual harassment - Further, PSAB found that the process had allowed employee natural justice in that he was provided with the allegations, that he had more than a reasonable opportunity to respond at the appropriate stages of the process and had taken the opportunities provided by him, thus PSAB were not satisfied that employee was denied natural justice - PSAB uphold the appeal as it related to the findings not being in the course of official duties and otherwise dismissed the appeal as it related to the issues of merit and process - Further, PSAB uphold the appeal in respect of the manner in which the Respondent had dealt with the imposition of the penalty - Upheld in part otherwise dismissed - Civil Service Association of Western Australia Incorporated -v- Director General, Department of Family and Children's Services - PSAB 4 of 2001 - Public Service Appeal Board - SCOTT C - 13/12/02 - Government Administration .....	390

## CUMULATIVE DIGEST—continued

	Page
MISCONDUCT—continued	
Appeal against Decision of Apprenticeship Tribunal re decision made on 27/09/2002 to allow a suspension of apprenticeship - Appellant argued that the Chairman erred in his findings as he accepted the submissions of Respondent and did not allow Appellant a full opportunity to present her case and documents - Respondent opposed the Appeal and argued that the suspension was warranted as Appellant was suspended for misconduct - Commission found that the Chairman's decision was discretionary and that Appellant had not proven on appeal that Chairman erred in the findings made - Further, Commission found that Chairman had correctly found aspects of misconduct on the part of the Appellant - Dismissed - Ms H Smith -v- Redz Hairdressing - APA 2 of 2002 - WOOD C - 28/01/03 - Personal and Other Services .....	400
Application re harsh, oppressive and unfair dismissal and contractual entitlements - Respondent argued that applicant was dismissed for gross misconduct, incompetence and neglect in the course of the performance of duties - Commission reviewed evidence and found inter alia, that Applicant's dismissal was not harsh, oppressive or unfair because Applicant knowingly allowed cheques to be issued when there were insufficient funds in the account - Further, Commission reviewed employment agreement, authorities and found on evidence that Respondent had discharged the onus upon it to show that the serious misconduct for which Applicant was dismissed had been made out, therefore the Respondent was entitled to dismiss Applicant in accordance with the terms of his employment agreement - Commission also found on evidence that Applicant had established that he was entitled to a benefit under his contract to which Respondent had denied him - Unfair dismissal claim dismissed and claim for denied contractual entitlements granted - Mr A Francois -v- Buzz Dance Theatre Limited - APPL 884 of 2002 - BEECH SC - 09/04/03 - Other Recreation Services .....	1198
Application re unfair dismissal seeking compensation - Applicant argued he was not given any warning or any reason for his dismissal, that there was no opportunity for discussion with the respondent about reduction of working hours or resolution of the issue - Respondent argued the dismissal came about due to a history of bad work performance that caused the respondent to suffer financially, that the financial pressures created by applicant were such it was no longer possible to employ him and at the same time deal with the improvement of the respondent's financial circumstances - Commission found there were some malafides in the conduct of the respondent in respect to their answer to the claim for unfair dismissal - Further, that applicant was dismissed summarily, there was no ground to support a dismissal for misconduct, therefore there was no ground on which to base summary termination and an order was issued awarding compensation - Granted - Mr GC Sutton -v- Audio Visual Technical Services - APPL 398 of 2002 - GREGOR C - 30/04/02 - Motion Picture Radio & TV Serv .....	1258
Appeal against decision to suspend made on 16/7/2002 - Preliminary issues re extension of time, perceived bias and whether matter ought proceed in public interest - Appellant argued that Respondent had failed to adhere to the disciplinary procedures and to comply with the requirements of the PSM Act 1994 - Appellant sought Orders that the Respondent's action be reviewed, modified, nullified and/or varied - Respondent argued that there had been no unlawful action undertaken and that the direction to the Appellant to not attend work did not constitute a suspension in accordance to the PSM Act 1994 - Further, Respondent argued that PSAB had no jurisdiction to deal with the matter and opposed the application for extension of time - Public Service Appeal Board invited the parties to make written submissions on whether or not the matter should proceed in the public interest - PSAB found that in accordance with the Act, the Board had a responsibility to manage the process of a particular case as it sees appropriate and the fact that Appellant would have preferred a different process did not meet the test of perceived bias - PSAB reviewed authorities and was unanimously of the view that the extension of time ought be granted because the Respondent had been made aware of the Appellant's challenge since the time expired for the filing of the appeal - PSAB concluded that there was no right of appeal to the Board arising from any action under s.82 of the PSM Act, there was no valid appeal before the board, in accordance with its jurisdiction and accordingly, had the Board the jurisdiction to deal with the matter, it would not have dismissed the appeal in the public interest as the passage of time and events had not resolved the matter or meant that it was merely academic to proceed - Orders Issued - Mr S Kelly -v- Director General, Department of Justice - PSAB 12 of 2002 - Public Service Appeal Board - SCOTT C - 17/04/03 - Government Administration .....	1283
<sup>2</sup> Appeal against Decision of Commission (82WAI3287) re unfair dismissal and contractual entitlements - Application by Appellant to amend grounds of appeal was dismissed - Appellant argued that the learned Commissioner erred in fact and in law in finding that the Appellant 'misconducted himself by not fulfilling the requirements of the job for which he claimed he had skills to undertake and for which he was employed' and in finding that the Appellant's contract of employment provided for a salary of \$60,000.00 per annum, to be paid pro-rata for the period of the nine month contract - Further, Appellant sought that the appeal be upheld and order of the Commission be set aside - Full Bench applied legal principles and found on evidence that the Commissioner was entitled and correct in finding as she did, that there was no error at first instance, discretionary or otherwise established by Appellant and that no ground of appeal was made out - Dismissed - Mr RA James -v- Australian Integration Management Services Corporation Pty Ltd - FBA 55 of 2002 - Full Bench - SHARKEY P/COLEMAN C/GREGOR C - 23/05/03 - Other Services .....	1387
Application re unfair dismissal - Applicant denied that she committed any misconduct, on the contrary she acted in accordance with her professional judgement at all times and with as much consultation as she was able to arrange with her employer during a period of crisis in dealing with a family - Respondent argued the Applicant did not clarify to other agencies she was acting in her own capacity, she inappropriately used a government vehicle, she attended a house without a police escort, entered into premises and this was a high risk activity and was in contradiction of the employer's policy and procedures - Respondent further argued the Applicant could have placed the employer in jeopardy of legal actions by her conduct and she was not contactable throughout the duration of her actions on Sunday, 8 September 2002 - Commission found inter alia, the Applicant was summarily dismissed, that her dismissal was misconceived and unfair because it lacked the necessary ingredient of a fair go all round - Reinstated and compensation awarded - Ordered Accordingly - Mrs IM Curtois -v- Geraldton Sexual Assault Resource Centre Inc - APPL 1816,1927 of 2002 - GREGOR C - 07/05/03 - Community Services .....	1486
Application re unfair dismissal lodged out of time - Applicant argued his application was lodged out of time as he did not have the money for the filing fee - Commission considered the evidence and it was not persuaded as to the reason for applicant not having money for the claim given his strong denial of the allegation that led to his dismissal - Commission concluded inter alia, that even though application was only one day out of time, in the context of Applicant's probationary employment, and that within the 10 days of his employment he had already received a written warning, possibly two oral warnings, and an allegation had been made against him, it had not been persuaded that it would be unfair not to accept his claim - Dismissed - Mr NJ Roberts -v- John Ryan owner of Metro Security Services - APPL 242 of 2003 - BEECH SC - 01/05/03 - Public Order & Safety Services .....	1521
Application re unfair dismissal - Applicant argued the respondent did not demonstrate sufficient reason for summary dismissal, it was not clear that the respondent required written permission to open the pool outside normal hours, much of the evidence relied upon by the respondent in regard to her misconduct was based on hearsay, money collected from each triathlon was not used for her personal gain and the respondent was aware of the triathlons taking place so there was no breach of Schedule A. - Clause 16 of the respondent's contract - Respondent argued the applicant breached the respondent's contract and the applicant misconducted herself sufficient to warrant summary dismissal - Commission found the respondent had not demonstrated that the applicant was guilty of gross misconduct justifying summary dismissal, the applicant was treated unfairly and harshly because she was not given sufficient opportunity to defend herself and the respondent did not conduct a full and comprehensive investigation into the events surrounding the applicant's termination - Commission also found that the applicant was not afforded 'a fair go all round' - Upheld and Order Issued - Mrs FA Webster -v- Prestige Property Management Services - Mr Rod Stewart - APPL 737 of 2002 - HARRISON C - 09/05/03 - Community Services .....	1529
NATURAL JUSTICE	
Application re unfair dismissal seeking reinstatement - Applicant argued that there was no reason for his termination, that he was denied natural justice in relation to the procedure adopted by the Respondent to terminate him and that Respondent should not have formed the view that he had misconducted himself given that the original conviction had been quashed on appeal and the DPP determined not to proceed with a retrial - Respondent argued that Commission lacked jurisdiction to deal with the matter as the Applicant was on a fixed term contract which expired due to the effluxion of time - Further, Respondent argued inter alia, that the Applicant's termination was capable of being effected given the evidence before the jury at first instance, and the jury's decision in finding Applicant guilty - Commission found on facts and was satisfied on balance that Respondent had not demonstrated that Applicant was guilty of misconduct justifying summary dismissal - Commission found that Applicant was treated unfairly and harshly and was denied procedural fairness in relation to the way these allegations were put to him - Further, Commission found that Respondent's conduct on this occasion was extremely callous and oppressive and ordered compensation in lieu of reinstatement - Upheld and Order Issued - "I" -v- Mr Paul Albert Director General Department of Education Western Australia - APPL 347 of 2002 - HARRISON C - 15/01/03 - Education .....	335

## CUMULATIVE DIGEST—continued

## NATURAL JUSTICE—continued

- Appeal against Decision of Respondent in regards to disciplinary matters relating to an employee - Appellant Union argued that the procedure adopted by Respondent in this matter was so badly flawed that the findings, conclusions and the penalty could not be sustained and that the substance of the complaints could not be separated from the procedure - Further, Appellant argued that while the PSAB could adjust the decision it could only do so after reviewing what Respondent had done - Respondent argued that it undertook a preliminary investigation of the complaint formed a suspicion that employee had misconducted himself and then proceeded with a disciplinary process - Further, Respondent proceeded with a formal process as required by the PSM Act and relied on various legislation or policies in respect of each allegation of misconduct - Public Service Appeal Board found that many of the grounds of appeal were not made out and that the Respondent had obligations towards its employees regarding equal opportunity and sexual harassment - Further, PSAB found that the process had allowed employee natural justice in that he was provided with the allegations, that he had more than a reasonable opportunity to respond at the appropriate stages of the process and had taken the opportunities provided by him, thus PSAB were not satisfied that employee was denied natural justice - PSAB uphold the appeal as it related to the findings not being in the course of official duties and otherwise dismissed the appeal as it related to the issues of merit and process - Further, PSAB uphold the appeal in respect of the manner in which the Respondent had dealt with the imposition of the penalty - Upheld in part otherwise dismissed - Civil Service Association of Western Australia Incorporated -v- Director General, Department of Family and Children's Services - PSAB 4 of 2001 - Public Service Appeal Board - SCOTT C - 13/12/02 - Government Administration 390
- Appeal against Decision of Apprenticeship Tribunal re decision made on 27/09/2002 to allow a suspension of apprenticeship - Appellant argued that the Chairman erred in his findings as he accepted the submissions of Respondent and did not allow Appellant a full opportunity to present her case and documents - Respondent opposed the Appeal and argued that the suspension was warranted as Appellant was suspended for misconduct - Commission found that the Chairman's decision was discretionary and that Appellant had not proven on appeal that Chairman erred in the findings made - Further, Commission found that Chairman had correctly found aspects of misconduct on the part of the Appellant - Dismissed - Ms H Smith -v- Redz Hairdressing - APA 2 of 2002 - WOOD C - 28/01/03 - Personal and Other Services..... 400
- <sup>2</sup>Appeal against Decision of Commission (83WAIG1053) re dismissed unfair dismissal claim lodged out of time - Appellant argued that the learned Commissioner erred in law when having listed the Appellant's application for hearing he dismissed the application without hearing or taking any evidence on oath - Appellant sought orders that the appeal be upheld and decision at first instance be suspended and matter referred back to the Senior Commissioner - No appearance on behalf of the Respondent - Full Bench cited authorities and found *inter alia*, that Appellant was not afforded procedural fairness or natural justice because findings were made which assessed matters based on the mere plausibility of assertions of fact from the bar table instead of evidence on oath or affirmation subject to cross-examination - Upheld, Decision at first instance suspended and the matter remitted to the Commission at first instance to be heard and determined accordingly to law and the reasons of the Full Bench - Mr J Rodriguez -v- Parks Industries Pty Ltd - FBA 6 of 2003 - Full Bench - SHARKEY P/KENNER C/WOOD C - 06/06/03 - Other Services..... 1395
- Application re unfair dismissal and contractual entitlements - Applicant argued that the process used to effect her termination was unfair because she believed that Respondent did not give proper weight to her side of the story and even thought she had not fully complied with the Respondent's procedures, she did not repeat the misdemeanours for which she was reprimanded, therefore it was inappropriate to terminate her contract of employment - Respondent argued that Applicant had breached Respondent's medical procedures, that Applicant had repudiated her contract of employment by behaving in the way she did, therefore it was appropriate to summarily terminate her - Respondent further argued that there were no benefits due to the Applicant under her contract of employment - Commission reviewed authorities and found on evidence that the Respondent had demonstrated that there was sufficient reason to summarily terminate the Applicant's contract of employment, that the Applicant was afforded procedural fairness in relation to the termination and that the Respondent conducted appropriate investigations into the Applicant's conduct in relation to these matters, therefore Applicant was not unfairly dismissed - Commission further found that Applicant had not discharged the onus on her to establish any entitlements to this claim and accordingly dismissed Applicant's claim for contractual entitlements - Dismissed - Mrs JE Gibson -v- The Sisters of Mercy Perth (Amalgamated) Inc - APPL 644 of 2002 - HARRISON C - 29/05/03 - Education..... 1505
- Application re unfair dismissal - Applicant argued the respondent did not demonstrate sufficient reason for summary dismissal, it was not clear that the respondent required written permission to open the pool outside normal hours, much of the evidence relied upon by the respondent in regard to her misconduct was based on hearsay, money collected from each triathlon was not used for her personal gain and the respondent was aware of the triathlons taking place so there was no breach of Schedule A. - Clause 16 of the respondent's contract - Respondent argued the applicant breached the respondent's contract and the applicant misconducted herself sufficient to warrant summary dismissal - Commission found the respondent had not demonstrated that the applicant was guilty of gross misconduct justifying summary dismissal, the applicant was treated unfairly and harshly because she was not given sufficient opportunity to defend herself and the respondent did not conduct a full and comprehensive investigation into the events surrounding the applicant's termination - Commission also found that the applicant was not afforded 'a fair go all round' - Upheld and Order Issued - Mrs FA Webster -v- Prestige Property Management Services - Mr Rod Stewart - APPL 737 of 2002 - HARRISON C - 09/05/03 - Community Services..... 1529
- Application for orders to reverse decision of Respondent to reprimand and transfer an employee and to impose penalty on employee - Preliminary issues raised re Commission's jurisdiction to entertain the application - Applicant Union argued Respondent had not complied with the relevant provisions of the Public Sector Management Act 1994 and that its member had been denied natural justice - Respondent denied that Applicant member had been treated unfairly or inappropriately under the PSM Act - Commission considered relevant legislative provisions and declared, *inter alia*, that the proceedings were validly brought and Commission could enquire into and deal with the subject matter - Further, Commission reviewed relevant Acts, authorities, the Dodd and Archibald reports and found that there had not been strict compliance with statutory scheme, the process undertaken by the Respondent, as reflected in the Dodd and Archibald reports, constituted a denial of natural justice to the employee - Commission found that the failure by Respondent to afford employee an opportunity of being heard on the issue of penalty, following its findings of guilt in relation to the charges, was also a denial of natural justice and that Respondent's decision to impose penalty on employee ought be quashed - Upheld, Declaration and Order Issued - Mr G Johnston -v- Mr Ron Mance, Acting Director General Department of Education - APPL 2302 of 2001 - KENNER C - 06/08/01 - Education..... 1553
- ON CALL
- <sup>2</sup>Appeal against Decision of Commission (82WAIG2188) re unfair dismissal - First Appeal No. FBA38/2002 - Appellant grounds of appeal was against the declaration that she was not dismissed in January 2001 and the order for compensation insofar as it "failed" to take account of the income that Appellant would likely have received from her participation in the on-call roster system operated by the Respondent - Second Appeal No. FBA39/2002 - Cross appeal by Respondent appealing against part of the decision relating to the Appellant's dismissal and her entitlement to compensation being a casual employee - Full Bench reviewed authorities, all of the evidence and material and all of the submissions, and found that there has been no error in the exercise of the discretion as alleged established, and no ground of appeal had been made out - Dismissed - Mrs CJ Byrne -v- Brian Ferrall Twaddle t/a Mount Hospital Pharmacy - FBA 38,39 of 2002 - Full Bench - SHARKEY P/GREGOR C/SCOTT C - 20/12/02 - Health Services..... 5
- <sup>2</sup>Appeal against Decision of Commission (82WAIG2690) re unfair dismissal and contractual entitlements - There were two appeals against the Decision of the Commission and both were heard together - Appellant Respondent argued that Commissioner erred in law in finding that Applicant had been unfairly dismissed due to absence of reasonable notice and that Commissioner erred in law in finding that there was a failure to pay Applicant redundancy payment and a contractual entitlement for unpaid call outs - Appellant Applicant argued that Commissioner failed to take into account relevant factors namely the time that Appellant would take to return to previous remuneration levels and the consequent failure to compensate Appellant Applicant for such loss and injury - Full Bench found that the dismissal correctly was found to be harsh, oppressive and unfair because only three days notice of termination of the contract was given when three months notice was what should be implied - Further, Full Bench found that the loss caused by the unfair dismissal was the loss of reasonable notice quantifiable at and compensate by an amount equal to three months salary as ordered - Further, Full Bench dismissed Appeal No. FBA 47 of 2002 and Upheld Appeal No FBA 48 of 2002 in part and varied the decision at first instance by ordering the payment of an amount equal to one month's salary for compensation in addition to that already ordered to be paid - Orders issued - EPath WA Pty Ltd -v- Mr I Adriansz - FBA 47, 48 of 2002 - Full Bench - SHARKEY P/COLEMAN CC/BEECH SC - 21/02/03 - Health Services..... 454

## CUMULATIVE DIGEST—continued

	Page
ON CALL—continued	
Claim re breach of Workplace Agreement - Claimant argued that he was owed payment for being on call - Defendant argued a lack of jurisdiction and that there was no provision for an availability allowance due to payment in excess of that normally paid to a practitioner and the need to have been rostered on, which the Claimant wasn't - Defendant argued that dispute was capable of resolution as per the Dispute Settlement Procedure contained in the WPA - Industrial Magistrate found that the allowance was not subject to rostering provisions and Claimant was therefore entitled to recover payment pursuant to the terms of the WPA, that the Claimant complied with the Dispute Settlement Procedure, that there was no jurisdictional impediment and that the Defendant underpaid the Claimant - Reasons for Decision Issued - Dr J Gill -v- Commissioner of Health - M 26 of 2002 - Industrial Magistrate - Cicchini IM - 20/12/02 - Health Services .....	532
<sup>2</sup> Appeal against Decision of Commission (82WAIG2690) re unfair dismissal and contractual entitlements - Solicitors for the Respondent wrote to the Commission requesting that the figure of compensation as contained in the Order of the Full Bench be amended because it was an incorrect figure and did not reflect the reasons for decision of the Full Bench - Full Bench concluded that pursuant to s.27(1)(m), it had jurisdiction to correct the order because the matter was still before the Commission until the 'slip rule error' in its order was corrected to reflect its decision - Supplementary Reasons for Decision and Correcting Order Issued - Mr I Adriansz -v- EPath WA Pty Ltd - FBA 48 of 2002 - Full Bench - SHARKEY P/COLEMAN CC/BEECH SC - 28/03/03 - Health Services.....	917
ORDER	
<sup>4</sup> Application for stay of operation in Matter No. P2 of 2001 pending appeal to Full Bench - Applicant sought an order staying the Commission's decision at least insofar as Order 6 was concerned - No appearance by or on behalf of the Respondent - President reviewed authorities and found that there was a serious issue to be tried, that the interests of the Applicant should take precedence over the interest of the Respondent and its member and that the equity, good conscience and substantial merits of the case for those reasons were established to lie with the Applicant - Granted - Director General, Department of Justice (Formerly known as Ministry Of Justice) -v- Civil Service Association of Western Australia Incorporated - PRES 36 of 2002 - President - SHARKEY P - 20/12/02 - Government Administration .....	47
<sup>4</sup> Application for stay of operation in Matter No. 1502 of 2001 pending appeal to Full Bench - President reviewed relevant sections of the Act and applied principles and found that the application was incompetent because there cannot be a stay of operation of a decision or part thereof when it has not been appealed against - Further, President was not satisfied that there was a serious issue to be tried and no exceptional circumstances existed to justify the making of the order sought - Dismissed - Mr AG Matthews -v- Cool or Cosy Pty Ltd; Ceil Comfort Home Insulation Pty Limited; Citigroup Pty Ltd - PRES 34 of 2002 - President - SHARKEY P - 11/12/02 - Construction Trade Services .....	52
Application re contractual entitlements - Applicant argued that he should be paid for work performed by way of settled transactions that occurred after termination of his employment, and that he "closed" prior to his departure from Respondent - Respondent tendered a variety of documents relating to the matter which the Commission accepted as exhibits - Commission reviewed the relevant Agreement and found on evidence that the Applicant "closed" a number of transactions, prior to the termination of his employment, which subsequently became "Paid Deals" for the purposes of the Agreement - Further, Commission found that the claims in respect of these transactions were entitlements due to the Applicant under his contract with the Respondent - Granted in Part and Order Issued - Mr JDH Terry -v- laian Melotte, City Finance Pty Ltd - APPL 181 of 2002 - KENNER C - 04/12/02 - Finance .....	175
Application for Orders for shortened time for answers and for the substantive matter to be expedited - Respondent opposed the application - Commission found on evidence that little prejudice would be suffered by the Union if the application for shortened time for answers was grant - However, Commission was of the view that the Union ought to be heard before granting the order for the substantive matter to be expedited - Granted in Part - Silent Vector Pty Ltd t/a Sizer Builders -v- The Construction, Forestry, Mining and Energy Union of Workers - APPL 42 of 2003 - BEECH SC - 14/01/03 - Food Retailing.....	325
<sup>2</sup> Appeal against Decision of Commission (82WAIG2579) re dismissed application to amend name of respondent - Appellant argued inter alia, that Commissioner at first instance erred in the exercise of her discretion by dismissing the application, by not correctly applying the principles and by failing to take into consideration or give sufficient weight to various facts - Appellant sought that the Orders at first instance be quashed, the application for change of name be allowed and the application alleging unfair dismissal seeking remedies be remitted to a different constituted Commission - Full Bench reviewed evidence, applied various principles and found that there was a genuine and reasonable mistake as to the identity of the employer and that the Commissioner erred by failing to consider or take into account the relevant fact, that by not permitting Appellant to join other parties in the event that one was not the correct party was an obvious occasion of likely severe detriment to the Appellant - Full Bench further found that the exercise of the discretion at first instance miscarried and had been established to have miscarried, having regard to the principles laid down in House v The King (op cit) - Upheld and Decision at first instance varied - Mr C Edwards -v- Pauline Dorn, Mirjana Tolich, Rosa Princi t/as Naval Garden Supplies & Other - FBA 45 of 2002 - Full Bench - SHARKEY P/BEECH SC/WOOD C - 27/02/03 - Other Personal Services .....	445
<sup>2</sup> Appeal against Decision of Commission (82WAIG2690) re unfair dismissal and contractual entitlements - Solicitors for the Respondent wrote to the Commission requesting that the figure of compensation as contained in the Order of the Full Bench be amended because it was an incorrect figure and did not reflect the reasons for decision of the Full Bench - Full Bench concluded that pursuant to s.27(1)(m), it had jurisdiction to correct the order because the matter was still before the Commission until the 'slip rule error' in its order was corrected to reflect its decision - Supplementary Reasons for Decision and Correcting Order Issued - Mr I Adriansz -v- EPath WA Pty Ltd - FBA 48 of 2002 - Full Bench - SHARKEY P/COLEMAN CC/BEECH SC - 28/03/03 - Health Services.....	917
<sup>4</sup> Application for orders pursuant to s.66 of the I.R. Act - Applicant's complaint was that the Respondent acted contrary to rule 3 of its rules in refusing to allow an external person to represent it in the matter relating to Applicant and at his expense - Respondent opposed the claim - President reviewed legal principles and found inter alia, that it had not been established that there was any rule, express or implied, which had been breach or not performed, and that no order was necessary to ensure that any wrong was avoided since no wrong had been or was likely to have been committed in relation to the rules in this instance - Having regard to s.26(1) and s.26(1)(c) of the Act, President found that the merits lay with the Respondent CSA and the case for the Applicant had not been established - Further, President was not persuaded that the application to strike out the particulars was made out and that it was satisfied entirely that there was sufficient material there for the Respondent to know and answer the case which was alleged against it - Dismissed, Orders and Directions Issued and Application for interim orders dismissed - Mr NJ Jones -v- Civil Service Association of Western Australia Incorporated - PRES 1 of 2003 - President - SHARKEY P - 31/03/03 - Unions.....	945
<sup>4</sup> Application for orders pursuant to s.66 of the I.R. Act - Applicant argued that Respondent had acted contrary to rule 3 of its rules by failing to act fairly and in the interests of its member - Respondent opposed application and denied that it had breached its rules or acted in a tyrannical oppressive, unreasonable or undemocratic way - President reviewed authorities, union rules and found inter alia, that the decision to refuse Applicant legal assistance was unfair and unreasonable and did not advance the objects contained in the rules - President ordered that Applicant's application be reconsidered and that this be done only after an opinion was derived from a solicitor of Applicant's choice and such opinion be funded by the Respondent - Orders and Directions Issued - Application granted in part - Mr GJ Wauhop -v- Civil Service Association of Western Australia Incorporated - PRES 2 of 2003 - President - SHARKEY P - 28/03/03 - Unions .....	951
Application re unfair dismissal and contractual entitlements - Applicant argued that employment terminated without notice on his return from holidays and found upon a visit for severance pay a new manager had been appointed - Applicant sought compensation and the reimbursement of court costs - Respondent failed to appear - Commission reviewed authorities and found that Applicant was terminated, that he was denied procedural fairness as no warnings were given to him, that no notice was given to him that he was to be terminated nor was the Applicant paid any monies in lieu of notice on termination, nor was the Applicant given the opportunity to discuss the Respondent's view that it could no longer afford to pay the Applicant - Further, Commission found that Applicant was unfairly terminated both substantively and procedurally and awarded compensation in lieu of reinstatement, and denied benefits - Commission was not satisfied that the circumstances of this matter were such as to warrant an order for costs against the Respondent - Upheld and Order Issued - Mr SN Kirkham -v- Premium Partners Pty Ltd t/as Allsteel Designs - APPL 1130 of 2002 - HARRISON C - 28/03/03 - General Construction .....	1050

## CUMULATIVE DIGEST—continued

## ORDER—continued

	Page
<sup>4</sup> Application for Orders pursuant to s.66 of the I.R. Act - Applicant sought a declaration and interim orders relating to, inter alia, the rules of the Respondent organisation, "the CSA", their observance or non-observance and the manner of their observance, within the meaning of s.66(2) of the Act - President applied legal principles and found inter alia, that there was a substantial case to be tried, that the consequences of making the order are readily reversible by an order to the contrary if the merits of the matter require it upon the final hearing and determination - Further, having regard to the equity, good conscience and substantial merits of the case, President was of the view that it should make an interim order in similar terms, in substance, to the order made in <i>Neville Jones v Civil Service Association of WA Inc</i> (op cit) - President added that it will make orders which affect the whole of the Council because they do not affect adversely the three members who are not parties to these proceedings and that there was nothing preventing those three persons to become parties to, or to intervene in, and thus to participate in these proceedings - Directions and Interim Orders Issued - Mr B Ellis & Others -v- Civil Service Association of Western Australia Incorporated - PRES 5 of 2003 - President - SHARKEY P - 16/04/03 - Unions .....	1144
<sup>4</sup> Application for Orders pursuant to s.66 of the I.R. Act - Applicant argued that a resolution SCM06/02, passed on 20 November 2002 was legally and factually incorrect and that the president complied with the rules and did afford procedural fairness - Respondent denied that applicant was entitled to the orders and directions sought and argued that clause 1 of the resolution SCM06/02 stated "act in consultation with the principal officers" not "officer" as referred to by the Applicant - President reviewed authorities, relevant sections of the CSA rules and found on evidence that the CSA was in breach of its rules in that the Council passed resolution SCM06/02, in particular because it was not a matter which the CSA should consider, being a CPSU matter - President declared that the president acted within the rules in obtaining the legal advice necessary to enable her to carry out her duties and that such expense was properly incurred - Further, President had doubts that the matter was at all a matter relating to the rules of an "organisation" as defined in s.7 of the Act, and therefore may not be within jurisdiction under s.66 - President found inter alia, that even if it was to act within jurisdiction and power by making the orders sought, the equity, good conscience and substantial merits of the matter, do not constrain it to make the orders sought - Dismissed - DM Robertson -v- Civil Service Association of Western Australia Incorporated - PRES 4 of 2003 - President - SHARKEY P - 17/04/03 - Unions.....	1156
Conference referred re breach of the requirements of the PSM Act 1994 - Applicant Union argued that the employee had been subjected to a campaign of intimidation, harassment and victimisation that would amount to workplace bullying, the employee was suffering anxiety and it had been assessed that her work had been a critical and significant factor in its cause - Applicant Union sought orders inter alia, that the Public Advocate cease and desist workplace bullying and provide the necessary assistance to relocate employee to a suitable alternative position within the public sector - Respondent objected to and opposed the claims and the declaration and orders being sought by the applicant - Public Service Arbitrator found inter alia, that there was not the 'repetitive' treatment or behaviour necessary to establish the campaign alleged by the Union, that the evidence showed that the employee had not been subjected to a campaign of intimidation, harassment and victimisation that would amount to workplace bullying and the orders sought by the Union had not been made out - Dismissed - Civil Service Association of Western Australia Incorporated -v- Director General, Department of Justice (Formerly known as Ministry Of Justice) - PSACR 20 of 2002 - Public Service Arbitrator - BEECH SC - 12/05/03 - Government Administration.....	1167
<sup>2</sup> Appeal against Decision of Commission (83WAIG1053) re dismissed unfair dismissal claim lodged out of time - Appellant argued that the learned Commissioner erred in law when having listed the Appellant's application for hearing he dismissed the application without hearing or taking any evidence on oath - Appellant sought orders that the appeal be upheld and decision at first instance be suspended and matter referred back to the Senior Commissioner - No appearance on behalf of the Respondent - Full Bench cited authorities and found inter alia, that Appellant was not afforded procedural fairness or natural justice because findings were made which assessed matters based on the mere plausibility of assertions of fact from the bar table instead of evidence on oath or affirmation subject to cross-examination - Upheld, Decision at first instance suspended and the matter remitted to the Commission at first instance to be heard and determined accordingly to law and the reasons of the Full Bench - Mr J Rodriguez -v- Parks Industries Pty Ltd - FBA 6 of 2003 - Full Bench - SHARKEY P/KENNER C/WOOD C - 06/06/03 - Other Services.....	1395
<sup>4</sup> Application for Orders pursuant to s.66 of the I.R Act - Respondent applied under s.71 of the Act for a declaration pursuant to s.71(2) of the Act that the CPSU was the counterpart federal body of the CSA - Applicant did not oppose to the order sought - President found inter alia, having regard to the equity, good conscience and substantial merits of the case and the relevant considerations laid down in <i>Jones v CSA</i> (op cit), that it should make the order sought to maintain the former de facto holders of office pending the hearing and determination of the s.71 application or until there was an election or other order or the time fixed generally in its order expires - Order and Declaration Issued because they do not affect adversely the three members who are not parties to these proceedings and that there was nothing preventing those three persons to become parties to, or to intervene in, and thus to participate in these proceedings - Directions and Interim Orders Issued - Mr B Ellis & Others -v- Civil Service Association of Western Australia Incorporated - PRES 5 of 2003 - President - SHARKEY P - 14/05/03 - Unions.....	1412
<b>OVER AWARD PAYMENT</b>	
<sup>1</sup> Appeal against Decision of Full Bench (82WAIG765) re breach of award in relation to underpayments and denial of benefits, flat hourly rate in excess of award entitlement for ordinary time, right of set-off, method of calculation of amount due to employee and whether claim truly for breach of award or for breach of over award agreement - IAC reviewed authorities, evidence and found inter alia, whether payment was made expressly or impliedly to cover a particular obligation, the payment could not be claimed as a set off, that the claim or the particulars of the claim was to enforce the award and not to enforce an over award agreement and that an application for enforcement of the terms and conditions of the award, could not proceed on the basis that what was due under the award was to be calculated by reference to the over award rate agreed between the parties - Upheld and Remitted - James Turner Roofing Pty Ltd -v- Mr CL Peters - IAC 7 of 2002 - Industrial Appeal Court - 10/03/03 - Construction Trade Services.....	427
<b>OVERTIME</b>	
Application re harsh, oppressive and unfair dismissal and contractual entitlements - Respondent argued that applicant was dismissed for gross misconduct, incompetence and neglect in the course of the performance of duties - Commission reviewed evidence and found inter alia, that Applicant's dismissal was not harsh, oppressive or unfair because Applicant knowingly allowed cheques to be issued when there were insufficient funds in the account - Further, Commission reviewed employment agreement, authorities and found on evidence that Respondent had discharged the onus upon it to show that the serious misconduct for which Applicant was dismissed had been made out, therefore the Respondent was entitled to dismiss Applicant in accordance with the terms of his employment agreement - Commission also found on evidence that Applicant had established that he was entitled to a benefit under his contract to which Respondent had denied him - Unfair dismissal claim dismissed and claim for denied contractual entitlements granted - Mr A Francois -v- Buzz Dance Theatre Limited - APPL 884 of 2002 - BEECH SC - 09/04/03 - Other Recreation Services .....	1198
Application re unfair dismissal and contractual entitlements seeking compensation, salary in lieu of notice, payment for bonuses, accrued annual leave, superannuation contributions and overtime payments - Applicant argued that there was no valid reason for her dismissal and that she was never warned her employment was in jeopardy, by reason of financial performance or otherwise - Respondent argued that Applicant's dismissal was for financial reasons, that Applicant had also breached her contract of employment by arranging placement of a friend on a without fee basis and that she displayed gross disloyalty by seeking alternative employment whilst she was engaged by the Respondent - Commission reviewed authorities, MCE Act and found inter alia, that there was a substantive and justifiable reason for the termination of the Applicant's employment and that Applicant had not established her claims - Dismissed - A McNamara -v- Loton Holdings Pty Ltd (ACN 00 - APPL 2223 of 2001 - KENNER C - 01/05/03 - Business Services .....	1224
Application re contractual entitlements - Applicant sought payment for overtime and argued that he was advised of the flexible hours and time off in lieu arrangement at the interview, that he expressed his dissatisfaction with the arrangement on the condition that he would be disadvantaged if he was unable to take time off and that one of the Respondent partner agreed and said that they would treat all of their employees fairly - Respondent argued that there was no such contractual term to entitle the Applicant to payment for overtime, that Applicant was advised of his working arrangements and that Applicant expressed no reservations about the time off in lieu arrangement - Further, Respondent made application for costs - Commission found that Applicant did not indicate any reservations about his working arrangements, that there was no such term between the parties and the Applicant's contract of employment does not give him a benefit to payment for overtime - Further, Commission reviewed authorities and concluded inter alia, that the circumstances of the case met the tests for awarding costs - Contractual entitlements claim dismissed and application for costs granted in part - Mr B Mitchem -v- Parkfeeds (WA) Pty Ltd - APPL 1618 of 2001 - SCOTT C - 09/08/02 .....	1230

## CUMULATIVE DIGEST—continued

	Page
<b>OVERTIME—continued</b>	
Conference referred re alleged summary dismissal seeking compensation and denied contractual entitlements - Applicant Union argued that employee was unfairly summarily dismissed following the tender of his resignation by the giving of one month's notice in writing to the Respondent and that employee had a contractual entitlement to payment of overtime that arose out of his attendance at mandatory company training - Respondent objected to and opposed the claims and argued that employee's refusal to be available to go offshore whilst the contract remained on foot was unacceptable and Respondent had no alternative but to bring the employment to an end - Commission reviewed authorities and found inter alia, that employee had not made out his claim for unfair dismissal because whilst the employment contract remained on foot, the requirement to attend from time to time offshore, as part of his duties, was an essential condition of his employment, that his refusal was deliberate or "wilful" and the effect of employee's repudiation was to say to the Respondent he was only prepared to perform his contract of employment in a fundamentally different way to that which he was obliged to do - Commission concluded that employee should be paid at time and one half for the Saturdays he attended the training course, for the 24 hours on the out bound journey to France and 24 hours at double time for Sunday travel - Upheld in Part - The Australian Workers' Union, West Australian Branch, Industrial Union of Workers -v- Schlumberger Oilfield Australia Pty Ltd ABN 26003264597 - CR 39 of 2002 - KENNER C - 18/12/02 - Services to Mining.....	1268
<b>PART-TIME</b>	
Complaint re breach of Restaurant, Tearoom and Catering Award 1979 No. R48/1978 - Claimant argued that she was entitled to annual leave because although she was paid a casual rate she was in fact a part-time employee as evidenced by the regular hours, continuous employment and the rosters that she was required to work - Respondents argued that she left on her own accord and that she was not entitled to annual leave as she was a casual employee - Further, Respondents argued that she was a casual employee as evidenced by the pay rate she received and that she was aware that she was being paid casual rates - Industrial Magistrate found that she was working as a part-time employee notwithstanding that she was being paid a casual rate and thus she was entitled to annual leave - Granted - Ms KJ Broadfoot -v- Andrew Ha C/- Paramount Bar & Cafe & Other - M 56 of 2002 - Industrial Magistrate - Cicchini IM - 07/08/02 - Accommodatn, Cafes&Restaurants.....	300
<b>PENALTY RATES</b>	
Claim re breach of Order - Claimant Union argued that Defendant contravened a Commission order - Defendant argued that Claimant refused to obey a lawful and reasonable instruction - Industrial Magistrate found that Claimant's refusal to carry out duties resulted from medical advice, therefore, it could not reasonably comply with the direction - Further, IM found that the Order was flagrantly breached, that proceedings were vexatiously defended and ordered Defendant to pay costs and a penalty to the Claimant - Reasons for Decision Issued - Australian Liquor, Hospitality and Miscellaneous Workers Union, Western Australian Branch -v- Burswood Resort (Management) Ltd - M 175 of 2001 - Industrial Magistrate - Cicchini IM - 12/12/02 - Accommodatn, Cafes&Restaurants.....	541
Complaint re breach of Enterprise Bargaining Agreement - Claimant Union argued that Respondent had failed to comply with clause 9.1(b) of the Chubb-Westrail Enterprise Bargaining Agreement 2001 and sought Orders that Defendant comply with the EEA by paying employee monies due, penalty rates and pay Claimant Union the costs and expenses to these proceedings - Defendant argued that on the strength of the police charge, the Claimant was guilty of serious misconduct warranting termination - Industrial Magistrate found that the Claimant Union failed to prove on the balance of probabilities that the EBA was breached - Dismissed - Australian Liquor, Hospitality and Miscellaneous Workers Union, Western Australian Branch -v- Chubb Security Australia Pty Ltd - M 277,309 of 2002 - Industrial Magistrate - Cicchini IM - 26/02/03 - Personal Services.....	546
<b>PRINCIPLES</b>	
<sup>3</sup> Application to vary the Hospital Salaried Officers' Award 1968 No. 39 of 1968 to incorporate a new classification structure for clinical psychologists and for the retrospective date of operation to have effect from 18 August 1997 - Applicant Union argued, inter alia, that the complexity of the profession, amounts to a significant change in work value and this should be recognised with increases in salary and the provision of a career structure for clinical psychologists - Respondents submitted numerous points and argued that the change in work value for the profession had been accommodated in classification restructuring that took place early 1990s, that pressures now being experienced by senior clinical psychologists could be overcome by the creation of more positions at higher levels and being filled on a "competitive basis" - Further, the development of professional skills evidenced by the use of more sophisticated tests and assessments and an involvement in direct patient referrals reflected normal development within a profession - Commission in Court Session considered evidence, submissions, authorities and Wage Fixing Principles and concluded that there had been a net increase in work value which was sufficient in the terms of the Work Value Principles, "to warrant the creation of a new classification or upgrading to a higher classification", however, they had reservations about the claim in its current form - CICS sought that the parties enter into discussions with a view to resolving the issues regarding the creation and filling more senior positions bearing in mind that the positions previously at lower level would move to higher increments and levels; and the creation of new grades and definitions for the establishment of higher level grades 3 to 5, and how those grades and definitions are to be reflected - CICS considered that there were special circumstances within the terms of s.39 of the Act, which made it fair and right to grant some degree of retrospectivity in the operation of any re-classification for clinical psychologists currently employed with the Respondents, who are re-classified as a result of this decision - CICS set the operative date from the 1st September 2001 - Matter divided and Granted in Part - Hospital Salaried Officers Association of Western Australia (Union of Workers) -v- Royal Perth Hospital & Others - P 39 of 1997 - Commission in Court Session - COLEMAN CC/BEECH SC/SCOTT C - 16/12/02 - Health Services.....	23
<sup>3</sup> Application for a new award, Burswood International Resort Casino Employees Award 2002 - Applicant Union applied for the registration of the above award to replace and supersede the Burswood International Resort Casino Employees' Industrial Agreement Ag 169 of 2001 and the Burswood Island Resort Employees Award No. A23 and A25 of 1985 - Further, Applicant Union argued that the terms of the award were substantially those that applied to the employees of Respondent who had entered into an Australian Workplace Agreement and that it was unfair for the Respondent to discriminate against employees because they chose to be covered by a collective agreement registered under the Industrial Relations Act 1979 - Respondent argued that Applicant's claim should be dismissed under s.27(1)(a)(iii) of the IRC Act on the grounds that further proceedings were not necessary or desirable in the public interest as the Union's claim breached clause 45 of the registered agreement and in that it should not allow a party to press for a claim that was contrary to its own agreement - Further, Respondent argued that Union could not make out a claim under Principle 10 as it could not justify why the claim had not been progressed as an industrial agreement under s.41 of the Act and it was an abuse of the process because the purpose of the application was not directed at protecting existing employees whose conditions of employment were not regulated by the 2001 Agreement - Commission in Court Session found that that Applicant Union had made out a case under Principle 10 and that a new award should be issued - Further, CICS found that the operative date should be from 10 July 2002, the date the application was lodged in the Commission - Granted - Australian Liquor, Hospitality and Miscellaneous Workers Union, Western Australian Branch -v- Burswood Resort (Management) Limited - A 4 of 2002 - Commission in Court Session - SMITH C/WOOD C/HARRISON C - 25/11/02 - Accommodatn, Cafes&Restaurants.....	57
<sup>1</sup> Appeal against Decision of Commission in Court Session (82WAI544) re registration of new award - Appellant argued that there was a miscarriage of the discretion to make the award by Commission in Court Session and relied upon findings of CICS that a reason for the creation of the Appellant was for Burswood Resort (Management) Limited to avoid its legal obligations under the industrial agreement - Further, the CICS failed to properly exercise its jurisdiction or to properly exercise any discretion to make an award pursuant to Principle 10 of the Wage Fixing Principles - Respondent Union opposed the appeal - Industrial Appeal Court found and appreciated the serious nature of the inference that it was asked to draw and did not consider that that CICS applied the wrong test in law in drawing such inference - Further, IAC found that CICS was not in error in concluding that there was no breach of Wage Fixing Principle 10 in all the circumstances of this case, the terms of the award expressly excluded work done in competition with outside catering contractors - Dismissed - Burswood Catering and Entertainment Pty Ltd -v- Australian Liquor, Hospitality and Miscellaneous Workers Union, Western Australian Branch - IAC 5 of 2002 - Industrial Appeal Court - 18/12/02 - Accommodatn, Cafes&Restaurants.....	201

## CUMULATIVE DIGEST—continued

## PRINCIPLES—continued

	Page
<sup>1</sup> Appeal against Decision of Commission in Court Session (82WAIG2432) re registration of a new award - Appellant argued that the CICS erred in law in finding that it had jurisdiction to determine the application and that there was no industrial matter between the parties of such nature as to give rise to jurisdiction in the Industrial Commission - Further, Appellant argued that any further proceedings or decision or determination of the Commission would be held or made in excess of or without jurisdiction - Respondent opposed the Appeal - Industrial Appeal Court found that the principal issue raised by the grounds of appeal were whether certain matters that were said to have been covered by an industrial agreement that was still in force between the parties could be dealt with by the Commission as industrial matters - Further, IAC found that no error had been demonstrated in the decision of the Commission in Court Session in determining that the Commission had jurisdiction to deal with the application, therefore, the appeal was dismissed - Dismissed - Burswood Resort (Management) Limited -v- Australian Liquor, Hospitality and Miscellaneous Workers Union, Western Australian Branch - IAC 9 of 2002 - Industrial Appeal Court - 18/12/02 - Accommodatn, Cafes&Restaurants.....	208
Application to vary Electrical Contracting Industry Award - Applicant Union sought to increase the rates of adult apprentices employed under the Award to an amount equivalent to the rates in the Metal Trades (General) Award by aligning the rate of adult apprentices to those of third year apprentices - Chamber of Commerce and Industry (CCI) sought to intervene on behalf of its members and as a section 50 party - Respondent and CCI opposed the application and argued that the claim should be dismissed because it was without merit, without precedent and that it imposed an unfair cost on employers - Commission found that application should be granted in part and ordered that a clause similar to that inserted in the Metal Trades (General) Award be granted in the Award - Award varied - COMM, ELECTRIC, ELECT, ENERGY -v- The Electrical Contractors' Association of Western Australia (Union of Employers) & Others - APPL 284 of 2001 - GREGOR C - 25/02/03 - Other Services.....	680
Application to vary Children's Services (Private) Award, Children's Services Consent Award 1984 and Child Care (Subsidised Centres) Award - Applicant Union argued that the variation to the awards are substantially the same, to insert the recent changes to the Community Services (Child Care) Regulations 1988 - Applicant Union sought to have inserted in each award a new classification for an 'E Worker' which was a class of child care worker that had been recently created under the Regulations, also including reimbursements of certain expenses - Respondent argued there was no objection to the creation of an E classification within the awards however objected to two steps rates being inserted and opposed the application for the allowances - Commission found that the applications were brought pursuant to the Statement of Principles in the 2001 State Wage Case decision and provided for the work value changes - Further, Commission was satisfied that the creation of an E classification should be created pursuant to the Work Value Principle and that the two step rates were properly struck and that the allowances should be allowed with concessions - Ordered Accordingly - Australian Liquor, Hospitality and Miscellaneous Workers Union, Western Australian Branch -v- Bassendean Day Care Centre - APPL 1280,1281,1282 of 2001 - SMITH C - 04/02/02 - Other Services.....	958
Application to vary a number of Independent Schools Awards - Applicant Union sought to incorporate terms and conditions applying in the non-government schools' sector, and to bring the awards in line with the provisions of the Workplace Relation Act 1996 covering termination of employment, and to incorporate requirements included in the Minimum Conditions of Employment Act 1993, the Superannuation Guarantee (Administration) Act 1992, the I.R. Act 1979 and increases to allowances pursuant to Principle 5 of the Statement of Principles of the 2002 State Wage Case - Applicant Union argued inter alia, that the terms of variations relating to redundancy and long service leave incorporate conditions currently applying to the majority of employees covered by the awards and employees not covered by enterprise agreements should not be excluded from the terms of these provisions - Respondent argued that the operative date for all variations should be the date of hearing except those relating to redundancy, payment of relief psychologists and houseparents should have a prospective date of 1 January 2004 as variations involve budgetary issues for some respondents - Commission was satisfied that the variations relating to redundancy and long service leave brought under Principle 10 of the 2002 State Wage Case, should be incorporated into the awards - Commission refused to grant a retrospective date for the operation of the variations relating to redundancy and found it had insufficient evidence as to when an agreement was reached in relation to that issue - Commission found that respondents have had substantial notice of the nature of all the proposed variations, that there had been no details about any hardship that will be suffered if the operative date was to be date of hearing and accepted Applicant's argument that an operative date of 1 January 2003 was appropriate for the variation - Awards Varied - INDEPENDENT SCHOOLS SAL OFFIC -v- Anglican Schools Commission (Inc) & Others - APPL 922,1045,1046,1047 of 2002 - HARRISON C - 04/06/03 - Education.....	1425
PROCEDURAL MATTERS	
<sup>3</sup> Application to vary Iron Ore Production and Processing (BHP Billiton Iron Ore Pty Ltd) Award 2002 - Applicants sought liberty to apply for a variation to the directions in essence on the grounds that the directions issued were unfair and unreasonable in terms of the time frames for the parties to file and serve their witness statements - Respondent argued that the witness statements be dealt with through simultaneous filing with an application for a new award - Commission in Court Session found that they were not in the view that the directions were either unfair or unreasonable and that the application to vary the directions issued was refused - Directions Issued - AUTO, FOOD, METAL, ENGIN UNION -v- BHP Billiton Iron Ore Pty Ltd - APPL 1646 of 2002 - Commission in Court Session - KENNER C/WOOD C/HARRISON C - 11/12/02 - Metal Ore Mining.....	21
<sup>3</sup> Application to vary the Hospital Salaried Officers' Award 1968 No. 39 of 1968 to incorporate a new classification structure for clinical psychologists and for the retrospective date of operation to have effect from 18 August 1997 - Applicant Union argued, inter alia, that the complexity of the profession, amounts to a significant change in work value and this should be recognised with increases in salary and the provision of a career structure for clinical psychologists - Respondents submitted numerous points and argued that the change in work value for the profession had been accommodated in classification restructuring that took place early 1990s, that pressures now being experienced by senior clinical psychologists could be overcome by the creation of more positions at higher levels and being filled on a "competitive basis" - Further, the development of professional skills evidenced by the use of more sophisticated tests and assessments and an involvement in direct patient referrals reflected normal development within a profession - Commission in Court Session considered evidence, submissions, authorities and Wage Fixing Principles and concluded that there had been a net increase in work value which was sufficient in the terms of the Work Value Principles, "to warrant the creation of a new classification or upgrading to a higher classification", however, they had reservations about the claim in its current form - CICS sought that the parties enter into discussions with a view to resolving the issues regarding the creation and filling more senior positions bearing in mind that the positions previously at lower level would move to higher increments and levels; and the creation of new grades and definitions for the establishment of higher level grades 3 to 5, and how those grades and definitions are to be reflected - CICS considered that there were special circumstances within the terms of s.39 of the Act, which made it fair and right to grant some degree of retrospectivity in the operation of any re-classification for clinical psychologists currently employed with the Respondents, who are re-classified as a result of this decision - CICS set the operative date from the 1st September 2001 - Matter divided and Granted in Part - Hospital Salaried Officers Association of Western Australia (Union of Workers) -v- Royal Perth Hospital & Others - P 39 of 1997 - Commission in Court Session - COLEMAN CC/BEECH SC/SCOTT C - 16/12/02 - Health Services.....	23
Application for Order pursuant to Section 80E re disciplinary action taken against an employee - Applicant Union argued that Respondent bring to an end the disciplinary process on the basis that there are significant procedural flaws, including denial of natural justice to member and that he had not committed breaches in circumstances which related to his employment entitling Respondent to undertake any disciplinary enquiries - Respondent argued that it was entitled to undertake and complete any disciplinary enquiries - Public Service Arbitrator found that the disciplinary process in this matter was not baseless and did not suffer the significant flaws or breaches such as to warrant the process being halted - Dismissed - Civil Service Association of Western Australia Incorporated -v- Director General, Department of Family and Children's Services - P 41 of 2001 - Public Service Arbitrator - SCOTT C - 16/12/02 - Government Administration.....	146
Application re unfair dismissal - Applicant argued that he withdrew from his work after experiencing difficulties in the workplace and that he did not wish to be reinstated - Respondent argued that he was not terminated but he resigned and that there was no jurisdiction - Commission found that Applicant resigned and that his claim of unfair dismissal could not be substantiated - Dismissed for want of jurisdiction - Mr A Aung -v- Kresta Blinds and Curtains - APPL 1653 of 2002 - WOOD C - 11/12/02 - Machinery & Equipment Mfg..	149

## CUMULATIVE DIGEST—continued

	Page
PROCEDURAL MATTERS—continued	
Application re unfair dismissal seeking compensation - Applicant argued that in all of the circumstances, given the lack of procedural fairness, his termination was unfair on the basis that the requirements under s.41 of the Minimum Conditions Employment Act 1993 were not met - Respondent argued there was no unfair dismissal, that the onus on the Applicant to demonstrate that he was unfairly terminated had not been made out and that there was no breach of s.41 of the MCE Act as numerous discussions were held with the Applicant, and consultation took place in order to avoid or minimise the effect of significant change on the Applicant - Commission reviewed authorities, Part 5 of the MCEA and found that Applicant was treated unfairly on the basis that he was not given sufficient notice of his termination in order to canvass alternatives, that it was also clear that the requirements of Part 5 of the MCEA in relation to attend job interviews were not met by the Respondent and given that the Applicant was afforded insufficient notice and was not given time to attend job interviews, his termination was unfair - However, given that the Applicant was paid a redundancy payment of 26 weeks' pay and five weeks' pay in lieu of notice, Commission concluded that the amount of five weeks' pay as compensation was to be offset against these payment, thus no monies were due to be paid to the Applicant - Dismissed - Mr PJ Caffery -v- Chubb Security Australia Pty Ltd t/as Chubb Protective Services - APPL 390 of 2002 - HARRISON C - 02/12/02 - Personal and Other Services.....	155
Application re contractual entitlements - Applicant argued that he should be paid for work performed by way of settled transactions that occurred after termination of his employment, and that he "closed" prior to his departure from Respondent - Respondent tendered a variety of documents relating to the matter which the Commission accepted as exhibits - Commission reviewed the relevant Agreement and found on evidence that the Applicant "closed" a number of transactions, prior to the termination of his employment, which subsequently became "Paid Deals" for the purposes of the Agreement - Further, Commission found that the claims in respect of these transactions were entitlements due to the Applicant under his contract with the Respondent - Granted in Part and Order Issued - Mr JDH Terry -v- Iaian Melotte, City Finance Pty Ltd - APPL 181 of 2002 - KENNER C - 04/12/02 - Finance.....	175
Appeal against Decision to suspend Union member - Appellant sought further orders for full discovery, production and inspection of documents and that Appellant had attended Respondent's premises for the purpose of examining documents which were produced but which were not available for copying and was concerned as to the allegedly vague nature those documents produced - Further, the documents which were provided did not allow Appellant to argue his case - Respondent argued that the preliminary investigation did not relate to a decision which the Board had power to adjust pursuant to S.801 of the Industrial Relations Act 1979 - Respondent also argued that there was nothing put forward to demonstrate why the documents should be made available to Appellant - Public Service Appeal Board found that there was nothing further which the Board ought do in respect of discovery, nothing new of substance had arisen which changed what was ordered on 20 September 2002 and that application for discovery ought to be dismissed - Dismissed - Mr S Kelly -v- Director General, Department of Justice - PSAB 12 of 2002 - Public Service Arbitrator - SCOTT C - 12/12/02 - Government Administration.....	183
<sup>1</sup> Appeal against Decision of Commission in Court Session (82WAIG544) re registration of new award - Appellant argued that there was a miscarriage of the discretion to make the award by Commission in Court Session and relied upon findings of CICS that a reason for the creation of the Appellant was for Burswood Resort (Management) Limited to avoid its legal obligations under the industrial agreement - Further, the CICS failed to properly exercise its jurisdiction or to properly exercise any discretion to make an award pursuant to Principle 10 of the Wage Fixing Principles - Respondent Union opposed the appeal - Industrial Appeal Court found and appreciated the serious nature of the inference that it was asked to draw and did not consider that that CICS applied the wrong test in law in drawing such inference - Further, IAC found that CICS was not in error in concluding that there was no breach of Wage Fixing Principle 10 in all the circumstances of this case, the terms of the award expressly excluded work done in competition with outside catering contractors - Dismissed - Burswood Catering and Entertainment Pty Ltd -v- Australian Liquor, Hospitality and Miscellaneous Workers Union, Western Australian Branch - IAC 5 of 2002 - Industrial Appeal Court - 18/12/02 - Accommodatn, Cafes&Restaurants.....	201
<sup>2</sup> Appeal against Decision of Commission (82WAIG2280) re unfair dismissal and contractual entitlements - Applicant argued that the learned Commissioner was in error when Commission failed to order general discovery and that such an order should have been made and thereby an error was made in the exercise of the Commission's discretion - Respondent argued and submitted that an order for discovery was not of such importance that in the public interest an appeal should lie and that the decision appealed against was both interlocutory and discretionary and could not readily be appealed against - Full Bench found that it would be loathe to consider an appeal on a point of practice and procedure or an interlocutory decision and thus unduly delay proceedings and reluctant to interfere with the exercise of the discretion of the Commission in such matters - Dismissed - Ms P Alderson -v- St Columba - Kingswood College - FBA 41 of 2002 - Full Bench - SHARKEY P/COLEMAN CC/HARRISON C - 30/01/03 - Education.....	215
<sup>2</sup> Appeal against Decision of Commission (82WAIG2195) re unfair dismissal - Appellant argued that the Commission and the Learned Commissioner did not act in equity, good conscience and substantial merits of the case, that the Learned Senior Commissioner did not see the alleged offensive gesture and thus, included contempt of court - Respondent argued that appeal should be dismissed - Full Bench found that the decision was a discretionary decision and that it was for Appellant to establish that the exercised discretion was miscarried - Further, Full Bench found that Appellant had failed to establish his case, that there was no evidence of procedural or substantive unfairness in the dismissal of the application established and no grounds of the appeal were made out - Dismissed - Mr R De Vos -v- Minit Australia Pty Ltd (ACN 000328825) - FBA 40 of 2002 - Full Bench - SHARKEY P/COLEMAN CC/WOOD C - 08/01/03 - Personal & Household Good Rtlg.....	219
Application re interpretation of Western Australian Police Service Enterprise Agreement PSA AG 8 of 2001 - Applicant Union sought an interpretation of clause 37 - Entitlement to Leave and Allowances Through Illness or Injury of the Agreement - Applicant Union argued that by providing medical certificates to cover the period of absence, member had complied with the requirements and was entitled to payment - Respondent argued that there was a right to make enquiries and seek clarification including employees to attend a medical practitioner of employer's choosing - Public Service Arbitrator found that the application in its current form was not within the powers of the Commission to determine the interpretation - Further, if the question were posed differently Arbitrator found that the clause does not prescribe all the conditions which might reasonably apply for granting sick leave - Reasons for Decision Issued - Western Australian Police Union of Workers -v- Commissioner of Police - P 24 of 2002 - Public Service Arbitrator - SCOTT C - 04/02/03 - Government Administration.....	283
Complaint re breach of award - Complainant Union signalled their intention to amend the claims so that they were not predicated upon the applicability of the Award - Respondent argued that the applications be dismissed and sought costs in relation to the applications as it attempted to resolve matters by way of agreement but was forced to make applications in order to resolve the issues - Industrial Magistrate found that the claims could not be amended as that would be tantamount to raising a new cause of action - Further, Industrial Magistrate found that Respondent had been put to cost in bringing these applications to finally resolve the matters and had incurred expenses in doing so - Reasons for Decision Issued - AUTO, FOOD, METAL, ENGIN UNION -v- Bell-A-Bike Rottmest Pty Ltd - M 268, M 270, M 271, M 272, M 286 of 2001 - Industrial Magistrate - Cicchini IM - 15/01/03 - Personal Services.....	299
Complaint re alleged breach of Section 49(M)(1) of the I.R. Act 1979 - Applicant Union argued that Respondents had breached section 49(M) of the IR Act and sought injunctive relief against Respondents and interim orders pursuant to section 83E(5) of the Act to prevent further breaches - Respondents argued and opposed the applications seeking interim orders and made application for the adjournment of the matters - Further, Respondents argued that there were proceedings on foot in the Federal Court of Australia with respect to substantially the same matter which struck at the validity of the relevant provisions referred to and that this Court should defer its consideration of the matter pending the determination of the matter by the Federal Court of Australia - Further, Honourable Minister for Employment and Workplace Relations of the Commonwealth of Australia sought leave to intervene - Industrial Magistrate found that there was no legislative basis for intervention, that the Court did not possess inherent jurisdiction as it was a creature of statute and it operated within the statutory framework provided - Further, IM found that it was undesirable for the matter to proceed until the Federal Court had dealt with the matter and had determined it as there would be a final determination of the constitutional issues before these proceedings and thus acceded to the applications made by Respondents for an adjournment of the proceedings - Reasons for Decision Issued - The Construction, Forestry, Mining and Energy Union of Workers -v- Woodside Energy Limited (ABN 63 005 482 986) & Other - M 304 of 2002 - Industrial Magistrate - Cicchini IM - 27/11/02 - Oil and Gas Extraction.....	302

## CUMULATIVE DIGEST—continued

## PROCEDURAL MATTERS—continued

	Page
Complaints re authority of Claimant to file claim re breach of award - Respondent sought that the claims be dismissed or otherwise amended so that it comply with the Act - Further, Respondent argued that Claimant lacked standing to bring the claims and that his appointment as an inspector under s.84(2) of the Workplace Relations Act 1996 was not validly made - Claimant argued against the Respondent's submissions - Industrial Magistrate found that Respondent's arguments were baseless and unsupported by authority, that the applications brought by Respondent were misconceived, based on its erroneous interpretation of the relevant provisions and regulations - IM further found that Respondent's interlocutory applications should be dismissed and the Claimant's interlocutory applications be allowed - Upheld - Greg Logan-Scales, Department of Consumer & Employment Protection -v- Olten Pty Ltd (ACN 076 543 130) t/a MSA Security - M 248,249 of 2002 - Industrial Magistrate - Cicchini IM - 27/11/02 - Business Services .....	323
Complaints re discrimination of member organisation under section 96C of the IR Act - Complainant argued Ms Peak was a solicitor and authorised to make complaints on behalf of her client and was employed by the CFMEUW Union and that Applicant was a member of CFMEUW Union - Respondents argued that there was no case to answer on the basis that Complainant had failed to establish that they were validly made - Further, Respondents argued that there was no proof of the fact that Elisabeth Peak was authorised to make the complaints - Industrial Magistrate found that there was no case to answer by the Defendant in each instance and that the solicitor employed by the Union could not act on the instructions of the Union in bringing the complaints but must act on the instructions of Complainant - Struck out - Mr C Workman -v- CECK Pty Ltd - CP 3,4,6,7 of 2002 - Industrial Magistrate - Cicchini IM - 19/12/02 .....	324
Application for Orders for shortened time for answers and for the substantive matter to be expedited - Respondent opposed the application - Commission found on evidence that little prejudice would be suffered by the Union if the application for shortened time for answers was grant - However, Commission was of the view that the Union ought to be heard before granting the order for the substantive matter to be expedited - Granted in Part - Silent Vector Pty Ltd t/a Sizer Builders -v- The Construction, Forestry, Mining and Energy Union of Workers - APPL 42 of 2003 - BEECH SC - 14/01/03 - Food Retailing .....	325
Application re unfair dismissal - Applicant lodged an application for an extension of time in which to file application and argued that the reasons for the delay related to her pregnancy, the birth of her child, her recovery and the illness of the child - Respondent opposed the applications - Commission found that there was no power to extend time in accordance with s.29(3) of the I.R. Act, in respect of an application filed on 16 October 2002 relating to a termination of employment in May 2002 - Dismissed - Mrs RJ Alberghini -v- Dr Geoffrey Bower Isotope Imaging Hollywood Hospital - APPL 1729 of 2002 - SCOTT C - 10/01/03 - Health Services .....	326
Application re unfair dismissal and contractual entitlements - Applicant argued that she intended to lodge her application within the 28 day time frame and lodged it in the Commission within the 28 day time limit, subsequent to lodging her application she was informed by Registry that Form 1 was missing from her application and needed to be completed and returned, she received a copy of a Form 1 on 9 October 2002 and lodged Form 1 the next day - Respondent argued that Applicant was terminated on 6 September 2002 - Commission found that Applicant was not sent the correct form in the first instance and that there was a valid reason why Applicant did not comply with the required 28 day time frame for lodging her application, it was clear that as soon as Applicant received the Form 1 she filed her application promptly the next day - Application to accept Applicant's claim which was lodged out of time granted - Mrs ES Harrison -v- Emmanuel Michael Papadoulis T/A Great Australian Travel Centre - APPL 1701 of 2002 - HARRISON C - 16/01/03 - Other Services .....	333
Application re unfair dismissal - Applicant argued that he was unfairly dismissed and that the Commission was within jurisdiction to consider the acceptance of the present application out of time - Respondent denied Applicant's allegations and raised as a preliminary issue that the Commission was without jurisdiction to entertain the claim on the basis proceedings commenced after 1 August 2002 whilst termination of employment took place on 26 July 2002 and there was no ability for Commission to extend time under the IR Act - Commission found that the amendments effected by the Labour Relations Reform Act 2002 to repeal s29(2) of the Act and to enact the new ss29(2) and s29(3) were not retrospective in the sense that the datum point for the termination of the employment was 1 August 2002 and not a date earlier for the purposes of the 28 day time limit - Dismissed for want of jurisdiction - Mr K McEwan -v- Australasian Correctional Management Pty Ltd (ACN 051 130 600) - APPL 1469 of 2002 - KENNER C - 10/12/02 - Food Retailing ...	360
Application re unfair dismissal seeking re-instatement - Applicant argued that dismissal was not justified because the Respondent wrongly assumed he was threatening to leave and that was why a decision was made to dismiss him - Further, Applicant argued that if the Respondent was of the view that his demands could not be met, he should have simply been told what their terms were and he would have accepted their decision - Respondent argued inter alia, that Applicant made demands that the directors were not able to meet as they had lost trust in him therefore, they had no choice but to terminate him - Commission reviewed authorities and found that Applicant's conduct constituted a repudiation of the terms of his contract of employment, however, the repudiatory conduct did not warrant summary dismissal - Further, Commission found inter alia, that although the circumstances of the termination were unlawful, it did not render the termination by the Respondent to be harsh or oppressive given that Applicant was paid two months' pay after his employment was terminated - Dismissed - Mr T Page -v- WSP IMP. & EXP Pty Ltd T/A Workforce Safety Products - APPL 728 of 2002 - SMITH C - 31/01/03 - Services to Transport .....	361
Application re unfair dismissal - Applicant argued that the dismissal was unfair because Applicant had tendered her resignation or offered to resign but was told by Respondent to "piss off" - Respondent opposed the application and had sought an adjournment but presented no evidence - Commission dismissed the application for an adjournment and found in favour of Applicant in that Applicant was dismissed summarily and did not resign from her employment - Further, Commission found that reinstatement was not an option and awarded compensation - Granted - Ms SM Theil -Harkin -v- Elizabeth Wiese & Associates, Solicitors - APPL 886 of 2002 - WOOD C - 21/01/03 - Other Services .....	369
Appeal against Decision of Respondent in regards to disciplinary matters relating to an employee - Appellant Union argued that the procedure adopted by Respondent in this matter was so badly flawed that the findings, conclusions and the penalty could not be sustained and that the substance of the complaints could not be separated from the procedure - Further, Appellant argued that while the PSAB could adjust the decision it could only do so after reviewing what Respondent had done - Respondent argued that it undertook a preliminary investigation of the complaint formed a suspicion that employee had misconducted himself and then proceeded with a disciplinary process - Further, Respondent proceeded with a formal process as required by the PSM Act and relied on various legislation or policies in respect of each allegation of misconduct - Public Service Appeal Board found that many of the grounds of appeal were not made out and that the Respondent had obligations towards its employees regarding equal opportunity and sexual harassment - Further, PSAB found that the process had allowed employee natural justice in that he was provided with the allegations, that he had more than a reasonable opportunity to respond at the appropriate stages of the process and had taken the opportunities provided by him, thus PSAB were not satisfied that employee was denied natural justice - PSAB uphold the appeal as it related to the findings not being in the course of official duties and otherwise dismissed the appeal as it related to the issues of merit and process - Further, PSAB uphold the appeal in respect of the manner in which the Respondent had dealt with the imposition of the penalty - Upheld in part otherwise dismissed - Civil Service Association of Western Australia Incorporated -v- Director General, Department of Family and Children's Services - PSAB 4 of 2001 - Public Service Appeal Board - SCOTT C - 13/12/02 - Government Administration .....	390
<sup>2</sup> Appeal against Decision of Commission (82WAIG2579) re dismissed application to amend name of respondent - Appellant argued inter alia, that Commissioner at first instance erred in the exercise of her discretion by dismissing the application, by not correctly applying the principles and by failing to take into consideration or give sufficient weight to various facts - Appellant sought that the Orders at first instance be quashed, the application for change of name be allowed and the application alleging unfair dismissal seeking remedies be remitted to a different constituted Commission - Full Bench reviewed evidence, applied various principles and found that there was a genuine and reasonable mistake as to the identity of the employer and that the Commissioner erred by failing to consider or take into account the relevant fact, that by not permitting Appellant to join other parties in the event that one was not the correct party was an obvious occasion of likely severe detriment to the Appellant - Full Bench further found that the exercise of the discretion at first instance miscarried and had been established to have miscarried, having regard to the principles laid down in <i>House v The King</i> (op cit) - Upheld and Decision at first instance varied - Mr C Edwards -v- Pauline Dorn, Mirjana Tolich, Rosa Princi t/as Naval Garden Supplies & Other - FBA 45 of 2002 - Full Bench - SHARKEY P/BEECH SC/WOOD C - 27/02/03 - Other Personal Services .....	445

CUMULATIVE DIGEST—*continued*

	Page
PROCEDURAL MATTERS— <i>continued</i>	
Conference referred re breach of the requirements of the Public Sector Management Act 1994 - Preliminary issue re appearance by counsel - Applicant Union objected to the appearance of counsel - Respondent requested representation by counsel - Public Service Arbitrator determined that counsel may appear and be heard in relation to the claim for an order and would accommodate the appearance of counsel on that issue either orally or in writing in all other respects leave for counsel to appear was not granted - Leave for counsel to appear generally refused - Civil Service Association of Western Australia Incorporated -v- Director General, Department of Justice (Formerly known as Ministry Of Justice) - PSACR 20 of 2002 - Public Service Arbitrator - BEECH SC - 07/03/03 - Government Administration.....	503
Complaint re contravention of s.96J of the I.R. Act - Claimant sought order that Respondent be restrained from entering premises and from directing its members to stop work - Further, Claimant submitted that in relation to all matters before IMC falling within general jurisdiction, the Court, by virtue of regulation 49(5) of the IMC (General Jurisdiction) Regulations 2000, was not bound by the rules of evidence - Industrial Magistrate found that the Act enabled it to deal with the matter as if these proceedings were an action within the Local Court and therefore had jurisdiction - Further, IM concluded that it was not bound by rules of evidence due to the interlocutory nature of the claim, that evidence was lacking and that there remained a substantive issue and did not want to pre-empt the trial - Dismissed - Silent Vector Pty Ltd t/a Sizer Builders -v- The Construction, Forestry, Mining and Energy Union of Workers - M 388 of 2001;CP 2,3,4,5,6,7 of 2002;M 75,76,121,122,188,263 of 2002 - Industrial Magistrate - Cicchini IM - 04/09/02 - General Construction.....	525
Complaint re breach of Enterprise Bargaining Agreement - Claimant Union argued that Respondent had failed to comply with clause 9.1(b) of the Chubb-Westrail Enterprise Bargaining Agreement 2001 and sought Orders that Defendant comply with the EBA by paying employee monies due, penalty rates and pay Claimant Union the costs and expenses to these proceedings - Defendant argued that on the strength of the police charge, the Claimant was guilty of serious misconduct warranting termination - Industrial Magistrate found that the Claimant Union failed to prove on the balance of probabilities that the EBA was breached - Dismissed - Australian Liquor, Hospitality and Miscellaneous Workers Union, Western Australian Branch -v- Chubb Security Australia Pty Ltd - M 277,309 of 2002 - Industrial Magistrate - Cicchini IM - 26/02/03 - Personal Services .....	546
Application re revocation of right of entry permit - Applicant sought that hearing dates be vacated and matters adjourned pending determination of criminal charges against Union representatives - Further, Applicant objected to any application by the Respondent for the Commission to exercise its discretion under s.27(1)(a)(ii) and (iv) - Respondent Union consented subject to proceedings in related applications being similarly vacated and adjourned - Commission applied principle and was satisfied that the hearing dates ought be vacated and applications adjourned to await the outcome of related criminal proceedings - Granted - Silent Vector Pty Ltd t/a Sizer Builders -v- The Construction, Forestry, Mining and Energy Union of Workers - APPL 1986,1987 of 2002 and APPL 92, 93 of 2003 - BEECH SC - 26/02/03 - General Construction .....	563
Application re unfair dismissal - Applicant argued that the application was lodged out of time as she was waiting to be re-engaged and sought relief under s.29(3) of the Act - Commission found that if the application were to be rejected, the prejudice to the Applicant would outweigh that of the respondent, because the Applicant would be denied any benefit that could be achieved from the application - Further, Commission found that it would be unfair not to accept the application pursuant to s.29(3) - Granted - Mrs C Anderson -v- E/Co Australia Pty Ltd - APPL 1587 of 2002 - WOOD C - 23/01/03 - Other Services.....	574
Application re unfair dismissal seeking to amend particulars of claim - Applicant argued that she had no choice but to cease immediately as her equipment was taken away from her and sought to amend the date of termination - Respondent argued that application was lodged outside of the 28 day time limit - Commission found that there was no mutual agreement between the parties to waive the notice period and that Applicant was not given a choice in the matter because of the actions and requirements of the Respondent - Further, Commission accepted the Applicant's amendment to change the date of termination and concluded that the application was lodged out of time - Order Issued - Mrs PT Hicks -v- Western Australian Local Government Association - APPL 1525 of 2002 - SCOTT C - 21/02/03 - Other Services .....	603
Application re contractual entitlements - Applicant argued that application could proceed without Respondent - Respondent made no appearance - Commission found that under s.29AA of the Act, it was prohibited from determining the matter, as no industrial instrument applied to the Applicant and because his contract of employment provided for a salary exceeding the prescribed amount - Dismissed - Mr JG Kelly -v- ITSP Australia Pty Ltd - APPL 1711 of 2002 - BEECH SC - 14/02/03 - Machinery & Equipment Mfg.....	605
Application re unfair dismissal - Applicant argued that he understood to be employed under a registered workplace agreement when terminated and thus filed a claim in the Industrial Magistrate's Court where a jurisdictional argument arose and the Industrial Magistrate found there was no registered workplace agreement - Respondent opposed the application and argued that that Commission had no jurisdiction to deal with matter - Commission found that application was lodged 41 days after matter was unsuccessful in the Industrial Magistrate's Court and there was no valid reason for the delay thus it was dismissed for want of jurisdiction - Dismissed for want of jurisdiction - Mr GW Rogers -v- DMW Constructions Pty Ltd - APPL 1833 of 2002 - HARRISON C - 05/03/03 - Construction Trade Services .....	606
<sup>2</sup> Appeal against Decision of Commission (82WAIG3037) re unfair dismissal and contractual entitlements - Appellant sought leave to amend the grounds of appeal on the following grounds by deleting reference to Citigroup Pty Ltd in the heading of the Notice of Appeal as Citigroup Pty Ltd was in liquidation - First two Respondents submitted that the liquidator was not entitled to or required to appear and did not appear - Full Bench found that in reality it was not an application to amend the notice of appeal at all but an application to strike out Citigroup Pty Ltd (in liquidation) as a party to the appeal as there was no intention to proceed against Citigroup Pty Ltd on this appeal - Further, Full Bench found that the application should be dismissed on the merits in that it would deny Citigroup Pty Ltd a role in the appeal and may deny it natural justice and proceedings were otherwise adjourned to enable appellant to consider his position - Application to amend notice of appeal dismissed and appeal adjourned sine die - Mr AG Matthews -v- Cool or Cosy Pty Ltd; Ceil Comfort Home Insulation Pty Limited; Citigroup Pty Ltd - FBA 52 of 2002 - Full Bench - SHARKEY P/COLEMAN CC/GREGOR C - 18/03/03 - Various .....	940
Application to vary Metal Trades (General) Award - Applicant sought to vary Award by increasing rates of allowances - Respondent argued that the claim was unfair in that it would provide for payments of a significant sum to employees in the industry with a significant departure from existing award conditions - Commission directed the parties to have discussions about the issues and then to report back which the parties did not do so - Commission found that the application presented confusing arguments and had decided in view of its history the application be dismissed - Dismissed - AUTO, FOOD, METAL, ENGIN UNION -v- Anodisers W.A. - APPLB 1756 of 2001 - COLEMAN CC - 24/03/03 - Metal Product Manufacturing.....	975
Application for Orders pursuant to Section 80E of I.R. Act - Applicant Union sought discovery of documents that ought to have been made available in dealing with the ongoing disciplinary proceedings against its member and that access to the documents were necessary for the purposes of the hearing - Further, Applicant Union argued that the application to dismiss pursuant to s.27 (1)(a)(ii) be dismissed as the dispute was still alive and had not been resolved - Respondent applied to the Arbitrator for the dismissal of the matter pursuant to s.27(1)(a)(ii) of the Industrial Relations Act as the dispute between the parties had been resolved by its undertaking given by the letter provided - Public Service Arbitrator issued orders for the discovery of documents to be used only for the purposes of the hearing and found that the dispute was still alive and dismissed the application for dismissal - Orders issued - Civil Service Association of Western Australia Incorporated -v- Anti-Corruption Commission - P 50 of 2002 - Public Service Arbitrator - SCOTT C - 18/03/03 - Government Administration .....	980

CUMULATIVE DIGEST—*continued*PROCEDURAL MATTERS—*continued*

	Page
Complaint re alleged breaches of clauses 3(1)(4)(5) & 4(1) of Industrial Relations (Industrial Agents) Regulations 1997 Schedule 1 - Complainant sought an extension of time to bring proceedings before the Industrial Magistrate in his application to have Respondents deregistered as Industrial Agents pursuant to the Industrial Relations (Industrial Agents) Regulations 1997 - Further Complainant argued that Industrial Magistrate did have the powers and jurisdiction to deal with complaint, that appeal had been properly initiated pursuant to the provisions of the Industrial Magistrate's Regulations and that the Registrar's decision was in effect a determination made for the purposes of regulation 15(3)(a) - Respondents lodged an interlocutory application and sought orders that the application be dismissed or struck out on the grounds that the application was out of time, <i>functus officio</i> , against public interest and with insufficient merit - Further, Respondent argued that in respect of regulations 12 of the I.R. Act there was no substantial compliance - Industrial Magistrate reviewed the relevant legislation and the intention of the legislation, the jurisdiction of the Industrial Magistrate's Court and found that under the proper administration of the Acts and Regulations an Industrial Magistrate could make a determination or a decision as to whether or not the registration of an industrial agent was to be cancelled - Further, IM found that it had no power to rule or view that the Registrar in dealing with the complaint in the circumstances was an unauthorised act or a series of unauthorised acts and that it could not be said that the matter was <i>functus officio</i> - IM further found that under regulation 19 of the I.R. Act an Industrial Magistrate had power to cancel registration of an industrial agent and consider allegations that there had been a breach of the code of conduct an industrial agent was subject to when they were registered - Industrial Magistrate granted the parties an extension of time in respect to the application of the extension of time within which an appeal may be commenced prior to final orders - Reasons for Decision Issued - Mr JRA Acosta -v- Mr G Broderick & Other - M 200 of 2002 - Industrial Magistrate - Graeme Neil Calder - 28/03/03 - Other Services .....	986
Application re contractual entitlements - Applicant argued that he had not been paid for 10 weeks of his employment and declared that he was bankrupt - Respondent opposed the application and sought the dismissal of the application - Commission found that the entitlement under his contract of employment was by the operation of the Bankruptcy Act 1966 vested in the Official Trustee and for that reason could not be continued by Applicant on his own behalf and the Commission adjourned the application sine die to allow Applicant to seek advice - Adjourned sine die due to bankruptcy of Applicant - Mr RE Impson -v- Mr K Bradley - APPL 1324 of 2002 - BEECH SC - 28/03/03 - Other Services .....	1048
Application re unfair dismissal - Applicant argued that application was lodged out of time because he found the termination disturbing which led to the delay in lodging the application - Respondent argued that Applicant was made redundant - Commission found that there was no acceptable explanation for the delay and dismissed the application - Dismissed - Mr J Rodriguez -v- Parks Industries Pty Ltd - APPL 255 of 2003 - BEECH SC - 28/03/03 - Other Services .....	1053
Application re unfair dismissal - Applicant argued that the application was lodged in the wrong jurisdiction as a result of the Commission's Registry giving him incorrect advice and incorrect forms to fill in which led to an application being filed in the Federal jurisdiction - Respondent argued that Applicant's explanation for the delay in lodging an application in the WAIRC was unacceptable and that Applicant did not make sufficient inquiries and also had the opportunity to lodge a claim in the WAIRC within the specified time - Commission found that Applicant did have advice that his initial application was lodged in the wrong jurisdiction but chose not to file an application in the WAIRC until the AIRC application was finally disposed - Further, Commission found that the onus was with Applicant to ensure that designated time frames are met - Dismissed - Mr R Turner -v- Air Liquide WA - APPL 1835 of 2002 - HARRISON C - 28/03/03 - Electricity and Gas Supply .....	1059
Appeals against the Refusal by the Registrar to register Employer Employee Agreements - Appellant argued that the Deputy Registrar was in error when she refused registration of the EEA Agreements on the grounds that the EEAs did not comply with the requirements of s.97UY(3)(a) of the Industrial Relations Act 1979 in relation to the EEAs being presented for lodgement with the Registrar more than 21 days from the date of execution by the parties - Further, Appellant argued that Registrar may only refuse to accept an EEA for registration if it was presented for lodgement after the end of the 21 day period and had not complied with the Act in relation to lodgement requirements - An application for intervention was made by Mr Bibby, a duly authorised bargaining agent appointed by the parties to represent and intervene in the appeal proceedings - No appearance from Respondent - Commission found that the parties had complied with the regulations and had met the requirements in relation to lodgement - Further, Commission found that it was erroneous to conclude that the absence of the date of execution precluded acceptance by the Registrar of the lodgement of the EEAs for registration under the Act and that the Deputy Registrar erred in refusing the registration of the EEAs - Commission upheld the appeals, set aside the refusals and remitted the matters to the Registrar with the directions as set out in the Commission's order - Order and Direction Issued - City of Melville -v- Registrar - APPL 101,103,104,105,106,107 of 2003 - KENNER C - 28/03/03 - Government Administration .....	1018
Application re harsh, oppressive and unfair dismissal seeking compensation - Applicant argued that she did not resign from her employment but was unfairly dismissed because of an accusation of theft - Respondent argued that he was not accusing Applicant of any wrongdoing, that he requested Applicant to drop off the keys after Applicant advised him that she was finishing because she was starting a new job - Commission reviewed authorities and found on evidence that Applicant was dismissed and the dismissal was harsh oppressive and unfair - Further, with regard to compensation, Commission found that in the absence of any evidence to make findings, it was not open to determine any compensation for loss as the Applicant had failed to establish it - Declaration Issued - Ms SE Dunn -v- Brian Bentley and Pauline Bentley and Joseph Sherlock in partnership T/A Video Ezy Woodbridge - APPL 1192 of 2002 - KENNER C - 04/04/03 - Personal Services .....	1033
Application re unfair dismissal and contractual entitlements - Respondent raised preliminary issue re Applicant incorrectly naming Respondent in the notice of application - Application by Applicant seeking to amend the Respondent's name was granted - Applicant argued that she had to resign after being terminated in order to obtain alternative employment and to ensure that Respondent would not claim commissions due to her for sales completed following her termination - Applicant argued that no issue was raised with her about any lack of co-operation between her and the other employees - Respondent denied that Applicant was unfairly terminated and argued that she resigned from her employment on her own volition - Further, Respondent argued that the commission claimed by Applicant was incorrect and counter proposed with a different quantum - Commission found on evidence that Applicant resigned of her own volition, thus no termination took place, and that Commission lacked jurisdiction to deal with this part of the application - Further, based on Respondent's contention that monies was owed to Applicant, Commission awarded the Applicant claim for benefits under her contract of employment - Dismissed for want of jurisdiction and application for contractual benefits partially allowed - Mrs MA Trimboli -v- Cusma Corporation Pty Ltd t/as Cusma Property Consultants - APPL 1276 of 2002 - HARRISON C - 28/03/03 - Property Services .....	1055
Application re unfair dismissal seeking extension of time - Applicant argued that circumstances surrounding the resignation amount to a dismissal of him by the Respondent - Further, Applicant argued that after the dismissal he could not afford the filing fee hence the delay in lodging his application - Commission applying the Principles set out in <i>Azzalini's Case</i> (ibid) found the length of the delay was not justifiable on the evidence before the Commission - Further, Commission found on Applicant's own evidence, that Applicant was not dismissed from his employment but left it voluntarily, therefore, there had been no dismissal to attract the jurisdiction in the Commission - Commission also found that Applicant's case would have no prospect to succeed and that it would be fair not to accept an application out of time in these circumstances - Dismissed - Mr P Scott -v- Sealcorp Holdings Limited (ABN 28 009 143 597) - APPL 289 of 2003 - GREGOR C - 01/04/03 - Insurance .....	1070
<sup>2</sup> Appeal against Decision of Commission (81WAIG1413) re unfair dismissal - On the day of the hearing Full Bench was advised by the Counsel for the Appellant that Appellant had died - Notwithstanding the opposition of the Agent for the Respondent, Full Bench adjourned the matter to enable the solicitors for the estate to consider what ought to be done - Application was made to substitute Appellant's wife as the executor of the will of the Appellant, as a party in lieu of the Appellant and application was not opposed - Full Bench reviewed authorities, Acts and found <i>inter alia</i> , that the order to substitute the executor for the deceased as Appellant was both necessary and required in order to serve the interests of justice, however, after the order for substitution was made, Appellant executor applied for leave to discontinue the appeal and the application was not objected to and was granted - Granted - Mr JA Fuller -v- North Beach Bowling Club - FBA 31 of 2001 - Full Bench - SHARKEY P/COLEMAN CC/BEECH SC - 05/05/03 - Sport and Recreation ...	1131

## CUMULATIVE DIGEST—continued

	Page
PROCEDURAL MATTERS—continued	
Application pursuant to s.80E of the I.R. Act seeking an Order for discovery - Applicant argued that the order should issue for discovery verified by an affidavit "to ensure that the list was true, accurate, correct and complete" and to provide him with the protection necessary in respect of discovery - Applicant further argued inter alia, that there are a number of documents which have not been discovered, in particular a report by investigators and that the documents relate to and only exist because of the allegations and are relevant to the proper hearing and determination of the matter - Respondent had previously consented to discovery and argued that no order was necessary as the parties had in fact already dealt with it, that not only had it provided discovery but had assisted by providing copies of the documents themselves - Commission reviewed authorities and found inter alia, that those reports into the investigations were not appropriate for discovery for two reasons being, that the issue being dealt with was the transfer of Applicant and that the reports followed investigations conducted after the transfer and these investigations were not the subject of these proceedings - Commission concluded that its role was to provide real solution to real issues not to issue orders which would appear to be unnecessary - Dismissed - Civil Service Association of Western Australia Incorporated -v- Anti-Corruption Commission - P 50 of 2002 - Public Service Arbitrator - SCOTT C - 29/04/03 - Government Administration .....	1165
Conference referred re breach of the requirements of the PSM Act 1994 - Applicant Union argued that the employee had been subjected to a campaign of intimidation, harassment and victimisation that would amount to workplace bullying, the employee was suffering anxiety and it had been assessed that her work had been a critical and significant factor in its cause - Applicant Union sought orders inter alia, that the Public Advocate cease and desist workplace bullying and provide the necessary assistance to relocate employee to a suitable alternative position within the public sector - Respondent objected to and opposed the claims and the declaration and orders being sought by the applicant - Public Service Arbitrator found inter alia, that there was not the 'repetitive' treatment or behaviour necessary to establish the campaign alleged by the Union, that the evidence showed that the employee had not been subjected to a campaign of intimidation, harassment and victimisation that would amount to workplace bullying and the orders sought by the Union had not been made out - Dismissed - Civil Service Association of Western Australia Incorporated -v- Director General, Department of Justice (Formerly known as Ministry Of Justice) - PSACR 20 of 2002 - Public Service Arbitrator - BEECH SC - 12/05/03 - Government Administration .....	1167
Application for leave to amend Notice of Answer and Counter Proposal re an unfair dismissal claim - Respondent sought leave to amend certain paragraphs of the Notice of Answer and Counter Proposal and to further insert a counter-claim - Applicant did not object to certain paragraphs of the amended Notice of Answer and opposed other paragraphs - Commission found inter alia, that there will be a prejudice to the applicant if certain paragraphs were amended and ordered that other than paragraph 1.3 and item 2, leave was granted to the respondent to substitute the schedule to the Notice of Answer and Counter Proposal as presented to the Commission on 1/4/2003 - Granted in Part - Applicant subsequently sought from the Commission an order dismissing the application - Dismissed - Mr TH Cameron -v- Boston Scientific Pty Ltd ACN 071 676 063 - APPL 2084 of 2002 - BEECH SC - 04/04/03 - Health Services.....	1189
Application for extension of time to file application re unfair dismissal - Applicant argued the Commission ought to accept the application out of time as he was unable to get representation from Solicitors prior to 17 January 2003 due to the Christmas period, he was unaware of the 28 day time limit to lodge a claim in the Commission and he would suffer material prejudice if he was not able to proceed with his claim - Commission found that it would be unfair not to extend time in the present case therefore an order was made to accept the Applicant's application and the matter referred by the Commission to a Deputy Registrar for conciliation pursuant to s.32 of the Act - Granted - Mr B Carrington -v- Perth 4WD Wreckers Pty Ltd trading as The Perth 4WD Centre - APPL 99 of 2003 - KENNER C - 28/03/03 - Machining and Motor Veh Wholesaling .....	1192
Application for extension of time to file an application re unfair dismissal - Applicant argued his application was filed out of time as he understood he had one month to lodge his application, not 28 days, that he did not have the money to lodge his claim until his son commenced work and he was able to borrow the money - Commission accepted the reasons for the delay and found that the delay was small and would not cause any prejudice to the respondent - Granted - Mr DW Evans -v- Jim Catchpole Civil Infrastructure - APPL 1763 of 2002 - WOOD C - 12/12/02 - General Construction.....	1197
Application re unfair dismissal seeking compensation - Applicant argued that she was not aware of formal disciplinary proceedings against her, she was not warned of the consequences of her alleged poor performance, she did not receive any written warnings, was not advised that her employment was in jeopardy, she was dismissed whilst on sick leave and the dismissal therefore was unlawful - Respondent argued that the Applicant was dismissed as she did not assist the Industrial Officer as required in her contract, did not attend for work during her required hours, shed was away from work during the day without authorisation or advising anyone and that she was seeking to repudiate her contract - Commission found the Applicant's treatment fell short of any sense of fairness, was not in accordance with her contract of employment, that dismissal was unfair and an order was issued awarding compensation - Order Issued - Ms M Hunter -v- Curtin Academic Staff Association - APPL 933 of 2002 - WOOD C - 08/04/03 - Education.....	1204
Application re unfair dismissal - Applicant argued she was unfairly dismissed because of an injury, which meant she could not carry out her duties 100% - Respondent argued that his concept of a trial period was that at any point the Applicant and company could part and once it realised there was no point in carrying on until the end of the trial period, Applicant was advised of its decision - Commission found on evidence that Applicant was not dismissed because of injury and that in the context of a probationary employment the Respondent was within its rights not to continue with the probationary period - Dismissed - Mrs K Lecaude -v- Trident Produce Pty Ltd - APPL 1793 of 2002 - BEECH SC - 09/04/03 - Food, Beverage and Tobacco Mfg.....	1214
Application re unfair dismissal and contractual entitlements seeking two weeks' pay in lieu of notice - Applicant argued that he was threatened by Respondent to resign immediately otherwise monies owed to him would be withheld, was not allowed to work out his notice period, was given no warnings about his performance and his termination was unfair as no proper process was followed in effecting the termination - Respondent argued that there was no dismissal, that Applicant resigned of his own volition and as Applicant resigned, no notice period was due - Commission reviewed authorities and found that Applicant was terminated at the instigation of the employer, thus a dismissal did take place - Further, Commission found that the Applicant was denied procedural fairness, that he was not given notice of his termination, that he was not given opportunity to respond to the issues, therefore termination was both substantively and procedurally - Commission awarded payment of two weeks' notice in accordance with the Award and also awarded compensation for loss - Upheld and Orders Issued - Mr ALC Lewis -v- Eastmere Nominees Pty Ltd - APPL 1377 of 2002 - HARRISON C - 04/04/03.....	1218
Application re unfair dismissal seeking extension of time pursuant to s.29(3) of the I.R. Act - Applicant argued that she was aware of the 28 day time limit at the time that she contemplated taking these proceedings, but that some personal factors and some health factors were relevant to the delay that took place - Commission applied legal principles and found that the length of the delay was substantial, and although it appeared from the Applicant that she would contest the employer's decision, from the date of termination, no further steps were taken by her to put the Respondent on notice that the dismissal was being contested - Further, Commission found that if it was to accept the application for extension of time, then there may be some prejudice occasioned upon Respondent, therefore, it was not persuaded that it ought exercise its discretion to receive the application out of time in the present circumstances - Dismissed for want of jurisdiction - Ms JS Palmer -v- Mr D Palumbo - APPL 26 of 2003 - KENNER C - 01/04/3003 - Food Retailing .....	1245
Application re unfair dismissal seeking compensation - Applicant argued that he was not experienced in the housing side of the business and did not get adequate assistance from Respondent, that he was dismissed suddenly without any warning and that he was very agitated by this and would not accept the alternative offer of erecting sheds - Respondent argued that Applicant experienced some difficulties with the job but that Respondent did not discuss these with him, that Applicant was taking advantage of the position, therefore, Respondent thought it would be better for the business if Respondent assumed the duties which Applicant was employed for and offer Applicant alternative position of erecting sheds - Commission reviewed authorities and found on evidence that Applicant used his position as an employee to gain an advantage to which he was not entitled, that Applicant breached his duty to his employer and the trust the employer held in him as a manager in the business, therefore, Applicant's dismissal was not unfair - Dismissed - Mr KR Pense -v- Gregory James Reilly - APPL 1055 of 2002 - WOOD C - 17/04/03 - Other Manufacturing .....	1248

## CUMULATIVE DIGEST—continued

	Page
<b>PROCEDURAL MATTERS—continued</b>	
Application for adjournment re unfair dismissal and contractual entitlements - Applicant argued he had to change his representation and had attempted to collect evidence from the respondent, that respondent holds records that will establish his application, that respondent had refused to supply information in this respect and it was necessary for his agent to seek to summons witnesses and obtain disclosure of documents - Respondent argued that the dismissal was due to the downturn in trade, that this application had caused him lots of stress and he would not want such a lengthy period of time to pass before the matter was resolved - Commission found that applicant had more than ample time to address the need to prepare for the hearing and that not to refuse the adjournment would cause injustice to the respondent - Refused - Subsequently applicant advised the Commission that the issues had been resolved - Discontinued - Mr GR Sampson -v- Albany Interiors Carpet Hotline - APPL 223 of 2001 - BEECH SC - 06/06/01 - Construction Trade Services .....	1252
Appeal against decision to dismiss an employee - Appellant had not sought to prosecute her appeal - Public Service Appeal Board wrote to Appellant seeking answers to a number of questions on issues relating to her appeal - No respond from Appellant was received by the Board to ascertain why she had not proceeded with her appeal - PSAB found that Appellant would suffer no hardship if deprived of the opportunity to pursue her appeal, and there was no explanation as to what prejudice if any she might suffer by not being able to proceed - PSAB concluded that as Appellant had not responded at all and had not sought to prosecute the appeal after a period of 8 months from the date of filing of the appeal, that it was appropriate to order that the appeal be dismissed - Dismissed - Ms SM Almeida -v- Commissioner, Main Roads Western Australia - PSAB 11 of 2002 - Public Service Appeal Board - SCOTT C - 14/04/03 - Government Administration.....	1281
Application re harsh, oppressive and unfair dismissal - Respondent submitted that it suggested that the process of handling customer complaints needed to change from a "best practice" perspective and that Applicant would first deal with the complaint to ascertain whether it should go to the manufacturer or to the layers to be attended to - Further, Respondent argued that the direction was lawful and reasonable and Applicant refused to comply with it and said inter alia, that he would resign - Commission found on the evidence presented that the direction given to the Applicant was indeed lawful and reasonable, that it was the Respondent's prerogative to consider how it would deal with the customer complaints and that Applicant's complete and resolute refusal to countenance the proposal, placed the Respondent in a position where it had little alternative - Commission further found that in the circumstances of this matter, and notwithstanding Applicant's character and integrity, Applicant's resolute opposition to how his employer wished to change the complaints procedure made his position untenable - Commission concluded that it had not been persuaded that Applicant's dismissal was harsh, oppressive or unfair - Dismissed - Mr R Davies -v- Carpet Call WA Pty Ltd - APPL 2102 of 2002 - BEECH SC - 28/05/03 - Other Services .....	1491
<b>PUBLIC HOLIDAYS</b>	
Complaint re breach of Enterprise Bargaining Agreement - Claimant Union argued that Defendant had breached Clause 22(b) of the Agreement by failing to pay public holiday penalties - Defendant denied claim and argued inter alia, that employees were paid according to the EBA - Industrial Magistrate reviewed Acts, Agreement and found inter alia, that the application of the clause in this instance had the effect of producing an inequitable result for employees that worked on public holidays and that all employees were technically adequately compensated whether they work on the public holiday or the day in lieu thereof - Reasons for Decision Issued - The Australian Nursing Federation, Industrial Union of Workers Perth -v- Silver Chain Nursing Association Inc - CP 61,62 of 2000 - Industrial Magistrate - Cicchini IM - 23/11/00 - Health Services.....	508
Claim re breach of the Clerks (Accountants Employees) Award No. A8 of 1982 - Claimant argued that Respondent had breached clauses 7B(3), 12(1) 10(1) and 14(2) of the Award by virtue of his failure to pay her entitlements pursuant to those provisions upon termination - Defendant argued that Claimant was at all material times a casual employee and not entitled to annual leave or public holiday pay or payment in lieu of notice and that termination was in accordance with the terms of their written agreement - Industrial Magistrate concluded that there was a mutual expectation of continuity of employment because the written agreement between the parties was both permanent and long -term, that flexibility, of itself, does not render a permanent relationship a casual one and that Claimant did not fall within the definition of casual employees as provided by the Award - Further, that Claimant had proved that Defendant had breached the Award by failing to make the appropriate payment in lieu of notice and also by failing to pay holiday pay and annual leave entitlements - Reasons for Decision Issued - Mr RM D'Arcy -v- Professional Innovators Pty Ltd - M 272 of 2002 - Industrial Magistrate - 26/02/03 - Finance .....	513
Complaint re breach of award - Claimant Union argued that Defendant breached award by not paying member award entitlements such as sick leave, public holidays, annual leave or pay in lieu and redundancy payments - Defendant argued that there was no redundancy payments because employee had not been made redundant and that accrued annual leave was not paid because employee abandoned his job - Further, that employee was paid superannuation and long service leave but was not paid allowances - Industrial Magistrate reviewed award and evidence and found that Complainant had failed to prove that employee was employed in a classification covered by the Award; that employee was engaged in work which was substantially or wholly covered by the Award and that the Award applied to the Defendant's operations - Reasons for Decision Issued - Australian Liquor, Hospitality and Miscellaneous Workers Union, Western Australian Branch -v- Derby Frail Aged and Disabled Hostel - Ngamang Bawoona - CP 292 of 2000 - Industrial Magistrate - 28/08/00 - General Construction .....	518
Complaint re breach of award - Claimant argued that she was employed on a part-time basis and was therefore entitled to annual leave and public holiday payments - Defendant argued that Claimant was a casual employee who had received casual loading, or in the alternative that the amount claimed should be offset against overpayment of wages - Industrial Magistrate found that Claimant was a part-time employee due to the substantial notice given when leave was taken and due to the mutual expectation of continuity of employment - IM found that payments made for a particular purpose cannot be attributed to another cause or purpose and therefore cannot operate to set-off or extinguish the totality of the amounts claimed - Granted - Ms JM Villanova -v- Balwa Pty Ltd T/as 7 Mile Inn - M 206,222,257,258,279 of 2002 - Industrial Magistrate - Cicchini IM - Accommodatn, Cafes&Restaurants .....	559
<b>PUBLIC INTEREST</b>	
<sup>3</sup> Application for a new award, Burswood International Resort Casino Employees Award 2002 - Applicant Union applied for the registration of the above award to replace and supersede the Burswood International Resort Casino Employees' Industrial Agreement Ag 169 of 2001 and the Burswood Island Resort Employees Award No. A23 and A25 of 1985 - Further, Applicant Union argued that the terms of the award were substantially those that applied to the employees of Respondent who had entered into an Australian Workplace Agreement and that it was unfair for the Respondent to discriminate against employees because they chose to be covered by a collective agreement registered under the Industrial Relations Act 1979 - Respondent argued that Applicant's claim should be dismissed under s.27(1)(a)(iii) of the IRC Act on the grounds that further proceedings were not necessary or desirable in the public interest as the Union's claim breached clause 45 of the registered agreement and in that it should not allow a party to press for a claim that was contrary to its own agreement - Further, Respondent argued that Union could not make out a claim under Principle 10 as it could not justify why the claim had not been progressed as an industrial agreement under s.41 of the Act and it was an abuse of the process because the purpose of the application was not directed at protecting existing employees whose conditions of employment were not regulated by the 2001 Agreement - Commission in Court Session found that that Applicant Union had made out a case under Principle 10 and that a new award should be issued - Further, CICS found that the operative date should be from 10 July 2002, the date the application was lodged in the Commission - Granted - Australian Liquor, Hospitality and Miscellaneous Workers Union, Western Australian Branch -v- Burswood Resort (Management) Limited - A 4 of 2002 - Commission in Court Session - SMITH C/WOOD C/HARRISON C - 25/11/02 - Accommodatn, Cafes&Restaurants.....	57
Application re unfair dismissal - Applicant argued that dismissal was unfair because Applicant had not yet attended court to prove his innocence of the charge - Respondent argued that termination of the contract of employment was because of unauthorised possession of company equipment and the reason given lacked credibility to the extent that there had been a serious breach of the employment contract and a breakdown in trust - Commission found that there has been a lack of response from Applicant in relation to this matter - Further, Commission found that Applicant had been found guilty of theft which was the substantive reason for the dismissal and Commission considered that it was in the public interest to dismiss application - Dismissed in the public interest - Mr G Chapman -v- Worsley Alumina Pty Ltd - APPL 1495 of 2001 - WOOD C - 20/11/02 - Services to Mining.....	160

## CUMULATIVE DIGEST—continued

	Page
<b>PUBLIC INTEREST—continued</b>	
<sup>2</sup> Appeal against Decision of Commission (82WAIG2280) re unfair dismissal and contractual entitlements - Applicant argued that the learned Commissioner was in error when Commission failed to order general discovery and that such an order should have been made and thereby an error was made in the exercise of the Commission's discretion - Respondent argued and submitted that an order for discovery was not of such importance that in the public interest an appeal should lie and that the decision appealed against was both interlocutory and discretionary and could not readily be appealed against - Full Bench found that it would be loathe to consider an appeal on a point of practice and procedure or an interlocutory decision and thus unduly delay proceedings and reluctant to interfere with the exercise of the discretion of the Commission in such matters - Dismissed - Ms P Alderson -v- St Columba - Kingswood College - FBA 41 of 2002 - Full Bench - SHARKEY P/COLEMAN CC/HARRISON C - 30/01/03 - Education .....	215
Application re revocation of right of entry permit - Application for an adjournment dismissed on the grounds that Commission was not satisfied that the refusal of the adjournment would result in a serious injustice to one party - Applicant argued that Respondent's representative had acted improperly and as a result of that conduct, Applicant suffered loss and damage and became exposed to the risk of liquidated damages for delay in completing the project - Applicant further argued that the limits of "proper" behaviour could be ascertained from the scope of the licence to enter the premises conferred by s.49H and s.49I and that license does not permit conducting safety audits - Respondent opposed the allegations and argued inter alia, that there was a legitimate safety concern on this particular site, that its representative was at one stage exercising powers but did not act improperly in the exercise of those powers - Commission found on evidence that the Respondent's representative did not intentionally or unduly hinder the employer or employees during working time and that whilst industrial action could have been avoided, he did not act in an improper manner in the exercise of powers under Division 2G of the Act - Dismissed - Silent Vector Pty Ltd t/a Sizer Builders -v- The Construction, Forestry, Mining and Energy Union of Workers - APPL 42,63 of 2003 - BEECH SC - 25/02/03 - General Construction .....	564
<sup>2</sup> Appeal against Decision of Commission (82WAIG3250) re transfer of an employee - Appellant argued that the Public Service Arbitrator erred in law in declaring that Appellant's decision to exclude the employee from the Broome Regional Prison was void, that the decision was within the Public Service Arbitrator's jurisdiction, and that the Appellant should not have ceased paying employee her ordinary salary - Appellant sought that the PSA's orders (1), (2) and (6) be quashed - Full Bench reviewed authorities and found inter alia, that the decision to exclude employee from Broome Regional Prison was an "industrial matter", and the decision to declare it void was within jurisdiction for that reason - Further, Full Bench found that the Arbitrator erred in ordering the Appellant to pay the employee indefinitely into the future when there was no evidence that she would perform any service, had performed any service or was entirely willing to - Upheld and order 6 of the decision at first instance quashed - Director General, Department of Justice (Formerly known as Ministry Of Justice) -v- Civil Service Association of Western Australia Incorporated - FBA 53 of 2002 - Full Bench - SHARKEY P/SCOTT C/WOOD C - 25/03/02 - Government Administration .....	908
<sup>2</sup> Appeal against Decision of Commission (unreported) re unfair dismissal - No steps had been taken by Appellant to proceed with the appeal - Full Bench on its own motion according to Practice Note 2 of 2000, required by notice to the parties to submit to the Commission in writing, should they wish to do so, whether the appeal should be dismissed there having been no steps taken to advance it for a period of 12 months - No submissions had been received, on behalf of Appellant - Written submissions had been received on behalf of the Respondent - Full Bench unanimously found inter alia, that the equity, good conscience and substantial merits of the case required that the case be dismissed and more particularly, it was not in the public interest that a matter which had not been prosecuted for such an inordinate period of time, should not be dismissed (see s.26(1)(a) and s.27(1)(a)(ii) of the Act) - Dismissed for want of prosecution - Mr G De Freitas -v- Youanmi Site Service Road Train Bulk Haulage - FBA 15 of 2002 - Full Bench - SHARKEY P/SCOTT C/WOOD C - 06/05/03 - Road Transport.....	1129
<b>REDUNDANCY/RETRENCHMENT</b>	
Application re unfair dismissal seeking compensation - Applicant argued that in all of the circumstances, given the lack of procedural fairness, his termination was unfair on the basis that the requirements under s.41 of the Minimum Conditions Employment Act 1993 were not met - Respondent argued there was no unfair dismissal, that the onus on the Applicant to demonstrate that he was unfairly terminated had not been made out and that there was no breach of s.41 of the MCE Act as numerous discussions were held with the Applicant, and consultation took place in order to avoid or minimise the effect of significant change on the Applicant - Commission reviewed authorities, Part 5 of the MCEA and found that Applicant was treated unfairly on the basis that he was not given sufficient notice of his termination in order to canvass alternatives, that it was also clear that the requirements of Part 5 of the MCEA in relation to attend job interviews were not met by the Respondent and given that the Applicant was afforded insufficient notice and was not given time to attend job interviews, his termination was unfair - However, given that the Applicant was paid a redundancy payment of 26 weeks' pay and five weeks' pay in lieu of notice, Commission concluded that the amount of five weeks' pay as compensation was to be offset against these payment, thus no monies were due to be paid to the Applicant - Dismissed - Mr PJ Caffery -v- Chubb Security Australia Pty Ltd t/as Chubb Protective Services - APPL 390 of 2002 - HARRISON C - 02/12/02 - Personal and Other Services.....	155
<sup>2</sup> Appeal against Decision of Commission (82WAIG2690) re unfair dismissal and contractual entitlements - There were two appeals against the Decision of the Commission and both were heard together - Appellant Respondent argued that Commissioner erred in law in finding that Applicant had been unfairly dismissed due to absence of reasonable notice and that Commissioner erred in law in finding that there was a failure to pay Applicant redundancy payment and a contractual entitlement for unpaid call outs - Appellant Applicant argued that Commissioner failed to take into account relevant factors namely the time that Appellant would take to return to previous remuneration levels and the consequent failure to compensate Appellant Applicant for such loss and injury - Full Bench found that the dismissal correctly was found to be harsh, oppressive and unfair because only three days notice of termination of the contract was given when three months notice was what should be implied - Further, Full Bench found that the loss caused by the unfair dismissal was the loss of reasonable notice quantifiable at and compensate by an amount equal to three months salary as ordered - Further, Full Bench dismissed Appeal No. FBA 47 of 2002 and Upheld Appeal No FBA 48 of 2002 in part and varied the decision at first instance by ordering the payment of an amount equal to one month's salary for compensation in addition to that already ordered to be paid - Orders issued - Mr I Adriansz -v- EPath WA Pty Ltd - FBA 47, 48 of 2002 - Full Bench - SHARKEY P/COLEMAN CC/BEECH SC - 21/02/03 - Health Services.....	454
Complaint re breach of award - Claimant Union argued that Defendant breached award by not paying member award entitlements such as sick leave, public holidays, annual leave or pay in lieu and redundancy payments - Defendant argued that there was no redundancy payments because employee had not been made redundant and that accrued annual leave was not paid because employee abandoned his job - Further, that employee was paid superannuation and long service leave but was not paid allowances - Industrial Magistrate reviewed award and evidence and found that Claimant had failed to prove that employee was employed in a classification covered by the Award; that employee was engaged in work which was substantially or wholly covered by the Award and that the Award applied to the Defendant's operations - Reasons for Decision Issued - Australian Liquor, Hospitality and Miscellaneous Workers Union, Western Australian Branch -v- Derby Frail Aged and Disabled Hostel - Ngamang Bawoona - CP 292 of 2000 - Industrial Magistrate - 28/08/00 - General Construction.....	518
Claim re breach of award seeking redundancy payment - Claimants argued that they were made redundant, that restructuring was orchestrated at achieving resignations and also sought to recover costs, and the imposition of a penalty upon Respondent for the breach - Respondent argued that as a result of low occupancy rates, a decision was made to restructure and alternative positions was offered, however both Claimants abandoned their employment - Industrial Magistrate reviewed authorities and found on evidence that there was no redundancy in either case, that Claimants were offered alternative employment without loss of entitlements and that the employment relationship came about at the initiative of the Claimants - Reasons for Decision Issued - Ms KB Millstead -v- R.D. Miles & Co. Pty Ltd (ACN 008 727 866) - M 292,405 of 2001 - Industrial Magistrate - Cicchimi IM - 08/08/01 - Health Services .....	527
Application re contractual entitlements - Applicant argued that she had been denied contractual entitlements that arose from an agreed redundancy package - Respondent opposed the application and argued that Applicant had expressed an interest in voluntary redundancy but no decision about acceptance of voluntary redundancies had been made - Commission found that the issue turns on the evidence as to whether the acceptance of voluntary redundancy was conditional upon Applicant remaining in employment to 21 December 2001 - Further, Commission found that Respondent had not accepted what Applicant was purporting to offer - Dismissed - Ms B Altham -v- Cable Sands (WA) Pty Ltd - APPL 2192 of 2001 - KENNER C - 07/03/03 - Metal Ore Mining .....	572

## CUMULATIVE DIGEST—continued

## REDUNDANCY/RETRENCHMENT—continued

	Page
Application re unfair dismissal and contractual entitlements - Applicant argued that termination was unfair because she was given insufficient notice and was harsh in the way it was effected and sought compensation - Respondent argued that the reason to terminate Applicant's contract of employment was due to a redundancy situation and the process of effecting Applicant's termination was not unfair - Commission found that Applicant was terminated for a valid reason but was not given adequate notice due to the termination, the actual notice was too short and unreasonable - Further, Commission found that reinstatement was impracticable and awarded compensation - Upheld and Order Issued - Ms R Clements -v- Caldera Nominees Pty Ltd ABN 96276831947 T/as Harrington Brokers - APPL 1093 of 2002 - HARRISON C - 28/02/03 - Insurance.....	587
Application re unfair dismissal - Applicant argued that his termination was both procedurally and substantively unfair and was not a genuine redundancy - Applicant argued that there were no warnings about the impending redundancy and that requirements under the Minimum Conditions of Employment Act 1993 were not complied with - Respondent argued that the Applicant had not demonstrated that another employee should have been chosen for redundancy instead of him and that MCE Act had been complied with - Commission found that redundancy itself is a sufficient reason for dismissal and that not every denial of procedural fairness will entitle an employee to a remedy - Commission found that termination was effected in an unfair manner and awarded Applicant payment for failure for compliance with MCE Act - Granted in Part - Mr AJ Evans -v- Theiss Pty Ltd - APPL 707 of 2002 - HARRISON C - 14/02/03 - General Construction.....	591
Application re unfair dismissal - Applicant argued that Respondent had breached section 41 of the Minimum Conditions of Employment Act 1993 in that it did not properly discuss or inform Applicant of its decision to restructure, did not provide proper criteria for assessing who was to be made redundant and that another employee should have been made redundant instead of Applicant - Respondent argued that there was no procedural unfairness in the redundancy as Applicant was advised soon after the decision was made, was offered outplacement assistance and was paid a generous redundancy payment - Commission found that there was no breach by Respondent of section 41 of the Minimum Conditions of Employment Act to warrant a finding of unfair dismissal - Dismissed - Ms AV Ross -v- Diamond Offshore General Company - APPL 1133 of 2002 - WOOD C - 07/03/03 - Other Services .....	608
<sup>1</sup> Appeal against Decision of Full Bench (82WAIG212) re dismissed appeal in respect of an unfair dismissal claim - Appellant argued inter alia, that the Full Bench erred in law in failing to give proper consideration to and provide adequate reasons for two findings in particular, namely, that the requirements of the Minimum Conditions of Employment Act were complied with, and that the appellant waived his right to discuss the adverse effects of his redundancy at the meeting of the 18 May 2000 - Industrial Appeal Court reviewed authorities, Acts and evidence and found, inter alia, that the Appellant was entitled to succeed in his appeal in respect of his contention that Respondent employer failed to comply with his obligation to inform and discuss imposed upon the employer by s.41 of the MCE Act and that it was appropriate for the decisions made by the Commissioner and the Full Bench to be set aside and remitted to Commissioner Wood for a determination to be made as to whether the Appellant was entitled to relief having regard to the reasons of the Industrial Appeal Court - Upheld and Remitted - Mr GE Garbett -v- Midland Brick Company Pty Ltd - IAC 3 of 2002 - Industrial Appeal Court - 10/03/03 - Non-Metallic Min Product Mfg.....	893
<sup>2</sup> Appeal against Decision of Commission (82WAIG2690) re unfair dismissal and contractual entitlements - Solicitors for the Respondent wrote to the Commission requesting that the figure of compensation as contained in the Order of the Full Bench be amended because it was an incorrect figure and did not reflect the reasons for decision of the Full Bench - Full Bench concluded that pursuant to s.27(1)(m), it had jurisdiction to correct the order because the matter was still before the Commission until the 'slip rule error' in its order was corrected to reflect its decision - Supplementary Reasons for Decision and Correcting Order Issued - Mr I Adriansz -v- EPath WA Pty Ltd - FBA 48 of 2002 - Full Bench - SHARKEY P/COLEMAN CC/BEECH SC - 28/03/03 - Health Services .....	917
Application re unfair dismissal - Applicant argued that dismissal was unfair because of the manner it was conducted, that she felt humiliated and devastated by her treatment by Respondent, and that she was also not given any notice or opportunity to discuss the matter - Respondent argued that Applicant had been made redundant effective immediately as there was no other roles available for her in the organisation, that she was paid four weeks' redundancy payment and that the redundancy was genuine - Commission found that Applicant was unfairly dismissed as the Minimum Conditions of Employment Act had not been complied with in a number of respects - Further, Commission found that reinstatement was impracticable and ordered that Applicant be paid notice payment, compensation and injury - Upheld and Order Issued - Ms JL Fitzgerald -v- Telis Pty Ltd - APPL 576 of 2002 - HARRISON C - 20/03/03 - Other Services .....	1036
Application re contractual entitlements - Applicant argued a redundancy payment was due to him under his contract of employment and he had relied upon an undertaking which he says the company gave to its employees in a letter - Respondent argued no such undertaking was given, the letter the applicant referred to was badly drafted and the company's position was made clear to the applicant prior to his resignation - Respondent also argued a redundancy package was not available to staff who relocated to Karratha - Commission found based on the evidence presented that applicant's contract did not include the payment of a redundancy benefit if he chose to relocate to Karratha - Dismissed - Mr S Brink -v- Schlumberger Oilfield Australia Pty Limited ACN 003 264 597 - APPL 1416 of 2002 - WOOD C - 08/05/03 - Services to Mining.....	1184
Application for extension of time to file application for harsh, oppressive and unfair dismissal - Applicant argued that the delay in lodging her application was due to Christmas break, that she wanted to prove that termination was in fact a true redundancy and that the work continued to be performed by someone else - Respondent argued that due to the economic situation there was a downturn in business at that time and needed to make the position redundant - Commission found on evidence that while the employer did not follow all appropriate processes, Applicant's position was in fact redundant and that the rationale for Applicant's delay in lodging her application was not reasonable, therefore the referral out of time was not accepted - Dismissed - Ms B Bryant -v- Boomerang Paper WA Pty Ltd - APPL 162 of 2003 - WOOD C - 25/03/03 - Paper Manufacturing.....	1188
Application for extension of time to file application re unfair dismissal - Applicant argued the delay came as a miscalculation by his legal representative and that his case was not a genuine redundancy but dismissal had occurred following safety concerns - Respondent argued that no safety issues had been raised by Applicant while working on the project completed immediately prior to the redundancy - Commission found there was an acceptable explanation for the delay, that the interest of justice outweigh the prejudice to the employer and that it would be unfair not to accept the application - Granted - Mr P Dawson -v- Devaugh Pty Ltd ABN 73 008 792 265 - APPL 175 of 2003 - COLEMAN CC - 10/04/03 - Construction Trade Services .....	1194
Application re unfair dismissal - Applicant argued he should not have been chosen for redundancy as the process lacked fairness, he had no knowledge of, or input to, how the assessment was made, the decision making process leading to him being made redundant was flawed and the comparison document drawn up by the respondent was inaccurate - Further, Applicant argued he was not given an opportunity to demonstrate his capacities given the nature of the process adopted by the respondent or any opportunity to canvass alternatives to termination and he was not working on the project that the respondent lost when he was made redundant - Respondent argued they had the right to decide which employees were to be made redundant, that it was not unusual when a major contract was lost for employees to be made redundant, that after evaluating all the supervisors it was appropriate for the respondent to choose the applicant for redundancy and that it was appropriate to terminate the applicant's contract of employment in preference to that of another employee - Commission found s.41 and s.43 of the Minimum Conditions of Employment Act were not met or complied with by the respondent, the process adopted by the respondent was unfair, inappropriate and callous and the applicant was denied procedural fairness and natural justice in relation to this process - Further, Applicant was not given an opportunity to demonstrate why he should not be chosen for redundancy and an order was issued alleging unfair dismissal and awarding compensation - Ordered Accordingly - Mr DS Morris -v- ABB Australia Pty Ltd - APPL 276 of 2002 - HARRISON C - 11/04/03 - Business Services .....	1236
Application re unfair dismissal seeking compensation - Applicant argued he was not given any warning or any reason for his dismissal, that there was no opportunity for discussion with the respondent about reduction of working hours or resolution of the issue - Respondent argued the dismissal came about due to a history of bad work performance that caused the respondent to suffer financially, that the financial pressures created by applicant were such it was no longer possible to employ him and at the same time deal with the improvement of the respondent's financial circumstances - Commission found there were some malafidies in the conduct of the respondent in respect to their answer to the claim for unfair dismissal - Further, that applicant was dismissed summarily, there was no ground to support a dismissal for misconduct, therefore there was no ground on which to base summary termination and an order was issued awarding compensation - Granted - Mr GC Sutton -v- Audio Visual Technical Services - APPL 398 of 2002 - GREGOR C - 30/04/02 - Motion Picture Radio & TV Serv .....	1258

## CUMULATIVE DIGEST—continued

	Page
REDUNDANCY/RETRENCHMENT—continued	
<sup>2</sup> Appeal against Decision of Commission (83WAIG155) re dismissed claim for compensation - Appellant argued that the learned Commissioner erred in law in dismissing his claim for compensation after finding that the termination of employment was unfair and in that respect the Commission failed to properly assess his loss arising from the unfair dismissal and was in error in taking into account entitlements paid by the respondent in the termination of employment arising from his redundancy - Appellant sought that there be a payment of compensation by the respondent, assessed for the loss that he suffered from the date of dismissal to the date of hearing - Full Bench applied legal principles and found that the Commissioner at first instance made no error in finding as she did, that Appellant suffered no loss because of the amount which he was paid, and no loss could or should be found to have been established - Further, Full Bench found that there was no error established in the exercise of the discretion and no ground of appeal had been made out - Dismissed - Mr PJ Caffery -v- Chubb Security Australia Pty Ltd t/as Chubb Protective Services - FBA 54 of 2002 - Full Bench - SHARKEY P/COLEMAN CC/BEECH SC - 01/05/03 - Personal and Other Services .....	1381
Application re unfair dismissal and contractual entitlements - Applicant sought redundancy payment, accrued sick leave, long service leave and payment for financial hardship due to his new job paying much lesser for the same work - Respondent argued that there was a downturn at the time of dismissal, the Applicant was made redundant and Applicant was aware that he was to be made redundant - Commission reviewed authorities and found on evidence that Applicant's application was 74 days out of time because the Applicant lodged his application first in the Federal Commission and once he knew that there was a jurisdictional challenge to his application, he took no further steps at that point in time to clarify his application, or to make the application in this Commission, therefore it would not be unfair for his application not to be accepted out of time - Commission concluded that it had doubt that the claims for long service leave and for financial hardship could be claimed and that it would convene a conference to deal with the matters in respect of redundancy and sick leave which are claimed as contractual benefits - Referral out of time not accepted - Order Issued - MR RS Brown -v- RCR Tomlinson Ltd - APPL 231 of 2003 - WOOD C - 12/05/03 - Motor Vehicle Rtlg & Services .....	1484
Application re contractual entitlements - Applicants argued their contractual entitlement to four weeks notice had been confirmed by the Respondent and they should receive a further two weeks wages as payment in lieu of notice in accordance with what they believed their contractual arrangements entitled them to - Respondent argued the contractual entitlements have been discharged in full and payments made on termination were in line with arrangements entered into between the parties - Commission found that there was a contractual entitlement to four weeks pay on termination and that this was paid on the basis of two weeks notice and two weeks redundancy - Dismissed - Mr BK Farrell -v- Q Multimed Limited - APPL 1335,1336 of 2001 - COLEMAN CC - 14/05/03 - Paper Manufacturing .....	1496
Conference referred re unfair dismissal - Applicant Union argued its member was unfairly dismissed by the respondent for reasons of redundancy, that there was no valid reason for the dismissal and the dismissal was unfair and unjust - Respondent argued the termination was fair due to reduction of work and requested the application be dismissed - Commission found that when Respondent brought the employment contract to an end it did not comply with the requirements of Part 5 of the MCE nor did it comply with Clause 32 or 32A of the Award - Further, Commission reviewed authorities and found that not only the dismissal was unfair for the manner in which it was given, it was unfair because of the circumstances in which it was given and amounts to an abuse of the employers right to terminate - Commission applied principles and found that applicant member had been compensated in excess of his loss already and for that reason there was no compensation orderable or payable to him pursuant to the Act - Ordered Accordingly - AUTO, FOOD, METAL, ENGIN UNION -v- Seagate Structural Engineering Pty Ltd - CR 267 of 2002 - GREGOR C - 13/05/03 - Metal Product Manufacturing .....	1537
REINSTATEMENT	
<sup>1</sup> Appeal against Decision of Full Bench (80WAIG4326) re dismissed application for unfair dismissal - Appellant argued the Full Bench erred in law in not taking cognisance of the legal significance of a cross appeal, by finding the Appellant was satisfied with the Commission's order and by not granting an extension of time - Industrial Appeal Court found the grounds of appeal for an extension of time was without merit and should not be granted - Dismissed - Mr M Cousins -v- YMCA of Perth - IAC 6 of 2000 - Industrial Appeal Court - Kennedy J/Scott J/Parker J. - 28/11/01 - Community Services .....	5
Complaint re breach of Workplace Agreement - Complainant argued that she had been unfairly dismissed because at the time of termination she was on sick leave - Further, Complainant sought reinstatement, unpaid sick leave and a finding that the termination was in breach of a workplace agreement and in contravention of the Workplace Agreements Act 1993 - Defendant argued Complainant repudiated the contract of employment and that its acceptance of that repudiation terminated the employment - Industrial Magistrate found that Defendant was justified, in all circumstances, in coming to a decision that Complainant had no intention of returning to work in the foreseeable future and had repudiated the contract of employment which led to her lawful termination - Dismissed - NL Medwid -v- Central Metropolitan College of TAFE - CP 129,251 of 2000 - Industrial Magistrate - Tarr IM - 13/12/01 - Education .....	124
<sup>2</sup> Appeal against Decision of Commission (82WAIG3011) re unfair dismissal and contractual entitlements - Appellant argued that the Commissioner erred in having grave reservations about the evidence given by Applicant and that Commissioner erred in having no hesitation in preferring the evidence of Respondent to that of Appellant - Further, Commissioner erred in fact in finding that the written contracts were identical except for the commencement and expiry dates and erred in not finding that the true contract between the parties was a single ongoing contract of employment - Respondent opposed the appeal - Full Bench found that there was clear evidence that Appellant had entered and knew he had entered separate fixed term contracts which he recognised as did other witnesses as being different from permanent - Further, Full Bench found that there was no error in the decision in the first instance and that Commissioner correctly found that there was no dismissal and therefore the Commission was without jurisdiction and the appeal was dismissed - Dismissed - Mr R Gallotti -v- Argyle Diamond Mines Pty Ltd Trading as Argyle Diamonds - FBA 50 of 2002 - Full Bench - SHARKEY P/COLEMAN CC/BEECH SC - 13/03/03 - Other Mining .....	919
Complaints re unfair dismissal - Claimants argued inter alia, that Respondent failed to give them an opportunity to defend or rebut any allegations of misconduct justifying dismissal, and sought reinstatement together with the recovery of remuneration lost - Respondent denied allegations and denied that it had failed to afford procedural fairness - Further, Respondent argued that the actions constituted gross misconduct, that the dismissal was justified and not harsh or oppressive and that Claimants were not entitled to the amounts claimed or any amounts at all - Industrial Magistrate reviewed authorities, Acts and Regulations and found that the decision to terminate resulted directly from the raising of the safety issue, that the decision was made without merit and it was harsh, oppressive and unfair - Further, IM found that the factual circumstances which reflect the actual operation of the contractual relationship demonstrated that the employment relationship was a casual one, that the continuing relationship between the Claimants and Respondent did not in law evince a continuing contract and that it was without jurisdiction to hear and determine the claims - Reasons for Decision Issued - Mr LJA Clark -v- Marine Fire & Security Pty Ltd - M 363,364 of 2001 - Industrial Magistrate - Cicchini IM - 27/03/03 - Other Business Services .....	1005
Application re unfair dismissal - Applicant denied that she committed any misconduct, on the contrary she acted in accordance with her professional judgement at all times and with as much consultation as she was able to arrange with her employer during a period of crisis in dealing with a family - Respondent argued the Applicant did not clarify to other agencies she was acting in her own capacity, she inappropriately used a government vehicle, she attended a house without a police escort, entered into premises and this was a high risk activity and was in contradiction of the employer's policy and procedures - Respondent further argued the Applicant could have placed the employer in jeopardy of legal actions by her conduct and she was not contactable throughout the duration of her actions on Sunday, 8 September 2002 - Commission found inter alia, the Applicant was summarily dismissed, that her dismissal was misconceived and unfair because it lacked the necessary ingredient of a fair go all round - Reinstated and compensation awarded - Ordered Accordingly - Mrs IM Curtois -v- Geraldton Sexual Assault Resource Centre Inc - APPL 1816,1927 of 2002 - GREGOR C - 07/05/03 - Community Services .....	1486

## CUMULATIVE DIGEST—continued

## SAFETY

- <sup>2</sup>Appeal against Decision of Commission (81WAIG2596) re unfair dismissal - Appellant argued that in relation to the written warning issued, the Commissioner erred in concluding that it was unfairly issued, that on various other issues such as health and safety, the relationship between Applicant and the Head Department, the Applicant's performance and compensation, the Commissioner failed to give proper weight to the evidence - Further, Appellant sought that the Commission's order be quashed - Full Bench reviewed evidence, authorities and found on various reasons, that the Commissioner was entitled to find and correct in finding that the dismissal was unfair, that it was quite clear that the exercise of the discretion at first instance did not miscarry as alleged in the grounds of appeal and that the appeal was not made out, therefore dismissed the appeal - Dismissed - Penrhos College (Inc) -v- Mrs M Muggerridge - FBA 52 of 2001 - Full Bench - SHARKEY P/COLEMAN CC/WOOD,C - 07/12/01 - Education..... 49
- Application re revocation of right of entry permit - Application for an adjournment dismissed on the grounds that Commission was not satisfied that the refusal of the adjournment would result in a serious injustice to one party - Applicant argued that Respondent's representative had acted improperly and as a result of that conduct, Applicant suffered loss and damage and became exposed to the risk of liquidated damages for delay in completing the project - Applicant further argued that the limits of "proper" behaviour could be ascertained from the scope of the licence to enter the premises conferred by s.49H and s.49I and that license does not permit conducting safety audits - Respondent opposed the allegations and argued inter alia, that there was a legitimate safety concern on this particular site, that its representative was at one stage exercising powers but did not act improperly in the exercise of those powers - Commission found on evidence that the Respondent's representative did not intentionally or unduly hinder the employer or employees during working time and that whilst industrial action could have been avoided, he did not act in an improper manner in the exercise of powers under Division 2G of the Act - Dismissed - Silent Vector Pty Ltd t/a Sizer Builders -v- The Construction, Forestry, Mining and Energy Union of Workers - APPL 42,63 of 2003 - BEECH SC - 25/02/03 - General Construction..... 564
- Complaints re unfair dismissal - Claimants argued inter alia, that Respondent failed to give them an opportunity to defend or rebut any allegations of misconduct justifying dismissal, and sought reinstatement together with the recovery of remuneration lost - Respondent denied allegations and denied that it had failed to afford procedural fairness - Further, Respondent argued that the actions constituted gross misconduct, that the dismissal was justified and not harsh or oppressive and that Claimants were not entitled to the amounts claimed or any amounts at all - Industrial Magistrate reviewed authorities, Acts and Regulations and found that the decision to terminate resulted directly from the raising of the safety issue, that the decision was made without merit and it was harsh, oppressive and unfair - Further, IM found that the factual circumstances which reflect the actual operation of the contractual relationship demonstrated that the employment relationship was a casual one, that the continuing relationship between the Claimants and Respondent did not in law evince a continuing contract and that it was without jurisdiction to hear and determine the claims - Reasons for Decision Issued - Mr LJA Clark -v- Marine Fire & Security Pty Ltd - M 363,364 of 2001 - Industrial Magistrate - Cicchini IM - 27/03/03 - Other Business Services..... 1005
- Application re unfair dismissal and contractual entitlements - Applicant argued that the dismissal was unfair because safety issues were never raised and were not an issue and sought compensation - Further, Applicant sought benefits under his contract of employment in relation to notice of termination - Respondent denied Applicant was unfairly terminated and argued that Applicant was not due any monies pursuant to his contract of employment - Further, Respondent argued that it was appropriate to terminate Applicant's contract of employment as Applicant continually defied instructions and had received adequate warnings regarding his performance and safety record - Commission found Respondent may have had some concerns about aspects of the Applicant's performance however these concerns were never relayed to the Applicant and there was no warning - Further Commission found that there was no substantive reason for the termination of Applicant's contract of service which was procedurally unfair and that Applicant was not given sufficient opportunity to respond to the allegations against him - Commission found that Applicant was unfairly terminated and awarded compensation and was also awarded contractual benefits which consisted of underpayment of notice and vehicle expenses - Upheld, compensation awarded and contractual benefits partially granted - Mr A Cockram -v- Emporio Homes Pty Ltd, Patricia Edingertha Emporio Property Consultants - APPL 1043 of 2002 - HARRISON C - 18/03/03 - General Construction..... 1026
- Application re unfair dismissal seeking compensation - Applicant argued he believed he went about his job in a safe manner, the respondent did not raise any complaints about his approach to work although on a number of occasions safety had been brought to his attention and he was not given an opportunity to explain his story - Respondent argued the applicant's performance was acceptable except his attitude to safety and because of continued breaches of safety in the best interests of work colleagues and in accordance with the Respondent's duty of care the applicant was dismissed - Commission found that the applicant knew that there were concerns held by the respondent in regard to safety issues and even though the termination was procedurally flawed, the termination could not be categorised as harsh, oppressive or unfair - Dismissed - Mr JSM Babbage -v- Tony Sadler Pty Ltd - APPL 1764 of 2002 - GREGOR C - 05/05/03 - Personal & Household Good Retailing..... 1179
- Application for extension of time to file application re unfair dismissal - Applicant argued the delay came as a miscalculation by his legal representative and that his case was not a genuine redundancy but dismissal had occurred following safety concerns - Respondent argued that no safety issues had been raised by Applicant while working on the project completed immediately prior to the redundancy - Commission found there was an acceptable explanation for the delay, that the interest of justice outweigh the prejudice to the employer and that it would be unfair not to accept the application - Granted - Mr P Dawson -v- Devaugh Pty Ltd ABN 73 008 792 265 - APPL 175 of 2003 - COLEMAN CC - 10/04/03 - Construction Trade Services..... 1194

## SHIFT WORK

- Claim re breach of award seeking redundancy payment - Claimants argued that they were made redundant, that restructuring was orchestrated at achieving resignations and also sought to recover costs, and the imposition of a penalty upon Respondent for the breach - Respondent argued that as a result of low occupancy rates, a decision was made to restructure and alternative positions was offered, however both Claimants abandoned their employment - Industrial Magistrate reviewed authorities and found on evidence that there was no redundancy in either case, that Claimants were offered alternative employment without loss of entitlements and that the employment relationship came about at the initiative of the Claimants - Reasons for Decision Issued - Ms KB Millstead -v- R.D. Miles & Co. Pty Ltd (ACN 008 727 866) - M 292,405 of 2001 - Industrial Magistrate - Cicchini IM - 08/08/01 - Health Services..... 527

## SICK LEAVE

- Complaint re breach of Workplace Agreement - Complainant argued that she had been unfairly dismissed because at the time of termination she was on sick leave - Further, Complainant sought reinstatement, unpaid sick leave and a finding that the termination was in breach of a workplace agreement and in contravention of the Workplace Agreements Act 1993 - Defendant argued Complainant repudiated the contract of employment and that its acceptance of that repudiation terminated the employment - Industrial Magistrate found that Defendant was justified, in all circumstances, in coming to a decision that Complainant had no intention of returning to work in the foreseeable future and had repudiated the contract of employment which led to her lawful termination - Dismissed - NL Medwid -v- Central Metropolitan College of TAFE - CP 129,251 of 2000 - Industrial Magistrate - Tarr IM - 13/12/01 - Education..... 124
- Application re interpretation of Western Australian Police Service Enterprise Agreement PSA AG 8 of 2001 - Applicant Union sought an interpretation of clause 37 - Entitlement to Leave and Allowances Through Illness or Injury of the Agreement - Applicant Union argued that by providing medical certificates to cover the period of absence, member had complied with the requirements and was entitled to payment - Respondent argued that there was a right to make enquiries and seek clarification including employees to attend a medical practitioner of employer's choosing - Public Service Arbitrator found that the application in its current form was not within the powers of the Commission to determine the interpretation - Further, if the question were posed differently Arbitrator found that the clause does not prescribe all the conditions which might reasonably apply for granting sick leave - Reasons for Decision Issued - Western Australian Police Union of Workers -v- Commissioner of Police - P 24 of 2002 - Public Service Arbitrator - SCOTT C - 04/02/03 - Government Administration..... 283

## CUMULATIVE DIGEST—continued

	Page
<b>SICK LEAVE—continued</b>	
Complaint re breach of award - Claimant Union argued that Defendant breached award by not paying member award entitlements such as sick leave, public holidays, annual leave or pay in lieu and redundancy payments - Defendant argued that there was no redundancy payments because employee had not been made redundant and that accrued annual leave was not paid because employee abandoned his job - Further, that employee was paid superannuation and long service leave but was not paid allowances - Industrial Magistrate reviewed award and evidence and found that Complainant had failed to prove that employee was employed in a classification covered by the Award; that employee was engaged in work which was substantially or wholly covered by the Award and that the Award applied to the Defendant's operations - Reasons for Decision Issued - Australian Liquor, Hospitality and Miscellaneous Workers Union, Western Australian Branch -v- Derby Frail Aged and Disabled Hostel - Ngamang Bawoona - CP 292 of 2000 - Industrial Magistrate - 28/08/00 - General Construction.....	518
Complaint re breach of Workplace Agreement re unfair dismissal - Complainant argued that dismissal was unfair and sought reinstatement or compensation and that Defendant had failed to pay him entitlements under the workplace agreement including annual leave and sick leave - Defendant argued that Complainant had misappropriated money and also that Complainant had been overpaid owing Defendant approximately \$2000 - Industrial Magistrate found that Complainant had been unfairly dismissed and there was no evidence established that monies had been misappropriated - Further, Complainant was entitled to annual leave, sick leave and other remuneration - Reasons for Decision Issued - Mr ID Riley -v- Healy Airconditioning Pty Ltd - CP 1 of 2001 - Industrial Magistrate - Cicchini IM - 15/08/01 - Personal & Household Good W/sg.....	556
Application re unfair dismissal and contractual entitlements - Applicant sought redundancy payment, accrued sick leave, long service leave and payment for financial hardship due to his new job paying much lesser for the same work - Respondent argued that there was a downturn at the time of dismissal, the Applicant was made redundant and Applicant was aware that he was to be made redundant - Commission reviewed authorities and found on evidence that Applicant's application was 74 days out of time because the Applicant lodged his application first in the Federal Commission and once he knew that there was a jurisdictional challenge to his application, he took no further steps at that point in time to clarify his application, or to make the application in this Commission, therefore it would not be unfair for his application not to be accepted out of time - Commission concluded that it had doubt that the claims for long service leave and for financial hardship could be claimed and that it would convene a conference to deal with the matters in respect of redundancy and sick leave which are claimed as contractual benefits - Referral out of time not accepted - Order Issued - MR RS Brown -v- RCR Tomlinson Ltd - APPL 231 of 2003 - WOOD C - 12/05/03 - Motor Vehicle Rtlg & Services.....	1484
<b>STANDDOWN</b>	
Complaints re unfair dismissal - Claimants argued inter alia, that Respondent failed to give them an opportunity to defend or rebut any allegations of misconduct justifying dismissal, and sought reinstatement together with the recovery of remuneration lost - Respondent denied allegations and denied that it had failed to afford procedural fairness - Further, Respondent argued that the actions constituted gross misconduct, that the dismissal was justified and not harsh or oppressive and that Claimants were not entitled to the amounts claimed or any amounts at all - Industrial Magistrate reviewed authorities, Acts and Regulations and found that the decision to terminate resulted directly from the raising of the safety issue, that the decision was made without merit and it was harsh, oppressive and unfair - Further, IM found that the factual circumstances which reflect the actual operation of the contractual relationship demonstrated that the employment relationship was a casual one, that the continuing relationship between the Claimants and Respondent did not in law evince a continuing contract and that it was without jurisdiction to hear and determine the claims - Reasons for Decision Issued - Mr LJA Clark -v- Marine Fire & Security Pty Ltd - M 363,364 of 2001 - Industrial Magistrate - Cicchini IM - 27/03/03 - Other Business Services.....	1005
<b>STAY OF PROCEEDINGS</b>	
<sup>4</sup> Application for stay of operation in Matter No. P2 of 2001 pending appeal to Full Bench - Applicant sought an order staying the Commission's decision at least insofar as Order 6 was concerned - No appearance by or on behalf of the Respondent - President reviewed authorities and found that there was a serious issue to be tried, that the interests of the Applicant should take precedence over the interest of the Respondent and its member and that the equity, good conscience and substantial merits of the case for those reasons were established to lie with the Applicant - Granted - Director General, Department of Justice (Formerly known as Ministry Of Justice) -v- Civil Service Association of Western Australia Incorporated - PRES 36 of 2002 - President - SHARKEY P - 20/12/02 - Government Administration.....	47
<sup>4</sup> Application for stay of operation in Matter No. 1502 of 2001 pending appeal to Full Bench - President reviewed relevant sections of the Act and applied principles and found that the application was incompetent because there cannot be a stay of operation of a decision or part thereof when it has not been appealed against - Further, President was not satisfied that there was a serious issue to be tried and no exceptional circumstances existed to justify the making of the order sought - Dismissed - Mr AG Matthews -v- Cool or Cosy Pty Ltd; Ceil Comfort Home Insulation Pty Limited; Citigroup Pty Ltd - PRES 34 of 2002 - President - SHARKEY P - 11/12/02 - Construction Trade Services.....	52
<b>SUPERANNUATION</b>	
Application re contractual entitlements - Applicant argued that he was owed wages, tool and fuel allowances, annual leave and superannuation - Respondent argued that it was not able to pay Applicant, as he no longer owns the business - Commission found that pursuant to the Minimum Conditions of Employment Act 1993, Applicant was entitled to be paid the wages he would have earned between 01/01/02 - 21/01/02, a proportion of the holiday pay as at 21/01/02 and superannuation, although it had no jurisdiction to enforce superannuation payments - Claim for tool and fuel allowance was not made out - Granted in Part - Mr D Smith -v- Zoulfikar Rahal - APPL 1538 of 2002 - BEECH SC - 03/12/02 - Other Services.....	614
Application re unfair dismissal and contractual entitlements seeking compensation, salary in lieu of notice, payment for bonuses, accrued annual leave, superannuation contributions and overtime payments - Applicant argued that there was no valid reason for her dismissal and that she was never warned her employment was in jeopardy, by reason of financial performance or otherwise - Respondent argued that Applicant's dismissal was for financial reasons, that Applicant had also breached her contract of employment by arranging placement of a friend on a without fee basis and that she displayed gross disloyalty by seeking alternative employment whilst she was engaged by the Respondent - Commission reviewed authorities, MCE Act and found inter alia, that there was a substantive and justifiable reason for the termination of the Applicant's employment and that Applicant had not established her claims - Dismissed - A McNamara -v- Loton Holdings Pty Ltd (ACN 00 - APPL 2223 of 2001 - KENNER C - 01/05/03 - Business Services.....	1224
<b>TERMINATION</b>	
<sup>2</sup> Appeal against Decision of Commission (82WAIG2188) re unfair dismissal - First Appeal No. FBA38/2002 - Appellant grounds of appeal was against the declaration that she was not dismissed in January 2001 and the order for compensation insofar as it "failed" to take account of the income that Appellant would likely have received from her participation in the on-call roster system operated by the Respondent - Second Appeal No. FBA39/2002 - Cross appeal by Respondent appealing against part of the decision relating to the Appellant's dismissal and her entitlement to compensation being a casual employee - Full Bench reviewed authorities, all of the evidence and material and all of the submissions, and found that there has been no error in the exercise of the discretion as alleged established, and no ground of appeal had been made out - Dismissed - Brian Ferrall Twaddle t/a Mount Hospital Pharmacy -v- Mrs CJ Byrne - FBA 38,39 of 2002 - Full Bench - SHARKEY P/GREGOR C/SCOTT C - 20/12/02 - Health Services.....	5
Application re unfair dismissal - Applicant argued that he withdrew from his work after experiencing difficulties in the workplace and that he did not wish to be reinstated - Respondent argued that he was not terminated but he resigned and that there was no jurisdiction - Commission found that Applicant resigned and that his claim of unfair dismissal could not be substantiated - Dismissed for want of jurisdiction - Mr A Aung -v- Kresta Blinds and Curtains - APPL 1653 of 2002 - WOOD C - 11/12/02 - Machinery & Equipment Mfg.....	149

## CUMULATIVE DIGEST—continued

## TERMINATION—continued

	Page
Application re unfair dismissal - Applicant argued that dismissal was unfair because Respondent had to make a choice between his family or her and he chose his family and also asked Applicant what it would take to have her leave her job quietly - Further, Applicant argued that Respondent alleged that she had misappropriated money which was not the case and established that it was not the case - Respondent argued that Applicant had agreed to resign, the basis of the resignation was that she be paid her entitlements plus two week's pay and at the time he believed that Applicant had written cheques in the amounts which he thought was inappropriate and he attempted to stop payment - Commission found that the relationship came to an end by the dismissal of Applicant in the circumstances where Respondent was trying to balance competing obligations of Applicant as an employee and family obligations - Further, Commission found that Applicant had never misappropriated money and that Applicant had been the subject to damaging rumours that she had misappropriated the Respondent's funds - Finally, Commission awarded six months compensation - Granted - Mrs KM Bristow -v- Bay of Isles Aboriginal community Inc. - APPL 873 of 2002 - GREGOR C - 09/12/02 - Community Services.....	150
Application re unfair dismissal - No appearance by the Applicant - Respondent submitted that the matter should be dismissed on the basis that the Applicant was not genuinely pursuing the application and that considerable costs and inconvenience had been incurred by the Respondent - Commission mailed a copy of the transcript of the proceedings of 21 October, 2002 to Applicant and advised him that he had until 20 November to advise the Commission as to why the matter should not be dismissed - Commission received no response to the letter and was satisfied that Applicant had been given every opportunity to prosecute his claim and had chosen not to do so - Dismissed - Mr KD Bolitho -v- The Wang Family Trust Trading name Geraldton Meat Exports - APPL 235,431 of 2002 - HARRISON C - 31/12/02 - Food, Beverage and Tobacco Mfg.....	154
Application re unfair dismissal seeking compensation - Applicant argued that in all of the circumstances, given the lack of procedural fairness, his termination was unfair on the basis that the requirements under s.41 of the Minimum Conditions Employment Act 1993 were not met - Respondent argued there was no unfair dismissal, that the onus on the Applicant to demonstrate that he was unfairly terminated had not been made out and that there was no breach of s.41 of the MCE Act as numerous discussions were held with the Applicant, and consultation took place in order to avoid or minimise the effect of significant change on the Applicant - Commission reviewed authorities, Part 5 of the MCEA and found that Applicant was treated unfairly on the basis that he was not given sufficient notice of his termination in order to canvass alternatives, that it was also clear that the requirements of Part 5 of the MCEA in relation to attend job interviews were not met by the Respondent and given that the Applicant was afforded insufficient notice and was not given time to attend job interviews, his termination was unfair - However, given that the Applicant was paid a redundancy payment of 26 weeks' pay and five weeks' pay in lieu of notice, Commission concluded that the amount of five weeks' pay as compensation was to be offset against these payment, thus no monies were due to be paid to the Applicant - Dismissed - Mr PJ Caffery -v- Chubb Security Australia Pty Ltd t/as Chubb Protective Services - APPL 390 of 2002 - HARRISON C - 02/12/02 - Personal and Other Services.....	155
Application re unfair dismissal - Applicant argued that no appropriate training was given to her during her term of employment, that she was not given warning about her performance or advised that her employment was in jeopardy and that she believed she was dismissed so that another employee could take her job - Respondent argued that Applicant was dismissed for unsatisfactory work performance following numerous discussions with her during the course of her employment and that her performance never reached the required standard - Commission reviewed authorities and found on evidence that Applicant was regularly advised about her performance, she was warned and knew that her job was in jeopardy and that her performance never reached an adequate level - Further, Commission found that in all circumstances, Applicant had failed to prove her allegations of unfair dismissal - Dismissed - Miss K Grant -v- Boomerang Environmental Industr - APPL 752 of 2002 - WOOD C - 24/12/02 - Business Services.....	161
Application re unfair dismissal seeking compensation - Respondent argued that on the day in question not only the Applicant told the Managing Director she resigned, she also told her personal staff and conducted herself in a fashion that indicated that she had resigned - Commission considered all the evidence and submissions and found that Applicant did in fact resign her position with the Respondent and because she resigned, she had no standing under s.29(1)(b)(i) to bring the application - Dismissed for want of jurisdiction - Mrs K Thomas -v- Perth Office Systems Pty Ltd t/a Ricoh Business Centre - APPL 399 of 2002 - GREGOR C - 10/12/02 - Business Services.....	177
<sup>2</sup> Appeal against Decision of Commission (82WAIG2280) re unfair dismissal and contractual entitlements - Applicant argued that the learned Commissioner was in error when Commission failed to order general discovery and that such an order should have been made and thereby an error was made in the exercise of the Commission's discretion - Respondent argued and submitted that an order for discovery was not of such importance that in the public interest an appeal should lie and that the decision appealed against was both interlocutory and discretionary and could not readily be appealed against - Full Bench found that it would be loathe to consider an appeal on a point of practice and procedure or an interlocutory decision and thus unduly delay proceedings and reluctant to interfere with the exercise of the discretion of the Commission in such matters - Dismissed - Ms P Alderson -v- St Columba - Kingswood College - FBA 41 of 2002 - Full Bench - SHARKEY P/COLEMAN CC/HARRISON C - 30/01/03 - Education.....	215
<sup>2</sup> Appeal against Decision of Commission (82WAIG2195) re unfair dismissal - Appellant argued that the Commission and the Learned Commissioner did not act in equity, good conscience and substantial merits of the case, that the Learned Senior Commissioner did not see the alleged offensive gesture and thus, included contempt of court - Respondent argued that appeal should be dismissed - Full Bench found that the decision was a discretionary decision and that it was for Appellant to establish that the exercised discretion was miscarried - Further, Full Bench found that Appellant had failed to establish his case, that there was no evidence of procedural or substantive unfairness in the dismissal of the application established and no grounds of the appeal were made out - Dismissed - Mr R De Vos -v- Minit Australia Pty Ltd (ACN 000328825) - FBA 40 of 2002 - Full Bench - SHARKEY P/COLEMAN CC/WOOD C - 08/01/03 - Personal & Household Good Rtlg.....	219
<sup>2</sup> Appeal against Decision of Commission (82WAIG1298) re unfair dismissal - Appellant argued that Commissioner failed to direct himself as to the onus of proof with respect to the issue of probation and ought to have found that the onus of proof was with Respondent and ought to have found that Respondent on the balance of probabilities had failed to prove that a three month probationary period applied to the Appellant's employment contract - Respondent opposed the appeal - Full Bench found that this was a discretionary decision and the principle applied was that Full Bench had no warrant to interfere with the decision unless Appellant established that there was a miscarriage of the exercise of discretion at first instance - Full Bench found that the discretion was miscarried according to the principles from the evidence given by Appellant and upheld the Appeal - Appeal upheld and the decision at first instance varied - Mr R Koster -v- Volute Pty Ltd trading as Catt Design - FBA 32 of 2002 - Full Bench - SHARKEY P/GREGOR C/HARRISON C - 08/01/03 - Other Manufacturing.....	225
Application re unfair dismissal - Applicant lodged an application for an extension of time in which to file application and argued that the reasons for the delay related to her pregnancy, the birth of her child, her recovery and the illness of the child - Respondent opposed the applications - Commission found that there was no power to extend time in accordance with s.29(3) of the I.R. Act, in respect of an application filed on 16 October 2002 relating to a termination of employment in May 2002 - Dismissed - Mrs RJ Alberghini -v- Dr Geoffrey Bower Isotope Imaging Hollywood Hospital - APPL 1729 of 2002 - SCOTT C - 10/01/03 - Health Services.....	326
Application re unfair dismissal - Applicant argued that dismissal was unfair because Respondent gave him no warnings about his performance, that he had only twice not turned up to work due to illness and was terminated in a summary fashion without reason and in an inappropriate manner - Respondent argued that Applicant was a casual employee, and as one hour's pay in lieu of notice was given as provided for in the Award, Applicant was lawfully terminated - Further, Respondent argued that there were good reasons to terminate because he was not turning up to work and there were complaints about Applicant's attitude and his cleaning standards - Commission found Applicant was denied procedural fairness given the way he was terminated, that he was not given any notice when Respondent effected his termination and as reinstatement was impracticable, compensation was awarded - Granted - Mr SVC Datta -v- Mastercare Property Services (WA) Pty Ltd - APPL 826 of 2002 - HARRISON C - 22/01/03 - Business Services.....	327
Application re unfair dismissal - Applicant argued that dismissal was unfair because she was harassed out of her employment and her hours of work were being cut - Respondent argued that Applicant was aware her hours were at the Respondent's discretion and she was offered work - Commission found that there was no evidence before it that the Respondent's conduct in these circumstances constituted a breach of a fundamental condition of the contract of employment such as to enable the employee to treat the employment as brought to an end - Further, Commission was not satisfied that there was a dismissal, or a termination at the initiative of Respondent - Dismissed - Ms N English -v- The Windsor Hotel South Perth Pty Ltd - APPL 1284 of 2002 - SCOTT C - 03/02/02 - Accommodatn, Cafes&Restaurants.....	331

## CUMULATIVE DIGEST—continued

	Page
TERMINATION—continued	
Application re contractual entitlements - Applicant sought payment of commission owed under his contract of employment - No appearance for the Respondent - Commission found on evidence that Applicant was due under his contract of employment the sum of \$1,950 gross in commission and ordered the Respondent to pay that amount to the Applicant - Granted - Mr A Greeneklee -v- Ozzi-Tech Security Pty Ltd - APPL 1379 of 2002 - WOOD C - 28/01/03 - Personal & Household Good Rtlg.....	332
Application re unfair dismissal and contractual entitlements - Applicant argued that she intended to lodge her application within the 28 day time frame and lodged it in the Commission within the 28 day time limit, subsequent to lodging her application she was informed by Registry that Form 1 was missing from her application and needed to be completed and returned, she received a copy of a Form 1 on 9 October 2002 and lodged Form 1 the next day - Respondent argued that Applicant was terminated on 6 September 2002 - Commission found that Applicant was not sent the correct form in the first instance and that there was a valid reason why Applicant did not comply with the required 28 day time frame for lodging her application, it was clear that as soon as Applicant received the Form 1 she filed her application promptly the next day - Application to accept Applicant's claim which was lodged out of time granted - Mrs ES Harrison -v- Emmanuel Michael Papadoulis T/A Great Australian Travel Centre - APPL 1701 of 2002 - HARRISON C - 16/01/03 - Other Services.....	333
Application re unfair dismissal seeking reinstatement - Applicant argued that there was no reason for his termination, that he was denied natural justice in relation to the procedure adopted by the Respondent to terminate him and that Respondent should not have formed the view that he had misconducted himself given that the original conviction had been quashed on appeal and the DPP determined not to proceed with a retrial - Respondent argued that Commission lacked jurisdiction to deal with the matter as the Applicant was on a fixed term contract which expired due to the effluxion of time - Further, Respondent argued inter alia, that the Applicant's termination was capable of being effected given the evidence before the jury at first instance, and the jury's decision in finding Applicant guilty - Commission found on facts and was satisfied on balance that Respondent had not demonstrated that Applicant was guilty of misconduct justifying summary dismissal - Commission found that Applicant was treated unfairly and harshly and was denied procedural fairness in relation to the way these allegations were put to him - Further, Commission found that Respondent's conduct on this occasion was extremely callous and oppressive and ordered compensation in lieu of reinstatement - Upheld and Order Issued - " I" -v- Mr Paul Albert Director General Department of Education Western Australia - APPL 347 of 2002 - HARRISON C - 15/01/03 - Education.....	335
Application re unfair dismissal - Applicant argued that dismissal was unfair because she was terminated without warning, that she was unaware that Respondent was dissatisfied with her performance until the day she was terminated and sought compensation - Respondent argued that Applicant was dismissed on the grounds of unsatisfactory performance and poor attitude and that Applicant had been counselled on a number of occasions about her unsatisfactory performance prior to the termination of her employment - Commission found that Respondent had made up their mind to terminate Applicant's employment about six weeks before they did so and could have warned Applicant that she had six weeks to improve but did not do so - Further, Commission found that Applicant was unfairly dismissed and that reinstatement was not practical and awarded compensation - Granted - Mrs C Johnson -v- Millswan holdings Pty Ltd ACN 063 694 299 T/A Drivewest Car Rentals - APPL 1076 of 2002 - SMITH C - 31/01/03 - Motor Vehicle Rtlg & Services.....	348
Application re unfair dismissal seeking orders pursuant to s.23A of the I.R. Act - Applicant argued that at no time had the quality of his workmanship been raised as an issue with him, nor had he been warned that his position was in jeopardy - Respondent argued inter alia, that Applicant was warned verbally on several occasions that he must be accountable for the quality of printing produced and that strict checking procedures had to be complied with, however, he did not do so and continued to produce work of poor standard - Commission found that Applicant did identify the difficulties with the quality of printing and chemicals used, that he made every effort to resolve them and that he was hindered in that process by the Respondent providing incorrect chemicals - Commission further found that Respondent's conduct was premeditated, that Applicant was dismissed in a summary fashion, therefore, dismissal was unfair and awarded compensation - Granted - Mr J Leeson -v- Classic FB Holdings - APPL 701 of 2002 - GREGOR C - 03/02/03 - Other Services.....	355
Application re unfair dismissal - Applicant argued that dismissal was unfair because she was on probation at the time and she did not receive any kind of feedback or warning that her employment was not viewed positively or that Respondent was not satisfied with her work - Respondent argued that Applicant was not meeting the required standard of performance - Commission found on evidence that Applicant's dismissal was unfair because Applicant was not given targets, budgets or levels of competent performance to meet and she would not have known how she was performing relevant to any set target - Commission found that reinstatement was impracticable and ordered compensation - Granted - Mrs L McDade -v- Paceway Mitsubishi - APPL 1649 of 2002 - BEECH SC - 14/01/03 - Motor Vehicle Rtlg & Services.....	358
Application re unfair dismissal seeking re-instatement - Applicant argued that dismissal was not justified because the Respondent wrongly assumed he was threatening to leave and that was why a decision was made to dismiss him - Further, Applicant argued that if the Respondent was of the view that his demands could not be met, he should have simply been told what their terms were and he would have accepted their decision - Respondent argued inter alia, that Applicant made demands that the directors were not able to meet as they had lost trust in him therefore, they had no choice but to terminate him - Commission reviewed authorities and found that Applicant's conduct constituted a repudiation of the terms of his contract of employment, however, the repudiatory conduct did not warrant summary dismissal - Further, Commission found inter alia, that although the circumstances of the termination were unlawful, it did not render the termination by the Respondent to be harsh or oppressive given that Applicant was paid two months' pay after his employment was terminated - Dismissed - Mr T Page -v- WSP IMP. & EXP Pty Ltd T/A Workforce Safety Products - APPL 728 of 2002 - SMITH C - 31/01/03 - Services to Transport.....	361
Application re unfair dismissal - Applicant argued that Respondent's conduct towards her constituted a constructive dismissal by there being a breach of a fundamental term of the contract of employment, an implied term of trust and confidence and she had no alternative but to tender her resignation under pressure - Respondent argued that Applicant tendered her resignation after being approached regarding her unresponsive behaviour and attitude - Commission found that Respondent did not force Applicant's resignation rather, there was counselling and a warning about her attitude and Commission did not accept that Applicant had no alternative but to resign - Further, Commission concluded that there was no dismissal and accordingly, no jurisdiction on the part of the Commission to hear and determine such claim - Dismissed - MS CM Perriman -v- Heiniken Australia Pty Ltd - APPL 928 of 2002 - SCOTT C - 30/01/03 - Food, Beverage and Tobacco Mfg.....	367
Application re unfair dismissal - Applicant argued that the dismissal was unfair because Applicant had tendered her resignation or offered to resign but was told by Respondent to "piss off" - Respondent opposed the application and had sought an adjournment but presented no evidence - Commission dismissed the application for an adjournment and found in favour of Applicant in that Applicant was dismissed summarily and did not resign from her employment - Further, Commission found that reinstatement was not an option and awarded compensation - Granted - Ms SM Theil -Harkin -v- Elizabeth Wiese & Associates, Solicitors - APPL 886 of 2002 - WOOD C - 21/01/03 - Other Services.....	369
<sup>2</sup> Appeal against Decision of Commission (82WAIG2690) re unfair dismissal and contractual entitlements - There were two appeals against the Decision of the Commission and both were heard together - Appellant Respondent argued that Commissioner erred in law in finding that Applicant had been unfairly dismissed due to absence of reasonable notice and that Commissioner erred in law in finding that there was a failure to pay Applicant redundancy payment and a contractual entitlement for unpaid call outs - Appellant Applicant argued that Commissioner failed to take into account relevant factors namely the time that Appellant would take to return to previous remuneration levels and the consequent failure to compensate Appellant Applicant for such loss and injury - Full Bench found that the dismissal correctly was found to be harsh, oppressive and unfair because only three days notice of termination of the contract was given when three months notice was what should be implied - Further, Full Bench found that the loss caused by the unfair dismissal was the loss of reasonable notice quantifiable at and compensate by an amount equal to three months salary as ordered - Further, Full Bench dismissed Appeal No. FBA 47 of 2002 and Upheld Appeal No FBA 48 of 2002 in part and varied the decision at first instance by ordering the payment of an amount equal to one month's salary for compensation in addition to that already ordered to be paid - Orders issued - EPath WA Pty Ltd -v- Mr I Adriansz - FBA 47, 48 of 2002 - Full Bench - SHARKEY P/COLEMAN CC/BEECH SC - 21/02/03 - Health Services.....	454

## CUMULATIVE DIGEST—continued

## TERMINATION—continued

	Page
<sup>2</sup> Appeal against Decision of Commission (82WAIG1298) re unfair dismissal - Full Bench issued supplementary reasons for decision regarding that monies might have been paid in reduction to the amount which the order subsequently ordered or will order to be paid was not a matter for the Full Bench - Further, Full Bench found that the part payment of the amount of the order was not a relevant matter to the order made - Order issued - Mr R Koster -v- Volute Pty Ltd trading as Catt Design - FBA 32 of 2002 - Full Bench - SHARKEY P/GREGOR C/HARRISON C - 12/02/03 - Other Manufacturing .....	465
Complaint re breach of Workplace Agreement - Claimant sought unpaid entitlements pursuant to the workplace agreement, including claims for pre-judgment interest, penalties pursuant to s83(6) of the I.R. Act, 1979 and costs - Defendant conceded that the Claimant was entitled to payment for normal working hours and holiday pay but denied liability for the payment of pay in lieu of notice, maintaining that the Claimant resigned, and in such circumstances was not entitled to pay in lieu of notice under the workplace agreement - Industrial Magistrate was not satisfied based on the evidence presented that the Claimant was dismissed, therefore his claim for one week's pay in lieu of notice was dismissed - Further, IM issued Orders by consent, that Respondent pay the Claimant the amount of \$1058.00 plus interest fixed at \$40.00, and reimburse the Claimant the amount of \$40.00 being the cost of making the claim - Reasons for Decision Issued - Mr P Maindok -v- Cabletech Electrical Pty Ltd - M 124 of 2001 - Industrial Magistrate - Tarr IM - 22/11/01 - Other Services .....	551
Complaint re breach of Workplace Agreement re unfair dismissal - Complainant argued that dismissal was unfair and sought reinstatement or compensation and that Defendant had failed to pay him entitlements under the workplace agreement including annual leave and sick leave - Defendant argued that Complainant had misappropriated money and also that Complainant had been overpaid owing Defendant approximately \$2000 - Industrial Magistrate found that Complainant had been unfairly dismissed and there was no evidence established that monies had been misappropriated - Further, Complainant was entitled to annual leave, sick leave and other remuneration - Reasons for Decision Issued - Mr ID Riley -v- Healy Airconditioning Pty Ltd - CP 1 of 2001 - Industrial Magistrate - Cicchini IM - 15/08/01 - Personal & Household Good W/sg.....	556
Application re unfair dismissal - Applicant argued that the application was lodged out of time as she was waiting to be re-engaged and sought relief under s.29(3) of the Act - Commission found that if the application were to be rejected, the prejudice to the Applicant would outweigh that of the respondent, because the Applicant would be denied any benefit that could be achieved from the application - Further, Commission found that it would be unfair not to accept the application pursuant to s.29(3) - Granted - Mrs C Anderson -v- E'Co Australia Pty Ltd - APPL 1587 of 2002 - WOOD C - 23/01/03 - Other Services .....	574
Application re unfair dismissal seeking Orders pursuant to s.23A of the I.R. Act - Applicant argued that termination took effect at a later date than the date of notification - Respondent argued that Applicant was issued with numerous warnings - Commission stated that the test was whether there had been a 'fair go all round', which there had been - Further, Commission concluded that there had been nothing demonstrated before it which would indicate there had been any unfairness and that the dismissal took effect from the time the Applicant was notified - Dismissed - Mr S Balagopalan -v- Competitive Foods Pty Ltd (Trading as Hungry Jack's) Competitive Foods Pty Ltd - APPL 1513 of 2002 - GREGOR C - 10/02/03 - Food Retailing.....	575
Application re unfair dismissal seeking compensation and reinstatement - Applicant argued that the complaints leading to the dismissal were unfounded - Respondent argued that the Applicant was warned twice and had been afforded procedural fairness - Commission found that it was understandable and probable that the Respondent would have formed the view that they no longer had confidence in the Applicant and that the trust between employer and employee had broken down and the duty to patients had to be put first - Dismissed - Mr D Balchand -v- Mayne Health, trading as Joondalup Health Campus - APPL 383 of 2002 - WOOD C - 28/02/03 - Health Services .....	577
Application re unfair dismissal and contractual entitlements - Applicant argued that termination was unfair because she was given insufficient notice and was harsh in the way it was effected and sought compensation - Respondent argued that the reason to terminate Applicant's contract of employment was due to a redundancy situation and the process of effecting Applicant's termination was not unfair - Commission found that Applicant was terminated for a valid reason but was not given adequate notice due to the termination, the actual notice was too short and unreasonable - Further, Commission found that reinstatement was impracticable and awarded compensation - Upheld and Order Issued - Ms R Clements -v- Caldera Nominees Pty Ltd ABN 96276831947 T/as Harrington Brokers - APPL 1093 of 2002 - HARRISON C - 28/02/03 - Insurance.....	587
Application re unfair dismissal - Applicant argued that his termination was both procedurally and substantively unfair and was not a genuine redundancy - Applicant argued that there were no warnings about the impending redundancy and that requirements under the Minimum Conditions of Employment Act 1993 were not complied with - Respondent argued that the Applicant had not demonstrated that another employee should have been chosen for redundancy instead of him and that MCE Act had been complied with - Commission found that redundancy itself is a sufficient reason for dismissal and that not every denial of procedural fairness will entitle an employee to a remedy - Commission found that termination was effected in an unfair manner and awarded Applicant payment for failure for compliance with MCE Act - Granted in Part - Mr AJ Evans -v- Theiss Pty Ltd - APPL 707 of 2002 - HARRISON C - 14/02/03 - General Construction.....	591
Application re unfair dismissal and contractual entitlements - Applicant argued that she was given insufficient notice of termination and was owed annual leave payments after having been forced to resign - Respondent argued that Applicant resigned of her own volition and therefore, was not entitled to notice or annual leave entitlements - Commission found that Applicant resigned of her own volition and not through actions by Respondent calculated to seriously damage the relationship of confidence and trust between parties - Commission found there was no constructive dismissal and Applicant was therefore not entitled to notice or annual leave payments - Dismissed - Mrs GFJ Greaves -v- The Sisters of Mercy Perth (Amalgamated) Inc trading as Santa Maria College - APPL 691 of 2002 - HARRISON C - 20/02/03 - Accommodatn, Cafes&Restaurants.....	596
Application re unfair dismissal seeking to amend particulars of claim - Applicant argued that she had no choice but to cease immediately as her equipment was taken away from her and sought to amend the date of termination - Respondent argued that application was lodged outside of the 28 day time limit - Commission found that there was no mutual agreement between the parties to waive the notice period and that Applicant was not given a choice in the matter because of the actions and requirements of the Respondent - Further, Commission accepted the Applicant's amendment to change the date of termination and concluded that the application was lodged out of time - Order Issued - Mrs PT Hicks -v- Western Australian Local Government Association - APPL 1525 of 2002 - SCOTT C - 21/02/03 - Other Services .....	603
Application re unfair dismissal - Applicant argued that he understood to be employed under a registered workplace agreement when terminated and thus filed a claim in the Industrial Magistrate's Court where a jurisdictional argument arose and the Industrial Magistrate found there was no registered workplace agreement - Respondent opposed the application and argued that that Commission had no jurisdiction to deal with matter - Commission found that application was lodged 41 days after matter was unsuccessful in the Industrial Magistrate's Court and there was no valid reason for the delay thus it was dismissed for want of jurisdiction - Dismissed for want of jurisdiction - Mr GW Rogers -v- DMW Constructions Pty Ltd - APPL 1833 of 2002 - HARRISON C - 05/03/03 - Construction Trade Services .....	606
Application re unfair dismissal - Applicant argued that Respondent had breached section 41 of the Minimum Conditions of Employment Act 1993 in that it did not properly discuss or inform Applicant of its decision to restructure, did not provide proper criteria for assessing who was to be made redundant and that another employee should have been made redundant instead of Applicant - Respondent argued that there was no procedural unfairness in the redundancy as Applicant was advised soon after the decision was made, was offered outplacement assistance and was paid a generous redundancy payment - Commission found that there was no breach by Respondent of section 41 of the Minimum Conditions of Employment Act to warrant a finding of unfair dismissal - Dismissed - Ms AV Ross -v- Diamond Offshore General Company - APPL 1133 of 2002 - WOOD C - 07/03/03 - Other Services .....	608
Application re unfair dismissal seeking Orders pursuant to s.23A of the I.R. Act - Applicant argued that there was no notice given - Respondent argued that Applicant was consistently late for work and that complaints had been made about his driving habits - Commission found that Applicant had not discharged his onus of proof, that he had failed to work out the notice period and had therefore abandoned the contract of employment and that it had no jurisdiction to hear the claim - Dismissed - Mr TW Scott -v- Woodsies Windscreens - APPL 1607 of 2002 - GREGOR C - 14/02/03 - Machinery & Equipment Mfg.....	612

## CUMULATIVE DIGEST—continued

	Page
TERMINATION—continued	
Application re unfair dismissal - Applicant incorrectly lodged application in Industrial Magistrates Court and sought to remedy this - Respondent opposed the claim and argued that s.29(3) has application only in respect to dismissals effected subsequent to the enactment of enabling legislation - Commission found that there was no power for it to direct the Industrial Magistrates Court to remit the matter to this Commission as it did not have jurisdiction, despite the potential injustice to the Applicant - Dismissed - Mr J Thomson -v- St Barbara Mines Limited - APPL 1655 of 2002 - GREGOR C - 11/02/02 - Other Services .....	616
<sup>1</sup> Appeal against Decision of Full Bench (82WAIG212) re dismissed appeal in respect of an unfair dismissal claim - Appellant argued inter alia, that the Full Bench erred in law in failing to give proper consideration to and provide adequate reasons for two findings in particular, namely, that the requirements of the Minimum Conditions of Employment Act were complied with, and that the appellant waived his right to discuss the adverse effects of his redundancy at the meeting of the 18 May 2000 - Industrial Appeal Court reviewed authorities, Acts and evidence and found, inter alia, that the Appellant was entitled to succeed in his appeal in respect of his contention that Respondent employer failed to comply with his obligation to inform and discuss imposed upon the employer by s.41 of the MCE Act and that it was appropriate for the decisions made by the Commissioner and the Full Bench to be set aside and remitted to Commissioner Wood for a determination to be made as to whether the Appellant was entitled to relief having regard to the reasons of the Industrial Appeal Court - Upheld and Remitted - Mr GE Garbett -v- Midland Brick Company Pty Ltd - IAC 3 of 2002 - Industrial Appeal Court - 10/03/03 - Non-Metallic Min Product Mfg .....	893
<sup>2</sup> Appeal against Decision of Commission (82WAIG2690) re unfair dismissal and contractual entitlements - Solicitors for the Respondent wrote to the Commission requesting that the figure of compensation as contained in the Order of the Full Bench be amended because it was an incorrect figure and did not reflect the reasons for decision of the Full Bench - Full Bench concluded that pursuant to s.27(1)(m), it had jurisdiction to correct the order because the matter was still before the Commission until the 'slip rule error' in its order was corrected to reflect its decision - Supplementary Reasons for Decision and Correcting Order Issued - Mr I Adriansz -v- EPath WA Pty Ltd - FBA 48 of 2002 - Full Bench - SHARKEY P/COLEMAN CC/BEECH SC - 28/03/03 - Health Services.....	917
<sup>2</sup> Appeal against Decision of Commission (82WAIG3011) re unfair dismissal and contractual entitlements - Appellant argued that the Commissioner erred in having grave reservations about the evidence given by Applicant and that Commissioner erred in having no hesitation in preferring the evidence of Respondent to that of Appellant - Further, Commissioner erred in fact in finding that the written contracts were identical except for the commencement and expiry dates and erred in not finding that the true contract between the parties was a single ongoing contract of employment - Respondent opposed the appeal - Full Bench found that there was clear evidence that Appellant had entered and knew he had entered separate fixed term contracts which he recognised as did other witnesses as being different from permanent - Further, Full Bench found that there was no error in the decision in the first instance and that Commissioner correctly found that there was no dismissal and therefore the Commission was without jurisdiction and the appeal was dismissed - Dismissed - Mr R Gallotti -v- Argyle Diamond Mines Pty Ltd Trading as Argyle Diamonds - FBA 50 of 2002 - Full Bench - SHARKEY P/COLEMAN CC/BEECH SC - 13/03/03 - Other Mining.....	919
<sup>2</sup> Appeal against Decision of Commission (82WAIG3020) re unfair dismissal and contractual entitlements - Appellant argued that Commissioner erred in not finding that the dismissal was wrongful and erred in holding that there were implied in the Appellant's contract of employment the terms and conditions of Respondent's drug and alcohol policy - Further, Commissioner erred in not finding the Respondent's direction that Appellant undergo a random drug and alcohol test was unlawful and unreasonable and its subsequent conduct was unlawful, unreasonable and unfair and that Commissioner erred in not holding that the dismissal was harsh, oppressive or unfair - Respondent opposed the appeal - Full Bench found that Appellant's employment was governed by the Award and was harshly, oppressively or unfairly dismissed and that Commission should have found the Respondent had effected an unfair dismissal - Further, Full Bench found that the grounds were made out and that Full Bench was entitled to substitute the exercise of its discretion for that of the Commission at first instance applying the findings that should have been made - Appeal upheld and decision at first instance suspended and remitted to a Commissioner - Ms DCD Larkin -v- Boral Construction Materials Group Ltd - FBA 49 of 2002 - Full Bench - SHARKEY P/COLEMAN CC/BEECH SC - 20/03/03 - Other Mining.....	929
Complaints re unfair dismissal - Claimants argued inter alia, that Respondent failed to give them an opportunity to defend or rebut any allegations of misconduct justifying dismissal, and sought reinstatement together with the recovery of remuneration lost - Respondent denied allegations and denied that it had failed to afford procedural fairness - Further, Respondent argued that the actions constituted gross misconduct, that the dismissal was justified and not harsh or oppressive and that Claimants were not entitled to the amounts claimed or any amounts at all - Industrial Magistrate reviewed authorities, Acts and Regulations and found that the decision to terminate resulted directly from the raising of the safety issue, that the decision was made without merit and it was harsh, oppressive and unfair - Further, IM found that the factual circumstances which reflect the actual operation of the contractual relationship demonstrated that the employment relationship was a casual one, that the continuing relationship between the Claimants and Respondent did not in law evince a continuing contract and that it was without jurisdiction to hear and determine the claims - Reasons for Decision Issued - Mr LJA Clark -v- Marine Fire & Security Pty Ltd - M 363,364 of 2001 - Industrial Magistrate - Cicchini IM - 27/03/03 - Other Business Services .....	1005
Application re unfair dismissal and contractual entitlements - Applicant argued that the dismissal was unfair because safety issues were never raised and were not an issue and sought compensation - Further, Applicant sought benefits under his contract of employment in relation to notice of termination - Respondent denied Applicant was unfairly terminated and argued that Applicant was not due any monies pursuant to his contract of employment - Further, Respondent argued that it was appropriate to terminate Applicant's contract of employment as Applicant continually defied instructions and had received adequate warnings regarding his performance and safety record - Commission found Respondent may have had some concerns about aspects of the Applicant's performance however these concerns were never relayed to the Applicant and there was no warning - Further Commission found that there was no substantive reason for the termination of Applicant's contract of service which was procedurally unfair and that Applicant was not given sufficient opportunity to respond to the allegations against him - Commission found that Applicant was unfairly terminated and awarded compensation and was also awarded contractual benefits which consisted of underpayment of notice and vehicle expenses - Upheld, compensation awarded and contractual benefits partially granted - Mr A Cockram -v- Emporio Homes Pty Ltd, Patricia Edingertha Emporio Property Consultants - APPL 1043 of 2002 - HARRISON C - 18/03/03 - General Construction .....	1026
Application re harsh, oppressive and unfair dismissal seeking compensation - Applicant argued that she did not resign from her employment but was unfairly dismissed because of an accusation of theft - Respondent argued that he was not accusing Applicant of any wrongdoing, that he requested Applicant to drop off the keys after Applicant advised him that she was finishing because she was starting a new job - Commission reviewed authorities and found on evidence that Applicant was dismissed and the dismissal was harsh oppressive and unfair - Further, with regard to compensation, Commission found that in the absence of any evidence to make findings, it was not open to determine any compensation for loss as the Applicant had failed to establish it - Declaration Issued - Ms SE Dunn -v- Brian Bentley and Pauline Bentley and Joseph Sherlock in partnership T/A Video Ezy Woodbridge - APPL 1192 of 2002 - KENNER C - 04/04/03 - Personal Services.....	1033
Application re unfair dismissal - Applicant argued that dismissal was unfair because of the manner it was conducted, that she felt humiliated and devastated by her treatment by Respondent, and that she was also not given any notice or opportunity to discuss the matter - Respondent argued that Applicant had been made redundant effective immediately as there was no other roles available for her in the organisation, that she was paid four weeks' redundancy payment and that the redundancy was genuine - Commission found that Applicant was unfairly dismissed as the Minimum Conditions of Employment Act had not been complied with in a number of respects - Further, Commission found that reinstatement was impracticable and ordered that Applicant be paid notice payment, compensation and injury - Upheld and Order Issued - Ms JL Fitzgerald -v- Telis Pty Ltd - APPL 576 of 2002 - HARRISON C - 20/03/03 - Other Services .....	1036
Application re unfair dismissal and contractual entitlements - Applicant argued that he was unfairly dismissed and that there was a contract of employment in place which had been breached - Further, Applicant argued that after a workplace accident had occurred he was removed from the mine site and not offered any further work - Respondent argued that there was no requirement for Applicant to return to the mine site and that ongoing offers of a similar nature were made - Commission found that contract of employment came to an end by frustration, by the operation that the contract was brought to an end beyond the Respondent's control - Further, Commission was not persuaded that in all the circumstances the Respondent did other than treat the Applicant fairly - Dismissed - Mr DW Helier -v- Belminco Pty Ltd - APPL 1255 of 2001 - KENNER C - 06/12/02 - Services to Mining .....	1041

## CUMULATIVE DIGEST—continued

	Page
TERMINATION—continued	
Application re unfair dismissal and contractual entitlements - Applicant argued that Respondent's conduct evinced an intention to force him to resign and that he was left no option but to resign and that Respondent had breached a fundamental condition of the contract of employment in that it had failed to administer the bonus and failed to pay entitlements owed - Respondent argued that Applicant had tendered his resignation which was accepted and that the letter of resignation did not indicate any specific problems - Commission found that Applicant had tendered his resignation, that there was no linkage between the resignation and the bonus and Respondent did not breach the contract of employment - Further, Commission found that Respondent owed Applicant two days annual leave - Order Issued - Mr PA Hirschberg -v- Logica Pty Ltd - APPL 1518 of 2002 - SCOTT C - 07/03/03 - Health Services.....	1043
Application re unfair dismissal and contractual entitlements - Applicant argued that employment terminated without notice on his return from holidays and found upon a visit for severance pay a new manager had been appointed - Applicant sought compensation and the reimbursement of court costs - Respondent failed to appear - Commission reviewed authorities and found that Applicant was terminated, that he was denied procedural fairness as no warnings were given to him, that no notice was given to him that he was to be terminated nor was the Applicant paid any monies in lieu of notice on termination, nor was the Applicant given the opportunity to discuss the Respondent's view that it could no longer afford to pay the Applicant - Further, Commission found that Applicant was unfairly terminated both substantively and procedurally and awarded compensation in lieu of reinstatement, and denied benefits - Commission was not satisfied that the circumstances of this matter were such as to warrant an order for costs against the Respondent - Upheld and Order Issued - Mr SN Kirkham -v- Premium Partners Pty Ltd t/as Allsteel Designs - APPL 1130 of 2002 - HARRISON C - 28/03/03 - General Construction.....	1050
Application re unfair dismissal - Applicant argued that application was lodged out of time because he found the termination disturbing which led to the delay in lodging the application - Respondent argued that Applicant was made redundant - Commission found that there was no acceptable explanation for the delay and dismissed the application - Dismissed - Mr J Rodriguez -v- Parks Industries Pty Ltd - APPL 255 of 2003 - BEECH SC - 28/03/03 - Other Services .....	1053
Application re unfair dismissal and contractual entitlements - Respondent raised preliminary issue re Applicant incorrectly naming Respondent in the notice of application - Application by Applicant seeking to amend the Respondent's name was granted - Applicant argued that she had to resign after being terminated in order to obtain alternative employment and to ensure that Respondent would not claim commissions due to her for sales completed following her termination - Applicant argued that no issue was raised with her about any lack of co-operation between her and the other employees - Respondent denied that Applicant was unfairly terminated and argued that she resigned from her employment on her own volition - Further, Respondent argued that the commission claimed by Applicant was incorrect and counter proposed with a different quantum - Commission found on evidence that Applicant resigned of her own volition, thus no termination took place, and that Commission lacked jurisdiction to deal with this part of the application - Further, based on Respondent's contention that monies was owed to Applicant, Commission awarded the Applicant claim for benefits under her contract of employment - Dismissed for want of jurisdiction and application for contractual benefits partially allowed - Mrs MA Trimboli -v- Cusma Corporation Pty Ltd t/as Cusma Property Consultants - APPL 1276 of 2002 - HARRISON C - 28/03/03 - Property Services .....	1055
Application re unfair dismissal - Applicant argued that the application was lodged in the wrong jurisdiction as a result of the Commission's Registry giving him incorrect advice and incorrect forms to fill in which led to an application being filed in the Federal jurisdiction - Respondent argued that Applicant's explanation for the delay in lodging an application in the WAIRC was unacceptable and that Applicant did not make sufficient inquiries and also had the opportunity to lodge a claim in the WAIRC within the specified time - Commission found that Applicant did have advice that his initial application was lodged in the wrong jurisdiction but chose not to file an application in the WAIRC until the AIRC application was finally disposed - Further, Commission found that the onus was with Applicant to ensure that designated time frames are met - Dismissed - Mr R Turner -v- Air Liquide WA - APPL 1835 of 2002 - HARRISON C - 28/03/03 - Electricity and Gas Supply.....	1059
Application re unfair dismissal seeking extension of time - Applicant argued that circumstances surrounding the resignation amount to a dismissal of him by the Respondent - Further, Applicant argued that after the dismissal he could not afford the filing fee hence the delay in lodging his application - Commission applying the Principles set out in Azzalini's Case (ibid) found the length of the delay was not justifiable on the evidence before the Commission - Further, Commission found on Applicant's own evidence, that Applicant was not dismissed from his employment but left it voluntarily, therefore, there had been no dismissal to attract the jurisdiction in the Commission - Commission also found that Applicant's case would have no prospect to success and that it would be fair not to accept an application out of time in these circumstances - Dismissed - Mr P Scott -v- Sealcorp Holdings Limited (ABN 28 009 143 597) - APPL 289 of 2003 - GREGOR C - 01/04/03 - Insurance .....	1070
<sup>2</sup> Appeal against Decision of Commission (unreported) re unfair dismissal - No steps had been taken by Appellant to proceed with the appeal - Full Bench on its own motion according to Practice Note 2 of 2000, required by notice to the parties to submit to the Commission in writing, should they wish to do so, whether the appeal should be dismissed there having been no steps taken to advance it for a period of 12 months - No submissions had been received, on behalf of Appellant - Written submissions had been received on behalf of the Respondent - Full Bench unanimously found inter alia, that the equity, good conscience and substantial merits of the case required that the case be dismissed and more particularly, it was not in the public interest that a matter which had not been prosecuted for such an inordinate period of time, should not be dismissed (see s.26(1)(a) and s.27(1)(a)(ii) of the Act) - Dismissed for want of prosecution - Mr G De Freitas -v- Youanmi Site Service Road Train Bulk Haulage - FBA 15 of 2002 - Full Bench - SHARKEY P/SCOTT/WOOD C - 06/05/03 - Road Transport.....	1129
<sup>2</sup> Appeal against Decision of Commission (81WAIG1413) re unfair dismissal - On the day of the hearing Full Bench was advised by the Counsel for the Appellant that Appellant had died - Notwithstanding the opposition of the Agent for the Respondent, Full Bench adjourned the matter to enable the solicitors for the estate to consider what ought to be done - Application was made to substitute Appellant's wife as the executor of the will of the Appellant, as a party in lieu of the Appellant and application was not opposed - Full Bench reviewed authorities, Acts and found inter alia, that the order to substitute the executor for the deceased as Appellant was both necessary and required in order to serve the interests of justice, however, after the order for substitution was made, Appellant executor applied for leave to discontinue the appeal and the application was not objected to and was granted - Granted - Mr JA Fuller -v- North Beach Bowling Club - FBA 31 of 2001 - Full Bench - SHARKEY P/COLEMAN CC/BEECH SC - 05/05/03 - Sport and Recreation ....	1131
<sup>2</sup> Appeal against Decision of Commission (83WAIG168) re unfair dismissal - Appellant argued that the Learned Commissioner erred in his findings, on numerous grounds relating to his employment relationship with the Respondent - Full Bench applied legal principles, reviewed indicia and authorities cited therein to determine the totality and the true nature of the contract and found inter alia, that it was open to the Commissioner at first instance to find, and the Commissioner should have found, that Appellant was an "employee" within the meaning of the definition of "employee" in s.7(a) of the Act, because he was a person employed by an employer to do work for hire or reward, and also because he was, within the meaning of the definition in s.7(b) of the Act, at all material times, a person whose usual status was that of an employee - Further, Full Bench found that Respondent was an employer because it was at all material times a company employing one or more employees, some of whom were not the Appellant, and that should have been so found - Full Bench found that the matter before the Commissioner was therefore an industrial matter as defined, and he was entitled to take cognisance of it pursuant to s.23 and s.29 of the Act - Upheld, Decision at first instance suspended and matter remitted to the Commission at first instance - Mr B Ryder -v- Beaulieu of Australia Limited - FBA 2 of 2003 - Full Bench - SHARKEY P/COLEMAN CC/GREGOR C - 29/04/03 - Personal & Household Good W/sg.....	1133
Application re unfair dismissal seeking compensation - Applicant argued he believed he went about his job in a safe manner, the respondent did not raise any complaints about his approach to work although on a number of occasions safety had been brought to his attention and he was not given an opportunity to explain his story - Respondent argued the applicant's performance was acceptable except his attitude to safety and because of continued breaches of safety in the best interests of work colleagues and in accordance with the Respondent's duty of care the applicant was dismissed - Commission found that the applicant knew that there were concerns held by the respondent in regard to safety issues and even though the termination was procedurally flawed, the termination could not be categorised as harsh, oppressive or unfair - Dismissed - Mr JSM Babbage -v- Tony Sadler Pty Ltd - APPL 1764 of 2002 - GREGOR C - 05/05/03 - Personal & Household Good Retailing.....	1179

## CUMULATIVE DIGEST—continued

	Page
TERMINATION—continued	
Application re unfair dismissal and denied contractual entitlements - Applicant argued the dismissal was unfair as the respondents refused to re-engage him upon his return from leave, that he made several attempts to contact the respondents to advise them of his availability for work upon his return from leave and that he should be paid denied contractual entitlements, pay in lieu of notice, reimbursement for fuel and purchases of materials and pro rata annual leave - Respondents argued they did not dismiss applicant, that his employment was of a casual nature, he did not regularly work 38 to 40 hours per week and that his employment was not covered by an award - Further, that Applicant was not entitled to notice or pro-rata annual leave, that applicant did not make any arrangements to take a period of leave and there was no indication from the applicant that he intended to return to work - Commission found inter alia, that in the circumstances of there being no application to extend time then the application was automatically out of time, that applicant's employment could not be regarded as casual for the purpose of any considerations of the employment contract coming to an end and as the applicant bears the onus of proving his case, and as Commission was unable to conclude in his favour, on the basis of the evidence having equal weight, then unfortunately for the applicant his case in respect of the unfair dismissal claim must fail - Further, Commission found that the claim for denied contractual entitlements and re-imbursement of expense of purchasing materials had been made out - Ordered Accordingly - Mr JG Bethell -v- Peter Raymond & Caroline A Hunt trading as PR Hunt Builders - APPL 1724 of 2002 - SCOTT C - 08/04/03 - Construction Trade Services .....	1181
Application for extension of time to file application for harsh, oppressive and unfair dismissal - Applicant argued that the delay in lodging her application was due to Christmas break, that she wanted to prove that termination was in fact a true redundancy and that the work continued to be performed by someone else - Respondent argued that due to the economic situation there was a downturn in business at that time and needed to make the position redundant - Commission found on evidence that while the employer did not follow all appropriate processes, Applicant's position was in fact redundant and that the rationale for Applicant's delay in lodging her application was not reasonable, therefore the referral out of time was not accepted - Dismissed - Ms B Bryant -v- Boomerang Paper WA Pty Ltd - APPL 162 of 2003 - WOOD C - 25/03/03 - Paper Manufacturing .....	1188
Application for leave to amend Notice of Answer and Counter Proposal re an unfair dismissal claim - Respondent sought leave to amend certain paragraphs of the Notice of Answer and Counter Proposal and to further insert a counter-claim - Applicant did not object to certain paragraphs of the amended Notice of Answer and opposed other paragraphs - Commission found inter alia, that there will be a prejudice to the applicant if certain paragraphs were amended and ordered that other than paragraph 1.3 and item 2, leave was granted to the respondent to substitute the schedule to the Notice of Answer and Counter Proposal as presented to the Commission on 1/4/2003 - Granted in Part - Applicant subsequently sought from the Commission an order dismissing the application - Dismissed - Mr TH Cameron -v- Boston Scientific Pty Ltd ACN 071 676 063 - APPL 2084 of 2002 - BEECH SC - 04/04/03 - Health Services.....	1189
Application for extension of time to file application re unfair dismissal - Applicant argued the Commission ought to accept the application out of time as he was unable to get representation from Solicitors prior to 17 January 2003 due to the Christmas period, he was unaware of the 28 day time limit to lodge a claim in the Commission and he would suffer material prejudice if he was not able to proceed with him claim - Commission found that it would be unfair not to extend time in the present case therefore an order was made to accept the Applicant's application and the matter referred by the Commission to a Deputy Registrar for conciliation pursuant to s.32 of the Act - Granted - Mr B Carrington -v- Perth 4WD Wreckers Pty Ltd trading as The Perth 4WD Centre - APPL 99 of 2003 - KENNER C - 28/03/03 - Machining and Motor Veh Wholesaling .....	1192
Application for extension of time to file application re unfair dismissal - Applicant argued the delay came as a miscalculation by his legal representative and that his case was not a genuine redundancy but dismissal had occurred following safety concerns - Respondent argued that no safety issues had been raised by Applicant while working on the project completed immediately prior to the redundancy - Commission found there was an acceptable explanation for the delay, that the interest of justice outweigh the prejudice to the employer and that it would be unfair not to accept the application - Granted - Mr P Dawson -v- Devaugh Pty Ltd ABN 73 008 792 265 - APPL 175 of 2003 - COLEMAN CC - 10/04/03 - Construction Trade Services .....	1194
Application for extension of time to file application re unfair dismissal - Applicant argued the reason for delay in lodging the application was he was given incorrect information by the Department of Consumer and Employment Protection, the 28 day period was a mere technicality and the Applicant took steps to make it clear to the Respondent that he contested the dismissal and was intending to lodge an application - Respondent argued there was no notification by the Applicant that he intended to contest his dismissal and that it was prejudiced, as a potential key witness that was available if the application had been made within time was no longer in the country and unavailable - Commission found that the application was 98 days out of time and the Applicant did not show that there was an acceptable explanation for the delay in lodging his application and an order was issued dismissing the application - Dismissed - Mr V Dimitriou -v- Energy World Corporation Limited - APPL 360 of 2003 - BEECH SC - 22/04/03 - Other Services .....	1195
Application for extension of time to file an application re unfair dismissal - Applicant argued his application was filed out of time as he understood he had one month to lodge his application, not 28 days, that he did not have the money to lodge his claim until his son commenced work and he was able to borrow the money - Commission accepted the reasons for the delay and found that the delay was small and would not cause any prejudice to the respondent - Granted - Mr DW Evans -v- Jim Catchpole Civil Infrastructure - APPL 1763 of 2002 - WOOD C - 12/12/02 - General Construction.....	1197
Application re unfair dismissal seeking compensation - Applicant argued that she was not aware of formal disciplinary proceedings against her, she was not warned of the consequences of her alleged poor performance, she did not receive any written warnings, was not advised that her employment was in jeopardy, she was dismissed whilst on sick leave and the dismissal therefore was unlawful - Respondent argued that the Applicant was dismissed as she did not assist the Industrial Officer as required in her contract, did not attend for work during her required hours, shed was away from work during the day without authorisation or advising anyone and that she was seeking to repudiate her contract - Commission found the Applicant's treatment fell short of any sense of fairness, was not in accordance with her contract of employment, that dismissal was unfair and an order was issued awarding compensation - Order Issued - Ms M Hunter -v- Curtin Academic Staff Association - APPL 933 of 2002 - WOOD C - 08/04/03 - Education.....	1204
Application re unfair dismissal seeking compensation - Applicant argued she was unfairly dismissed by the respondent as a consequence of the disclosure of a federal police clearance - Respondent argued that the applicant was not unfairly dismissed and denies that it employed the applicant on the basis of what is described as a conditional offer of employment - Commission found that applicant was offered employment by the respondent, that the employment offer was conditional upon the satisfaction of a term that a federal police clearance was furnished by applicant and that it was open for the respondent to withdraw the offer on the basis that the condition precedent in the contract was not satisfied - Dismissed - Mrs JL Issit -v- Synergy - APPL 1459 of 2002 - KENNER C - 07/03/03 - Business Services .....	1212
Application re unfair dismissal - Applicant argued she was unfairly dismissed because of an injury, which meant she could not carry out her duties 100% - Respondent argued that his concept of a trial period was that at any point the Applicant and company could part and once it realised there was no point in carrying on until the end of the trial period, Applicant was advised of its decision - Commission found on evidence that Applicant was not dismissed because of injury and that in the context of a probationary employment the Respondent was within its rights not to continue with the probationary period - Dismissed - Mrs K Lecaude -v- Trident Produce Pty Ltd - APPL 1793 of 2002 - BEECH SC - 09/04/03 - Food, Beverage and Tobacco Mfg.....	1214
Application re unfair dismissal and contractual entitlements seeking two weeks' pay in lieu of notice - Applicant argued that he was threatened by Respondent to resign immediately otherwise monies owed to him would be withheld, was not allowed to work out his notice period, was given no warnings about his performance and his termination was unfair as no proper process was followed in effecting the termination - Respondent argued that there was no dismissal, that Applicant resigned of his own volition and as Applicant resigned, no notice period was due - Commission reviewed authorities and found that Applicant was terminated at the instigation of the employer, thus a dismissal did take place - Further, Commission found that the Applicant was denied procedural fairness, that he was not given notice of his termination, that he was not given opportunity to respond to the issues, therefore termination was both substantively and procedurally - Commission awarded payment of two weeks' notice in accordance with the Award and also awarded compensation for loss - Upheld and Orders Issued - Mr ALC Lewis -v- Eastmere Nominees Pty Ltd - APPL 1377 of 2002 - HARRISON C - 04/04/03.....	1218

CUMULATIVE DIGEST—*continued*

	Page
TERMINATION— <i>continued</i>	
Application for extension of time to file application re unfair dismissal and denied contractual entitlements - Applicant argued that the application was not filed as he awaited a response from the respondent to a letter sent by his Solicitor to the respondent - Respondent argued there would be a prejudice to the respondent if the matter were to proceed in the circumstances of the delay given that the respondent did not have advice of the intention of the applicant to lodge a claim until some three months after the applicant's dismissal - Commission found the reason for delay in the circumstances of the applicant having legal advice and prompting from the Commission was not adequate and the applicant has not met the obligation that falls to him to prosecute his claim with appropriate diligence and an order was issued dismissing the application - Dismissed - Mr MW Leyssenaar -v- Darren Bracewell, Seagate Holdings Pty Ltd - APPL 127 of 2003 - SCOTT C - 14/04/03 - Other Services .....	1221
Application re unfair dismissal - Applicant argued he had difficulty contacting his solicitor, that telephone calls had not been returned and he assumed the solicitor would deal with the service of the application - No appearance on behalf of the respondent - Commission found a six week period had elapsed since the applicant had filed the application in the Commission and when he contacted a solicitor, that applicant had not responded to communication from the Commission, therefore he was entirely responsible for the lack of service of the application - Dismissed - Mr AG McGuire -v- Liz Baggeta of Millennium Inorganic Chemicals - APPL 245 of 2003 - SCOTT C - 12/05/03 - Other Manufacturing .....	1223
Application re unfair dismissal - Applicant argued that the respondent had reacted aggressively to a query from her regarding the amount of wages she was paid and she was dismissed - Respondent argued he did not dismiss the applicant, she was a casual employee, she was not doing the cleaning work requested and he was aware of a rumour that the applicant was looking for work elsewhere - Commission found inter alia, that applicant was unfairly dismissed, that reinstatement was impracticable and awarded compensation - Granted - Ms RA Napoli -v- Kamel Lebeidi - Sugar Gum Restaurant - APPL 1778 of 1998 - BEECH SC - 08/02/99 - Accommodation, Cafes & Restaurants .....	1242
Application re unfair dismissal seeking extension of time pursuant to s.29(3) of the I.R. Act - Applicant argued that she was aware of the 28 day time limit at the time that she contemplated taking these proceedings, but that some personal factors and some health factors were relevant to the delay that took place - Commission applied legal principles and found that the length of the delay was substantial, and although it appeared from the Applicant that she would contest the employer's decision, from the date of termination, no further steps were taken by her to put the Respondent on notice that the dismissal was being contested - Further, Commission found that if it was to accept the application for extension of time, then there may be some prejudice occasioned upon Respondent, therefore, it was not persuaded that it ought exercise its discretion to receive the application out of time in the present circumstances - Dismissed for want of jurisdiction - Ms JS Palmer -v- Mr D Palumbo - APPL 26 of 2003 - KENNER C - 01/04/3003 - Food Retailing.....	1245
Application for extension of time to file an application re unfair dismissal - Applicant argued that upon receiving advice from a government department she did commence an application in the Equal Opportunity Commission very promptly, that in subsequent to a discussion with a person at the EOC, she was advised that she could commence proceedings in this Commission and that at no time was she aware of the 28 day time limit to lodge an application - Commission found on evidence that applicant had acted promptly on all advice given to her, that she was unaware of the 28 day time limit and that the respondent was not able to inform the Commission of any prejudice beyond that which would normally be expected, that is, the prejudice of having to defend proceedings brought against it - Granted - LI Pearce -v- Tomlinson Ltd - APPL 90 of 2003 - KENNER C - 11/04/03 .....	1247
Application re unfair dismissal seeking compensation - Applicant argued that he was not experienced in the housing side of the business and did not get adequate assistance from Respondent, that he was dismissed suddenly without any warning and that he was very agitated by this and would not accept the alternative offer of erecting sheds - Respondent argued that Applicant experienced some difficulties with the job but that Respondent did not discuss these with him, that Applicant was taking advantage of the position, therefore, Respondent thought it would be better for the business if Respondent assumed the duties which Applicant was employed for and offer Applicant alternative position of erecting sheds - Commission reviewed authorities and found on evidence that Applicant used his position as an employee to gain an advantage to which he was not entitled, that Applicant breached his duty to his employer and the trust the employer held in him as a manager in the business, therefore, Applicant's dismissal was not unfair - Dismissed - Mr KR Pense -v- Gregory James Reilly - APPL 1055 of 2002 - WOOD C - 17/04/03 - Other Manufacturing.....	1248
Application for adjournment re unfair dismissal and contractual entitlements - Applicant argued he had to change his representation and had attempted to collect evidence from the respondent, that respondent holds records that will establish his application, that respondent had refused to supply information in this respect and it was necessary for his agent to seek to summons witnesses and obtain disclosure of documents - Respondent argued that the dismissal was due to the downturn in trade, that this application had caused him lots of stress and he would not want such a lengthy period of time to pass before the matter was resolved - Commission found that applicant had more than ample time to address the need to prepare for the hearing and that not to refuse the adjournment would cause injustice to the respondent - Refused - Subsequently applicant advised the Commission that the issues had been resolved - Discontinued - Mr GR Sampson -v- Albany Interiors Carpet Hotline - APPL 223 of 2001 - BEECH SC - 06/06/01 - Construction Trade Services.....	1252
Application re unfair dismissal and contractual entitlements seeking compensation - Applicant argued that Respondent had a history of unfairness towards her and as a result of discussion on the last working day prior to her dismissal, she was informed by Respondent that she was to be paid \$13.00 per hour for all duties and that she could either accept it or "go and walk" - Applicant further argued that she was not given any reason other than that she was not wanted any more - Respondent argued that as a casual employee Applicant only had one hour's notice to leave her employment and she only had to be given one hour's notice of termination and that Applicant breached her contract of employment by not working out her notice - Commission found on evidence that Applicant was a casual employee, that Applicant's employment was terminated due to a restructure, however, Respondent's decision not to tell Applicant of her dismissal until one hour before her rostered finishing time showed absolutely no consideration to the consequences for Applicant or her circumstances - Further, Commission found that Applicant's dismissal, though lawful, was nevertheless harsh, oppressive and unfair, that reinstatement was impracticable and awarded compensation and contractual entitlements claim - Granted - Ms M Slatter -v- Cityfire Holdings Pty Ltd T/A Skaters on Ice - APPL 1495 of 2002 - BEECH SC - 15/04/03 - Sport and Recreation .....	1254
Application re unfair dismissal seeking compensation - Applicant argued he was not given any warning or any reason for his dismissal, that there was no opportunity for discussion with the respondent about reduction of working hours or resolution of the issue - Respondent argued the dismissal came about due to a history of bad work performance that caused the respondent to suffer financially, that the financial pressures created by applicant were such it was no longer possible to employ him and at the same time deal with the improvement of the respondent's financial circumstances - Commission found there were some malafidies in the conduct of the respondent in respect to their answer to the claim for unfair dismissal - Further, that applicant was dismissed summarily, there was no ground to support a dismissal for misconduct, therefore there was no ground on which to base summary termination and an order was issued awarding compensation - Granted - Mr GC Sutton -v- Audio Visual Technical Services - APPL 398 of 2002 - GREGOR C - 30/04/02 - Motion Picture Radio & TV Serv .....	1258
Application for extension of time to file an application re unfair dismissal - Applicant argued he was waiting until he received a Separation Certificate from the respondent as he needed to know the reason the respondent relied upon to dismiss him - Commission accepted applicant's explanation for the delay and found that the period of delay in filing was so short and whether or not there was a sufficiently arguable case, the Applicant must be given the benefit of the doubts - Commission concluded that it intend to grant the extension for the application to be dealt with by the Commission and in view of its comments about the unfair dismissal, it was appropriate that it refer the matter to the Chief Commissioner for his consideration of reallocation to the Commission otherwise constituted - Granted - Mr A Vanyi -v- Greg Turner (Director), Boston Technologies T/AS Copier Wholesale - APPL 319 of 2003 - KENNER C - 10/04/03 - Machining and Motor Veh Whlslg.....	1265

## CUMULATIVE DIGEST—continued

	Page
TERMINATION—continued	
Conference referred re alleged summary dismissal seeking compensation and denied contractual entitlements - Applicant Union argued that employee was unfairly summarily dismissed following the tender of his resignation by the giving of one month's notice in writing to the Respondent and that employee had a contractual entitlement to payment of overtime that arose out of his attendance at mandatory company training - Respondent objected to and opposed the claims and argued that employee's refusal to be available to go offshore whilst the contract remained on foot was unacceptable and Respondent had no alternative but to bring the employment to an end - Commission reviewed authorities and found inter alia, that employee had not made out his claim for unfair dismissal because whilst the employment contract remained on foot, the requirement to attend from time to time offshore, as part of his duties, was an essential condition of his employment, that his refusal was deliberate or "wilful" and the effect of employee's repudiation was to say to the Respondent he was only prepared to perform his contract of employment in a fundamentally different way to that which he was obliged to do - Commission concluded that employee should be paid at time and one half for the Saturdays he attended the training course, for the 24 hours on the out bound journey to France and 24 hours at double time for Sunday travel - Upheld in Part - The Australian Workers' Union, West Australian Branch, Industrial Union of Workers -v- Schlumberger Oilfield Australia Pty Ltd ABN 26003264597 - CR 39 of 2002 - KENNER C - 18/12/02 - Services to Mining.....	1268
Appeal against decision to dismiss an employee - Appellant had not sought to prosecute her appeal - Public Service Appeal Board wrote to Appellant seeking answers to a number of questions on issues relating to her appeal - No respond from Appellant was received by the Board to ascertain why she had not proceeded with her appeal - PSAB found that Appellant would suffer no hardship if deprived of the opportunity to pursue her appeal, and there was no explanation as to what prejudice if any she might suffer by not being able to proceed - PSAB concluded that as Appellant had not responded at all and had not sought to prosecute the appeal after a period of 8 months from the date of filing of the appeal, that it was appropriate to order that the appeal be dismissed - Dismissed - Ms SM Almeida -v- Commissioner, Main Roads Western Australia - PSAB 11 of 2002 - Public Service Appeal Board - SCOTT C - 14/04/03 - Government Administration .....	1281
<sup>2</sup> Appeal against Decision of Commission (83WAIG155) re dismissed claim for compensation - Appellant argued that the learned Commissioner erred in law in dismissing his claim for compensation after finding that the termination of employment was unfair and in that respect the Commission failed to properly assess his loss arising from the unfair dismissal and was in error in taking into account entitlements paid by the respondent in the termination of employment arising from his redundancy - Appellant sought that there be a payment of compensation by the respondent, assessed for the loss that he suffered from the date of dismissal to the date of hearing - Full Bench applied legal principles and found that the Commissioner at first instance made no error in finding as she did, that Appellant suffered no loss because of the amount which he was paid, and no loss could or should be found to have been established - Further, Full Bench found that there was no error established in the exercise of the discretion and no ground of appeal had been made out - Dismissed - Mr PJ Caffery -v- Chubb Security Australia Pty Ltd t/as Chubb Protective Services - FBA 54 of 2002 - Full Bench - SHARKEY P/COLEMAN CC/BEECH SC - 01/05/03 - Personal and Other Services.....	1381
<sup>2</sup> Appeal against Decision of Commission (82WAIG3287) re unfair dismissal and contractual entitlements - Application by Appellant to amend grounds of appeal was dismissed - Appellant argued that the learned Commissioner erred in fact and in law in finding that the Appellant 'misconducted himself by not fulfilling the requirements of the job for which he claimed he had skills to undertake and for which he was employed' and in finding that the Appellant's contract of employment provided for a salary of \$60,000.00 per annum, to be paid pro-rata for the period of the nine month contract - Further, Appellant sought that the appeal be upheld and order of the Commission be set aside - Full Bench applied legal principles and found on evidence that the Commissioner was entitled and correct in finding as she did, that there was no error at first instance, discretionary or otherwise established by Appellant and that no ground of appeal was made out - Dismissed - Mr RA James -v- Australian Integration Management Services Corporation Pty Ltd - FBA 55 of 2002 - Full Bench - SHARKEY P/COLEMAN CC/GREGOR C - 23/05/03 - Other Services .....	1387
<sup>2</sup> Appeal against Decision of Commission (83WAIG1053) re dismissed unfair dismissal claim lodged out of time - Appellant argued that the learned Commissioner erred in law when having listed the Appellant's application for hearing he dismissed the application without hearing or taking any evidence on oath - Appellant sought orders that the appeal be upheld and decision at first instance be suspended and matter referred back to the Senior Commissioner - No appearance on behalf of the Respondent - Full Bench cited authorities and found inter alia, that Appellant was not afforded procedural fairness or natural justice because findings were made which assessed matters based on the mere plausibility of assertions of fact from the bar table instead of evidence on oath or affirmation subject to cross-examination - Upheld, Decision at first instance suspended and the matter remitted to the Commission at first instance to be heard and determined accordingly to law and the reasons of the Full Bench - Mr J Rodriguez -v- Parks Industries Pty Ltd - FBA 6 of 2003 - Full Bench - SHARKEY P/KENNER C/WOOD C - 06/06/03 - Other Services.....	1395
Application re unfair dismissal and contractual entitlements - Applicant sought redundancy payment, accrued sick leave, long service leave and payment for financial hardship due to his new job paying much lesser for the same work - Respondent argued that there was a downturn at the time of dismissal, the Applicant was made redundant and Applicant was aware that he was to be made redundant - Commission reviewed authorities and found on evidence that Applicant's application was 74 days out of time because the Applicant lodged his application first in the Federal Commission and once he knew that there was a jurisdictional challenge to his application, he took no further steps at that point in time to clarify his application, or to make the application in this Commission, therefore it would not be unfair for his application not to be accepted out of time - Commission concluded that it had doubt that the claims for long service leave and for financial hardship could be claimed and that it would convene a conference to deal with the matters in respect of redundancy and sick leave which are claimed as contractual benefits - Referral out of time not accepted - Order Issued - MR RS Brown -v- RCR Tomlinson Ltd - APPL 231 of 2003 - WOOD C - 12/05/03 - Motor Vehicle Rtlg & Services.....	1484
Application re unfair dismissal - Applicant denied that she committed any misconduct, on the contrary she acted in accordance with her professional judgement at all times and with as much consultation as she was able to arrange with her employer during a period of crisis in dealing with a family - Respondent argued the Applicant did not clarify to other agencies she was acting in her own capacity, she inappropriately used a government vehicle, she attended a house without a police escort, entered into premises and this was a high risk activity and was in contradiction of the employer's policy and procedures - Respondent further argued the Applicant could have placed the employer in jeopardy of legal actions by her conduct and she was not contactable throughout the duration of her actions on Sunday, 8 September 2002 - Commission found inter alia, the Applicant was summarily dismissed, that her dismissal was misconceived and unfair because it lacked the necessary ingredient of a fair go all round - Reinstated and compensation awarded - Ordered Accordingly - Mrs IM Curtois -v- Wonthella House Inc - APPL 1816,1927 of 2002 - GREGOR C - 07/05/03 - Community Services .....	1486
Application re harsh, oppressive and unfair dismissal - Respondent submitted that it suggested that the process of handling customer complaints needed to change from a "best practice" perspective and that Applicant would first deal with the complaint to ascertain whether it should go to the manufacturer or to the layers to be attended to - Further, Respondent argued that the direction was lawful and reasonable and Applicant refused to comply with it and said inter alia, that he would resign - Commission found on the evidence presented that the direction given to the Applicant was indeed lawful and reasonable, that it was the Respondent's prerogative to consider how it would deal with the customer complaints and that Applicant's complete and resolute refusal to countenance the proposal, placed the Respondent in a position where it had little alternative - Commission further found that in the circumstances of this matter, and notwithstanding Applicant's character and integrity, Applicant's resolute opposition to how his employer wished to change the complaints procedure made his position untenable - Commission concluded that it had not been persuaded that Applicant's dismissal was harsh, oppressive or unfair - Dismissed - Mr R Davies -v- Carpet Call WA Pty Ltd - APPL 2102 of 2002 - BEECH SC - 28/05/03 - Other Services .....	1491
Application re unfair dismissal - Commission called proceeding on of its own motion as the application was filed some six months or thereabouts out of time - Commission also found the applicant accepted in her evidence she was advised of her application being well out of time and nothing further was done for some time and the delay has been compounded by the applicant's failure to take heed of advice and to commence proceedings - Dismissed - Ms J Dimasi -v- Alphapharm Pty Ltd ABN 93 002 359 739 - APPL 291 of 2003 - KENNER C - 09/05/03 - Health Services.....	1495

## CUMULATIVE DIGEST—continued

## TERMINATION—continued

	Page
Application re unfair dismissal seeking compensation - Commission called proceedings on its own motion by reason that application was filed out of time - Applicant argued that although she had been advised of the need to file the application within 28 days of the date of termination of employment she sought legal advice and the firm of solicitors was on leave until 6 January 2003 - Respondent opposed the application and said that at all times it treated the Applicant fairly and there was no indication to it that a claim would be filed against it until the notice of application was received by service - Commission was not persuaded in the circumstances that an extension of time should be granted because the applicant admitted to her credit, that she was aware of the necessity to bring these proceedings within 28 days - Dismissed for want of jurisdiction - Miss KJ Francis -v- Pilbeam Family Trust t/a Stamp-It Rubber Stamp Co (WA) - APPL 27 of 2003 - KENNER C - 24/03/03 - Property and Business Services.....	1502
Application re unfair dismissal and contractual entitlements - Applicant argued that the process used to effect her termination was unfair because she believed that Respondent did not give proper weight to her side of the story and even thought she had not fully complied with the Respondent's procedures, she did not repeat the misdemeanours for which she was reprimanded, therefore it was inappropriate to terminate her contract of employment - Respondent argued that Applicant had breached Respondent's medical procedures, that Applicant had repudiated her contract of employment by behaving in the way she did, therefore it was appropriate to summarily terminate her - Respondent further argued that there were no benefits due to the Applicant under her contract of employment - Commission reviewed authorities and found on evidence that the Respondent had demonstrated that there was sufficient reason to summarily terminate the Applicant's contract of employment, that the Applicant was afforded procedural fairness in relation to the termination and that the Respondent conducted appropriate investigations into the Applicant's conduct in relation to these matters, therefore Applicant was not unfairly dismissed - Commission further found that Applicant had not discharged the onus on her to establish any entitlements to this claim and accordingly dismissed Applicant's claim for contractual entitlements - Dismissed - Mrs JE Gibson -v- The Sisters of Mercy Perth (Amalgamated) Inc - APPL 644 of 2002 - HARRISON C - 29/05/03 - Education.....	1505
Application re unfair dismissal seeking compensation - Applicant argued when she commenced with the respondent there was no order to the office, the respondent requested that she sort out the mess in the office and it was up to her to organise the smooth functioning of the office - Applicant also argued she was not given a warning or told that her position was in jeopardy - Respondent argued the standard of work and full scope of the job were explained clearly to the applicant, the manner in which her main duties were carried out was far from acceptable and did not meet the standards discussed on commencement of her employment - Further, respondent argued that Applicant was granted three extensions on her probation period, that Respondent discussed the problems with her regularly but no improvements were made - Commission found that any difficulties that arose did so from lack of instruction and communication from the Respondent - Further, Commission found that applicant was not afforded a fair go all round and was dismissed unfairly - Granted, Supplementary Reasons for Decision and Order Issued - Mrs AJ Harvey -v- LRC Pty Ltd - APPL 1497 of 2002 - WOOD C - 23/05/03 - Business Services.....	1512
Application for extension of time to file an application re unfair dismissal - Applicant argued she was confused and thought the Australian Workplace Agreement applied to her employment and therefore ought to commence proceedings in the Australian Industrial Relations Commission - Commission found the onus was on employees to take all reasonable steps to ensure they are commencing proceedings in the appropriate jurisdiction, that there was little or no evidence before the Commission to indicate other steps were taken by the applicant to properly ascertain the correct jurisdiction and a considerable period of time lapsed before the applicant took any steps to lodge an application - Dismissed - Mrs M Kostovski -v- Gull Petroleum (WA) Pty Ltd - APPL 260 of 2003 - KENNER C - 06/05/03 - Petroleum Coal Chemical Assoc.....	1516
Application re unfair dismissal - Application lodged out of time - Commission reviewed authorities and considered it would be unfair not to accept the Applicant's referral out of time because she was dismissed without notice and without warning, and in the circumstances particularly the lack of response from the Respondent, then the illness and hospitalisation of the Applicant's children, the reasons for the delay was understandable - Commission concluded that there was no prejudice to the Respondent above and beyond having to face an application for unfair dismissal - Accepted - Mrs E Massandy -v- Fred Margaria Cleaning Services - APPL 318 of 2003 - WOOD C - 09/05/03 - Personal Services.....	1518
Application for extension of time to file application re unfair dismissal - Applicant argued that the delay in lodging his application was because he was exchanging emails with a representative of the respondent in regard to taxation of his ex gratia payment - Respondent argued the applicant had not provided information that the termination would be contested - Commission found the delay in this application was almost three times the period provided in the Act, the applicant was not dismissed so the jurisdiction which resides in the Commission to hear the industrial matter referred under s.29 of the Act does not arise therefore the application was without jurisdiction and there was no case to be argued - Dismissed - Mr SJ Moretti -v- Canning Vale Weaving Mills Ltd - APPL 355 of 2003 - GREGOR C - 14/05/03 - Other Manufacturing.....	1519
Application re unfair dismissal lodged out of time - Applicant argued his application was lodged out of time as he did not have the money for the filing fee - Commission considered the evidence and it was not persuaded as to the reason for applicant not having money for the claim given his strong denial of the allegation that led to his dismissal - Commission concluded inter alia, that even though application was only one day out of time, in the context of Applicant's probationary employment, and that within the 10 days of his employment he had already received a written warning, possibly two oral warnings, and an allegation had been made against him, it had not been persuaded that it would be unfair not to accept his claim - Dismissed - Mr NJ Roberts -v- John Ryan owner of Metro Security Services - APPL 242 of 2003 - BEECH SC - 01/05/03 - Public Order & Safety Services.....	1521
Application re unfair dismissal - Commission called these proceedings on its own motion as application was out of time - Commission found that 46 days was a significant delay and was a factor which must be taken against the applicant and the application, and the state of the evidence was such that there was no real and proper explanation for the delay - Further, Commission had significant doubts as to whether the applicant, as a matter of fact and law, was an employee of the respondent as at the time it was alleged the relationship came to an end - Application for extension of time refused and application for unfair dismissal dismissed for want of jurisdiction - Mr D Suparta -v- Swan Transit Operations Pty Ltd - APPL 135 of 2003 - KENNER C - 09/05/03 - Road Transport.....	1527
Application re unfair dismissal - Applicant argued the respondent did not demonstrate sufficient reason for summary dismissal, it was not clear that the respondent required written permission to open the pool outside normal hours, much of the evidence relied upon by the respondent in regard to her misconduct was based on hearsay, money collected from each triathlon was not used for her personal gain and the respondent was aware of the triathlons taking place so there was no breach of Schedule A. - Clause 16 of the respondent's contract - Respondent argued the applicant breached the respondent's contract and the applicant misconducted herself sufficient to warrant summary dismissal - Commission found the respondent had not demonstrated that the applicant was guilty of gross misconduct justifying summary dismissal, the applicant was treated unfairly and harshly because she was not given sufficient opportunity to defend herself and the respondent did not conduct a full and comprehensive investigation into the events surrounding the applicant's termination - Commission also found that the applicant was not afforded 'a fair go all round' - Upheld and Order Issued - Mrs FA Webster -v- Prestige Property Management Services - Mr Rod Stewart - APPL 737 of 2002 - HARRISON C - 09/05/03 - Community Services.....	1529
Conference referred re unfair dismissal - Applicant Union argued its member was unfairly dismissed by the respondent for reasons of redundancy, that there was no valid reason for the dismissal and the dismissal was unfair and unjust - Respondent argued the termination was fair due to reduction of work and requested the application be dismissed - Commission found that when Respondent brought the employment contract to an end it did not comply with the requirements of Part 5 of the MCE nor did it comply with Clause 32 or 32A of the Award - Further, Commission reviewed authorities and found that not only the dismissal was unfair for the manner in which it was given, it was unfair because of the circumstances in which it was given and amounts to an abuse of the employers right to terminate - Commission applied principles and found that applicant member had been compensated in excess of his loss already and for that reason there was no compensation orderable or payable to him pursuant to the Act - Ordered Accordingly - AUTO, FOOD, METAL, ENGIN UNION -v- Seagate Structural Engineering Pty Ltd - CR 267 of 2002 - GREGOR C - 13/05/03 - Metal Product Manufacturing.....	1537

## CUMULATIVE DIGEST—continued

	Page
<b>TRAINING</b>	
Appeal against Decision of Apprenticeship Tribunal re decision made on 27/09/2002 to allow a suspension of apprenticeship - Appellant argued that the Chairman erred in his findings as he accepted the submissions of Respondent and did not allow Appellant a full opportunity to present her case and documents - Respondent opposed the Appeal and argued that the suspension was warranted as Appellant was suspended for misconduct - Commission found that the Chairman's decision was discretionary and that Appellant had not proven on appeal that Chairman erred in the findings made - Further, Commission found that Chairman had correctly found aspects of misconduct on the part of the Appellant - Dismissed - Ms H Smith -v- Redz Hairdressing - APA 2 of 2002 - WOOD C - 28/01/03 - Personal and Other Services .....	400
<b>TRANSFER</b>	
<sup>2</sup> Appeal against Decision of Commission (82WAIG3250) re transfer of an employee - Appellant argued that the Public Service Arbitrator erred in law in declaring that Appellant's decision to exclude the employee from the Broome Regional Prison was void, that the decision was within the Public Service Arbitrator's jurisdiction, and that the Appellant should not have ceased paying employee her ordinary salary - Appellant sought that the PSA's orders (1), (2) and (6) be quashed - Full Bench reviewed authorities and found inter alia, that the decision to exclude employee from Broome Regional Prison was an "industrial matter", and the decision to declare it void was within jurisdiction for that reason - Further, Full Bench found that the Arbitrator erred in ordering the Appellant to pay the employee indefinitely into the future when there was no evidence that she would perform any service, had performed any service or was entirely willing to - Upheld and order 6 of the decision at first instance quashed - Director General, Department of Justice (Formerly known as Ministry Of Justice) -v- Civil Service Association of Western Australia Incorporated - FBA 53 of 2002 - Full Bench - SHARKEY P/SCOTT C/WOOD C - 25/03/02 - Government Administration .....	908
Application for Orders pursuant to Section 80E of I.R. Act - Applicant Union sought discovery of documents that ought to have been made available in dealing with the ongoing disciplinary proceedings against its member and that access to the documents were necessary for the purposes of the hearing - Further, Applicant Union argued that the application to dismiss pursuant to s.27 (1)(a)(ii) be dismissed as the dispute was still alive and had not been resolved - Respondent applied to the Arbitrator for the dismissal of the matter pursuant to s.27(1)(a)(ii) of the Industrial Relations Act as the dispute between the parties had been resolved by its undertaking given by the letter provided - Public Service Arbitrator issued orders for the discovery of documents to be used only for the purposes of the hearing and found that the dispute was still alive and dismissed the application for dismissal - Orders issued - Civil Service Association of Western Australia Incorporated -v- Anti-Corruption Commission - P 50 of 2002 - Public Service Arbitrator - SCOTT C - 18/03/03 - Government Administration .....	980
Application pursuant to s.80E of the I.R. Act seeking an Order for discovery - Applicant argued that the order should issue for discovery verified by an affidavit "to ensure that the list was true, accurate, correct and complete" and to provide him with the protection necessary in respect of discovery - Applicant further argued inter alia, that there are a number of documents which have not been discovered, in particular a report by investigators and that the documents relate to and only exist because of the allegations and are relevant to the proper hearing and determination of the matter - Respondent had previously consented to discovery and argued that no order was necessary as the parties had in fact already dealt with it, that not only had it provided discovery but had assisted by providing copies of the documents themselves - Commission reviewed authorities and found inter alia, that those reports into the investigations were not appropriate for discovery for two reasons being, that the issue being dealt with was the transfer of Applicant and that the reports followed investigations conducted after the transfer and these investigations were not the subject of these proceedings - Commission concluded that its role was to provide real solution to real issues not to issue orders which would appear to be unnecessary - Dismissed - Civil Service Association of Western Australia Incorporated -v- Anti-Corruption Commission - P 50 of 2002 - Public Service Arbitrator - SCOTT C - 29/04/03 - Government Administration .....	1165
Application for orders to reverse decision of Respondent to reprimand and transfer an employee and to impose penalty on employee - Preliminary issues raised re Commission's jurisdiction to entertain the application - Applicant Union argued Respondent had not complied with the relevant provisions of the Public Sector Management Act 1994 and that its member had been denied natural justice - Respondent denied that Applicant member had been treated unfairly or inappropriately under the PSM Act - Commission considered relevant legislative provisions and declared, inter alia, that the proceedings were validly brought and Commission could enquire into and deal with the subject matter - Further, Commission reviewed relevant Acts, authorities, the Dodd and Archibald reports and found that there had not been strict compliance with statutory scheme, the process undertaken by the Respondent, as reflected in the Dodd and Archibald reports, constituted a denial of natural justice to the employee - Commission found that the failure by Respondent to afford employee an opportunity of being heard on the issue of penalty, following its findings of guilt in relation to the charges, was also a denial of natural justice and that Respondent's decision to impose penalty on employee ought be quashed - Upheld, Declaration and Order Issued - Mr G Johnston -v- Mr Ron Mance, Acting Director General Department of Education - APPL 2302 of 2001 - KENNER C - 06/08/01 - Education .....	1553
<b>TRAVELLING</b>	
Conference referred re alleged summary dismissal seeking compensation and denied contractual entitlements - Applicant Union argued that employee was unfairly summarily dismissed following the tender of his resignation by the giving of one month's notice in writing to the Respondent and that employee had a contractual entitlement to payment of overtime that arose out of his attendance at mandatory company training - Respondent objected to and opposed the claims and argued that employee's refusal to be available to go offshore whilst the contract remained on foot was unacceptable and Respondent had no alternative but to bring the employment to an end - Commission reviewed authorities and found inter alia, that employee had not made out his claim for unfair dismissal because whilst the employment contract remained on foot, the requirement to attend from time to time offshore, as part of his duties, was an essential condition of his employment, that his refusal was deliberate or "wilful" and the effect of employee's repudiation was to say to the Respondent he was only prepared to perform his contract of employment in a fundamentally different way to that which he was obliged to do - Commission concluded that employee should be paid at time and one half for the Saturdays he attended the training course, for the 24 hours on the out bound journey to France and 24 hours at double time for Sunday travel - Upheld in Part - The Australian Workers' Union, West Australian Branch, Industrial Union of Workers -v- Schlumberger Oilfield Australia Pty Ltd ABN 26003264597 - CR 39 of 2002 - KENNER C - 18/12/02 - Services to Mining .....	1268
<b>UNIONS</b>	
<sup>3</sup> Application for a new award, Burswood International Resort Casino Employees Award 2002 - Applicant Union applied for the registration of the above award to replace and supersede the Burswood International Resort Casino Employees' Industrial Agreement Ag 169 of 2001 and the Burswood Island Resort Employees Award No. A23 and A25 of 1985 - Further, Applicant Union argued that the terms of the award were substantially those that applied to the employees of Respondent who had entered into an Australian Workplace Agreement and that it was unfair for the Respondent to discriminate against employees because they chose to be covered by a collective agreement registered under the Industrial Relations Act 1979 - Respondent argued that Applicant's claim should be dismissed under s.27(1)(a)(iii) of the IRC Act on the grounds that further proceedings were not necessary or desirable in the public interest as the Union's claim breached clause 45 of the registered agreement and in that it should not allow a party to press for a claim that was contrary to its own agreement - Further, Respondent argued that Union could not make out a claim under Principle 10 as it could not justify why the claim had not been progressed as an industrial agreement under s.41 of the Act and it was an abuse of the process because the purpose of the application was not directed at protecting existing employees whose conditions of employment were not regulated by the 2001 Agreement - Commission in Court Session found that that Applicant Union had made out a case under Principle 10 and that a new award should be issued - Further, CICS found that the operative date should be from 10 July 2002, the date the application was lodged in the Commission - Granted - Australian Liquor, Hospitality and Miscellaneous Workers Union, Western Australian Branch -v- Burswood Resort (Management) Limited - A 4 of 2002 - Commission in Court Session - SMITH C/WOOD C/HARRISON C - 25/11/02 - Accommodation, Cafes&Restaurants .....	57

## CUMULATIVE DIGEST—continued

## UNIONS—continued

Page

- <sup>1</sup>Appeal against Decision of Commission in Court Session (82WAIG544) re registration of new award - Appellant argued that there was a miscarriage of the discretion to make the award by Commission in Court Session and relied upon findings of CICS that a reason for the creation of the Appellant was for Burswood Resort (Management) Limited to avoid its legal obligations under the industrial agreement - Further, the CICS failed to properly exercise its jurisdiction or to properly exercise any discretion to make an award pursuant to Principle 10 of the Wage Fixing Principles - Respondent Union opposed the appeal - Industrial Appeal Court found and appreciated the serious nature of the inference that it was asked to draw and did not consider that that CICS applied the wrong test in law in drawing such inference - Further, IAC found that CICS was not in error in concluding that there was no breach of Wage Fixing Principle 10 in all the circumstances of this case, the terms of the award expressly excluded work done in competition with outside catering contractors - Dismissed - Burswood Catering and Entertainment Pty Ltd -v- Australian Liquor, Hospitality and Miscellaneous Workers Union, Western Australian Branch - IAC 5 of 2002 - Industrial Appeal Court - 18/12/02 - Accommodatn, Cafes&Restaurants ..... 201
- <sup>1</sup>Appeal against Decision of Commission in Court Session (82WAIG2432) re registration of a new award - Appellant argued that the CICS erred in law in finding that it had jurisdiction to determine the application and that there was no industrial matter between the parties of such nature as to give rise to jurisdiction in the Industrial Commission - Further, Appellant argued that any further proceedings or decision or determination of the Commission would be held or made in excess of or without jurisdiction - Respondent opposed the Appeal - Industrial Appeal Court found that the principal issue raised by the grounds of appeal were whether certain matters that were said to have been covered by an industrial agreement that was still in force between the parties could be dealt with by the Commission as industrial matters - Further, IAC found that no error had been demonstrated in the decision of the Commission in Court Session in determining that the Commission had jurisdiction to deal with the application, therefore, the appeal was dismissed - Dismissed - Burswood Resort (Management) Limited -v- Australian Liquor, Hospitality and Miscellaneous Workers Union, Western Australian Branch - IAC 9 of 2002 - Industrial Appeal Court - 18/12/02 - Accommodatn, Cafes&Restaurants..... 208
- <sup>4</sup>Application for Orders pursuant to s.66 of the I.R. Act - Applicant argued that Respondent and its members had breached its rules and s.6 of the Act - Respondent opposed application and argued that the President lacked jurisdiction to hear and determine the matter - President found on evidence that Applicant was not a person prescribed as having right to make application pursuant to s.66 of the Act, and in particular s.66(1), that there was no jurisdiction to hear and determine application as the application sought orders in relation to the organisation's rules of which Applicant was not a member and has never been a member - Dismissed - Mr DP Deen -v- The Construction, Forestry, Mining and Energy Union of Workers - PRES 35 of 2002 - President - SHARKEY P - 08/01/03 - Unions ..... 233
- Complaint re alleged failure to comply with C S Perrott Industrial Agreement No. AG 191 of 1997 and the Building Trades (Construction) Award No. 14 of 1978 - Claimant Union argued that Respondents breached the agreement by failing to pay site allowance, the correct redundancy entitlements, accrued sick leave on termination and failed to apply the first on - last off requirement - Further, Claimant Union argued that Respondent had committed various breaches of the Award including failure to pay fares and travelling allowance and failure to provide time and wages records as requested - Respondents argued that the worker was not an employee but rather a subcontractor and denied that worker was engaged pursuant to the Agreement - Further, Respondents denied they were liable to pay site allowance, redundancy entitlements and sick leave indeed they claim that he had been overpaid for fares and travelling and into the superannuation fund - Industrial Magistrate found that the alleged breaches had been proven with the exception of one being the failure to apply the first on - last off requirement - IM also imposed penalties and awarded prejudgement interest and refused the application for costs - However, after claim for costs was remitted back to Industrial Magistrate from Full Bench, IM ordered Respondents to pay costs to Claimant - Reasons for Decision Issued - Construction, Forestry, Mining and Energy Union -v- Carl Anthony Perrot & Sandra Lee Perrott trading as C & S Perrott - M 18 of 2002 - Industrial Magistrate - Cicchini IM - 17/07/02 - Construction Trade Services ..... 305
- Complaints re discrimination of member organisation under section 96C of the IR Act - Complainant argued Ms Peak was a solicitor and authorised to make complaints on behalf of her client and was employed by the CFMEUW Union and that Applicant was a member of CFMEUW Union - Respondents argued that there was no case to answer on the basis that Complainant had failed to establish that they were validly made - Further, Respondents argued that there was no proof of the fact that Elisabeth Peak was authorised to make the complaints - Industrial Magistrate found that there was no case to answer by the Defendant in each instance and that the solicitor employed by the Union could not act on the instructions of the Union in bringing the complaints but must act on the instructions of Complainant - Struck out - Mr C Workman -v- CECK Pty Ltd - CP 3,4,6,7 of 2002 - Industrial Magistrate - Cicchini IM - 19/12/02 ..... 324
- Conference referred re alleged refusal to allow Applicant Union official access to the Respondents' workplace - Applicant Union argued that the rights of entry for union officials became a statutory code introduced by the Labour Relations Reform Act 2002 dealing with rights of entry into premises where relevant employees work - Further, Applicant Union submitted that the Commission did not have the jurisdiction to declare the parties rights as to right of entry under the Industrial Relations Act 1979 - Respondent argued that the Act did not preclude the Commission from making an order that union officials be subject to a random drug and alcohol test prior to entering Respondent's premises and that it would be consistent with the scheme of legislation and its policy was consistent with the workplace health and safety - Commission found and declared that the Respondents did not have the right to require Mr Brett Davis, an authorised representative of the Applicant Union, in possession of the requisite authority, exercising his rights under Division 2G of the Industrial Relations Act 1979, to submit a random drug and alcohol test, as a condition of the exercise of those rights - Declaration Issued - AUTO, FOOD, METAL, ENGIN UNION -v- Transfield Services (Australia) Pty Ltd & Other - CR 71 of 2002 - KENNER C - 12/12/02 - Unions ..... 376
- Application for joinder of party to an application for an enterprise order pursuant to s.421 - Applicant Union sought for joinder as a party to the application as it had participated in the negotiations and was a bargaining party on behalf of its members - Respondent Union had no objection whilst Respondent (Coromal Caravans) opposed the joinder to the application - Commission found that Applicant Union had been a negotiating party for the purposes of the bargaining initiated under s.42 by the AMWU and that Respondent would suffer little, if any detriment from granting the application for joinder - Granted - AUTO, FOOD, METAL, ENGIN UNION -v- Coromal Caravans - APPL 2075 of 2002 - BEECH SC - 24/01/03 - Machining and Motor Veh Whlslg ..... 389
- Conference referred re breach of the requirements of the Public Sector Management Act 1994 - Preliminary issue re appearance by counsel - Applicant Union objected to the appearance of counsel - Respondent requested representation by counsel - Public Service Arbitrator determined that counsel may appear and be heard in relation to the claim for an order and would accommodate the appearance of counsel on that issue either orally or in writing in all other respects leave for counsel to appear was not granted - Leave for counsel to appear generally refused - Civil Service Association of Western Australia Incorporated -v- Director General, Department of Justice (Formerly known as Ministry Of Justice) - PSACR 20 of 2002 - Public Service Arbitrator - BEECH SC - 07/03/03 - Government Administration ..... 503
- <sup>4</sup>Application for orders pursuant to s.66 of the I.R. Act - Applicant's complaint was that the Respondent acted contrary to rule 3 of its rules in refusing to allow an external person to represent it in the matter relating to Applicant and at his expense - Respondent opposed the claim - President reviewed legal principles and found inter alia, that it had not been established that there was any rule, express or implied, which had been breach or not performed, and that no order was necessary to ensure that any wrong was avoided since no wrong had been or was likely to have been committed in relation to the rules in this instance - Having regard to s.26(1) and s.26(1)(c) of the Act, President found that the merits lay with the Respondent CSA and the case for the Applicant had not been established - Further, President was not persuaded that the application to strike out the particulars was made out and that it was satisfied entirely that there was sufficient material there for the Respondent to know and answer the case which was alleged against it - Dismissed, Orders and Directions Issued and Application for interim orders dismissed - Mr NJ Jones -v- Civil Service Association of Western Australia Incorporated - PRES 1 of 2003 - President - SHARKEY P - 31/03/03 - Unions ..... 945
- <sup>4</sup>Application for orders pursuant to s.66 of the I.R. Act - Applicant argued that Respondent had acted contrary to rule 3 of its rules by failing to act fairly and in the interests of its member - Respondent opposed application and denied that it had breached its rules or acted in a tyrannical oppressive, unreasonable or undemocratic way - President reviewed authorities, union rules and found inter alia, that the decision to refuse Applicant legal assistance was unfair and unreasonable and did not advance the objects contained in the rules - President ordered that Applicant's application be reconsidered and that this be done only after an opinion was derived from a solicitor of Applicant's choice and such opinion be funded by the Respondent - Orders and Directions Issued - Application granted in part - Mr GJ Wauhup -v- Civil Service Association of Western Australia Incorporated - PRES 2 of 2003 - President - SHARKEY P - 28/03/03 - Unions ..... 951

## CUMULATIVE DIGEST—continued

	Page
UNIONS—continued	
Application to vary Metal Trades (General) Award - Applicant sought to vary Award by increasing rates of allowances - Respondent argued that the claim was unfair in that it would provide for payments of a significant sum to employees in the industry with a significant departure from existing award conditions - Commission directed the parties to have discussions about the issues and then to report back which the parties did not do so - Commission found that the application presented confusing arguments and had decided in view of its history the application be dismissed - Dismissed - AUTO, FOOD, METAL, ENGIN UNION -v- Anodisers W.A. - APPLB1756 of 2001 - COLEMAN CC - 24/03/03 - Metal Product Manufacturing.....	975
Conference re refusal of the Respondent to reclassify positions - Applicant Union sought an interim order preventing Respondent from filling Juvenile Justice Officer positions until the claim of the Union that Group Workers be reclassified was decided by Commission - Respondent argued that it was not aware of any threat of industrial action - Public Service Arbitrator issued interim order sought by Applicant Union in that it prevents the filling of the positions at the end of that process - Interim order issued - Civil Service Association of Western Australia Incorporated -v- The Director General, Department of Justice - PSAC 9 of 2003 - Public Service Arbitrator - BEECH SC - 12/03/03 - Government Administration .....	985
<sup>4</sup> Application for Orders pursuant to s.66 of the I.R. Act - Applicant sought a declaration and interim orders relating to, inter alia, the rules of the Respondent organisation, "the CSA", their observance or non-observance and the manner of their observance, within the meaning of s.66(2) of the Act - President applied legal principles and found inter alia, that there was a substantial case to be tried, that the consequences of making the order are readily reversible by an order to the contrary if the merits of the matter require it upon the final hearing and determination - Further, having regard to the equity, good conscience and substantial merits of the case, President was of the view that it should make an interim order in similar terms, in substance, to the order made in <i>Neville Jones v Civil Service Association of WA Inc (op cit)</i> - President added that it will make orders which affect the whole of the Council because they do not affect adversely the three members who are not parties to these proceedings and that there was nothing preventing those three persons to become parties to, or to intervene in, and thus to participate in these proceedings - Directions and Interim Orders Issued - Mr B Ellis & Others -v- Civil Service Association of Western Australia Incorporated - PRES 5 of 2003 - President - SHARKEY P - 16/04/03 - Unions .....	1144
<sup>4</sup> Application for Orders pursuant to s.66 of the I.R. Act - Applicant argued inter alia, that there had been no election under the CSA rules, and the General Secretary and Assistant General Secretary had ipso facto been invalidly appointed contrary to the CSA rules, and ultra vires those rules - Further, Applicant argued that once the SPSF ceased to exist, there had to be a new s.71 application, and the Full Bench had to be satisfied anew of the s.71 requirements, about a new Counterpart Federal Body, the CPSU and this had not been done - Respondent argued that the agreement made under s.202 of the Federal legislation continued in force by virtue of s.253TA of the WR Act, thus enabling persons appointed or elected pursuant to the rule of the CPSU to become General Secretary and Assistant General Secretary of the CSA - Respondent, further submitted that the Commission, constituted by the President, had no jurisdiction to consider the effect of the WR Act and the s.202 agreement - President found that it was within his jurisdiction under s.66(2) of the Act to determine whether the rules of the CSA have been observed or not, and particularly whether persons are officers of the CSA pursuant to its rules or by the operation of any law - President reviewed legal principles, relevant Acts, agreement and the CSA rules and found that the appointments to the offices of the WA Branch Secretary and WA Branch Assistant Secretary of the CPSU, could not constitute or serve as valid elections or appointments to the offices of General Secretary and Assistant Secretary in accordance with the rules of the CSA, and that they therefore have not, since 28 November 2001, validly occupied those offices - Supplementary Reasons for Decision, Declarations and Orders Issued - Mr N Jones -v- Civil Service Association of Western Australia Incorporated - PRES 3 of 2003 - President - SHARKEY P - 10/04/03 - Unions .....	1146
<sup>4</sup> Application for Orders pursuant to s.66 of the I.R. Act - Applicant argued that a resolution SCM06/02, passed on 20 November 2002 was legally and factually incorrect and that the president complied with the rules and did afford procedural fairness - Respondent denied that applicant was entitled to the orders and directions sought and argued that clause 1 of the resolution SCM06/02 stated "act in consultation with the principal officers" not "officer" as referred to by the Applicant - President reviewed authorities, relevant sections of the CSA rules and found on evidence that the CSA was in breach of its rules in that the Council passed resolution SCM06/02, in particular because it was not a matter which the CSA should consider, being a CPSU matter - President declared that the president acted within the rules in obtaining the legal advice necessary to enable her to carry out her duties and that such expense was properly incurred - Further, President had doubts that the matter was at all a matter relating to the rules of an "organisation" as defined in s.7 of the Act, and therefore may not be within jurisdiction under s.66 - President found inter alia, that even if it was to act within jurisdiction and power by making the orders sought, the equity, good conscience and substantial merits of the matter, do not constrain it to make the orders sought - Dismissed - DM Robertson -v- Civil Service Association of Western Australia Incorporated - PRES 4 of 2003 - President - SHARKEY P - 17/04/03 - Unions .....	1156
<sup>2</sup> Application for alteration of rule 5 - Eligibility - Full Bench reviewed union rules, relevant sections of the I.R. Act and was satisfied, on evidence, that all of the relevant requirements of s.55 and s.56 of the Act had been met, save and except for s.55(4)(a) - Full Bench was not satisfied that the meeting which approved the alterations was a meeting called especially for the purpose of considering the proposed alterations within the meaning of rule 40 of the rules of the Applicant, thus, it was unable to find that the alteration which was authorised by an annual general meeting, was authorised in accordance with the rules - Full Bench not being satisfied that s.55(4)(a) of the Act had been complied with, refused and dismissed the application - Dismissed - United Firefighters Union of Western Australia -v- (Not applicable) - FBM 1 of 2003 - Full Bench - SHARKEY P/SCOTT C/HARRISON C - 03/06/03 - Unions ....	1400
<sup>2</sup> Application for Declaration pursuant to s.71 of the I.R. Act - Applicant sought a declaration pursuant to s.71(2) of the Act that the CPSU and SPSF Group was the counterpart federal body of the CSA - Applicant argued that the requirements for issuing the declaration as prescribed in s.71(3) of the Act had been satisfied - The interveners alleged that the application was not filed in accordance with the rules and was therefore invalid - In written submissions which were tendered at the proceeding, it was submitted that the CSA Council did not have the power to 'regularise' or 'validate' ex post that which was done unlawfully because 'those powers' (sic) required specific statutory provisions - Full Bench reviewed CSA rules, Acts, authorities and found inter alia, that pursuant to s.71 of the Act, the branch was the counterpart federal body in relation to the state organisation, because the rules of which relating to the qualifications of persons for membership and prescribing the offices which shall exist within the branch were deemed to be the same as the rules of the state organisation relating to the corresponding subject matter - Full Bench concluded that it would grant the application and make the s.71 declaration sought, there being no valid obstacle to it being granted, and it being satisfied that, having regard to the provisions of s.71, the branch was the counterpart federal body to the applicant - Granted - Civil Service Association of Western Australia Incorporated -v- (Not applicable) - FBM 4 of 2003 - Full Bench - SHARKEY P/BEECH SC/SCOTT C - 23/05/03 - Unions .....	1403
<sup>4</sup> Application for Orders pursuant to s.66 of the I.R. Act - Respondent applied under s.71 of the Act for a declaration pursuant to s.71(2) of the Act that the CPSU was the counterpart federal body of the CSA - Applicant did not oppose to the order sought - President found inter alia, having regard to the equity, good conscience and substantial merits of the case and the relevant considerations laid down in <i>Jones v CSA (op cit)</i> , that it should make the order sought to maintain the former de facto holders of office pending the hearing and determination of the s.71 application or until there was an election or other order or the time fixed generally in its order expires - Order and Declaration Issued because they do not affect adversely the three members who are not parties to these proceedings and that there was nothing preventing those three persons to become parties to, or to intervene in, and thus to participate in these proceedings - Directions and Interim Orders Issued - Mr B Ellis & Others -v- Civil Service Association of Western Australia Incorporated - PRES 5 of 2003 - President - SHARKEY P - 14/05/03 - Unions .....	1412

## CUMULATIVE DIGEST—continued

	Page
<b>VICTIMISATION</b>	
Appeal against Decision of Respondent in regards to disciplinary matters relating to an employee - Appellant Union argued that the procedure adopted by Respondent in this matter was so badly flawed that the findings, conclusions and the penalty could not be sustained and that the substance of the complaints could not be separated from the procedure - Further, Appellant argued that while the PSAB could adjust the decision it could only do so after reviewing what Respondent had done - Respondent argued that it undertook a preliminary investigation of the complaint formed a suspicion that employee had misconducted himself and then proceeded with a disciplinary process - Further, Respondent proceeded with a formal process as required by the PSM Act and relied on various legislation or policies in respect of each allegation of misconduct - Public Service Appeal Board found that many of the grounds of appeal were not made out and that the Respondent had obligations towards its employees regarding equal opportunity and sexual harassment - Further, PSAB found that the process had allowed employee natural justice in that he was provided with the allegations, that he had more than a reasonable opportunity to respond at the appropriate stages of the process and had taken the opportunities provided by him, thus PSAB were not satisfied that employee was denied natural justice - PSAB uphold the appeal as it related to the findings not being in the course of official duties and otherwise dismissed the appeal as it related to the issues of merit and process - Further, PSAB uphold the appeal in respect of the manner in which the Respondent had dealt with the imposition of the penalty - Upheld in part otherwise dismissed - Civil Service Association of Western Australia Incorporated -v- Director General, Department of Family and Children's Services - PSAB 4 of 2001 - Public Service Appeal Board - SCOTT C - 13/12/02 - Government Administration	390
Conference referred re breach of the requirements of the PSM Act 1994 - Applicant Union argued that the employee had been subjected to a campaign of intimidation, harassment and victimisation that would amount to workplace bullying, the employee was suffering anxiety and it had been assessed that her work had been a critical and significant factor in its cause - Applicant Union sought orders inter alia, that the Public Advocate cease and desist workplace bullying and provide the necessary assistance to relocate employee to a suitable alternative position within the public sector - Respondent objected to and opposed the claims and the declaration and orders being sought by the applicant - Public Service Arbitrator found inter alia, that there was not the 'repetitive' treatment or behaviour necessary to establish the campaign alleged by the Union, that the evidence showed that the employee had not been subjected to a campaign of intimidation, harassment and victimisation that would amount to workplace bullying and the orders sought by the Union had not been made out - Dismissed - Civil Service Association of Western Australia Incorporated -v- Director General, Department of Justice (Formerly known as Ministry Of Justice) - PSACR 20 of 2002 - Public Service Arbitrator - BEECH SC - 12/05/03 - Government Administration.....	1167
<b>WAGES</b>	
Complaint re breach of Restaurant, Tearoom and Catering Workers Award No. R48 of 1978 - Claimant argued that Respondent had failed during the period of employment to pay him appropriate wages and overtime in accordance with the provisions of clauses 10 and 21 of the Award that bound Respondent - Respondent admitted that the Award bound the parties and that Claimant worked as a full time chef for the Respondent but denied it had breached the Award as alleged - Further, Respondent informed the Industrial Magistrate's Court that it had over the material period inadvertently underpaid Claimant \$7,745.00 however denied the claim - Industrial Magistrate found that Claimant had failed to establish on the balance of probabilities that he had worked the times he alleged and thus failed to establish each alleged breach - Further, Industrial Magistrate made an order in favour of Claimant with respect to the amount of \$7,745.00 - Reasons for Decision issued - Mr A Kaew-Ard -v- Sawasdee Pty Ltd - M 193 of 2002 - Industrial Magistrate - Cicchini IM - 06/02/03 - Accommodatn, Cafes&Restaurants .....	314
Application re contractual entitlements - Applicant argued that application could proceed without Respondent - Respondent made no appearance - Commission found that under s.29AA of the Act, it was prohibited from determining the matter, as no industrial instrument applied to the Applicant and because his contract of employment provided for a salary exceeding the prescribed amount - Dismissed - Mr JG Kelly -v- ITSP Australia Pty Ltd - APPL 1711 of 2002 - BEECH SC - 14/02/03 - Machinery & Equipment Mfg .....	605
Application re contractual entitlements - Applicant argued that he was owed wages, tool and fuel allowances, annual leave and superannuation - Respondent argued that it was not able to pay Applicant, as he no longer owns the business - Commission found that pursuant to the Minimum Conditions of Employment Act 1993, Applicant was entitled to be paid the wages he would have earned between 01/01/02 - 21/01/02, a proportion of the holiday pay as at 21/01/02 and superannuation, although it had no jurisdiction to enforce superannuation payments - Claim for tool and fuel allowance was not made out - Granted in Part - Mr D Smith -v- Zoulfikar Rahal - APPL 1538 of 2002 - BEECH SC - 03/12/02 - Other Services.....	614
Application re contractual entitlement seeking payment of one week's notice - Respondent argued the applicant's contract was terminated due to performance reasons - Commission found that applicant's employment was terminated at the employer's hands whilst on probation, that applicant was owed one week's pay in lieu of notice and ordered that respondent pay applicant the denied contractual entitlements - Granted - Mrs NN Gamlin -v- Capebay Holdings - APPL 1688 of 2002 - WOOD C - 17/04/03 - Property Services .....	1504
<b>WORK VALUE</b>	
Application to vary Children's Services (Private) Award, Children's Services Consent Award 1984 and Child Care (Subsidised Centres) Award - Applicant Union argued that the variation to the awards are substantially the same, to insert the recent changes to the Community Services (Child Care) Regulations 1988 - Applicant Union sought to have inserted in each award a new classification for an 'E Worker' which was a class of child care worker that had been recently created under the Regulations, also including reimbursements of certain expenses - Respondent argued there was no objection to the creation of an E classification within the awards however objected to two steps rates being inserted and opposed the application for the allowances - Commission found that the applications were brought pursuant to the Statement of Principles in the 2001 State Wage Case decision and provided for the work value changes - Further, Commission was satisfied that the creation of an E classification should be created pursuant to the Work Value Principle and that the two step rates were properly struck and that the allowances should be allowed with concessions - Ordered Accordingly - Australian Liquor, Hospitality and Miscellaneous Workers Union, Western Australian Branch -v- Bassendean Day Care Centre - APPL 1280,1281,1282 of 2001 - SMITH C - 04/02/02 - Other Services.....	958
<b>WORKERS COMPENSATION</b>	
Application re unfair dismissal - Applicant argued she was unfairly dismissed because of an injury, which meant she could not carry out her duties 100% - Respondent argued that his concept of a trial period was that at any point the Applicant and company could part and once it realised there was no point in carrying on until the end of the trial period, Applicant was advised of its decision - Commission found on evidence that Applicant was not dismissed because of injury and that in the context of a probationary employment the Respondent was within its rights not to continue with the probationary period - Dismissed - Mrs K Lecaude -v- Trident Produce Pty Ltd - APPL 1793 of 2002 - BEECH SC - 09/04/03 - Food, Beverage and Tobacco Mfg.....	1214
<b>WORKPLACE AGREEMENTS</b>	
<sup>2</sup> Appeal against Decision of Industrial Magistrate (unreported) re breach of agreement - Appellant appealed against the Magistrate's refusal to make an order for costs - Application by Respondent to adduce new evidence was dismissed - Full Bench reviewed authorities and evidence and found on a number of reasons that the exercise of the discretion at first instance to deny an order for costs to the Appellant miscarried, and the Appellant had so established - Upheld and Remitted - The Construction, Forestry, Mining and Energy Union of Workers -v- Carl Anthony Perrott & Sandra Lee Perrott trading as C & S Perrott - FBA 44 of 2002 - Full Bench - SHARKEY P/BEECH SC/SCOTT C - 12/12/02.....	17
Application re unfair dismissal - Applicant argued that he was unfairly dismissed whilst a casual employee employed under a registered workplace agreement and that this application was made appropriately from the advise of Commission Registry - Respondent argued that Commission did not have the jurisdiction to hear the matter as there were no terms in the workplace agreement as required by section 7G of the Industrial Relations Act 1979 which permitted the Commission to hear the claim - Commission found that the workplace agreement did not encompass a referral of a claim for unfair dismissal as per section 7G of Industrial Relations Act and thus did not have the jurisdiction to deal with the claim - Dismissed for want of jurisdiction - Mr J Pettit -v- Mr Bradley Harris (Director) Dewson Bicton - APPL 775 of 2002 - WOOD C - 11/11/02 - Personal & Household Good Rtlg.....	166

## CUMULATIVE DIGEST—continued

	Page
WORKPLACE AGREEMENTS—continued	
<sup>2</sup> Appeal against Decision of Commission (82WAIG1298) re unfair dismissal - Appellant argued that Commissioner failed to direct himself as to the onus of proof with respect to the issue of probation and ought to have found that the onus of proof was with Respondent and ought to have found that Respondent on the balance of probabilities had failed to prove that a three month probationary period applied to the Appellant's employment contract - Respondent opposed the appeal - Full Bench found that this was a discretionary decision and the principle applied was that Full Bench had no warrant to interfere with the decision unless Appellant established that there was a miscarriage of the exercise of discretion at first instance - Full Bench found that the discretion was miscarried according to the principles from the evidence given by Appellant and upheld the Appeal - Appeal upheld and the decision at first instance varied - Mr R Koster -v- Volute Pty Ltd trading as Catt Design - FBA 32 of 2002 - Full Bench - SHARKEY P/GREGOR C/HARRISON C - 08/01/03 - Other Manufacturing .....	225
Complaints re authority of Claimant to file claim re breach of award - Respondent sought that the claims be dismissed or otherwise amended so that it comply with the Act - Further, Respondent argued that Claimant lacked standing to bring the claims and that his appointment as an inspector under s.84(2) of the Workplace Relations Act 1996 was not validly made - Claimant argued against the Respondent's submissions - Industrial Magistrate found that Respondent's arguments were baseless and unsupported by authority, that the applications brought by Respondent were misconceived, based on its erroneous interpretation of the relevant provisions and regulations - IM further found that Respondent's interlocutory applications should be dismissed and the Claimant's interlocutory applications be allowed - Upheld - Greg Logan-Scales, Department of Consumer & Employment Protection -v- Olten Pty Ltd (ACN 076 543 130) t/a MSA Security - M 248,249 of 2002 - Industrial Magistrate - Cicchini IM - 27/11/02 - Business Services .....	323
<sup>2</sup> Appeal against Decision of Commission (82WAIG1298) re unfair dismissal - Full Bench issued supplementary reasons for decision regarding that monies might have been paid in reduction to the amount which the order subsequently ordered or will order to be paid was not a matter for the Full Bench - Further, Full Bench found that the part payment of the amount of the order was not a relevant matter to the order made - Order issued - Mr R Koster -v- Volute Pty Ltd trading as Catt Design - FBA 32 of 2002 - Full Bench - SHARKEY P/GREGOR C/HARRISON C - 12/02/03 - Other Manufacturing .....	465
Claim re breach of Workplace Agreement - Claimant argued that he was owed payment for being on call - Defendant argued a lack of jurisdiction and that there was no provision for an availability allowance due to payment in excess of that normally paid to a practitioner and the need to have been rostered on, which the Claimant wasn't - Defendant argued that dispute was capable of resolution as per the Dispute Settlement Procedure contained in the WPA - Industrial Magistrate found that the allowance was not subject to rostering provisions and Claimant was therefore entitled to recover payment pursuant to the terms of the WPA, that the Claimant complied with the Dispute Settlement Procedure, that there was no jurisdictional impediment and that the Defendant underpaid the Claimant - Reasons for Decision Issued - Dr J Gill -v- Commissioner of Health - M 26 of 2002 - Industrial Magistrate - Cicchini IM - 20/12/02 - Health Services .....	532
Complaint re breach of Workplace Agreement - Claimant sought unpaid entitlements pursuant to the workplace agreement, including claims for pre-judgment interest, penalties pursuant to s83(6) of the I.R. Act, 1979 and costs - Defendant conceded that the Claimant was entitled to payment for normal working hours and holiday pay but denied liability for the payment of pay in lieu of notice, maintaining that the Claimant resigned, and in such circumstances was not entitled to pay in lieu of notice under the workplace agreement - Industrial Magistrate was not satisfied based on the evidence presented that the Claimant was dismissed, therefore his claim for one week's pay in lieu of notice was dismissed - Further, IM issued Orders by consent, that Respondent pay the Claimant the amount of \$1058.00 plus interest fixed at \$40.00, and reimburse the Claimant the amount of \$40.00 being the cost of making the claim - Reasons for Decision Issued - Mr P Maindok -v- Cabletech Electrical Pty Ltd - M 124 of 2001 - Industrial Magistrate - Tarr IM - 22/11/01 - Other Services .....	551
Complaints re breach of Workplace Agreement - Respondent argued that Claimants failed to comply with section 54(1) of the Workplace Agreement Act 1993 by not including a certificate in the claim, which raised jurisdictional issues and that the Workplace Agreements to which Claimants were party precludes any claim relating to any period prior to the Workplace Agreement coming into effect, rendering the substantive claims untenable - Industrial Magistrate found that entitlements accrued prior to the Workplace Agreements coming into effect were not lost by virtue of provisions of the MCE Act - Further, IM found that the claims were fundamentally flawed by virtue of the fact that the certificate was not included in the claims and stated that fresh pleadings must be filed re entitlements under MCE Act - Dismissed - Mr RA Sosa -v- Austral Ships Pty Ltd - M 313,314,315,316,317,318,319,320 of 2002 - Industrial Magistrate - Cicchini IM - 13/02/03 - Water Transport .....	552
Complaint re breach of Workplace Agreement re unfair dismissal - Complainant argued that dismissal was unfair and sought reinstatement or compensation and that Defendant had failed to pay him entitlements under the workplace agreement including annual leave and sick leave - Defendant argued that Complainant had misappropriated money and also that Complainant had been overpaid owing Defendant approximately \$2000 - Industrial Magistrate found that Complainant had been unfairly dismissed and there was no evidence established that monies had been misappropriated - Further, Complainant was entitled to annual leave, sick leave and other remuneration - Reasons for Decision Issued - Mr ID Riley -v- Healy Airconditioning Pty Ltd - CP 1 of 2001 - Industrial Magistrate - Cicchini IM - 15/08/01 - Personal & Household Good W/sg .....	556
Application re unfair dismissal - Applicant argued that he understood to be employed under a registered workplace agreement when terminated and thus filed a claim in the Industrial Magistrate's Court where a jurisdictional argument arose and the Industrial Magistrate found there was no registered workplace agreement - Respondent opposed the application and argued that that Commission had no jurisdiction to deal with matter - Commission found that application was lodged 41 days after matter was unsuccessful in the Industrial Magistrate's Court and there was no valid reason for the delay thus it was dismissed for want of jurisdiction - Dismissed for want of jurisdiction - Mr GW Rogers -v- DMW Constructions Pty Ltd - APPL 1833 of 2002 - HARRISON C - 05/03/03 - Construction Trade Services .....	606
Application re unfair dismissal - Applicant incorrectly lodged application in Industrial Magistrates Court and sought to remedy this - Respondent opposed the claim and argued that s.29(3) has application only in respect to dismissals effected subsequent to the enactment of enabling legislation - Commission found that there was no power for it to direct the Industrial Magistrates Court to remit the matter to this Commission as it did not have jurisdiction, despite the potential injustice to the Applicant - Dismissed - Mr J Thomson -v- St Barbara Mines Limited - APPL 1655 of 2002 - GREGOR C - 11/02/02 - Other Services .....	616
<sup>1</sup> Appeal against Decision of Commission in Court Session (83WAIG57) re registration of an award - Appellant appealed on the ground that Commission in Court Session erred in law by wrongly construing or interpreting s41(6) of the I.R. Act, 1979 and Clause 45 of the Burswood International Resort Casino Employees Industrial Agreement 2001 AG 169 of 2001 - Appellant sought to have the decision of CICS quashed and the application for the award dismissed - Industrial Appeal Court reviewed authorities, I.R. Act, Agreement and the majority IAC found inter alia, that it was proper to have regard to the legislation as it stood as at the date of enforcement of the contract not at its entry date, that the relationship between the parties and the options available to them were regulated by statute and the statute extended the agreement to facilitate a smooth transition to its replacement at any time from the nominal expiry date of the agreement - Further, IAC found that it was not intended that an industrial agreement be used as a vehicle for altering the statutory scheme for facilitating the replacement of an industrial agreement after its nominal expiry date and that insofar as clause 45 prohibited the Respondent from taking steps for a substitute award as contemplated in s41 of the Act it was to that extend void - Dismissed - Burswood Resort (Management) Ltd -v- Australian Liquor, Hospitality and Miscellaneous Workers Union, Western Australian Branch - IAC 1 of 2003 - Industrial Appeal Court - Owen J./Scott J./Parker J. - 13/05/03 - Accommodatn, Cafes&Restaurants .....	1371
Appeals re reclassification of position - Parties agreed that the matter ought be dealt with by the Arbitrator on the basis of written submission - Public Service Arbitrator reviewed authorities and submissions and found that there was no industrial matter upon which Commission could exercise jurisdiction because at the time the Appellants filed Notices of Appeal, their employment was the subject of a Workplace Agreement pursuant to the Workplace Agreement Act 1993 - Dismissed for want of jurisdiction - Mr P Brash -v- WorkCover W.A - PSA 5,7,8 of 2000 - Public Service Arbitrator - SCOTT C - 22/05/03 - Government Administration .....	1551